Disclosure of Medical Information Under Louisiana and Federal Law

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DISCLOSURE OF MEDICAL INFORMATION UNDER LOUISIANA AND FEDERAL LAW

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I. INTRODUCTION

This Comment will examine the law governing disclosure of medical information in various contexts, including criminal and civil proceedings, state and federal actions, and other situations in which disclosure may be demanded. This piece is intended to be a practical guide for people and institutions in Louisiana, providing a fairly comprehensive view of the law. Because of the importance of understanding the background of the medical privilege, the Comment includes a brief historical synopsis.

Much of the law that determines whether medical information may be revealed is related to the doctrine of privilege. While Louisiana recognizes a broad medical privilege in civil matters, the privilege is somewhat more limited in criminal matters. Health care providers cannot be compelled by a court or other authority to disclose information gained in a protected medical relationship, unless one of the numerous exceptions
apply. This "medical privilege" is distinct from a "physician-patient privilege"; the latter is generally much narrower and usually does not encompass communications made to nurses and similar personnel. The exceptions to both kinds of privilege are significant, including mandatory reporting laws for child abuse cases, as well as various statutory and jurisprudential reporting requirements. However, unlike Louisiana law, federal law does not recognize a broad medical privilege; in fact the Fifth Circuit recognizes none at all. Nonetheless, federal statutes and regulations do protect specific kinds of information.

In addition to the protective relational privilege, Louisiana law also requires confidentiality in most settings. This law is conceptually distinct from privilege, although in practice the distinction can become blurred. In theory, privilege serves as a defensive weapon, enabling one to resist an attempt at compelled disclosure. Conversely, the confidentiality requirement is an offensive weapon, which allows a patient-plaintiff to sue the health care provider for disclosing information that should have been kept private. These laws are founded on principles of medical ethics, as well as old common-law remedies such as breach of confidence. To understand these and other aspects of this specialized privilege, a short overview of the development of the medical privilege and confidentiality laws is necessary.

II. HISTORY

The medical privilege has a long history in the civil law. Its origins are the attorney-client privilege recognized in Roman law, and the seal of the confessional protected by medieval law. The relational privilege, called "professional secret" in the civil law, re-emerged with the discovery of the Roman Digest and the subsequent reception of much Roman doctrine on the Continent. Domat wrote that the physician-patient professional secret in French law originated with the incorporation of the Hippocratic Oath in the Constitution of the Paris Medical School in the eleventh or twelfth century. The Hippocratic Oath, taken by physicians in ancient times and still administered

1. Aside from the question of privilege, some federal laws and regulations restrict disclosures concerning people treated for drug and alcohol abuse.
3. Id. at 58.
at most medical schools, forbids disclosure of anything learned in a professional relation; this vow is a positive mandate of confidentiality. The oath, however, was not formally recognized until 1670 and was only sporadically in effect in pre-Revolutionary France. But after the passage of article 378 of the French Penal Code of 1810, French law continuously recognized the professional secret for physicians.

The common law, on the other hand, did not recognize a medical privilege, nor is one recognized in England today. As one commentator wryly put it, early modes of trial at common law (such as trial by battle) "did not suggest the need for relational privileges." This bit of common-law history is significant because the Federal Rules of Evidence are still governed by the common law on questions of privilege. Many states, however, did adopt the physician-patient privilege by statute. These laws eventually led to the recognition in the United States of a common-law tort of breach of confidence, which applies when the confidence of a medical relationship is broken.

Louisiana's Constitution of 1879 recognized the medical privilege, but the provision for it in the Constitution of 1921 was ruled to be not self-operative; as a result, Louisiana courts refused to recognize the privilege without additional legislative action. To resolve this situation, the legislature promptly passed legislation on medical privilege, establishing separate statutes for civil and criminal medical privileges. The Louisiana civil statute became one of the most comprehensive in the country.

Not all agree that a medical privilege is beneficial to the courts or even to society generally. The privilege has always been controversial because it tends to obscure the truth. Many commentators have argued that it is unnecessary. In fact, mod-

7. Id. at 60.
ern legal scholars nearly universally disapprove of it. Many, however, think that such a privilege is appropriate for psychotherapy because of the special need to ensure confidentiality. Yet the traditional justification for the physician-patient privilege—that patients might not be honest with their doctors without guarantees of confidentiality—is not supported by empirical evidence, even in psychotherapy relationships. For example, some patients do not even know that the privilege exists. Moreover, even if the public does know about the privilege, it may be useless in effect because of all of its exceptions. Commentators, therefore, remain skeptical of the medical privilege.

III. LOUISIANA LAW

A. Medical Privilege in Criminal Matters

In 1928 the Louisiana Legislature passed article 476 of the Code of Criminal Procedure, creating a privilege in criminal matters. Article 476 states in pertinent part:

No physician is permitted, whether during or after the termination of his employment as such, unless with his patient's express consent, to disclose any communication made to him as such physician by or on behalf of his patient, or the result of any investigation made into the patient's physical or mental condition, or any opinion based upon such investigation, or any information that he may have gotten by reason of his being such physician....

The statute does not apply when a physician is appointed by the court to conduct an examination, provided that the doctor was not selected by the patient. Presumably, lawmakers wanted

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13. E. CLEARY, MCCORMICK ON EVIDENCE § 98 (3d ed. 1984) [hereinafter MCCORMICK].


14. State v. Aucoin, 362 So. 2d 503, 505 (La. 1978); D. SHUMAN & M. WEINER, supra note 2, at 3 passim; R. SLOVENKO & G. USDIN, supra note 5, at 4 passim.

15. D. SHUMAN & M. WEINER, supra note 2, at 77-134 (including empirical studies on psychotherapy).

16. See MCCORMICK, supra note 13, § 105 & n.1 (collecting commentary); 8 J. WIGMORE, supra note 8, § 2380.


18. Id. The statute also provides that a physician may be cross-examined about any certificate issued by him. Id.

DISCLOSING MEDICAL INFORMATION

the courts to have some means to obtain reliable information about the medical condition of criminal defendants without discouraging people from seeking medical attention. When a court orders an examination, the patient has not sought medical help; thus no physician-patient relationship, at least in the legal sense, exists. According to article 476, therefore, someone who needs medical assistance can seek it and be honest in the relationship without fear of disclosure. The court, however, still has the ability to get the information it needs by ordering a separate examination by another doctor.20

Under article 476, certain general requirements must be met before the medical privilege applies. Internally, the statute refers only to physicians and not to health care providers in general.21 The law might conceivably be applied to others if they were deemed to be acting as the physician's agent or assistant.22 In State v. Lassai, however, the director of a state drug-treatment center was denied the privilege, even though she was the functional equivalent of a physician or social worker.23 The crucial question was whether the director was in fact a physician or other professional under the statute, not whether she was the equivalent of one.24 Ultimately, article 476 only applies to information that a doctor received "by reason of his being such physician."25

A second requirement that must be met for article 476 to apply is that the patient must "voluntarily consult the physician for treatment or diagnosis."26 Thus, in State v. Berry, the court

20. Theoretically, the patient might refuse to tell the court-appointed physician anything.
22. McCormick, supra note 13, § 101 & n.6, § 313 & n.25.
25. See State v. Lyons, 113 La. 959, 37 So. 890 (1904), holding that the doctor must have gained the knowledge in his professional capacity if the privilege is to attach. This case should still be good law.
26. State v. Walker, 376 So. 2d 92, 93 (La. 1979); see also State v. Brogdon, 457 So. 2d 616, 627 (La. 1984); State v. Carter, 383 So. 2d 357, 359 (La. 1980); State v. Berry, 324
held that the defendant's examination by the coroner after his arrest was not subject to the privilege.27 In State v. Walker, on the other hand, the defendant had voluntarily consulted a prison doctor for diagnosis and treatment three days after his arrival in prison, so the privilege did attach.28 When read together, Walker and Berry show that the person who claims the privilege must have voluntarily consulted the physician for diagnosis or treatment, and whether that person was in custody at the time is irrelevant. This principle is supported by State v. Carter.29

Further, article 476 only applies when the patient's communication is made in confidence.30 This requirement is not to be too strictly interpreted in Louisiana, however. For example, in Carter, the attending physician (in the frenetic emergency room of Charity Hospital in New Orleans) asked the defendant how he had received his gunshot wounds, and the defendant candidly replied that he had been trying to rob a lady but she shot him. The state argued that since this statement was made in a busy corridor in the presence of two police officers, it was not privileged. The court rejected the argument, noting that the officers were standing far enough away that they did not hear the exchange.31

The liberal view of confidentiality espoused in Carter (and supported by the broad language of R.S. 15:476) can be distinguished from the four Wigmore principles quoted in State v. Aucoin.32 Wigmore, who was not well disposed towards privileges in general and who particularly disparaged the physician-patient privilege, wrote that there should be no privilege unless

So. 2d 822, 828 (La. 1975); MCCORMICK, supra note 13, § 99. See generally 8 J. WIGMORE, supra note 8, § 2381.

Louisiana adopted the Uniform Narcotic Drug Act, which contained a provision explicitly suspending any medical privilege when a patient was illegally attempting to obtain drugs. LA. REV. STAT. ANN. § 40:978 (West 1977 & Supp. 1990). This provision was probably unnecessary because of the requirement that the "patient" be seeking treatment, and the provision was repealed when the Uniform Controlled Substances Act replaced the Uniform Narcotic Drug Act. Act No. 634, 1972 La. Acts 1406.

27. Berry, 324 So. 2d at 828 (relying on principles espoused by Wigmore & McCormick).
28. Walker, 376 So. 2d at 93. The dissent, however, did not believe that the relationship was in fact an "employment" within the meaning of the statute. Id. at 94 (Marcus, J., dissenting).
29. Carter, 383 So. 2d at 359.
30. Id.; Berry, 324 So. 2d at 829 (regarding the clergy-penitent privilege).
31. Carter, 383 So. 2d at 359.
the following conditions were met: first, the person must have made the communication in confidence; second, confidentiality must be essential to the relationship; third, society must wish to foster such relationships; and fourth, the injury to the relationship that would result from disclosure must be greater than the benefit to the factfinder resulting from disclosure.\textsuperscript{33} Wigmore opined that only the third factor holds true for the physician-patient privilege. While some may disagree with Wigmore, their position is tenuous, given the results of empirical studies.\textsuperscript{34} Louisiana courts have not insisted that all four factors be fulfilled, and although there is general agreement that privileges should be strictly construed,\textsuperscript{35} the courts are not always so stringent. For instance, many laws (including R.S. 13:3734, Louisiana's civil medical privilege) require that privileged communications be necessary to the treatment of the patient.\textsuperscript{36} Carter's statement, however, was probably unnecessary to treatment but was held privileged anyway.

Under article 476, the right to exclude privileged testimony is personal and can only be invoked by the person in whose favor the privilege lies.\textsuperscript{37} Thus, if the patient is not a party to the action or cannot protect his own rights, the patient "should be given an opportunity to claim the privilege before the examination is proceeded with,"\textsuperscript{38} unless the privilege was already abandoned. However, until the patient decides whether to exercise the option, most authorities would allow the judge or the physician to invoke the privilege.\textsuperscript{39} If they have the opportunity, doc-
tors should enforce the privilege and resist divulging protected information because of their ethical obligations.

1. The Child Abuse Exception

Section 403 of the Louisiana Criminal Code expressly provides for an exception to the medical privilege when child abuse is involved.\(^{40}\) Section 403 may be invoked by "any individual who provides health care services."\(^{41}\) If that individual "has cause to believe that a child's physical or mental health or welfare is endangered as a result of abuse or neglect . . . or that abuse . . . was a contributing factor in a child's death,"\(^{42}\) and the child's caretaker is believed to be involved in the abuse, then that individual must report to the local child protection unit of the Department of Social Services. If the caretaker is not involved, then the local law enforcement agency must be alerted.\(^{43}\) The statute sets forth in detail the information to be included in the report.\(^{44}\) The report may name those "thought to have caused or contributed to the child's condition."\(^{45}\) The first report may be oral, but a written one must be given within five days.\(^{46}\) The statute also immunizes from civil or criminal liability those who

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\(^{40}\) LA. REV. STAT. ANN. § 14:403(F) (West Supp. 1990).

\(^{41}\) Id. § 14:403(B)(4)(a).

\(^{42}\) Id. § 14:403(C).

\(^{43}\) Id. § 14:403(D). A caretaker includes the child's parent, guardian, foster parent, "an employee of a public or private residential facility, or other person providing residential care." Id. § 14:403(B)(2).

\(^{44}\) Id. § 14:403(D)(2). The report must contain, if known:

(a) The name, address, age, sex, and race of the child.

(b) The nature, extent, and cause of the child's injuries or endangered condition, including any previous known or suspected abuse to this child or the child's siblings.

(c) The name and address of the child's parent or other caretaker.

(d) The child's family composition.

(e) The name and address of the reporter.

(f) An account of how this child came to the reporter's attention.

(g) Any explanation of the cause of the child's injury or condition offered by the child, the caretaker, or any other person.

(h) Any other information which the reporter believes might be important or relevant.

Id.

\(^{45}\) Id. § 14:403(D)(3).

\(^{46}\) Id. § 14:403(D)(4).
report, cooperate, and testify in good faith.\textsuperscript{47} A mandatory reporter who willfully fails to report is guilty of a misdemeanor punishable by fines and incarceration.\textsuperscript{48}

The abrogation of privilege by section 403 is complete: no evidence whatsoever may be excluded on grounds of medical privilege in "any proceeding concerning the abuse or neglect . . . of a child."\textsuperscript{49} The section waives not only the victim's privilege, but also any privilege the perpetrator may have had. In \textit{State v. Bellard}, the defendant's doctor found not only that the defendant had gonorrhea, but also that a five-year-old child living with the defendant had also contracted the disease.\textsuperscript{50} The court held that section 403 abrogated the defendant's privilege.\textsuperscript{51} Recently, the legislature has made this rule even clearer.\textsuperscript{52}

Section 403.2 of title 14 provides similarly for the abuse and neglect of adults who cannot act for themselves. The statute does not single out health care providers as specific mandatory reporters, but instead requires "[a]ny person having cause to believe that an adult's physical or mental health or welfare has been or may be further adversely affected by abuse or neglect by others or self-neglect"\textsuperscript{53} to report to any adult-protection or law enforcement agency.\textsuperscript{54} In addition, there are criminal penalties for those who knowingly and willfully fail to report,\textsuperscript{55} and immunity is provided for all those who report in good faith, except for the perpetrator.\textsuperscript{56} Although privileges are not explicitly addressed, the immunity provision nullifies any penalties for violating a professional confidence, so reporting is the advisable course. The report should be made orally, immediately after learning of the abuse or neglect.\textsuperscript{57} A written confirmation would

\textsuperscript{47} Id. § 14:403(E); Gross v. Haight, 496 So. 2d 1225 (La. Ct. App. 5th Cir. 1986).
\textsuperscript{48} LA. REV. STAT. ANN. § 14:403(I) (all health care providers are mandatory reporters under this statute).
\textsuperscript{49} Id. § 14:403(F).
\textsuperscript{50} 533 So. 2d 961 (La. 1988).
\textsuperscript{51} Id. at 964-66 (alternate holding).
\textsuperscript{52} A 1988 amendment to subsection F of the statute strengthened the rule: under the former subsection F, the defendant's being deemed a caretaker was significant. \textit{See id.} at 964. This factor is now immaterial.
\textsuperscript{53} LA. REV. STAT. ANN. § 14:403.2(C) (West 1986 & Supp. 1990) (emphasis added).
\textsuperscript{54} Id. § 14:403.2(D)(1).
\textsuperscript{55} Id. § 14:403.2(J)(1).
\textsuperscript{56} Id. § 14:403.2(K).
\textsuperscript{57} Id. § 14:403.2(D)(4).
be prudent, particularly because of the criminal penalties that result from a failure to report abuse or neglect.

2. The Hospital Records Controversy

The importance of the medical privilege is demonstrated in the rape case of State v. Walker. As in Bellard, the defendant and the rape victim were found to have gonorrhea. The disease was discovered in the victim shortly after the rape; the defendant sought treatment on his own initiative at a parish prison. The prison doctor testified, over objection, about the defendant's condition, and Walker was convicted by a jury of aggravated rape. Admissibility of the doctor's testimony was the issue on appeal.

Since the victim was not a child, R.S. 14:403, which abrogates all privileges, did not apply. Because the defendant sought medical attention on his own, the knowledge of the prison doctor was privileged. The state advanced two arguments that the privilege did not apply, one of which was that the doctor's testimony was admissible because hospital records are always admissible. This argument is completely untenable in all states other than Louisiana. In Louisiana, however, there is some question regarding this issue.

By statute, "Whenever a certified copy of the chart or record of any hospital . . . is offered in evidence in any court of competent jurisdiction, it shall be received in evidence by such court as prima facie proof of its contents." In State v. O'Brien, the court held that this statute was a special law, which abrogated the privilege granted by the general physician's privilege statute. This decision contradicted the existing commentary and was sharply criticized when handed down: the doctor should not be able to waive the privilege simply by recording the information. Courts also criticized the O'Brien decision.

Unsurprisingly, the court in State v. Walker, explicitly

58. 376 So. 2d 92 (La. 1979).
59. See, e.g., McCORMICK, supra note 13, § 313; 8 J. WIGMORE, supra note 8, § 2382(3) (Wigmore, however, might accept the argument as applied to public hospitals because then the records would be public records as well as medical records.).
rejected the reasoning of *O'Brien* as "unsound."\(^{63}\) The justices observed that section 3714 was merely an exception to the hearsay rule and should not affect the medical privilege.\(^{64}\) Unfortunately, instead of overruling *O'Brien*, the *Walker* court only distinguished it: in *O'Brien* actual records were introduced, but in *Walker* there was only testimony. Nevertheless, the *Walker* decision was enthusiastically received.\(^{65}\) The supreme court in *State v. Carter*, using the same approach, again distinguished *O'Brien*.\(^{66}\) But in *State v. Berluchaux*, a lower court, ruling on the admissibility of actual records, applied the faulty *O'Brien* reasoning because the case had never been explicitly overruled.\(^{67}\)

Unquestionably, *Berluchaux* will be criticized on the same grounds as *O'Brien*. A more consistent ruling would have been that *O'Brien* was limited to its specific facts and was no longer good law after *Walker* and *Carter*. Ultimately, if courts continue to follow the *O'Brien* rationale, there will be an inappropriate loophole in the medical privilege. Thus, if a physician is asked at trial to disclose documents that have been recorded by a hospital, he should contend that the information is privileged. If the trial court rules adversely, and irreparable injury results from the disclosure, the defendant would have the right to an interlocutory petition for a writ of certiorari.\(^{68}\) Absent irreparable injury, defendant should appeal the conviction and sentence with a bill of exceptions, assigning the privilege ruling as error.\(^{69}\)

3. **Implied Consent**

By statute, anyone who drives on public highways is deemed to have consented to body-fluid tests for alcohol and certain drugs.\(^{70}\) Tests taken pursuant to the procedures in those laws and regulations set up certain presumptions and are generally admissible.\(^{71}\) Since the driver is deemed by these special

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63. State v. Walker, 376 So. 2d 92, 94 n.5 (La. 1979).
64. Id.
66. 383 So. 2d 357 (La. 1980).
67. 522 So. 2d 600 (La. Ct. App. 1st Cir.), *writ denied*, 531 So. 2d 467 (La. 1988).
68. LA. CODE CRIM. PROC. ANN. art. 912 comment (c) (West 1984); see *State v. Doucet*, 199 La. 276, 5 So. 2d 894 (1942); *State v. Moore*, 140 La. 281, 72 So. 965 (1916).
69. In federal court, defendant may move for certification of the question for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1988), if necessary. Eventually the Louisiana Supreme Court should clarify the law in this regard.
71. Id. §§ 32:661-664.
statutes to have consented to the test and to the use of the test results in a criminal trial, the medical privilege does not apply.

In *Berluchaux*, the procedures prescribed by the legislature in the statute were not followed. The defendant was seriously injured in a car accident and the blood alcohol test was ordered by the attending physician in the course of pre-operative preparation. Berluchaux had personally sought medical help and was not accompanied by law enforcement officers. Since the test was not administered in compliance with the implied consent law, the state was not entitled to the results of the test; consequently, the state issued a subpoena duces tecum for the defendant's hospital records. Only at that point did the question of privilege arise. Thus, unlike *Berluchaux*, if the procedures set forth in sections 661 to 664 of title 32 are followed, privilege and the use of hospital records in judicial proceedings is not an issue. The hospitals and those who administer the tests are exempted from civil and criminal liability for administration of the tests.

Although there is no per se abrogation of the physician-patient privilege in the statute, it seems that the patient, by driving on a public highway, has consented as a matter of law to certain tests under specified conditions, and has additionally consented to the use of the results in a criminal trial. In fact, the statute requires that the arrested person be apprised by the arresting officer that the results of the test can be used against him in a legal proceeding. Generally, the defendant is allowed to withdraw his consent. Absent withdrawal, because the patient consents to the use of the information, the medical privilege does not apply. Similarly, the doctor or other medical personnel do not violate any medical ethical rule by cooperating in the disclosure to law enforcement agencies, since the disclosure

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73. *Id.* at 601.
74. Other than *Berluchaux*, no cases have been found in which the defendant tried to invoke the privilege in this context. The best defense argument would be that R.S. 32:661 implies consent, while R.S. 15:476 requires "express consent" before the privilege is waived. As noted in the next section in the text of the Comment, the supreme court wrote its way around this argument in an insanity-defense case, State v. Aucoin, 362 So. 2d 503, 506 (La. 1978), and would probably do the same in the drunk-driving context.
75. LA. REV. STAT. ANN. § 32:666(A) (but the arrested person is not allowed to refuse the test when someone in the accident has died or sustained serious bodily injury).
was made with the test subject’s legal consent, and because phys-
icians are required by law to make the disclosure.

4. The Insanity Defense Exception

The Louisiana Supreme Court has consistently held that
when a defendant puts his sanity at issue, he has impliedly
waived any physician-patient privilege he may have had relative
to that narrow issue, unless prejudicial effect on the merits out-
weighs the probative value of the evidence. In this context, a
physician can be required to testify, even if he is not a court-
appointed physician. The supreme court’s approach to the
insanity defense exception, however, has been criticized because
R.S. 15:476 requires an express waiver of the privilege. Recogn-
izing the conflict, Judge Tate in State v. Aucoin, wrote around
it by saying that the insanity defense was not an implied waiver,
but rather “an implied restriction on the use of the privilege.”
Under Judge Tate’s rationale, the statute does not apply when-
ever the defendant puts his sanity at issue, regardless of implied
or express consent. The insanity defense exception, therefore,
remains good law.

5. Other Exceptions

In addition to the other mandatory-reporting exceptions,
one statute requires disclosure of certain burn injuries. They
must be reported under defined circumstances. The report
must be made orally to the state fire marshal’s office immediately
after examination or treatment. There is no mention of the

78. State v. Berry, 324 So. 2d 822, 827-28 (La. 1975) (relying on 8 J. WIGMORE,
supra note 8, §§ 2388-2390 for authority), cert. denied, 425 U.S. 954 (1976); see State v.
Brogdon, 457 So. 2d 616, 628 (La. 1984), cert. denied, 471 U.S. 1111 (1985); Aucoin, 362
So. 2d at 505.

79. Pugh & McClelland, The Work of the Louisiana Appellate Courts for the 1978-

80. Aucoin, 362 So. 2d at 506.

81. LA. REV. STAT. ANN. § 14:403.4(B) (West Supp. 1990). The report must be
given when there is reason to believe that arson is involved and the victim sustains second or
third degree burns to five percent or more of the body or any burns to the upper
respiratory tract or laryngeal edema due to the inhalation of super-heated air, and
every case of a burn injury or wound which is likely to or may result in death.

Id.

82. Id. § 14:403.4(C)(1). The report should contain, if known, the victim’s name,
address and birth date; the address where the injury occurred; the date and time of injuries;
their degree and severity; the percent and areas of the body burned; the apparent cause; the
name and address of the reporting facility; and the physician’s name. Id. § 14:403.4(C)(2).
physician-patient privilege, but since immunity is provided, cooperation with the law is the advisable course.

Additionally, physicians and hospital managers or superintendents are required to report every case of venereal disease, omitting the name and address of the patient. \(^83\) Venereal diseases, in the eyes of the statute, are syphilis, gonorrhea, and chancroid. \(^84\) If the patient refuses to submit to treatment for ten days, or if he exposes anyone else, the attending physician must report the patient’s name and address. \(^85\) This statute could be important in a number of court contexts because it often is relevant in rape and child molestation cases. \(^86\)

Psychologists and psychiatrists are subject to another reporting requirement, but it is different from the others. These professionals have a positive duty to warn or take reasonable precautions “[w]hen a patient has communicated an immediate threat of physical violence against a clearly identified victim or victims, coupled with the apparent intent and ability to carry out that threat.” \(^87\) In that situation, the treating psychologist or psychiatrist, while “exercising reasonable professional judgment, shall not be liable for a breach of confidentiality for warning of such threat or taking precautions to provide protection.” \(^88\) This reporting requirement is different because it may be discharged by warning the victim as well as notifying law enforcement authorities near the victim or patient’s residence. \(^89\)

There is one final caveat: In forming their opinions, expert medical witnesses rely on certain types of evidence, including medical records. The experts may be cross-examined about these sources, and may refer specifically to them while testifying. \(^90\) Accordingly, information on which experts base their

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The fire marshal has authority to make rules to carry out the section, and all reporters in good faith are given immunity. \(\text{Id.} \ § 14:403.4(\text{D})(\text{2}), (\text{E})\).

83. \(\text{Id.} \ § 40:1065(\text{A})\) (West Supp. 1990).
84. \(\text{Id.} \ § 40:1061. \text{See also infra notes 127-29 and accompanying text (discussing the AIDS statute)}\).
85. \(\text{Id.} \ § 40:1065(\text{B})\).
86. \(\text{E.g., State v. Bellard, 533 So. 2d 961, 963 n.2 (La. 1988); State v. Walker, 376 So. 2d 92 (La. 1979).}\)
87. \(\text{LA. REV. STAT. ANN.} \ § 9:2800.2(\text{A})\) (West Supp. 1990). \(\text{See generally Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (the seminal case in this area)}\).
88. \(\text{LA. REV. STAT. ANN.} \ § 9:2800.2(\text{A})\).
89. \(\text{Id.} \ § 9:2800.2(\text{C})\).
90. \(\text{State v. Fallon, 290 So. 2d 273 (La. 1974); State v. Brogdon, 457 So. 2d 616, 628 (La. 1984)}\).
opinions should no longer be considered privileged; there is no physician-patient relationship with the expert because the patient has not sought out the doctor for treatment or similar services.

B. Medical Privilege in Civil Matters

There was no medical privilege in Louisiana civil matters until the passage of R.S. 13:3734 in 1968. Now, section 3734 is one of the most comprehensive privilege statutes:

Except as hereinafter provided, in civil cases, proceedings before a medical review panel and in medical and dental arbitration proceedings, and in proceedings and investigation preliminary to all such actions, a patient or his authorized representative, has a privilege to refuse to disclose and to prevent a health care provider from disclosing any communication, wherever made, relating to any fact, statement or opinion which was necessary to enable that health care provider or any other health care provider to diagnose, treat, prescribe or act for the patient.

According to the statute, "'Communication' means the acquiring, recording or transmittal of any information, in any manner whatsoever, concerning any facts, opinions or statements necessary to enable the health care provider to diagnose, treat, prescribe or to act for the patient."


91. The Section above on the medical privilege in criminal matters discusses privilege statutes that also apply in civil matters, i.e., LA. REV. STAT. ANN. § 9:2800.2 (psychotherapist's duty to warn); id. § 37:1114 (West 1988) (licensed social worker's privilege); id. § 37:2714 (West 1988) (licensed mental health counselors enjoy the same privilege as attorneys).


94. Id. § 13:3734(A)(1), (3).
privilege in contests of wills, and an administrator, spouse, or child’s representative is deemed to consent to disclosure when seeking damages for the patient’s death. Otherwise, there is general agreement that the privilege may be claimed by a proper representative after the death of a patient.

The privilege does not attach when “any person brings an action to recover damages, in tort or for worker’s compensation under federal or state laws, for personal injuries.” Yet, when the patient is the defendant in the action instead of the plaintiff, the privilege applies. The statutory waiver of privilege applies to both discovery and testimony at trial but to nothing else. In Dennis v. Claiborne, however, the court held that a physician who disclosed patient information to the defendant-physician in a malpractice suit was not liable because the information would be discoverable; therefore, the informal disclosure by letter did no harm. Thus, Dennis applies to disclosures that are at least incidental to a lawsuit. Health care providers would be more prudent, though, to refuse disclosure unless they are required to disclose by valid legal process.

What information is protected by the privilege is a more difficult issue. According to Williams v. Sistrunk, only information that was necessary to treatment and relevant to the claim or defense may be disclosed. This limitation on what may be disclosed is not addressed in the statute. The statute provides only that when the privilege is waived, “any health care provider who has attended such person at any time may disclose any communication which was necessary to enable him to diagnose, treat, prescribe, or act for said patient.”

Medical records in worker’s compensation cases are governed by a specific section: “a health care provider who has at

95. Id. § 13:3734(C)(1), (2), (4).
100. Williams v. Sistrunk, 417 So. 2d 14, 16 (La. Ct. App. 4th Cir. 1982). When disclosure is made outside of trial or discovery, the doctor may be held liable in tort for violation of the privilege. See infra note 122 and accompanying text.
101. 441 So. 2d 387 (La. Ct. App. 4th Cir. 1983).
102. Williams, 417 So. 2d at 15.
any time treated the employee shall release any requested medical information and records relative to the employee's injury, to the employee, employer, or its worker's compensation insurer, or the agent or representative” of any of them. Information about other treatments or conditions becomes available only on presentation of a subpoena or by written consent of the worker. The information must be kept confidential, and those who obtain it are liable for breach of confidence. Use of the information before a court, the Office of Worker's Compensation Administration, or the Louisiana Worker's Compensation Second Injury Board is not a breach of confidence.

Outside of the worker's compensation context, the patient's written authorization will still allow the provider to disclose stipulated information. (Of course such an authorization allows disclosure in a worker's compensation context as well, but it is not required.) Upon paying reasonable costs, patients must be allowed access to and copies of their records unless there is good cause to deny the patient the information. The provider may rely on the reasonable representations of the person making the request.

A waiver of the medical privilege may be inferred, in some cases, from certain actions of the patient. The commentators treat the subject of waiver in great detail, and most would impose numerous restrictions on the use of the privilege when the patient takes certain actions. Louisiana decisions do not infer a waiver as often as the commentators would, but the courts have held that the legislature, by making “[t]he mental and physical health of the parties” one of the factors in deciding child custody, created another exception to the privilege.

104. Id. § 23:1127(A) (West Supp. 1990).
105. Id. Releases of records under this statute must be in writing, with a copy sent free to the employee.
106. Id. § 23:1127(B).
109. See McCormick, supra note 13, § 103 passim; 8 J. Wigmore, supra note 8, § 2390 passim.
111. LA. CIV. CODE ANN. art. 146(C)(2)(g) (West Supp. 1990); Gras v. Gras, 489 So. 2d 1283, 1288 (La. Ct. App. 2d Cir.), writ denied, 493 So. 2d 1222 (La. 1986); Dawes v. Dawes, 454 So. 2d 311, 312 (La. Ct. App. 4th Cir.), writ denied, 457 So. 2d 18 (La. 1984). Wing v. Wing, 393 So. 2d 285 (La. Ct. App. 1st Cir. 1980), was decided before revised article 146 was passed, and held that the privilege did apply in a child custody proceeding. It is no longer good law.
The court in *Dawes v. Dawes* alternatively held that because a plaintiff-father made his physical condition an "essential element" of his suit, he impliedly waived his medical privilege.\(^{112}\)

The essential-element criterion was taken from *Arsenaux v. Arsenaux*,\(^{113}\) a controversial and important case concerning the medical privilege.\(^{114}\) The supreme court held that in a suit for separation and divorce, the medical privilege is not abrogated, because such a suit is not enumerated among the exceptions to section 3734. In *Arsenaux*, the husband proffered his wife's medical record, which tended to prove that she was adulterous. In an oft-quoted passage, the court stated: "Since the legislature has delineated the civil suits which waive the privilege, an additional judicial exception would contravene the statute and flout the law. Because Ms. Arsenaux's physical condition is not an essential element of her suit, no implied waiver of the privilege should be inferred."\(^{115}\)

Everyone who has written on the subject, other than the majority, believes that the wife, by suing for alimony and alleging freedom from fault, did make her physical condition an essential element in her case.\(^{116}\) Following the decision, there were many calls on the legislature to modify the privilege, but no action has been taken. In accord with the principle in *Arsenaux*, courts have since held that the privilege is abrogated only in suits enumerated in section 3734. These courts have confronted persuasive arguments that the privilege should be abrogated in interdiction and paternity proceedings, but they have not departed from the statute.\(^{117}\) *Arsenaux* remains good law.

Essentially the same confidentiality and privilege laws apply to a health maintenance organization (HMO): "Any data or information pertaining to the diagnosis, treatment, or health of

\(^{112}\) *Dawes*, 454 So. 2d at 313.

\(^{113}\) 428 So. 2d 427 (La. 1983).


\(^{115}\) *Arsenaux*, 428 So. 2d at 430 (citation omitted).


\(^{117}\) See Interdiction of Haggerty, 485 So. 2d 67 (La. Ct. App. 4th Cir. 1985); Heable v. Heable, 248 So. 2d 847 (La. Ct. App. 2d Cir.) (en banc) (claim to disavow paternity), writ denied, 252 So. 2d 456 (La. 1971). The child custody cases are arguably consistent with these cases if one accepts the court's reasoning that the legislature itself abrogated the privilege in child custody suits by amending article 146. See *supra* notes 110-12 and accompanying text.
any enrollee or potential enrollee obtained from such persons or from any provider by any [HMO] shall be held in confidence and shall not be disclosed to any person,” except as required by other law, upon express consent of the patient, or in litigation between the patient and the HMO. The HMO is entitled to invoke the same privileges as other health care providers.

Whether the privilege involves an HMO or other health care provider, there is a loophole in the privilege that should not be overlooked: Disclosures made to insurers are not privileged. This exception is very important. In the words of the Louisiana Fourth Circuit Court of Appeal, “Health care insurers are not required under any statutory provision to protect confidential communications. They are immunized from liability if they disseminate [sic] an insured’s medical information.” An insurer, if called to testify, must make the required disclosures.

Health care providers themselves, however, have a duty of a much different nature. If a provider makes an unauthorized disclosure—that is, if information is disclosed in the absence of either the patient’s written authorization, a subpoena, or a court order—the provider is subject to tort liability under several theories, such as violation of privilege, breach of confidence, invasion of privacy, and defamation. If the medical information is not privileged (i.e., if one of the exceptions applies) then under state law the provider should respond to discovery. If the information might be privileged, a doctor, hospital, or health organization should respond to discovery.

119. Id. § 22:2020(B).
should find out positively, or else risk tort liability. The type of suit may determine whether the privilege applies. The prudent health care provider should assert the privilege in all cases except those in which the privilege positively does not apply. In this way, the provider should be protected from tort liability.

When served with a subpoena duces tecum for trial, as opposed to discovery, the records custodian of the hospital or clinic should deliver a copy of the requested records. They should be enclosed in a sealed inner envelope, and precautions should be taken to ensure that the records will only be unsealed at the direction of the court. The statute describes the particular procedures to be followed.123

Aside from the privilege laws, there are specific provisions governing the disclosure of medical information in certain circumstances. When a patient has successfully sued for medical malpractice and has become eligible for future medical care, his compensation fund must select a physician who will be present at subsequent physical examinations and who may be required to testify about them. In these situations, the privilege is abrogated.124 Minors may undergo abortions with a court order if the parents are not consulted or do not consent; procedures for obtaining such an order are set by statute.125 There is absolute liability for disclosing "the making or acceptance" of an anatomical gift without the consent of the donor, or of his representative (as specially defined in the statute). The minimum civil penalty is $5000; however, these provisions do not apply if the disclosure

123. The inner envelope should be sealed, with the title and number of the action, name of the witness, and date of the subpoena written on it. The inner envelope should be enclosed in another envelope, sealed, and sent to the clerk of court, who will open it "only at the direction of the judge or tribunal." LA. REV. STAT. ANN. § 13:3715.1(B)-(D) (West Supp. 1990). The copies should be accompanied by an affidavit by the custodian or other qualified witness stating that the affiant is duly authorized to certify the records, that they are true copies of all records described in the subpoena, and that the records were prepared by or under the control of hospital or clinic personnel. If the facility has none or only some of the described records, the affiant should so state. Id. § 13:3715.1(E)-(F). If the subpoena is not served at least five days before the date that production is required, it should be quashed by the trial court without an appearance by the facility. Id. § 13:3715.2(1). On the other hand, if a copy of the request for the subpoena duces tecum arrives by hand or registered mail more than five days ahead of time, the subpoena itself is considered timely. Id. § 13:3715.2(2).

124. Id. § 40:1299.43(D)(1)-(2) (West Supp. 1990).

125. Id. § 40:1299.35.5. The statute appears to have been tailored to comply with elaborate requirements for such laws, as prescribed by the Supreme Court of the United States in Bellotti v. Baird (Bellotti II), 443 U.S. 622 (1979), and Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983).
is required by law.126

The AIDS statute mandates that results of AIDS tests be released only to certain people and agencies, and judicial officers are not among them.127 The allowed disclosures are extremely limited: they may only be made to emergency and other medical personnel who have been exposed to an AIDS victim or a carrier of the human immunodeficiency virus (HIV), and institutions receiving the infected patient should be told as well. Deaths of those with HIV must be reported to the coroner (as must all other “sudden, accidental, violent, or suspicious” deaths).128 In all cases in which AIDS is involved, precautions must be taken to protect the identities of both the person with HIV and the persons who may have been exposed to it.129

There are also special laws governing professional peer review.130 Records and proceedings of “[a]ny hospital committee . . . [or] peer review committee of a group medical practice of twenty or more physicians”131 are confidential and may only be used in the proper functions of the committee. The records are not subject to discovery or subpoena, except that records forming the basis of a decision affecting the hospital staff privileges of a physician may be obtained by that physician.132 Any hospital or organization and its personnel are immune from damages for releasing information to such a committee.133 The patient may still gain access to his records under R.S. 40:2144.134

IV. FEDERAL LAW

A. Generally No Physician-Patient Privilege

In the Fifth Circuit, there is no physician-patient privilege of any variety.135 Admissibility of evidence in federal criminal

126. LA. REV. STAT. ANN. § 17:2352(D) (West 1982).
128. Id. § 33:1562(A) (West 1988); accord id. § 40:1099 (West Supp. 1990).
129. LA. REV. STAT. ANN. § 40:1099.
131. Id. § 13:3715.3(A)(2). This should include health maintenance organizations, ambulatory surgical centers, and other health-care providing organizations.
132. Id. § 13:3715.3(A).
133. Id. § 13:3715.3(B).
cases is governed by the common law, unless modified by Congress. Privileged information, in general, is governed by the common law as interpreted by federal courts "in the light of reason and experience." Since there was no physician-patient privilege at common law, and Congress has not chosen to adopt one, there is none now. However, with respect to civil claims or defenses decided under state law, Rule 501 provides that state privilege rules apply.

Proposed Federal Rule of Evidence 504 would have recognized a psychotherapist-patient privilege. That privilege would not apply, however, when a party put his sanity at issue. In passing the general privilege rule, instead of the specific psychotherapist-patient privilege, Congress was not to be "understood as disapproving ... a psychiatrist-patient [privilege] ...; [r]ather, [its] action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis." Notably, the proposed rule was approved as part of the uniform rules, applying to psychotherapists and optionally to all physicians.

Some circuits recognize the psychotherapist-patient privilege, while others do not. For instance, the Second and Eleventh Circuits do not recognize the privilege. Yet the Sixth Circuit in the case *In re Zuniga*, held that there is a psychothera-

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137. *FED. R. CRIM. P. 26*.

138. 8 J. *Wigmore*, *supra* note 8, § 2380; *see supra* note 9 and accompanying text (on early modes of trial at common law).

139. *Meagher*, 531 F.2d at 753.


142. *Id.*


144. *UNIF. R. EVID. 503*.


The court saw a special need to ensure confidentiality in psychotherapy. Because the Fifth and Eleventh Circuits did not consider this special need, the Sixth Circuit found their cases unpersuasive. Instead, the court concluded “that a psychotherapist-patient privilege is mandated by ‘reason and experience.’ Rule 501.” The court also held, however, that the scope of the privilege did not include “the identity of the patients, the dates on which they were treated and the length of the treatment on each date.” One factor in this decision was that the patients had already disclosed their identities to insurance companies. This theory of waiver was also used by the Seventh Circuit in applying an Illinois privilege statute.

B. The Constitutional Right to Privacy

Some courts have held that a constitutional right to privacy protects certain medical relationships. Apparently, no Fifth Circuit case has considered the broad question whether a privilege might arise under the constitutional right to privacy; however, Louisiana courts have addressed the issue. Those federal courts that do recognize some sort of privilege arising from the privacy right, limit its applicability by requiring that the state interest in disclosure be balanced against the individual’s interest in confidentiality. The balancing usually tilts in favor of disclosure. For instance, in Zuniga the Sixth Circuit assumed that such a right existed, but held that the need for disclosure outweighed the interest in privacy when a grand jury sought the names of psychotherapists’ patients and the dates and times they were treated. In doing so, the court emphasized the secrecy shrouding grand jury investigations.

The Third Circuit has squarely addressed the question of

148. Id. at 638.
149. Id. at 639.
150. Id. at 640; see also MCCORMICK, supra note 13, § 100; 8 J. WIGMORE, supra note 8, § 2384 & n.2.
151. In re Pebsworth, 705 F.2d 261 (7th Cir. 1983). Also, because there is a privilege statute in the District of Columbia, decisions there have little applicability in other federal courts. See Taylor v. United States, 222 F.2d 398 (D.C. Cir. 1955).
153. Zuniga, 714 F.2d at 641.
154. Id. at 641-42.
privilege and the constitutional right to privacy. Noting "the individual interest in avoiding disclosing personal matters," and observing that medical records were "clearly within this constitutionally protected sphere," the court in In re Search Warrant (Sealed) held that this interest must bow to a grand jury interest in investigating fraud. The Search Warrant court stated that Whalen v. Roe "strongly suggests the existence of some constitutional right on the part of patients to preserve confidentiality with respect to medical treatment." The court, however, noted that identities and other information had already been given to insurance companies. Following the Zuniga court, the Third Circuit relied on the judicial safeguards of confidentiality, such as grand jury secrecy and sealing.

C. Statutes and Regulations

1. Alcohol- and Drug-Abuse Patients

There are extraordinarily strict laws and regulations limiting the disclosure of medical records of patients who have abused drugs or alcohol. Under the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970,

Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to alcoholism or alcohol abuse education, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in . . . this section, be confidential and be disclosed only for the purposes and under the cir-

156. Id. at 71 (quoting Whalen v. Roe, 429 U.S. 589 (1977), which upheld a statute requiring physicians to report certain patients and prescriptions to a registry).
158. Search Warrant, 810 F.2d at 72-73.
159. The author would like to thank B. Peter Urbanowicz, Esq., for providing access to research he conducted in this area.
cumstances expressly authorized under . . . this section.\textsuperscript{160} The Drug Abuse Office and Treatment Act of 1972 contains a similar provision; records described in the 1970 Act are restricted under the 1972 statute when they “are maintained in connection with the performance of any drug abuse prevention function” aided by the federal government.\textsuperscript{161} The scope of the statutes are very broad. For example, a health care provider that receives any Medicare payments is considered federally assisted.\textsuperscript{162}

The language of the statutes does not precisely describe what should be considered a “program,” or exactly what records are protected. Courts that have addressed the issue have interpreted the statutes broadly, and health care providers should proceed with caution when they receive a request for a record that refers to drug or alcohol abuse. The case \textit{In re Baby X}\textsuperscript{163} concerned hospital records of a newborn child and its mother. The records were not part of any conventional drug treatment program, but they did show that the baby and mother were addicted to heroin. The court held that these records would be covered by the federal confidentiality statutes.\textsuperscript{164} Similarly, in \textit{Commissioner of Social Services v. David R.S.}, the New York Court of Appeals held that records about drug abuse maintained by a multiservice social assistance agency were “program” records covered by the federal statutes, even though the patient first went to the agency for pregnancy testing.\textsuperscript{165}

These records may be released if the patient gives written authorization.\textsuperscript{166} Consent is revocable, however. Disclosed information may not be redisclosed, and consent to release to parole officers and the like must expire when the officers no longer have a right to know.\textsuperscript{167} The only other justification for releasing the information in a judicial setting (as opposed to, \textit{e.g.}, in medical emergencies) is “an appropriate order of a court

\begin{itemize}
\item \textsuperscript{160} Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, 42 U.S.C. § 290dd-3(a) (1988).
\item \textsuperscript{161} Drug Abuse Office and Treatment Act of 1972, 42 U.S.C. § 290ee-3(a) (1988).
\item \textsuperscript{162} 42 C.F.R. § 2.12(b)(2) (1989).
\item \textsuperscript{163} 97 Mich. App. 111, 293 N.W.2d 736 (1980).
\item \textsuperscript{164} \textit{See id.} at 120, 293 N.W.2d at 741.
\item \textsuperscript{165} 55 N.Y.2d 588, 436 N.E.2d 431, 451 N.Y.S.2d 1 (1982).
\item \textsuperscript{166} The authorization form should include the name or designation of the party authorized to make the disclosure, the name or title of the person authorized to receive it, the name of the patient, the purpose of disclosure, and what information is to be disclosed. 42 C.F.R. § 2.31 (1988) (also giving a sample form).
\item \textsuperscript{167} \textit{Id.} § 2.35(c) \textit{passim.}\
\end{itemize}
of competent jurisdiction granted after application showing good cause therefor." All state laws which would allow or compel disclosure otherwise are preempted and unenforceable, except where child abuse is suspected.

When presented with a subpoena or court order requesting disclosure of these records, the provider should not immediately comply. It should insist on a hearing to show cause, referring the court to the applicable laws and regulations. The statute enumerates factors for the court to consider. Pursuant to its rule-making authority, the Department of Health and Human Services has promulgated extensive regulations governing aspects of confidentiality and disclosure of these special medical records.

Under these rules, there must be both a subpoena or other compulsory process and a court order whose "only purpose is to authorize a disclosure or use of patient information which would otherwise be prohibited" under the Act. The usual court orders requesting all records, charts, and other documents, should be resisted. Such special orders may only be issued if "disclosure is necessary to protect against an existing threat to life or of serious bodily injury, including . . . suspected child abuse . . . and verbal threats against third parties," or when "disclosure is necessary in connection with investigation or prosecution of an extremely serious crime, such as . . . homicide," or when the patient has offered testimony regarding these confidential communications.

Until all of the requirements for disclosure are met, the hospital may not even confirm a patient's presence in a drug or alcohol rehabilitation area. The most prudent policy is to give the inquiring party a copy of 42 C.F.R. part 2 and 42 U.S.C. sections 290dd-3 and 290ee-3, which provide that disclosure of such

169. See id. §§ 290dd-3(e), 290ee-3(e); 42 C.F.R. § 2.20; 2A HEALTH LAW CENTER, HOSPITAL LAW MANUAL ¶ 3-6 (1986) [hereinafter HOSPITAL LAW MANUAL].
170. 2A HOSPITAL LAW MANUAL, supra note 169, ¶ 3-6.
171. 42 U.S.C. §§ 290dd-3(b)(2)(C), 290ee-3(b)(2)(c).
172. Id. §§ 290dd-3(g), 290ee-3(g).
174. 2A HOSPITAL LAW MANUAL, supra note 169, ¶ 3-6.
175. 42 C.F.R. § 2.63.
information is protected. The hospital may state that a certain individual is not and never was a patient, but because of the problems of negative implication, handing out copies of the regulations in all cases is the best policy.176

Disclosure of the records of patients treated for drug and alcohol abuse may be compelled in civil actions only if other regulatory procedures are followed.177 The application for subpoena must not only use a fictitious name like John Doe, but must also allow the hospital or other provider an opportunity to file a written response or appear in person.178 Any review must be in chambers, unless the patient requests an open hearing.179 An order may be issued only upon a finding that there are no other effective ways to obtain the information, and that the public interest “outweigh[s] the potential injury to the patient, the physician-patient relationship and the treatment services.”180 The order must limit disclosure to those who need to know. Also, disclosure is confined to the essential parts of the record, and other devices to limit disclosure, such as sealing, are appropriate.181

The same procedures and criteria apply if the hospital or a law enforcement agency wishes to use records for a criminal investigation or prosecution. There must also be “a reasonable likelihood that the records will disclose information of substantial value in the investigation or prosecution.”182 If the application is sought by a law enforcement officer, the hospital must be “afforded an opportunity to be represented by independent counsel.”183 Unless the requisite court orders have been obtained according to the above rules, no record “may be used to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient.”184 If the information is obtained through any method other than specific court order, even if that method is lawful, the information may not be

176. See id. § 2.13(c).
177. Id. § 2.64.
178. Id. § 2.64(b)(2).
179. Id. § 2.64(c).
180. Id. § 2.64(d)(2).
181. Id. § 2.64(d)-(e).
182. Id. § 2.65(d)(2).
183. Id. § 2.65(a)(5)(i).
There are specific procedures for obtaining a court order when the hospital or its personnel are suspected of criminal activity. No notice to the hospital is required, although upon implementation of such an order, the hospital, personnel, or patient must be given an opportunity to seek revocation or amendment. Otherwise, the same criteria and limitations as in section 2.64 apply. Use of undercover agents and informants may be authorized if the hospital or personnel are suspected of criminal activity but in no other case. Notice must be given to the director of the program, unless the director is suspected or might disclose the confidential information. Before issuing an order under this section, the court must find that "[t]here is reason to believe that an employee or agent of the program is engaged in criminal activity," that there are no other ways to obtain the information, and that the public interest outweighs the possible harm done. The order must specifically authorize the placement of an informant or officer, limit the period to six months, prohibit the officer from disclosing patient-identifying information, and limit disruption to the program. No information obtained through the undercover agent may be used against a patient.

The above regulations apply only to information that "[w]ould identify a patient as an alcohol . . . abuser either directly, by reference . . . or through verification." The restrictions, however, do not apply to information passed between personnel who need to know as part of the treatment program, or to the entity that administers the program. Information may also be disclosed to obtain services for the program.

If a patient commits a crime on the premises or against program personnel, or threatens to do so, a report of the incident, patient status, the patient's name and address, along with the patient's last known whereabouts, may be disclosed. The Act provides that child abuse reporting laws remain in effect, but the

185. 42 C.F.R. § 2.12(d).
186. Id. § 2.67(c)(1).
187. Id. §§ 2.66-67.
188. Id. §§ 2.17, 2.66(d)(2), 2.67(e).
189. Id. § 2.12(a)(1)(i).
190. Id. § 2.12(c)(3).
191. Id. § 2.12(c)(4)-(5).
confidentiality restrictions do apply when records are sought to be used in criminal or civil proceedings which arise out of the report of abuse.\textsuperscript{192}

Similarly, as required by law, vital statistics may be reported upon a patient's death. Otherwise, identifying information about a deceased patient may not be given without written consent by the patient or his appointed representative, such as his executor or administrator.\textsuperscript{193}

The federal programs that supply heroin addicts with methadone are subject to the above confidentiality regulations, and the Food and Drug Administration is authorized to copy the records subject to them.\textsuperscript{194} These programs are also governed by other federal regulations. Appended to one such methadone regulation, which subjects those programs to the usual confidentiality provisions, is an unexplained sentence that states, "A treatment program may reveal such records only when necessary in a related administrative or court proceeding."\textsuperscript{195} What this sentence means is not clear; perhaps it intends to summarize the confidentiality regulations. Any other interpretation would endanger the elaborate system that carefully protects abusers, and encourages them to seek treatment without fear of prosecution or harassment.

Those who conduct research in the areas of psychoactive drugs and who use human subjects may apply for a certificate of confidentiality under procedures outlined in 42 C.F.R. part 2a. These regulations are independent of those governing patients in federally assisted alcohol- and drug-abuse programs. Also, if the Attorney General of the United States conducts research on the uses of illegal or controlled substances, he may direct that the subjects' identities remain confidential. In that case, their identities are absolutely undiscoverable, whether in state, federal, or international criminal or civil proceedings. Additionally, no treaties may be construed to require this type of disclosure.\textsuperscript{196}

2. Other Federal Laws

The Privacy Act of 1974 regulates government contractors when a federal agency contracts for the operation of "a system

\begin{footnotesize}
\begin{itemize}
\item 192. Id. § 2.12(e)(6).
\item 193. Id. § 2.15(b)(2).
\item 194. Id. § 291.505(g) (1988).
\item 195. Id. § 291.505(g)(2).
\item 196. 21 U.S.C. § 872(c)-(d) (1988).
\end{itemize}
\end{footnotesize}
of records to accomplish an agency function."\textsuperscript{197} For the statute to apply, the records must be kept "on behalf of an agency."\textsuperscript{198} From its language, the Act should only apply when an agency is supposed to keep records as part of its function, and specifically makes a contract with a private party for the keeping of such records. The Privacy Act of 1974 probably does not apply to most private hospitals, although in some instances it could, and it may apply to some public hospitals. A clear case in which a hospital would be subject to the Act is when it keeps a cancer registry pursuant to a federal contract.\textsuperscript{199}

The Freedom of Information Act of 1966 (FOIA) probably does not apply to most private hospitals either.\textsuperscript{200} It applies only to government agencies and contains no provisions for government contractors. In \textit{Forsham v. Harris}, the Supreme Court held that those who perform research as federal grantees, even if the funding agency has the right to obtain the records, are not subject to the FOIA.\textsuperscript{201} Only if the agency actually did obtain the records would the documents become "agency records" and subject to the FOIA.\textsuperscript{202}

V. SUMMARY

The state and federal law on disclosure of medical information may be summarized, albeit not very briefly. There is a medical privilege limited to physicians, board-certified social workers and licensed mental health counselors in state criminal matters; the privilege applies to all knowledge obtained in a professional capacity. The privilege does not apply when a health care provider suspects abuse of children or helpless adults; rather, the physician must report his suspicions. In Louisiana, some controversy remains whether hospital records may be admitted into evidence in spite of the privilege. There are further exceptions when a hospital performs drunk-driving blood tests according to special laws, and when a defendant pleads insanity.

There is a more comprehensive medical privilege in state civil cases, although it is considered waived in will contests and tort or worker's compensation claims for personal injuries.

\textsuperscript{198} Id.
\textsuperscript{199} 2A HOSPITAL LAW MANUAL, supra note 169, ¶ 3-7.
\textsuperscript{200} See 5 U.S.C. § 552.
\textsuperscript{201} 445 U.S. 169, 171 (1980).
\textsuperscript{202} Id. See generally 2A HOSPITAL LAW MANUAL, supra note 169, ¶ 3-8.
There is no privilege in child custody proceedings. A court might find waiver in an action in which a plaintiff’s mental or physical condition is an essential element, but this issue is not settled. Courts are wary of finding the privilege waived by the institution of a suit other than one enumerated in the statute. When the privilege is waived, medical information may be released. When it is not waived, there are special laws governing exactly how the medical information should be sent and sealed for trial.

Absent waiver, no information should be disclosed during discovery. Disclosing medical information without express permission of the patient is a tort, for which the hospital, clinic, physician, or other provider would be liable. The privilege is also waived when a successful malpractice claimant is examined for future medical care, and there are special laws governing AIDS, peer review, minors’ abortions, and organ donations.

Medical information enjoys much less protection under federal law. In the Fifth Circuit there is no medical privilege at all. Although other circuits have recognized certain varieties of a medical privilege, they are generally confined to the psychotherapist-patient relationship because of the special need for confidentiality in that setting. Special laws govern the release of information about patients in alcohol- and drug-abuse programs. Peer review and the reporting of malpractitioners is also governed to some extent by federal law. Other federal statutes that govern the disclosure of information probably do not apply to most hospitals.

VI. FINAL OBSERVATIONS

Certain areas of the law on disclosure of medical information is in need of development and clarification. At present the most obvious problem in Louisiana law is the hospital records controversy. The problem is all the more frustrating because in reality there is no controversy: Both the Supreme Court of Louisiana and the courts of appeal have recognized that the statute allowing admission of hospital records into evidence is not meant to abrogate any privileges, but that it is meant to expand the business records exception to the hearsay rule. The supreme court should have expressly overruled State v. O’Brien, which held otherwise. That case was wrong when decided, and it is

203. See supra notes 58-67 and accompanying text.
wrong now. The error is exacerbated because lower courts continue to follow its unsound reasoning, under the theory that the supreme court only distinguished it and did not overrule it.

Respect for stare decisis\textsuperscript{204} obstructed the supreme court's effort to correct the mistake of \textit{O'Brien}. The lower courts in \textit{State v. Berluchaux} should have held that after \textit{State v. Walker} and \textit{State v. Carter}, in which the supreme court criticized and distinguished \textit{O'Brien}, the \textit{O'Brien} "rationale" was limited to its specific facts and was no longer good law. By continuing to apply \textit{O'Brien}, the courts of appeal failed to recognize the key device of limiting a case to its specific facts without overruling it. If the appellate courts had recognized this, their opinions would have followed the reasoning of the supreme court. At present, however, the cases decided by the lower courts are inconsistent with the supreme court opinions, inconsistent with the purpose of the statute, and inconsistent with most authorities on the subject.

The issue presented by \textit{Arsenaux v. Arsenaux}\textsuperscript{205} is more problematic than the medical-records question in that it does not admit one clearly correct answer. In \textit{Arsenaux}, a wife sued for alimony and alleged that she was free from fault. The husband was not allowed to introduce medical records that proved she was adulterous because a suit for separation and divorce is not one of the statutorily enumerated actions that waives the privilege. Nor did the supreme court agree that the wife had made her physical condition an "essential element" of the suit by alleging freedom from fault. Thus, by upholding the wife's invocation of the medical privilege to exclude probative evidence against her, the supreme court committed a miscarriage of justice in \textit{Arsenaux}. In so doing, however, the court may have reinforced the protection that a medical relationship sometimes needs, and arguably the court was right not to let hard facts lead to bad law.

The problem raised by \textit{Arsenaux} is typical of problems raised by privileges in general: they can lead to grossly incorrect results because evidence—often the best evidence—is withheld from the factfinder. For this reason Wigmore and other com-

\textsuperscript{204}. At this point in the legal history of Louisiana, the state courts consistently cite prior decisions as authority that is almost as binding (if not equally as binding) as in common-law states.

\textsuperscript{205}. \textit{See supra} notes 113-17 and accompanying text.
mentators disparaged privileges, particularly the physician-patient privilege. Also, many scholars have doubted that confidentiality is essential to the relationship between a patient and a health care provider. Yet this author agrees with the Arsenaux court. When privileges exist, miscarriages of justice will occur. But the relationship that is protected, on the whole, outweighs some of the individually incorrect results.

Confidentiality is important in many health care relationships. The existence of so many privilege statutes should make that principle clear. The extraordinary federal regulations protecting patients treated for drug abuse are another example. By ensuring the patients' confidentiality, these regulations encourage victims of drug abuse to seek medical assistance, helping them to turn from drugs and rejoin the rest of society. Similarly, the victims of the deadly and stigmatizing human immunodeficiency virus, which causes AIDS, must feel that they can get medical advice. Society cannot afford to scare people away from medical treatment. It is particularly important that AIDS victims and those in drug rehabilitation programs, who would suffer the most from disclosure, be encouraged to get help. All of society benefits when they receive treatment; the spread of AIDS is impeded, and the spread of the drug culture is slowed.

These are the reasons that the medical privilege exists. Courts should be skeptical of alleged implied waivers, especially when statutes require express waiver. The federal courts should look more closely when they consider the subject. The drug- and alcohol-abuse regulations show that, in certain contexts, the federal government is at least as sympathetic to the privilege as the states are. The Sixth Circuit approach, finding that the psychotherapy relationship mandated a privilege "in the light of reason and experience," is in accord with the states' laws, with the various federal regulations, and with the intent of Congress. At present, we cannot afford to undercut the medical relation-

206. See supra notes 32-34 and accompanying text.
207. See supra notes 159-98 and accompanying text.
ship, for we just as surely would undermine its power for healing.

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