IMPLIED WAIVER OF PHYSICIAN AND PSYCHOTHERAPIST—PATIENT PRIVILEGE IN NORTH DAKOTA MEDICAL MALPRACTICE AND PERSONAL INJURY LITIGATION

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When I looked down at my mail on my desk one morning in 1988, I was embarrassed as I saw graphic photographs of my female client's breasts. The photographs were on the top of a packet of my client's medical records for a breast reduction surgery, which was unrelated to her orthopedic medical malpractice case I had in litigation. The photographs and medical records had arrived at my desk pursuant to a medical authorization I had provided to the defense allowing the other side to obtain all of my client's medical records both before and after the alleged malpractice. After all, had my client not waived physician-patient privilege by initiating a medical malpractice action in which she had placed her health at issue? As a condition of providing the medical releases, I had requested that the medical provider send me a copy of all medical records provided to the defense. I knew, therefore, that the male defense attorney was also probably looking at the same photographs that morning. The dilemma was that the malpractice case alleged the defendant had inappropriately performed a foot surgery. Clearly, my client's breast reduction surgery was not even tangentially related to the issues in the malpractice case involving negligent foot surgery. Had my client waived the physician-patient privilege for all medical treatment she had ever received? I concluded this could not be right, so I telephoned the defense attorney immediately and requested that he destroy the photographs. He told me he would do so promptly. I received them in the mail the next day and promptly destroyed all copies of the photographs.[1]

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1. This is based on a true event occurring during the author's early litigation career.

I. INTRODUCTION

When a plaintiff initiates a personal injury action, does he or she waive physician and psychotherapist-patient privilege for all medical and mental health treatment ever received? Ten years after the personal experience described above, the Illinois Supreme Court, in *Kunkel v. Welton*,[2] declared unconstitutional a state statute that required personal injury plaintiffs to provide medical authorizations to the defendant for all medical care received by the plaintiff whether it related to the medical issues in the litigation or not.[3] In holding that the statute violated the plaintiff's right of privacy, the court stated:

> The confidentiality of personal medical information is, without question, at the core of what society regards as a fundamental component of individual privacy. Physicians are privy to the most intimate details of their patients' lives, touching on diverse subjects like mental health, sexual health, and reproductive choice. Moreover, some medical conditions are poorly understood by the public, and their disclosure may cause those afflicted to be unfairly stigmatized. Respect for the privacy of medical information is a central feature of the physician-patient relationship. Under the Hippocratic Oath, and modern principles of medical ethics derived from it, physicians are ethically bound to maintain patient confidences.[4]

In 1974, in *Sagmiller v. Carlsen*,[5] the North Dakota Supreme Court held that an implied waiver of physician-patient privilege occurred when a plaintiff initiates a lawsuit for medical malpractice.[6] The reason being that when a person initiates medical malpractice litigation, the person openly discloses and releases to the public his or her health condition and should not expect that the medical condition will stay private. As a result, during almost every work day in North Dakota, personal injury attorneys for both the plaintiff and defense use this legal premise to casually obtain and review medical records related to the medical and mental health conditions in dispute. But, because of the way medical records are structured, they

2. 689 N.E.2d 1047 (Ill. 1998).

3. *Kunkel*, 689 N.E.2d at 1055-56.

4. *Id.* at 1055. North Dakota has not recognized a right to privacy under the state constitution. Hovet v. Hebron Pub. Sch. Dist., 419 N.W.2d 189, 192 (N.D. 1998). The quotation is nevertheless an accurate description of the need for the privilege and patient expectations that their physicians will protect their private medical information.

5. 219 N.W.2d 885 (N.D. 1974).

6. *Sagmiller*, 219 N.W.2d at 894.

may contain highly sensitive medical information that may not be directly pertinent to the medical condition in dispute.[7]

Normally, in personal injury practice, the other side is allowed to obtain discovery of that person's relevant medical and psychological information, including medical records. To accomplish this expediently, defense attorneys regularly request that plaintiffs' attorneys have their clients provide signed medical authorizations to them.[8] The releases provided by defense counsel for signature often request unlimited access to all medical records ever generated both before and after the personal injury occurred; and, they often request allowance of ex parte conversations with treating physicians.[9]

North Dakota plaintiff lawyers vary in their approach in responding to these requests.[10] The practice varies from some attorneys willingly signing unlimited authorizations to other attorneys only sending redacted copies of medical records. The North Dakota Supreme Court has never decided the propriety of requiring plaintiffs to sign unlimited defense medical authorizations, although it has been the subject of some discovery motion practice in the state.[11] This article explores whether initiation of a medical malpractice or personal injury action causes an unlimited waiver of the physician and psychotherapist-patient privilege.

II. THE DISCOVERY RULES

Both formal and informal discovery methods are available to parties of civil litigation to obtain information from the other side and third parties that may prove to be useful in the prosecution or defense of civil litigation.[12] One of the primary purposes of formal discovery is to alleviate trial by ambush by bringing to light all information relevant to the claims and

7. This statement is based on more than twenty years of legal experience by the author who has reviewed the medical records of hundreds of clients. Almost all consultation reports and reports of initial visits with a physician disclose a medical history that often reveals medical conditions not related to the issues of the litigation.

8. These requests for signed authorizations are made under North Dakota Rule of Civil Procedure 34. Courts may require plaintiffs to execute the releases. *See, e.g.*, Freeman v. Lincoln Beach Motel, 442 A.2d 650, 651-52 (1981) (citing Smith v. Md. Cas. Co., 42 F.R.D. 587, 588-89 (E.D. La. 1967)). Some courts, however, will allow conditions and limitations to be added to the offered releases. *See* discussion *infra* notes 180-85, 189 and 190 and accompanying text.

9. Receipt of such requests is an almost weekly occurrence at the author's law office.

10. This statement is based on some interviews conducted with plaintiff attorneys over the years.

11. *Id.*; *see also infra* note 133 and accompanying text.

12. THOMAS A. MAUET, PRETRIAL 8-11 (6th ed. 2005).

defenses in the litigation.[13] The North Dakota Supreme Court adopted the North Dakota Rules of Civil Procedure in 1957 to foster a more formalized system to litigation.[14] These rules, and the case law that interpret them, have governed formal civil discovery practice in North Dakota ever since. Although the rules were patterned after the Federal Rules of Civil Procedure, they are not necessarily the same in all respects.[15] As a result, federal case law does not govern the interpretation of the rules by the North Dakota Supreme Court. Federal case law interpreting the federal rules, however, can be considered persuasive by the North Dakota Supreme Court when the state rule is worded similar to the federal rule.[16]

Rules 26 through 37 of the North Dakota Rules of Civil Procedure are considered the discovery rules.[17] Rule 26 is the general rule for discovery that sets the parameters of all other discovery rules and methods.[18] It specifically directs that not all information is discoverable:

> Parties may obtain discovery regarding any matter, *not privileged*, which is *relevant to the subject matter involved in the pending action*, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.[19]

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13. Hickman v. Taylor, 329 U.S. 495, 507-08 (1947); CHARLES ALAN WRIGHT ET AL., 8 FEDERAL PRACTICE AND PROCEDURE: CIV. 2D § 2001 at 39 (2d ed. 1994); Sagmiller v. Carlsen, 219 N.W.2d 885, 895 (N.D. 1974) (stating purpose is to end "sporting theory of justice").

14. Charles L. Crum, *Summary of North Dakota Rules of Civil Procedure*, 33 N.D. L. REV. 287, 288 (1957).

15. *Sagmiller*, 219 N.W.2d at 895; *see also* N.D. R. CIV. P. 1 explanatory note.

16. *In re* Estate of Elmer, 210 N.W.2d 815, 820 (N.D. 1973).

17. *Sagmiller*, 219 N.W.2d at 895.

18. WRIGHT ET AL., *supra* note 13, at 43-44.

19. N.D. R. CIV. P. 26(b)(1) (emphasis added). The Federal Rules of Civil Procedure are more limited than the North Dakota Rules of Civil Procedure regarding the scope of discovery. *Compare* FED. R. CIV. P. 26(b)(1) (providing that discovery must be "relevant to any party's claim or defense"), *with* N.D. R. CIV. P. 26(b)(1) (allowing discovery "relevant to the subject matter"). In federal court, good cause must be shown to obtain discovery of "any matter not privileged which is relevant to the subject matter" involved in the action. FED. R. CIV. P. 26(b)(1). The last sentence of the quotation from Rule 26(b)(1) is generally understood to allow broad discovery with relevance determined at the time that admission of the evidence is sought or during a motion in limine. Courts still, however, use relevance to limit the scope of some discovery. ROGER S. HAYDOCK ET AL., FUNDAMENTALS OF PRETRIAL LITIGATION 215-16 (5th ed. 2001).

Rule 26(b)(1) establishes that *privileged* and *irrelevant information* are not discoverable. Since the Rules of Civil Procedure do not define privilege or relevance, other sources must be consulted for a determination of the scope of privilege. In North Dakota, the North Dakota Rules of Evidence contain most of the recognized privileges.[20] These same rules also define relevance.[21]

III. BASIS OF PRIVILEGES IN GENERAL

Privileges have their genesis in common law, constitutions, statutes, and rules of evidence.[22] They exist both at the federal and state level. An example of a federal and state common law privilege is lawyer-client.[23] Examples of federal statutory privilege are drug and alcohol treatment records and Human Immunodeficiency Virus records.[24] Examples of state statutory privileges are peer review privilege,[25] school counselor,[26] and counselor-client privilege.[27] Examples of privileges recognized by state rules of evidence are found at North Dakota Rules of Evidence 502 through 509.[28] The only federal privilege rule is Federal Rule of Evidence 501, which provides that federal privileges are found in the Constitution,

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20. *See* N.D. R. EVID. 501. For examples of statutory privileges, see *infra* text accompanying notes 25-27.

21. *See* N.D. R. EVID. 401. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id*. The test of relevance in a discovery context, however, is different than the question of admissibility of evidence. HAYDOCK ET AL., *supra* note 19, at 213. Evidence does not need to be admissible to be discoverable. Instead, the discovery sought must be "reasonably calculated to lead to the discovery of admissible evidence." *Id*. at 215. Courts nevertheless still prohibit discovery of irrelevant information that could not lead to the discovery of admissible evidence. *Id*. (citing Herbert v. Lando, 441 U.S. 153, 177 (1979)). This is usually done for another protective reason, such as privilege, embarrassment, waste of time, unnecessary expense, etc. MAUET, *supra* note 12, at 291-92. At least one court has held that the "relevance standard" does not apply to discovery of medical records. *See* Desclos v. S. N.H. Med. Ctr., 903 A.2d 952, 957 (2006) (analyzing discoverability of mental health records in a medical malpractice case). Instead, discoverability of privileged matter is determined by whether a waiver occurred or there is another reason for the Court to invade the privilege. *Id*.

22. State v. Red Paint, 311 N.W.2d 182, 184 (N.D. 1981) (citing N.D. R. EVID. 501 for the source of privilege being all but common law).

23. EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES 103-04 (2002).

24. 42 U.S.C. §§ 290dd-3, ee-3 (2000) (alcohol and drug treatment); 38 U.S.C. § 7332 (2000) (HIV).

25. N.D. CENT. CODE § 23-34-03 (2002).

26. *Id*. § 31-01-06.1 (1996).

27. *Id*. § 43-47-09 (2001). Although the statute uses the word "confidentiality," the plain wording of the statute creates a privilege.

28. N.D. R. EVID. 502-509 (including privileges such as lawyer-client, physician and psychotherapist-patient, husband-wife, religious, political vote, trade secrets, secrets of state or other official information, governmental secrets, identity of informer).

statutes, rules of the Supreme Court, or common law. In the early 1970s, there was an attempt within the federal court system to develop federally recognized privileges by rules of evidence, including physician-patient and psychotherapist-client privileges, but this was rejected by Congress.[29] As a result, in federal litigation not involving diversity, all privileges but a few are either determined by common law or federal statute.[30]

A privilege is a public policy recognition that protection of a communication is so important to the public good that it "outweighs the principle that all rational means should be employed to ascertain the truth."[31] The theory of privilege is that frank disclosures will not be made during certain confidential relationships, if it is possible the communications will later be revealed publicly during litigation.[32] It is assumed frank disclosures are necessary to foster the purpose of the communication, which further promotes the public interest. All privileges are evidentiary tradeoffs to accomplish a public policy purpose.[33] Each type of privilege has its own requirements defining its existence, scope, and waiver.[34] Since evidentiary privileges are in derogation of the search for the truth, they are strictly construed to accomplish their purpose.[35]

The physician-patient privilege has come under some criticism over the years. Most notably, Dean Wigmore argued in his famous evidence treatise that legislatures and courts should not recognize physician-patient privilege.[36] The reasons he offered were: (1) only a very few medical conditions bring reproach, so there really is nothing to keep confidential; (2) most

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29. 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE, § 501.02(1)(a) (Joseph M. McLaughlin ed., Matthew Bender, 2d ed. 2007) (indicating there was an unsuccessful attempt to adopt two Rules: 504 (psychotherapist-patient privilege) and 514 (physician-patient privilege)).

30. Since few privileges existed at common law, almost all federal privileges are statutory. Some, however, have been created by federal rule. For example, Federal Rule of Civil Procedure 26(b)(3), (4), & (5) establishes attorney work product, mental impressions, and trial preparation as privileged from discovery. FED. R. CIV. P. 26(b)(3)-(5) (2007). Trade secrets also enjoy a privilege under the Federal Rule of Civil Procedure. FED. R. CIV. P. 26(c)(7) (2007).

31. State v. Red Paint, 311 N.W.2d 182, 185 (N.D. 1981).

32. IMWINKELRIED, *supra* note 23, at 339-41.

33. N.D. R. EVID. 510 explanatory note, ¶ 2 ("The rules of privilege are designed to foster certain relationships or policies that are deemed important to our society. The rules seek to accomplish this end by enveloping selected communication with the necessary degree of confidentiality.").

34. *See generally* IMWINKELRIED, *supra* note 23, § 72-77.

35. State v. Clark, 1997 N.D. 199, ¶ 19, 570 N.W.2d 195, 201; Trinity Med. Ctr. v. Holum, 544 N.W.2d 148, 152 (N.D. 1996).

36. JOHN HENRY WIGMORE, 8 WIGMORE ON EVIDENCE § 2380a, at 829-32 (McNaughton rev. 1961); *see also* IMWINKELRIED, *supra* note 23, at 493-95 nn.360 & 361 (stating other critics were Dean Ladd and Edmund Morgan) (citing MASON LADD & RONALD CARLSON, CASES AND MATERIAL ON EVIDENCE 361 (1972); Edmund Morgan, *Foreward* to MODEL CODE OF EVIDENCE 28-29 (1942)).

medical conditions are openly visible; (3) if the privilege did not exist, people would still seek medical help; and, (4) the injury to the justice system greatly outweighs any benefit to society by recognition of the privilege.[37] Despite the arguments advanced by Wigmore against the privilege, its existence was established by statute in most states, including North Dakota.[38] It is now a generally accepted evidentiary premise resulting in expectations of medical privacy by the public.

IV. DOCTOR-PATIENT PRIVILEGE

A. HISTORY OF DOCTOR-PATIENT PRIVILEGE

One of the first enunciations of confidentiality of patient medical information can be found in the Hippocratic Oath.[39] Hippocrates, a fifth century B.C. Greek physician, is considered the father of medicine.[40] He is credited with establishing a physician's code of conduct composed of seven core principles governing the treatment of patients.[41] One of the Oath's core principles stated: "What I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself, holding such things shameful to be spoken about."[42]

The Hippocratic Oath of confidentiality no longer formally governs a physician's professional conduct, except ceremoniously;[43] but, this duty of confidentiality now exists as a matter of medical ethics in the American Medical Association's Code of Medical Ethics and is "an expression of ideal conduct for the physician."[44]. The current version of the American Medical Association's ethic of confidentiality of patient secrets is worded: "A physician shall respect the rights of patients, colleagues, and other health professionals, and shall safeguard patient confidences and privacy

37. WIGMORE, *supra* note 36, at 829-32.

38. *See infra* notes 56-58 and accompanying text.

39. IMWINKELRIED, *supra* note 23, at 4.

40. FREDERICK TICE, M.D., 1 PRACTICE OF MEDICINE 5 (1957).

41. *Id*. at 6.

42. NOVA Online, Hippocratic Oath—Classical Version, http//www.pbs.org/wgbh/nova/doctors/oath_classical.html. Many medical students still take the oath at some point during their education. *Id*.

43. For a discussion of the historical evolution of the ethics principle, see *In re* Vioxx Products Liability Litigation, 230 F.R.D. 473, 476-77 (E.D. La. 2005) (stating most medical school graduates recite the oath).

44. NOVA Online, The Hippocratic Oath Today: Meaningless Relic or Valuable Moral Guide?, http//www.pbs.org/wgbh/nova/doctors/oath_today.html.

within the constraints of the law."[45] It does not appear that the North Dakota Board of Medical Examiners has adopted the American Medical Association's code of ethics.[46] The North Dakota State Legislature has, however, adopted confidentiality as a standard for physician conduct.[47] As a result, disciplinary action can be imposed by the board against a physician for violating the confidentiality between physician and patient.[48]

The fact the medical profession may consider a communication made in a professional capacity to be confidential, however, does not make that communication privileged. Confidentiality and privilege are not synonyms.[49] Medical and mental health professionals recognize a duty to keep their patients' and clients' secrets confidential, but the law does not necessarily recognize a privilege for the communications.[50] The best example of this is North Dakota social workers. Social workers can and do provide mental health services, but North Dakota does not recognize a social worker-client privilege even though social work ethics require maintenance of the confidentiality of communications with clients.[51] Licensed counselors,

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45. Amer. Med. Ass'n, Principles of Medical Ethics at IV, *available at* http//www.ama-ssn.org/ama/pub/category/2512.html (last visited Feb. 5, 2008).

46. *See generally* N.D. CENT. CODE ch. 43-17 (2001); N.D. ADMIN. CODE tit. 50 (2007).

47. N.D. CENT. CODE § 43-17-31(13) (2001).

48. State v. Altru Health Sys., 2007 N.D. 38, ¶ 18, 729 N.W.2d 113, 118; Tehven v. Job Serv. N.D., 488 N.W.2d 48, 51 (N.D. 1992) (disciplinary action may be imposed for "willful or negligent violation of confidentiality between physician and patient" (citing N.D. CENT. CODE § 43-17-31(13))). A similar duty of confidentiality exists for psychologists. N.D. CENT. CODE § 43-32-27(1)(g). This duty of confidentiality has been adopted from the American Psychologist's Code of Ethics Rule, which states: "Psychologists have a primary obligation and take reasonable precautions to protect confidential information. . . ." ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT, ETHICAL STANDARD 4.01 (2003).

49. *See* Trinity Med. Ctr., Inc. v. Holum, 554 N.W.2d 148, 156 (1996) (citing Susan O. Scheutzow & Sylvia Lynn Gillis, *Confidentiality and Privilege of Peer Review Information: More Imagined Than Real*, 7 J. L. & HEALTH 169, 192 (1992-1993)); *see also* IMWINKELRIED, *supra* note 23, at 25-26.

50. IMWINKELRIED, *supra* note 23, at 23-24.

51. State v. Copeland, 448 N.W.2d 611, 616 (N.D. 1989); State v. Clark, 1997 ND 199, ¶ 29, 570 N.W.2d 195, 203-04. The Court in *Clark* rejected the argument that *Jaffee v. Redmond*, 518 U.S. 1 (1996), mandated the State of North Dakota to recognize a social worker privilege. *Clark*, ¶ 29, 570 N.W.2d at 203. In *Jaffee*, the United States Supreme Court adopted a common law psychotherapist-patient privilege under Federal Rule of Evidence 501 and extended it to social workers who engage in psychotherapy. *Jaffee*, 518 U.S. at 10, 15-16. The *Clark* court concluded that since social workers were not physicians or licensed psychologists as defined in Rule 503(a) there was no privilege despite *Jaffee*. *Clark*, 1997 N.D. 199, ¶ 32, 507 N.W. 2d at 204. Of note, however, is that social workers in North Dakota are licensed to practice psychotherapy. *See* N.D. CENT. CODE § 43-41-01(7) (2007) ("Social work practice consists of . . . psychotherapy with individuals, families, and groups. . . ."). Social worker-client communications, however, may be privileged if the communication occurs in a hospital setting, or in a chemical abuse treatment situation, or domestic violence work. This is due to HIPAA, *see infra* text accompanying note 67 and 69; federal chemical addiction law, *see infra* text accompanying note 64; and, N.D. CENT. CODE § 14.07.1-18 (2007). The ultimate solution for social workers and their clients is to seek adoption of a privilege by statute by the State Legislature.

which also have an ethical duty of client confidentiality, on the other hand, have a privilege recognized by state statute.[52] This illustrates the principle that while all privileged communications are confidential, not all confidential communications are privileged.[53] Professional confidentiality is a matter of professional ethics, while privilege is a rule of evidence.[54] Thus, while Hippocrates articulated a lofty professional ethic of confidentiality for the medical profession, the law had to create a physician-patient evidentiary privilege to fully protect a patient's medical secrets from being revealed in litigation.

The physician-patient privilege is a creature of statute or rule of evidence because the privilege did not exist at common law.[55] The first physician-patient privilege statute in the United States was enacted in New York in 1828.[56] The second one was enacted in Missouri in 1835.[57] Other states, including North Dakota, then followed. North Dakota enacted its first physician-patient privilege statute in 1877, while it was still a territory. All but five states have recognized physician-patient privilege by either statute or rules of evidence.[58] The statutes and rules of evidence vary in

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52. N. D. CENT. CODE § 43-47-09 (2007).

53. IMWINKELRIED, *supra* note 23, at 25.

54. *Id*.

55. *See* State v. Schroeder, 524 N.W.2d 837, 839 (N.D. 1994) (citations omitted); Whalen v. Roe, 429 U.S. 589, 602 n.28 (1977). For a recent law review article arguing for recognition of a federal physician-patient privilege, see Ralph Ruebner & Leslie Ann Reis, *Hippocrates to HIPAA: A Foundation for a Federal Physician-Patient Privilege*, 77 TEMPLE L. REV. 505, 575 (2004). For another recitation of the history of physician-patient privilege, see Robert A. Wade, *The Ohio Physician-Patient Privilege: Modified, Revised, and Defined*, 49 OHIO ST. L.J. 1147, 1147-51 (1989).

56. WIGMORE, *supra* note 36, § 2380, 819 n.4.

57. *Id*. at 820. Missouri has been particularly active in deciding the extent of implied waiver. *See* discussions *infra* notes 142-45.

58. 1 MCCORMICK ON EVIDENCE § 98, at 448 n.6 (6th ed. 2006) (citing IMWINKELRIED, *supra* note 23, app. D). Imwinkelried identifies two states, Florida and South Carolina, in a footnote of its text. *See* IMWINKELRIED, *supra* note 23, § 6.2.6, n.347 (citing to Arias v. State, 593 So.2d 260 (Fla. Dist. Ct. App. 1992); McCormick v. England, 49 S.E.2d 431, 434 (1998)). *McCormick on Evidence* states there are six states which do not have physician-patient privilege. *Id*. at 448. However, the author's review of E.J. Imwinkelried, Appendix D, found only five states: Alabama; Maryland (has a therapist-patient privilege); Massachusetts (has a therapist-patient privilege); Tennessee (has a therapist-patient privilege); and, West Virginia (recognizes a duty of confidentiality inherent in the fiduciary relationship of physician and patient). IMWINKELRIED, *supra* note 23, at 1474, 1494, 1495, 1516, 1522. *See also* State *ex rel*. Kitzmiller v. Henning, 437 S.E.2d 452, 454 (W.Va. 1993) (recognizing a therapist-patient privilege). It should be noted that contrary to *McCormick on Evidence*, Imwinkelried, Appendix D identified Florida as having a physician-patient and therapist-patient privilege. IMWINKELRIED, *supra* note 23, at 1483. Although not listed in Appendix D of Imwinkelried, Georgia does not recognize a physician-patient privilege by common law or statute. *See* King v. State, 535 S.E.2d 492, 494 (2000). *King*, however, held that Georgia's constitutional right to privacy protects the confidentiality of medical information. *Id*. at 495. Appendix D also identified that South Carolina has a therapist-patient privilege. IMWINKELRIED, *supra* note 23, at 1514.

their composition; and, in order to assert the privilege in legal proceedings, strict adherence to the provisions of the statute or rule must be established.[59]

Unlike most states, there is no federal statute or federal rule definitively creating a physician-patient privilege.[60] As a result, federal courts have not recognized the privilege.[61] Federal courts, however, in 1996 recognized a psychotherapist-patient privilege by common law.[62] Federal courts will, nevertheless, apply a state's physician-patient privilege in diversity personal injury cases.[63] In addition, since Congress has created a statutory privilege for drug and alcohol treatment records,[64] a patient's chemical dependency records are privileged, unless certain conditions are met.[65] The same holds true for HIV records.[66]

B. HAS HIPAA CREATED A FEDERAL PHYSICIAN-PATIENT PRIVILEGE?

More recently, Congress enacted the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[67] The intent of HIPAA is to "ensure the integrity and confidentiality of patients' information and protect against unauthorized uses or disclosures of the information."[68] Some legal scholars believe HIPAA has created a federally recognized privilege for medical information.[69] McCormick, however, suggests that HIPAA did not create a

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59. *Schroeder*, 524 N.W.2d at 840.

60. WEINSTEIN & BERGER, *supra* note 29, § 18.10.

61. *See, e.g.*, United States v. Bercier, 848 F.2d 917, 920 (8th Cir. 1988) (criminal case). Legislation has been introduced by Senator Hillary Clinton that would "amend the Federal Rules of Evidence to create a Rule 502 containing an explicit medical privacy privilege." IMWINKELRIED, *supra* note 23, § 6.2.6 at 49 (citing to *Legislation Would Create Explicit Privilege Protecting Medical Records From Disclosure*, 73 U.S.L.W. (BNA) 2182 (Oct. 4, 2004)).

62. 6 JAMES WM. MOORE ET AL., FEDERAL PRACTICE § 26.50(5) (3d ed. 2007). The United States Supreme Court recognized the privilege in *Jaffee v. Redmond,* 518 U.S. 1, 15 (1996). *See supra* note 51 and accompanying text.

63. *See* FED. R. EVID. 501; Lind v. Canada Dry Corp., 283 F. Supp. 861, 864-65 (D. Minn. 1968).

64. Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, 42 U.S.C. § 290dd-3 (2000); Drug Abuse Prevention, Treatment, and Rehabilitation Act, 42 U.S.C. § 290ee-3 (2000).

65. Jane H. v. Rothe, 488 N.W.2d 879, 881-82 (N.D. 1992). The communications are actually quasi-privileged because the communications are not considered privileged in limited situations with a court order. *Id.*

66. WEINSTEIN & BERGER, *supra* note 29, § 514.02.

67. Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 (1996).

68. Northlake Med. Ctr., LLC v. Queen, 634 S.E.2d 486, 489 (2006); *see also* 42 U.S.C. § 1320d-2(d)(2)(A) & (B)(ii)(2000).

69. *See generally* Ruebner & Reis, *supra* note 55, at 505. *But see* Northwestern Mem. Hosp. v. Ashcroft, 362 F.3d 923, 932-33 (7th Cir. 2004); Lovato v. Burlington Northern & Santa Fe Ry. Co., 200 F.R.D. 448, 450 (D. Colo. 2001), *rev'd*, 201 F.R.D 509 (D. Colo. 2001) (holding a

federal privilege.[70] One scholar has stated there is confusion regarding HIPAA's effect on state privilege law.[71] HIPAA, however, does pre-empt any state's law that is less protective than HIPAA.[72] Court decisions regarding the extent of the pre-emption vary by state and are often fact specific.[73] The courts which have considered the extent of HIPAA's protection conclude the Act has had a significant impact on state privilege law.[74]

C. THE EARLY NORTH DAKOTA PHYSICIAN-PATIENT PRIVILEGE STATUTES

The original 1877 physician-patient privilege statute read as follows:

> There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:
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> . . . .
>
> 3. A physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient.[75]

It was in *Booren v. McWilliams*[76] that the North Dakota Supreme Court first articulated the purpose of the statutory physician-patient privilege:

> [The privilege] was intended to inspire confidence in the patient and encourage him in making a full disclosure to the physician as to his symptoms and condition, by preventing physicians from making known to the curious the ailments of their patients, particularly when afflicted with diseases which might bring reproach, criticism, unfriendly comment, or disgrace upon the patient if known to exist.[77]

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physician-patient privilege existed and inquiry of plaintiff's physician must be done by deposition).

70. 1 MCCORMICK ON EVIDENCE, *supra* note 58, at 452 n.29.

71. Jeanna Phipps, *HIPAA Privacy Rule and State Physician-Patient Privilege Law in Federal Question Cases,* 12 SUFFOLK J. TRIAL & APP. ADVOC. 159, 159 (2007). Phipps argue, however, that HIPAA did not create a federal privilege. *Id.* at 172-74.

72. *See* 42 U.S.C. § 1320d-7(a)(1) (2000); 45 C.F.R. § 160.203 (2006).

73. *See generally In re* Antonia E, 838 N.Y.S.2d 872 (N.Y. Fam. Ct. 2007). This opinion provides a very good summary of preemption, and identifies most of the cases discussing preemption. Id. at 874-78.

74. *See* discussions Part VI.

75. State v. Schroeder, 524 N.W.2d 837, 841 n.4 (N.D. 1994) (quoting REVISED CODES OF TERRITORY OF DAKOTA, CODE. CIV. P. § 499(3) (1877)).

76. 145 N.W. 410 (1914).

77. *Booren*, 145 N.W. at 414.

The physician-patient privilege statute has evolved over time.[78] The final state codification of the statute was North Dakota Century Code Section 31-01-06(3).[79] That statute was repealed and replaced with North Dakota Rule of Evidence 503 in 1976.[80] At the time, the name of the privilege was changed from "physician-patient" to "physician and psychotherapist-patient" privilege. Until that time, the North Dakota Century Code did not recognize a privilege for psychotherapists, unless they held a medical license.[81] Although, in 1969 the Legislature had created a privilege for communications made to a school counselor.[82]

Other North Dakota statutes exist that have an impact upon doctor-patient privilege[83] in automobile crash cases, medical malpractice litigation, workers compensation cases, and other legal matters. For example, section 26.1-41-12(2) provides that insureds must authorize disclosure of medical records to their no-fault insurance carriers as a condition of receipt of no-fault benefits.[84] Section 28-01-46.1 provides that initiation of a medical malpractice case constitutes a waiver of the privilege.[85] North Dakota Century Code Section 65-05-30 requires Workers Compensation recipients

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78. For a discussion of some of these changes, see *Schroeder*, 524 N.W.2d at 840-41.

79. 1965 N.D. Laws. ch. 230, § 1, 448. "A physician or surgeon, without consent of his patient cannot be examined as to any information acquired in attending the patient or as to any communication made by the patient to him during the course of professional employment." *Id.*

80. *See* N.D. JOINT PROCEDURE COMMITTEE MINUTES 5-6 (Jan. 29, 1976). The Rule also created a psychotherapist-patient privilege. *Id.*

81. *See generally* N.D. CENT. CODE 31-01 (1960) & (1975 Pocket Supp.) *repealed by* N.D. R. EVID. 503.

82. *See* 1969 N.D. Laws, ch. 309 (codified at N.D. CENT. CODE § 31-01-06.1) (1975 Supp.).

83. Physician and psychotherapist-patient privilege will be called "doctor-patient privilege" for ease of reference in this article. This reflects that psychotherapists, who must have earned a doctorate to be a licensed psychotherapist, are incorporated in the term. *See infra* note 95 and accompanying text. When a specific profession is discussed, the profession will be used before the word "patient".

84. N.D. CENT. CODE § 26.1-41-12(2) (2007). The statute also has a limit to the amount that medical providers can charge for providing copies of the records. Parts of this statute are probably not HIPAA compliant. *See infra* text accompanying notes 179-182 and accompanying text.

85. North Dakota Century Code Section 28-01-46.1 creates a statutory waiver allowing a defense attorney

> to examine the medical records, opinions, or other information and informally participate in a discussion with the health care provider, if the provider consents, regarding the medical records, opinions, or other information that appear reasonably calculated to lead to the discovery of admissible evidence as to any element of the action or defense of the action.

N.D. CENT. CODE § 28-01-46.1 (2007). The author was unable to locate any cases interpreting this statute. The statute also requires the plaintiff to execute medical authorizations for the use of the defendant. *Id.* If the plaintiff refuses to provide the releases, the defendant can use other means, such as subpoena or court order to obtain the information. The statute prohibits ex parte conversations with treating physicians. This statute may or may not comply with HIPAA. *See infra* notes 179-82 and accompanying text..

to provide full access to their medical and mental health records.[86] And, physicians and psychotherapists must report suspected cases of child abuse and neglect of their patients or perpetrated by their patients.[87]

D. RULE 503: THE CURRENT PHYSICIAN AND PSYCHOTHERAPIST-PATIENT PRIVILEGE

Rule 503 differs in some major respects from its predecessor statutes.[88] It was modeled after the unadopted Rules 503 of the 1974 Uniform Rules of Evidence.[89] The most notable difference between Rule 503 and its predecessor statute, section 31-01-06(3), is that it recognizes a psychotherapist-patient privilege. The other differences are that there are detailed definitions of the various terms; the rule describes the specifics of the privilege; and, the rule defines who may claim the privilege. The explanatory note following the rule, which was adopted from the proposed federal rules, provides some interpretation as to how the privilege should be applied in litigation. For example, it describes that the doctor-patient privilege adopted by the rule is "a narrower privilege" than under prior law, North Dakota Century Code Section 31-01-06, which covered "any communication made by the patient in the course of professional employment."[90]

1. *Definitions*

Rule 503(a) contains the definitions governing the doctor-patient privilege.[91] Pertinent is that a patient is a person "who consults or is examined or is interviewed by a physician or psychotherapist."[92] A physician must be "authorized to practice medicine in any state or nation."[93] The definition of physician, however, also includes a communication with someone whom the patient "reasonably believed" to be authorized to practice medicine.[94] The definition of psychotherapist includes three kinds of persons: (1) a person authorized to practice medicine; (2) a person

86. N.D. CENT. CODE § 65-05-30 (2007) (providing that disclosure "must be relevant to the employee's work injury or return to work issues.") For a more in depth discussion, see Dan Buchanan, *Evidence in Workmen's Compensation Cases*, 54 N.D. L. REV. 171, 180-81 (1977).

87. N.D. CENT. CODE § 50-25.1-03 (2007).

88. *Compare* N.D. R. EVID. 503 *with* N.D. CENT. CODE § 31-1-06(3) (repealed).

89. N.D. R. EVID. 503 explanatory note, ¶ 1; *see also* State v. Schroeder, 524 N.W.2d 837, 841 (N.D. 1994).

90. N.D. R. EVID. 503 explanatory note, ¶ 3. For an in depth discussion, see *Schroeder*, 524 N.W.2d at 841.

91. N.D. R. EVID. 503 explanatory note, ¶ 2.

92. N.D. R. EVID. 503(a)(1).

93. N.D. R. EVID. 503(a)(2); State v. Copeland, 448 N.W.2d 611, 616 (N.D. 1989).

94. N.D. R. EVID. 503(a)(1).

reasonably believed by the patient to be so licensed; and, (3) "a person licensed or certified as a psychologist."[95]

2. *Confidential Communication*

The definition of confidential communication is found at Rule 503(a)(4).[96] A communication is confidential if it is "not intended to be disclosed to third persons."[97] The definition of confidential communication recognizes that third persons may have to be present during the communication, so exceptions for the presence of third parties have been created. Persons necessary to further the interests of the patient in the consultation, examination or interview can be present without defeating the privilege.[98] The privilege is also not defeated by the presence of persons necessary for transmission of the communication.[99] Finally, the privilege is not defeated by the presence of persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist.[100] This includes members of the patient's family.[101] Thus, communications with all kinds of other persons are allowed under the privilege rule, even though they are not a physician or psychotherapist.

3. *General Rule of Privilege*

Rule 503(b) enunciates the general rule of the privilege: "A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications. . . ."[102] A number of conditions must be met for the patient to claim the privilege. First, there must be a

95. *Copeland*, 448 N.W.2d at 616. To be licensed or certified as a psychologist, a person must possess "a doctorate degree in a program of studies substantially psychological in nature." N.D. CENT. CODE § 43-32-20(2) (2007 Supp.). As already discussed in note 51, *supra*, this definition has been strictly construed by the Supreme Court. As a result, the definition does not extend to all mental health workers or professionals who provide mental health services or practice psychotherapy, such as social workers, even though they may be licensed to practice psychotherapy.

96. State v. Schroeder, 524 N.W.2d 837, 840-41 (N.D. 1994).

97. N.D. R. EVID. 503(a)(4). *See* State v. Werner, 112 N.W. 60, 63-64 (N.D. 1907) (providing a case decided under the earlier version of the privilege statute). *Werner* can be considered the first reported case in North Dakota of a direct waiver of physician-patient privilege by allowing the presence of a third party during an incriminating conversation with a physician.

98. N.D. R. EVID. 503(a)(4).

99. *Id*.

100. *Id*.; *see also* Meyer v. Russell, 214 N.W. 857 (N.D. 1927) (providing a case decided under the earlier statute). *Meyer* is notable for holding that communications by a patient to a nurse necessary for the physician to provide treatment are privileged.

101. N.D. R. EVID. 503(a)(4).

102. N.D. R. EVID. 503(b).

physician or psychotherapist-patient relationship.[103] Second, the communication must be confidential.[104] And, third, the confidential communication must be made "for the purpose of diagnosis or treatment of [the patient's] physical, mental or emotional condition."[105] There has been a fair amount of litigation involving determination of what is a confidential communication and case decisions are fact specific.[106]

4. *Who May Claim the Privilege*

Rule 503(c) identifies who may claim the privilege. It can be claimed by the patient, the patient's guardian or conservator, or if the patient is deceased, the patient's personal representative.[107] The privilege can also be claimed by the patient's physician or psychotherapist.[108]

5. *Exceptions to the General Rule of Privilege*

Rule 503(d) identifies three exceptions to the rule of privilege: (1) proceedings for hospitalization;[109] (2) examinations conducted by order of the court;[110] and, (3) when the communication is relevant to a physical,

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103. *Id.*

104. *Id.*

105. *Id.*

106. The phrase "for the purpose of diagnosis or treatment" is narrower than the prior privilege law, North Dakota Century Code § 31-01-06(3), which protected "*any communication* made by the patient in the course of professional employment." N.D. R. EVID. 503 explanatory note, ¶ 3 (emphasis added). A number of cases have explored the limits of the privilege in cases involving driving under the influence. In *State v. Erickson*, 241 N.W.2d 854 (N.D. 1976), the court held that the blood alcohol tests taken pursuant to the state's implied consent law were not privileged because they were not taken for the purpose of diagnosis or treatment of an injury or disease. In *State v. Schroeder*, 524 N.W.2d 837 (N.D. 1994), the court held that an emergency room doctor was barred from testifying about his observations of his patient's inebriated state because they were made for the purpose of diagnosis and treatment. *Id.* at 842. A year later, the supreme court held that an emergency room nurse was allowed to testify in a DUI case, that she did not observe the patient drink alcohol while under her care because the observation was not made for the purposes of diagnosis or treatment. State v. Miller, 530 N.W.2d 652, 655-56 (N.D. 1995). This is a reflection that for the privilege to apply, there must be information received or observations made *for the purpose of diagnosis or treatment* of the patient's medical condition. *Schroeder*, 524 N.W.2d at 842 (emphasis added).

107. N.D. R. EVID. 503(c); Lembke v. Unke, 171 N.W.2d 837, 847 (N.D. 1969) (overruling Auld v. Cathro, 128 N.W. 1025 (1910) which held that a personal representative may not waive the privilege).

108. N.D. R. EVID. 503(c).

109. N.D. R. EVID. 503(d)(1). This exception recognizes that physicians and psychotherapists may need to reveal a patient's confidences if the patient needs hospitalization for mental health reasons or other reasons of necessity for the health and well-being of the patient or others. *Id.* explanatory note, ¶ 5.

110. N.D. R. EVID. 503(d)(2). A court ordered examination, such as under North Dakota Rule of Civil Procedure 35, does not create a doctor-patient relationship, so it is not privileged. N.D. R. EVID. 503 explanatory note, ¶ 8.

mental, or emotional condition that is an element of a claim or defense.[111] The latter exception is considered an implied waiver.

E. DIRECT WAIVER OF PRIVILEGE

North Dakota has had a statute pertaining to waiver of privilege since the inception of the physician-patient privilege in 1877.[112] The statute, however, only contemplated a direct waiver of the privilege. The last codification of the waiver statute was North Dakota Century Code Section 31-01-07.[113] North Dakota Rule of Evidence 510 is the most current manifestation of the waiver rule. It provides that any privilege can be waived, if the holder of the privilege voluntarily discloses or explicitly consents to disclosure of "a significant portion" of the privileged matter.[114] The "significant" portion language used in the rule reflects that the waiver must be more than just a minor disclosure.[115] This type of waiver is direct, as opposed to implied. The direct waiver rule recognizes, however, that a disclosure to another privileged source does not cause a waiver.[116] As a result, a plaintiff's attorney may look at a client's sensitive medical records without causing a waiver of the privilege.

V. IMPLIED WAIVER OF DOCTOR-PATIENT PRIVILEGE

A. IMPLIED WAIVER IN NORTH DAKOTA

1. *Introduction*

Implied waiver of doctor-patient privilege in North Dakota medical malpractice litigation has been a component of doctor-patient privilege for

111. N.D. R. EVID. 503(d)(2) explanatory note, ¶ 8 ("[There is no] justification for allowing the privilege to be used as a 'sword' rather than a 'shield.'").

112. *See* REV. CODES OF THE TERRITORY OF DAKOTA, CODE CIV. P. § 500 (1877). The wording of the statute was: "If a person offer [sic] himself as a witness, that is to be deemed a consent to the examination, also of an attorney, clergyman, priest, physician or surgeon, on the same subject, within the meaning of the first three subdivisions of the preceding [sic] section." *Id.*

113. N.D. CENT. CODE § 31-01-07(1976) (repealed) stated: "If a person testifies as a witness to any subject which comes within the protection of any of the provisions of the first three subsections of Section 31-01-06, he shall be deemed to have consented to the examination of an attorney, clergyman, priest, physician, or surgeon on the same subject matter." *Id.*

114. The exact wording of North Dakota Rule of Evidence 510 is: "A person upon whom a privilege against disclosure is conferred by rule or by law waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged." N.D. R. EVID. 510.

115. N.D. R. EVID. explanatory note, ¶ 3. "The determination of what is significant must be made with a common sense approach." *Id.* This suggests that the waiver is limited.

116. N.D. R. EVID. 510.

over a half of a century. The waiver is implied from the circumstances or conduct of the holder of the privilege. The first reported North Dakota Supreme Court case to address this type of waiver was *McDonnell v. Monteith*.[117] McDonnell, a farmer, sued Monteith, a physician, for medical malpractice alleging negligent treatment of an arm fracture.[118] During trial, McDonnell called his subsequent treating physician to testify about the corrective treatment he provided.[119] Monteith then called the physician as a witness in his defense.[120] McDonnell objected predicated upon physician-patient privilege.[121] The objection was sustained by the trial court, but the North Dakota Supreme Court reversed, holding that when McDonnell called his physician to testify about his treatment of the arm, he waived his privilege; and, Monteith was allowed to question the physician "fully and at length as to all relevant matters with respect to the condition of the arm."[122] The court quoted at length from *Powers v. Metropolitan Railway Co.*:[123] "Having once waived it upon the trial, it then ceased to exist, either partially or entirely, *at least as far as that trial was concerned*."[124] This suggests that the court recognized there was a limit to the waiver.

The waiver in *McDonnell* can be best understood in the context of the old legal cliché, "once you open the door to a line of questioning, you cannot slam it shut." This cliché applies even though the door being opened is to privileged medical information. *McDonnell* did not address the issue of whether the implied waiver opened the door of inquiry to other medical conditions possessed by the plaintiff that did not relate to the plaintiff's claim.

2. Sagmiller v. Carlsen

a. The *Sagmiller* Implied Waiver Rule

It took forty-four more years before the North Dakota Supreme Court, in *Sagmiller v. Carlsen*,[125] directly addressed the implied waiver of doctor-patient privilege. *Sagmiller* is considered the quintessential implied waiver

117. 231 N.W. 854 (N.D. 1930).
118. *McDonnell*, 231 N.W. at 855-56.
119. *Id.* at 858-59.
120. *Id.* at 859.
121. *Id.* (citing N.D. COMP. LAWS § 7923, ¶ 3 (1913)).
122. *Id.* at 859.
123. 94 N.Y.S. 184 (App. Div. 1905).
124. *Powers*, 94 N.Y.S. at 186 (emphasis added). This seems to imply that the waiver is not indefinite, but limited.
125. 219 N.W.2d 885 (N.D. 1974).

case in personal injury litigation in North Dakota. It involved an allegation that Carlsen, a physician, negligently performed a vaginal repair to correct Sagmiller's cystocele.[126] One of the issues in the case was whether Sagmiller's subsequent treating physician could be questioned by the defendant during a pretrial deposition.[127] Sagmiller had refused to give permission to Carlsen to take the deposition of two of her treating physicians based on physician-patient privilege, even though the physicians had been disclosed by Sagmiller as testifying and treating experts.[128] The North Dakota Supreme Court held that the pretrial discovery should be allowed because "when Mrs. Sagmiller put her physical condition at issue by bringing the medical malpractice suit, she waived the doctor-patient privilege."[129]

The court found an "implied" waiver by mere initiation of the lawsuit.[130] The court held there was no public policy reason to recognize the privilege once litigation was initiated because Sagmiller had disclosed her medical ailment to the public by bringing the lawsuit.[131] The court quoted a phrase from *McCormick's Law of Evidence* that is often used in waiver matters: "[T]he privilege should not be used both as a sword and a shield."[132] *Sagmiller* leaves no doubt that doctor-patient privilege is waived upon initiation of the lawsuit for those medical conditions that are put in issue in the litigation.

Sagmiller has been interpreted by many attorneys as creating an implied waiver as to all medical records of any personal injury plaintiff.[133]

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126. *Sagmiller*, 219 N.W.2d at 888. A cystocele "is a hernial protrusion of part of the female bladder into the opening of the vagina, resulting in inability to control the passage of urine." *Id*.

127. *Id*. at 893.

128. *Id*.

129. *Id*. at 894. *Sagmiller* was decided under the former law, North Dakota Century Code Section 31-01-06(3) (1960). The court, however, did not refer to the then existing privilege waiver statute, North Dakota Century Code Section 31-01-07 (1960). *See generally Sagmiller*, 219 N.W.2d at 885.

130. *Sagmiller*, 219 N.W.2d at 894.

131. *Id*.

132. *Id*. at 895 (citing MCCORMICK, LAW OF EVIDENCE, ch. 11, Waiver, § 106 at 219 (West Publ'g Co. 1954)). In the most recent edition of *McCormick*, the phrase is still used. 1 MCCORMICK ON EVIDENCE, *supra* note 58, § 103, at 464. *Sagmiller* had also argued that, while she accepted that she would have to waive the privilege at trial, the privilege was not waived at the pretrial stage. *Sagmiller*, 219 N.W.2d at 895. The court quickly disposed of this argument by recognizing that the policy of the discovery rules is to promote open disclosure of evidence to avoid the "sporting theory of justice." *Id*. Additionally, there was no logical reason to wait until trial for the waiver to occur. *Id*.

133. The author has had at least one case go to a discovery motion hearing in which the defense argued that the *Sagmiller* implied waiver was unlimited in scope. In late 2003, a defense attorney in one of the author's automobile crash cases brought a motion to compel the spouse of an injured plaintiff to sign blank medical authorizations to disclose all of her medical records, including any chemical dependency records, both before and after her husband's automobile crash

Sagmiller stated, however, that its waiver decision "extends only to malpractice cases. Whether the bringing of an action for personal injuries caused otherwise than by malpractice constitutes a like waiver we leave for future decisions."[134] The author could not locate a North Dakota Supreme Court opinion holding that the *Sagmiller* implied waiver rule also applies to other types of personal injury litigation than medical malpractice. While this seems surprising, the practice among litigators on both sides has been to treat personal injury cases the same as malpractice cases for implied waiver purposes.[135] There is no logical reason to treat them otherwise. It is likely that personal attorneys have recognized this and have assumed the *Sagmille*r waiver rule would definitely be applied equally by the North Dakota Supreme Court to other personal injury litigation, so the question has never been brought to the court's attention.[136]

b. Is The *Sagmiller* Implied Waiver Rule Unlimited?

Sagmiller did not specifically state that the implied waiver applied only to the medical condition directly at issue in the case; nor, on the other hand, did it state that the waiver extended beyond the medical condition at issue.[137] *Sagmiller*, however, contains lengthy quotations from other legal sources in support of its decision, which suggest that there are limits to the extent of the waiver. The court's use of these lengthy quotations could be

injury. Since her only claim was loss of consortium, the author refused to have his client sign blank authorizations, but did consent to disclosure of some employee assistance records. Attached to the defense's motion to compel were three unreported opinions from other North Dakota district courts requiring execution of broad disclosure of a spouse's medical records unrelated to the loss of consortium claim. Order Partially Granting Defendant's Motion to Compel, Jubie v. Bucholz, Civ. No. 18-03-C-00298 (N.D. N.E. Cent. Judicial Dist. Dec. 31, 2003). This author argued that *Sagmiller* did not authorize the defense to peek into all medical records merely because they may contain relevant information. Judge Joel Medd refused to compel execution of the unlimited authorizations, but he required an in camera review of the records to determine their direct relevancy to the issues in the loss of consortium claim. The case was settled before the issue was litigated further. A 1970 case note in the NORTH DAKOTA LAW REVIEW seems to have found that the implied waiver of physician-patient privilege was limited to medical conditions raised in the litigation. *See* Dennis W. Schurman, Comment, *Witnesses—Competency—Waiver of Privilege of Communication to or Information Acquired by Physician*, 46 N.D. L. REV. 470, 471-72 (1970). The law review predates *Sagmiller*.

134. *Sagmiller*, 219 N.W.2d at 897.

135. This is based upon the personal experience of the author and discussions with other attorneys.

136. Also, the waiver provision found in North Dakota Rule of Evidence 503(d)(3) makes the implied waiver applicable to all litigation.

137. North Dakota Rule of Evidence 503(d)(3) and its explanatory note do not identify the extent of the waiver. The explanatory note cites to *Sagmiller*, however.

interpreted as a statement of the court's recognition that the scope of implied waiver was limited.[138]

For example, *Sagmiller* used a quotation from *Burlage v. Haudenshield*,[139] which in turn had quoted the following from *Moore's Federal Practice*:

> We believe that where a plaintiff in a personal injury action has put his physical condition directly in issue, he may not thereafter cloak communications to doctors or nurses, which were occasioned by the injury complained of, with the claim of privilege. *This would not mean that the plaintiff could not assert privilege, if available, as to communications not germane to his claim.*[140]

The North Dakota Supreme Court's use of this quotation of *Moore's Federal Practice* from *Burlage* suggests that the court intended that the waiver was limited and not an open door to all medical information of a plaintiff.[141]

That *Sagmiller* created a limited waiver is further evidenced by the court's quotation from *State ex rel. McNutt v. Keet*:[142] "We therefore hold that *once the matter of plaintiff's physical condition is in issue under the pleadings, plaintiff will be considered to have waived the privilege under § 491.060(5) so far as information from doctors or medical and hospital records bearing on that issue is concerned*."[143]

Prior to quoting from *McNutt*, the court used the following language to introduce the quotation: "[T]he defendants were entitled to pretrial discovery of medical and hospital records of the plaintiff *bearing on injuries she claimed*."[144] Again, this strongly suggests that the *Sagmiller* court never intended to create an unlimited waiver.

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138. The *Sagmiller* opinion was authored by then Justice Robert Vogel. He was the author's mentor and former owner of the author's law firm. He once told the author that *Sagmiller* was one of the least understood and most misapplied of his opinions that he authored while he was a member of the court. He maintained that *Sagmiller* did not create a wholesale waiver of doctor-patient privilege. He insisted that the waiver was limited only to the conditions directly put at issue in the litigation.

139. 42 F.R.D. 397 (N.D. Iowa. 1967).

140. Sagmiller v. Carlsen, 219 N.W.2d 885, 896 (N.D. 1974) (citing 4 JAMES WM. MOORE ET AL., FEDERAL PRACTICE § 26.22(5) (3d ed. 2003)) (emphasis added).

141. Moore's Federal Practice does not include this language in its most recent edition of the treatise. *See generally* 6 JAMES WM. MOORE ET AL., FEDERAL PRACTICE § 26.47(5), 26.50(3), & (5) (3d ed. 2007).

142. 432 S.W.2d 597 (Mo. 1968).

143. *Sagmiller*, 219 N.W.2d at 897 (quoting State *ex rel.* McNutt v. Keet, 432 S.W.2d 597 (Mo. 1968)) (second emphasis added).

144. *Id.* at 896 (emphasis added).

When the court quoted at length from *McNutt*, it was familiar with the full extent and limitations of the authority it was quoting. The *McNutt* Court strongly believed that implied waiver was not unlimited. In describing the extent of the implied waiver, it stated: "The waiver . . . does not mean that it automatically extends to every doctor or hospital record a party has had from birth regardless of the bearing or lack of bearing . . . on the matter in issue."[145] Given the North Dakota Supreme Court's reliance on *McNutt* in *Sagmiller*, it seems logical to conclude that the court intended the implied waiver to be limited.

The North Dakota Supreme Court has not decided an implied waiver of doctor-patient privilege since *Sagmiller*.[146] It is difficult, therefore, to know what the current court's interpretation of *Sagmiller* would be if confronted again with the issue of the extent of the implied waiver. If the court determined the implied waiver is unlimited, however, it would place North Dakota in a very small minority of states.[147]

B. IMPLIED WAIVER IN OTHER STATES

Other state and federal courts have addressed the issue of the extent of the implied waiver in medical malpractice and personal injury cases.[148] Most of these cases have been decided within the last decade. An overwhelming majority of the courts deciding the issue hold that initiation of a malpractice or personal injury case is not a wholesale waiver of doctor-patient privilege.[149] The result in these cases reflects an overriding public

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145. *McNutt*, 432 S.W.2d at 602.

146. It is not quite true that an implied waiver case has not been decided since by the Supreme Court. In *Jane H.*, 488 N.W.2d 879 (N.D. 1992), which was a medical malpractice case, the defendants sought disclosure of any chemical addiction records of the plaintiff. 488 N.W.2d at 881. The defendants argued that pursuant to *Sagmiller* by initiating litigation the plaintiff had waived her doctor-patient privilege with respect to all records, including chemical addiction treatment. *Id.* The court did not decide that particular issue, but instead held that federal law preempted any state privilege waiver law regarding discovery of chemical dependency treatment records, and the requirements of federal law would have to be met before disclosure was to occur. *Id.*

147. *See infra* note 149 and accompanying text, and text accompanying notes 151-57.

148. *See generally* C.C. Marvel, Annotation, *Commencing Action Involving Physical Condition of Plaintiff or Decedent as Waiving Physician-Patient Privilege as to Discovery Proceedings*, 21 A.L.R.3d 912 (1968).

149. The following jurisdictions have held that implied waiver is limited to only the physical and mental conditions put in issue in the litigation. *See* Transworld Inv. v. Drobny, 554 P.2d 1148, 1151 (Alaska 1976) (holding waiver is limited to only matters plaintiff has put in issue); Davis v. Superior Court, 9 Cal. Rptr.2d 331, 335 (Cal. App. 5th Dist. 1992) (holding waiver must be as narrow as possible); Alcon v. Spicer, 113 P.3d 735, 740-41 (Colo. 2005) (en banc) (holding that tangential relevance is not enough); Reda v. Advocate HealthCare, 765 N.E.2d 1002, 1009 (Ill. 2002) (holding that mental health records were not put in issue for discovery purpose merely by claiming damages for a neurological condition); Canfield v. Sandock, 563 N.E.2d 526, 530 (Ind. 1990) (holding unrelated medical care is not discoverable); Scott v. Flynt, 704 So.2d 998, 999

policy choice that doctor-patient confidences must be carefully protected to ensure that only those matters directly necessary for the just resolution of the case in litigation are opened to discovery. One court, in describing the limited scope of the implied waiver, stated: "By placing one's condition in controversy one is not thereby required to sign a 'blank check' for medical records disclosure."[150]

There appears to be very limited case law supporting the view that the implied waiver is unlimited. In *Doran v. Culver*,[151] the Oregon Court of Appeals allowed very broad discovery of medical records of the plaintiff in an automobile crash case to determine whether other medical conditions could have been the cause of her pain.[152] It should be noted, however, that later in *Calley v. Olsen*,[153] the Supreme Court of Oregon distinctly held that the implied waiver was not unlimited.[154]

New Jersey, in *Freeman v. Lincoln Motel Beach*,[155] also seems to allow broad medical records discovery. *Freeman* states: "A party should not have

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(Miss. 1996) (holding waiver is not unlimited); Stecher v. Dowd, 912 S.W.2d 462, 464 (Mo. 1995) (reaffirming McNutt v. Keet, 32 S.W.2d 597 (Mo. 1968) (holding the waiver is not an entitlement to any and all records); State *ex rel.* Mapes v. Dist. Ct. of Eighth Judicial Dist. in & for Cty. of Cascade, 822 P.2d 91, 94-95 (Mont. 1991) (holding the waiver is not unlimited); Vredeveld v. Clark, 504 N.W.2d 292, 300 (Neb. 1993) (holding the waiver is not unlimited); Desclos v. S. N.H. Med. Ctr., 903 A.2d 952, 957 (N.H. 2006) (holding the scope of waiver is limited, and that generic mental suffering incident to a personal injury case will not waive psychotherapist-patient privilege); Doe v. G. J. Adams Printing, Inc., 794 N.Y.S.2d 636, 637 (N.Y. 2005) (holding that by "placing one's condition in controversy one is not thereby required to sign a 'blank check' for medical records disclosure."); Porter v. Lit. Mgmt., Inc., No. 76159, 2000 WL 573197, at *3 (Ohio App. May 11, 2000) (holding waiver is not unlimited); Holmes v. Nightingale, 158 P.3d 1039, 1046 (Okla. 2007) (finding state statutes preclude disclosure of all records and that disclosure is limited to those relevant to the litigation); State *ex rel.* Calley v. Olsen, 532 P.2d 230, 236 (Or. 1975) (holding waiver is not unlimited); *but see Oleson*, 532 P.2d at 236 nn. 4 & 5; R. K. v. Ramirez, 887 S.W.2d 836, 843 (Tex. 1994) (holding waiver is limited "to avoid any unnecessary incursion into private affairs"); Mattison v. Poulen, 353 A.2d 327, 330-31 (Vt. 1976) (holding waiver is limited to matters "causally or historically related to . . . injuries and damages claimed in the action").

150. *G.J. Adams Printing, Inc.*, 794 N.Y.S.2d at 637. *American Jurisprudence* agrees:

> The patient impliedly waives the privilege with respect to matters that have direct medical relevance to the claim, and this implied waiver constitutes the patient's 'consent' for the purpose of a statute providing that a health-care provider shall not be examined without the patient's consent as to any information acquired in attending the patient. *However, medical records or information unrelated to the condition at issue remain privileged.*

81 AM. JUR. 2D *Witnesses* § 485 (2007) (emphasis added); *see also* Richard J. Kohlman, *Protected Communication Between Physician and Patient*, 45 AM. JUR. 2D *Proof of Facts* 585, 618-19 (2007); Morry S. Cole, *Medical Malpractice Claim? Plaintiff's Privacy is Protected*, 62 MO. L. REV. 175, 178 (1997).

151. 745 P.2d 817 (1987).

152. *Doran*, 745 P.2d at 819.

153. 532 P.2d 230 (Or. 1975).

154. *Calley*, 532 P.2d at 236.

155. 442 A.2d 650 (1981).

to rely upon only what his opponent has supplied to him, but should be able to ascertain that he has examined the entire record."[156] The author was not able to find a reported case that definitively holds that initiating a medical malpractice or personal injury case is a wholesale waiver of doctor-patient privilege for all medical records since birth. Nevertheless, this issue continues to be litigated.[157]

C. PUBLIC POLICY FAVORS A LIMITED IMPLIED WAIVER

The North Dakota Legislature long ago decided that doctor-patient communications were so important to the successful functioning of the professional relationship that a privilege was needed to protect these fundamentally important communications. The privilege is inculcated into our jurisprudence; and, given the expectations of North Dakota's health care professionals and health consumers, it is unlikely the privilege will ever be eliminated.[158] Yet, it is equally important that defendants in medical malpractice and other personal injury litigation be able to obtain medical discovery so they can effectively advance their defenses in our adversarial system of justice. *Sagmiller* correctly recognized that there must be some tradeoff of doctor-patient privilege to allow the adversarial system to function properly. An unlimited waiver, however, would nullify the public policy purpose of the privilege without advancing the legitimate interests of the judicial system in full disclosure.

Medical records contain highly sensitive and private information that does not necessarily need to be disclosed to foster the effective functioning of the adversarial system. The rationale behind implied waiver is that by initiating litigation, the plaintiff has already revealed private medical conditions to the public so there is no need for the court to protect the plaintiff's medical privacy. There has not, however, been a revelation of all the patient's medical and mental health conditions.

The rationale behind an unlimited implied waiver is that the patient may be concealing damaging pre-existing medical information, or other causes of the plaintiff's medical condition may be hidden in the undisclosed

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156. *Freeman*, 442 A.2d at 651. But the case also states that the medical authorizations had to be confined to relevant dates. *Id.* This surely suggests a limited implied waiver.

157. *See* cases cited *supra* in note 149. Some courts allow discovery of previous medical records historically related to the physical or mental conditions at issue in the litigation. *See, e.g.*, Mattison v. Poulen, 353 A.2d 327, 330-31 (Vt. 1976); Porter v. Litig. Mgmt. Inc., No. 76159, 2000 WL 573197, at *3 (Ohio Ct. App. May 11, 2000).

158. For an explanation of patient expectations, see Wade, *supra* note 55, at 1149-50 n.24. The Supreme Court of North Dakota recently recognized again that there are expectations of confidentiality that flow from the physician-patient relationship. State v. Altru Health Sys., 2007 ND 38, ¶ 18, 729 N.W.2d 113, 118.

medical records. While this may be true to a limited extent, it does not mean the plaintiff has revealed to the public other non-pertinent medical conditions and waived all doctor-patient privilege for those unrelated matters. The example from the author's personal experience identified at the beginning of this article illustrates this point clearly. A limited implied waiver ensures that embarrassing, unrelated medical secrets will not be disclosed, while still ensuring that medical information directly pertinent to the issues in the litigation will be able to be discovered for the defense of the action. When there is any dispute about discoverability or the veracity of the plaintiff's disclosure, a court's power to conduct an in camera review will adequately allay any defense fears that the privilege will be used as a sword instead of as just a shield.

A limited implied waiver rule is also consistent with modern medical ethics. In a recent ethics opinion, the American Medical Association recognized that when a physician is required to reveal patient confidences by law, the disclosure should be kept to a minimum: "When the disclosure of confidential information is required by law or court order, physicians generally should notify the patient. Physicians *should disclose the minimal information* required by law, advocate for the protection of confidential information and, if appropriate, seek a change in the law."[159] This medical ethic would best be advanced by construing *Sagmiller* as a limited implied waiver rule.

This concept of limited disclosure is also found in HIPAA. The United State Department of Health and Human Services, which is charged with the duty of enforcing HIPAA, has published its view that disclosure should be limited. "In general, disclosure of information will be limited *to the minimum necessary* for the purpose of the disclosure."[160] This federal pronouncement of a public policy of medical and mental health confidentiality is best promoted by a limited implied waiver rule.

D. IMPLIED WAIVER AND EX PARTE TREATING PHYSICIAN CONTACT

Ex parte defense contact with treating physicians is a litigation issue closely related to the question of the extent of the implied waiver.[161] A

159. Am. Med. Ass'n Ethics Opinions, E-5.05 Confidentiality (Issued Dec. 1993; updated June 1994 & June 2007) (emphasis added).

160. U.S. Dep't of Health and Human Services, HHS Fact Sheet (May 9, 2001), http://aspe.hhs.gov/admnsimp/final/pvcfact2.htm (emphasis added).

161. Ex parte contact means communications with the opposing party's physicians without the formal consent of the patient or the patient's attorney. This article is not a full exploration of this subject, but it is mentioned because it could be a significant discovery issue in litigation, and implied waiver is often used to justify ex parte communications.

large number of jurisdictions have addressed the issue.[162] The majority rule is to prohibit ex parte contacts.[163]

This issue has been the subject of legal commentary.[164] The theory for allowing ex parte contact is that due to the implied waiver there is no longer a privilege, so the contact should be allowed.[165] Those advocating ex parte contact state that it is a cost efficient way to discover the evidence since depositions are so expensive.[166] Also, they argue that a requirement of the presence of the plaintiff's attorney during conversations with the plaintiff's physicians would reveal the defendant's trial strategies, which are privileged.[167] The argument for prohibiting such discussions is that the informality of the discussions, without the plaintiff's attorney present, could lead to inadvertent disclosures of privileged information unrelated to the litigation.[168] It also puts the physician in the position of having to decide a legal issue regarding the extent of the implied waiver.[169]

While the North Dakota Supreme Court has not had occasion to address this issue, the North Dakota Federal District Court has in *Weaver v. Mann*.[170] *Weaver* is a diversity case involving allegations of medical malpractice. The defense had engaged in ex parte contact with the plaintiff's treating physicians.[171] While the plaintiff admitted that doctor-patient privilege did not apply due to the *Sagmiller* implied waiver rule, she argued that the contacts with treating physicians were limited to only the discovery

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162. *See* 1 MCCORMICK ON EVIDENCE, *supra* note 58, at 446-52 (providing cases that approve and disapprove of ex parte defense contact); *see also* Daniel D. Jones, *Discovery: Right to Ex Parte Interview with Injured Party's Treating Physician*, 50 A.L.R.4th 714, 714 (1986); Daniel M. Roche, Comment, *Don't Ask, Don't Tell: HIPAA's Effect on Informal Discovery in Products Liability and Personal Injury Cases*, 2006 BYU L. REV. 1075, 1083 (listing states opposed to ex parte interviews due to fear of ex parte contact under HIPAA). HIPAA appears to have triggered increased appellate activity in this regard. For more discussion, see Kohlman, *supra* note 150, at 187-90 (2007 Supp.).

163. 1 MCCORMICK ON EVIDENCE, *supra* note 58, at 446-52.

164. *See, e.g.*, Note, *The Physician-Patient Relationship: The Permissibility of Ex Parte Communication Between Plaintiff's Treating Physicians and Defense Counsel*, 59 MO. L. REV. 441, 454-59 (1994); Christine L. Companion, *Ex Parte Conferences with Treating Physicians POINT . . . Fairness Demands Equal Access*, 9 S.C. LAW. 37, 37 (Sept.-Oct. 1997); John Kassel, *Ex Parte Conference with Treating Physicians COUNTERPOINT . . . Defense Counsel's Ex Parte Communication with Plaintiff's Doctors: A Bad One-Sided Deal*, 9 S.C. Law. 42, 42 (Sept.-Oct. 1997); Frank Garrison, *Rule 503 Limits Waiver in Medical Malpractice Cases to Injuries Placed In Issue and Excludes Evidence Obtained from Ex Parte Contact*s, 66 MISS. L.J. 221, 230 (1996).

165. 1 MCCORMICK ON EVIDENCE, *supra* note 58, § 130, at 466-67.

166. *Id.*

167. *See* Stufflebam v. Appelquist, 694 S.W.2d 882, 885 (Mo. App. 1985).

168. *See* Scott v. Flynt, 704 So. 2d 998, 1004-05 (Miss. 1996) (citing Jaap v. Dist. Ct., 623 P.2d 1389 (1981)); Browne v. Horbar, 792 N.Y.S. 2d 314, 319 (N.Y. Sup. Ct. 2004). For a discussion of *Scott v. Flynt*, see Garrison, *supra* note 164, at 221-22, 231-34.

169. *See* Neubeck v. Lundquist, 186 F.R.D. 249, 251 (D. Me. 1999).

170. 90 F.R.D. 443 (D.C. N.D. 1981).

171. *Weaver*, 90 F.R.D. at 444-45.

procedures identified in Rules 26 through 37 of the Federal Rules of Civil Procedure.[172] The court agreed and held that ex parte contact was not permissible under the discovery rules.[173]

The result in *Weaver* is supported by the majority rule of reported cases.[174] There are a significant minority of cases that reach an opposite conclusion.[175] Many of the more recent cases discuss the impact of HIPAA on ex parte contact. This will be discussed in the next section.[176]

For the most part, the ex parte issue has been resolved in medical malpractice litigation in North Dakota. The North Dakota Legislature, in North Dakota Century Code Section 28-01-46.1, made ex parte contacts inappropriate in medical malpractice cases. The statute, instead, contains a detailed procedure allowing informal discussions with treating physicians in the presence of plaintiff's counsel. The Legislature has not enacted similar statutes for other types of personal injury litigation; therefore, this issue has not been resolved in other types of personal injury cases. It remains to be

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172. *Id*. at 445.

173. *See id*. (rejecting argument that the *Sagmiller* implied waiver rule allowed ex parte conversations with the plaintiff's treating physicians).

174. *E.g.*, Mull v. String, 448 So. 2d 952, 954 (Ala. 1984); Garner v. Ford Motor Co., 61 F.R.D. 22, 24 (D. Alaska 1973); Benally v. United States, 216 F.R.D. 478, 480-81 (D. Ariz. 2003); Torres v. Superior Ct., 270 Cal. Rptr. 401, 405 (Cal. App. 4th Dist. 1990); Neal v. Boulder, 142 F.R.D. 325, 328 (D. Colo. 1992); Lemieux v. Tandem Health Care of Fla., Inc., 862 So. 2d 745, 751 (Fla. Dist. Ct. App. 2003); Testin v. Dreyer Med. Clinic, 605 N.E.2d 1070, 1073-74 (Ill. 1992); Cua v. Morrison, 636 N.E.2d 1248, 1248 (Ind. 1994); Roosevelt Hotel Ltd. P'ship **v**. Sweeney, 394 N.W.2d. 353, 355-57 (Iowa 1986); Coutee v. Global Marine Drilling Co., 895 So. 2d 631, 642 (La. Ct. App. 2005); Neubeck v. Lundquist,186 F.R.D. 249, 251 (D. Me. 1999); Wenninger v. Muesing, 240 N.W.2d 333, 336-37 (Minn. 1976); Scott v. Flynt, 704 So.2d 998, 1005 (Miss. 1996); Jaap v. Dist. Ct. of Eighth Judicial Dist. in & for County of Cascade, 623 P.2d 1389, 1391 (Mont. 1981); Nelson v. Lewis, 534 A.2d 720, 723 (N.H. 1987); Smith v. Ashby, 743 P.2d 114, 116 (N.M. 1987); Friedlander v. Morales, 415 N.Y.S.2d 831, 832 (N.Y. App. Div. 1979); Weaver v. Mann, 90 F.R.D. 443, 445 (D.N.D. 1981); Hammonds v. Aetna Cas. & Surety Co., 243 F. Supp. 793, 800 (N.D. Ohio 1965); Horner v. Rowan Cos., 153 F.R.D. 597, 601 (S.D. Tex. 1994); McCauley v. Purdue Pharm., L.P., 224 F. Supp. 2d 1066, 1069 (W.D. Va. 2002); State *ex rel*. Kitzmiller v. Henning, 437 S.E.2d 452, 455-56 (W.Va. 1993); Loudon v. Mhyre, 756 P.2d 138, 140 (Wash. 1988); *see also* J. Christopher Smith, *Recognizing the Split: The Jurisdictional Treatment of Defense Counsel's Ex Parte Contact with Plaintiff's Treating Physician*, 23 J. LEGAL PROF. 247, 252-55 (1999).

175. Trans-World Inv. v. v. Drobny, 554 P.2d 1148, 1151-52 (Alaska 1976); Samms v. Dist. Ct. (*Pelican*), 908 P.2d 520, 526 (Colo. 1995) (concluding discussion must be limited to relevant information and notice to plaintiff to allow attendance); Green v. Bloodsworth, 501 A.2d 1257, 1259 (Del. Super. Ct. 1985); Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128 (D.D.C. 1983); Coralluzzo v. Fass, 450 So. 2d 858, 859 (Fla. 1984); Domako v. Rowe, 475 N.W.2d 30, 36 (Mich. 1991); Brandt v. Pelican, 856 S.W.2d 658, 662 (Mo. 1993); Stempler v. Speidell, 295 A.2d 857, 864 (N.J. 1985); Moses v. McWilliams, 549 A.2d 950, 953-54 (Pa. Super. Ct. 1988); Lewis v. Roderick, 617 A.2d 119, 122 (R.I. 1992); Felder v. Wyman, 139 F.R.D 85, 88-89 (D. S.C. 1991); Steinberg v. Jensen, 534 N.W.2d 361, 370 (Wisc. 1995) (noting conversation must be limited to matters of the lawsuit).

176. *See* discussion *infra* Part VI.

seen how the North Dakota Supreme Court will decide the issue if confronted with it in personal injury cases not involving medical malpractice.

VI. HIPAA AND DOCTOR-PATIENT PRIVILEGE

As already discussed, HIPAA has definitively changed the landscape of both informal and formal discovery of medical information.[177] With the enactment of the law, Congress strongly declared a public policy in protecting the confidentiality of medical information. HIPAA preempts any state doctor-patient privilege laws that conflict with its provisions.[178] While state privilege statutes and rules regarding medical information can be more strictly protective, they cannot be less protective.[179]

The primary impact of the preemption provision of the law has been that medical information cannot be disclosed without a written medical authorization, a court order, or satisfaction of the requirements of another exception. Authorizations, court orders, and other exceptions must meet strict federal HIPAA requirements.[180] Therefore, any medical authorization presented by defense counsel to plaintiff counsel for signature must meet the requirements of federal law, even in a state law claim. Although the North Dakota Supreme Court and North Dakota federal court have not decided this issue, courts in other jurisdictions have set aside nonconforming state statutes, releases, and court orders.[181] For example, courts have held that patients involved in litigation must be given an opportunity to object to disclosure of non-relevant information.[182]

The propriety of ex parte contacts after HIPAA has also been the subject of recent court decisions.[183] The opinions are mixed.[184] From a

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177. *See* Law v. Zuckerman, 307 F. Supp. 2d 705, 711 (D. Md. 2004) (using the words "radically changed"); Roche, *supra* note 162, at 1075-76, 1078.

178. *See* Northlake Med. Ctr., LLC v. Queen, 634 S.E.2d 486, 489 n.7 (Ga. Ct. App. 2006) (citing 42 U.S.C. § 1320d-7(a)(1) & 45 C.F.R. § 160.203).

179. *See* Allen v. Wright, 644 S.E.2d 814, 818 (Ga. 2007) (holding that state statute requiring plaintiffs to sign medical releases at initiation of the lawsuit preempted by HIPAA, unless it complies with HIPAA). One court described the concept of less or more restrictive as those which "narrow the scope of duration [of a medical authorization], increase privacy protections afforded . . ., or reduce a coercive effect of the circumstances surrounding the express legal permission" *Law*, 307 F. Supp. 2d at 709 (citing 45 C.F.R. § 160.202 (2006)).

180. *See* Roche, *supra* note 162, at 1078; *see also In re* Antonia E., 838 N.Y.S.2d 872, 875 (N.Y. Fam. Ct. 2007).

181. *See, e.g.*, *Northlake Med. Ctr.*, 634 S.E.2d at 490-91.

182. *Id.* at 491; Bayne v. Provost, 359 F. Supp. 2d 234, 241-43 (N.D.N.Y. 2005); Croskey v. BMW of N. Am., Inc., No. 02CV73747DT, 2005 WL 1959452, at *8-9 (E.D. Mich. 2005); Crenshaw v. MONY Life Ins. Co., 318 F. Supp. 2d 1015, 1029 (S.D. Cal. 2004); *In re* Vioxx Prods. Liab. Litig., 230 F.R.D. 473, 477 (E.D.L.A. 2005).

183. *See, e.g.*, Brown v. Horbar, 792 N.Y.S.2d 314 (N.Y. Sup. Ct. 2004).

184. For cases holding that HIPAA prohibits ex parte contact see the following: Law v. Zuckerman, 307 F. Supp. 2d 705, 709, 711 (D. Md. 2004) ("HIPAA . . . is controlling on the issue

practical point of view, however, most medical providers are so worried about violating HIPAA that they will not provide medical information, including ex parte attorney interviews, without a HIPAA compliant release.[185]

VII. PRACTICE CONSIDERATIONS

Assuming that the *Sagmiller* implied waiver rule is limited, attorneys may want to develop practices and procedures in accordance with their client's interest in maintaining their medical privacy. Plaintiff attorneys should be mindful that broad pleadings could open the door to broad discovery of their client's medical information.[186] Answers to interrogatories could further open the door to broader medical records disclosure.[187] Defense attorneys, on the other hand, may be able to assert defenses that more broadly open the door to discovery of the plaintiff's other medical conditions.[188] If the defendant raises a medical condition as a defense, it may open the door to discovery by the plaintiff of the defendant's medical and mental health information.

If a plaintiff's attorney allows a client to sign blank medical authorizations, which have been submitted by the defense, this may allow unnecessary disclosures of their client's most intimate secrets even though the records are not even tangentially related to the issues in the case. Medical authorizations can be drafted in such a manner that disclosure is limited to only what is necessary for the litigation. Blank authorizations should never be provided to the opposing side. There is too great a risk that non-relevant privileged information will be disclosed.[189] It is best to identify in the release a specific medical provider, identify relevant dates, identify specifically what records can or cannot be disclosed, prohibit ex parte contact, and require that a copy of all records sent to the defense attorney also be sent to

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of *ex parte* communications.") (holding ex parte contact is prohibited); *Crenshaw*, 318 F. Supp. 2d at 1030 (finding ex parte contact was prohibited by HIPAA); Allen v. Wright, 644 S.E.2d 814, 817 (Ga. 2007) (holding Georgia law requiring signing of releases with ex parte provision violated supremacy of HIPAA, because the state law did not allow for revocation of the authorization.); *Bayne*, 359 F. Supp. 2d at 239 (holding there is no HIPAA "brightline" prohibiting ex parte contact, but such conversations can only occur with a qualifying protective order); Boukadown v. Hubanks, 239 F.R.D. 427, 429, n.2 (D. Md. 2006). For cases holding that HIPAA does not prohibit ex parte contact the following can be noted: Holmes v. Nightingale, 158 P.3d 1039 1044-46 (2007) (holding ex parte is not per se prohibited by HIPAA); Smith v. Am. Home Prod. Corp., 855 A.2d 608, 622-25 (N.J. 2003) (holding HIPAA does not expressly bar ex parte contact).

185. Arons v. Jutkowitz, No. 09139, slip op. at 3 (N.Y. App. Div. Dec. 5, 2006). (Guide to Medical Privacy: HIPAA at p. 11 (Feb. 2007)).

186. Cole, *supra* note 150, at 184.

187. *Id.*

188. *Id.*

189. State *ex rel.* Stecher v. Dowd, 912 S.W.2d 462, 464 (1995).

the plaintiff attorney.[190] The latter allows plaintiff attorneys to identify whether there should be a request for destruction of records that should not have been disclosed, make a motion for protective order, or make a motion in limine.

It is difficult for the attorney to know how to limit medical authorizations without knowing what is contained in a client's medical records. This may necessitate that the plaintiff attorney obtain a full set of the client's medical records early in the litigation before any authorizations are provided to the defense. The best method to avoid unnecessary disclosures of medical information may be for the plaintiff attorney to do the bulk of the work by reviewing all of their clients' medical records, and provide the defense with copies of redacted records instead of medical authorizations.[191] This is the only way to truly ensure that inappropriate disclosures do not occur.

While this could save the defense the time and expense of reviewing irrelevant medical records, defense attorneys may not want to rely on redacted medical records, especially if they are suspicious of the plaintiff or plaintiff's attorney.[192] When a client or attorney has a history of incomplete disclosure, a court is more likely to mandate that an unlimited medical authorization be provided to the defense attorney so he or she can confirm whether discovery disclosure has been complete.[193] This could, however, defeat the purpose of a limited waiver rule.

One solution that a number of courts have used, when there is suspicion about the adequacy of the disclosures, is an in camera inspection of the records.[194] The North Dakota Supreme Court has voiced a preference for in camera review of material for which a privilege is claimed.[195] Courts have plenty of experience in handling confidential information.

To aid the defense in determining whether to ask for in camera review, there is a requirement in federal court that attorneys claiming privilege must

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190. *See* Freeman v. Lincoln Beach Motel, 442 A.2d 650, 652 (1981).

191. In *R.K. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994), the court recognized that just because some of a medical record contains discoverable medical information, doesn't mean everything on the page is discoverable and, therefore must be redacted. *Id.* at 843. *But see Freeman*, 442 A.2d at 652 (finding that the defendants have a right to unedited records to test for the truth, which promotes full disclosure.)

192. *See Freeman*, 442 A.2d at 651.

193. Medical records discovery is not unique in this regard. Most courts do not allow a wholesale fishing expedition to satisfy a party's concern that the other side might not have revealed everything when non-medical discovery is at issue. HAYDOCK ET AL., *supra* note 20, at 215-16.

194. *E.g., Stecher*, 912 S.W.2d at 465; State *ex. rel.* Crowden v. Dandurand, 970 S.W.2d 340, 343 (Mo. 1998); Alcon v. Spicer, 113 P.3d 735, 742 (Colo. 2005) (en banc).

195. *E.g.,* Trinity Med. Ctr. v. Holum, 544 N.W.2d 148, 156 n.3 (N.D. 1996).

keep a detailed and specific privilege log so the other side can evaluate whether to make a motion to compel discovery.[196] North Dakota did not adopt this provision of the Federal Rules of Civil Procedure. The North Dakota Supreme Court, nevertheless, has "strongly encourage[d]" that when a party claims a privilege, all documents or information claimed to be privileged should be specifically identified.[197] This allows those contesting a claim of privilege to make intelligent choices regarding whether to seek more expansive discovery. It also provides a better record for the trial court or Supreme Court, if there is a dispute regarding whether particular medical records are privileged.[198]

Once litigation is finally concluded, both sides will have sensitive medical records in their possession that need to be protected from further disclosure.[199] Should they be retained in the files by both sides' attorneys indefinitely? Given the highly sensitive nature of medical information, especially if the implied waiver is unlimited, it is problematic to keep the records in files beyond the need for them. The plaintiff's attorney may consider sending the records to the client. Defense attorneys may consider destroying the records or sending them to the plaintiff's attorney. In order to ensure this, plaintiff attorneys might, as a condition of providing signed medical authorizations or medical records, consider having the defense sign a medical authorization agreement mandating return or destruction of all medical records after completion of the litigation.[200]

VIII. ETHICAL RESPONSIBILITIES

North Dakota Rule of Professional Conduct 1.1 provides that "[a] lawyer shall provide competent representation to a client."[201] A part of competence in medical malpractice and personal injury litigation is to know what portions of a client's personal life is discoverable and limiting

196. *See* FED. R. CIV. P. 26(b)(5) (stating all objections based on privilege have to be made "expressly" and shall describe the material for which the objection is made). Professor Thomas A. Mauet calls this a privilege log. MAUET, *supra* note 13, at 177.

197. *Trinity Med. Ctr.*, 544 N.W.2d at 156 n.3. Identification must be specific enough to allow the other side to evaluate whether to compel production of the records, without revealing the confidential information. *Id.*

198. *Id.*

199. This appears to be required by HIPAA. Law v. Zuckerman, 307 F. Supp. 2d 705, 708 (D. Md. 2004); Helping Hand, LLC. v. Baltimore, 295 F. Supp. 2d 585 (D. Md. 2003).

200. Brende v. Hara, 153 P.3d 1109, 1114 (Haw. 2007). In *Brende,* after automobile crash litigation was concluded, plaintiff sought a protective order requiring the defendant insurer and its employees be prohibited from using the plaintiff's medical records in any other way outside that particular lawsuit. *Id.* at 1111. The Hawaii Supreme Court allowed a protection order barring further use of the medical information under Hawaii's right of privacy. *Id.* at 1117.

201. N.D. R. PROF'L CONDUCT 1.1.

disclosures to only what is required for litigation purposes.[202] This includes the handling and discovery of medical records. While there is not a specific rule in the Rules of Professional Conduct that requires attorneys to protect the confidentiality of their client's medical secrets, North Dakota Rule of Professional Conduct 1.6 states: "[a] lawyer shall not reveal information relating to the representation of the client unless the client consents."[203] A client's medical information is his or her secret. In medical malpractice and other personal injury litigation, it may well relate to the representation. The secrets should not be disclosed to others unless necessary under the discovery rules and the rules of privilege.

North Dakota Rule of Professional Conduct 3.4(a), on the other hand, states that a lawyer shall not obstruct another party's access to evidence.[204] Plaintiff's attorney may not use the concept of limited implied waiver as a ruse to avoid revealing discoverable information. Privilege is a shield not a sword.

IX. CONCLUSION

The *Sagmille*r implied waiver rule best effectuates a just resolution of medical malpractice and personal injury litigation by allowing discovery of relevant medical records and their use at trial. An unlimited implied waiver rule, however, is not needed for a just resolution of a claim involving medical issues. North Dakota and Congress, through HIPAA, have articulated a strong public policy interest in keeping medical secrets private. A limited waiver rule best effectuates that public policy interest and still provides necessary access to information relevant to defense of a claim. While discovery of medical information may become more cumbersome and expensive with a limited waiver of the doctor-patient privilege, it is a small price to pay to ensure that private, sensitive medical information will not be unnecessarily revealed during litigation.

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202. N.D. R. PROF'L CONDUCT 1.1 cmt. 6 (stating competence includes "inquiry into and analysis of the factual and legal elements of the problem").

203. N.D. R .PROF'L CONDUCT 1.6(a).

204. N.D. R. PROF'L CONDUCT 3.4 cmt. 2.

> Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privilege, the right of an opposing party . . . to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed. . . .

Id.