

IN THE SUPREME COURT OF OHIO

JOHN AND JUNE ROE, individually and as	:	Case No. 07-1832
parents and next friends of JANE ROE, a minor	:	
	:	Appeal from the Hamilton County
Appellants,	:	Court of Appeals,
	:	First Appellate District,
v.	:	Case No. C060557
	:	
PLANNED PARENTHOOD SOUTHWEST	:	
OHIO REGION, et al.	:	
	:	
Appellees.	:	

**MERIT BRIEF OF AMICI CURIAE
OHIO STATE MEDICAL ASSOCIATION,
AMERICAN MEDICAL ASSOCIATION AND AMERICAN COLLEGE OF
OBSTETRICIANS AND GYNECOLOGISTS,
IN SUPPORT OF APPELLEES**

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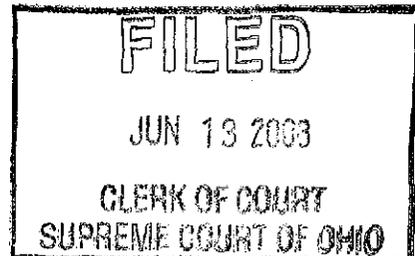


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STATEMENT OF INTEREST OF AMICI CURIAE

Amici Curiae, the Ohio State Medical Association (“OSMA”), the American Medical Association (“AMA”), and the American College of Obstetricians and Gynecologists (“ACOG”) (collectively “Amici”) file this brief because they have a strong interest in ensuring that all Ohioans, including minors, have access to safe and effective health care.

Protecting the confidentiality of medical records is vital to achieving this goal. Amici believe that uncertainty about whether communications with physicians and/or medical records are confidential will lead patients to avoid or delay seeking medical treatment, or to withhold important information when they do seek medical treatment. In the case of minors, the personal and public health consequences associated with avoiding or delaying medical treatment or withholding information are serious and can thwart public health initiatives aimed at preventing adolescent pregnancy, reducing the spread of sexually transmitted diseases, and promoting early prenatal care. The need for confidentiality is especially acute in the context of health care for sexually active adolescents, who, in the absence of confidentiality, might not seek care.

Amici are deeply concerned that allowing broad discovery in civil lawsuits of nonparty medical records -- even when redacted -- will seriously undermine the delivery of health care. Redactions do not guarantee anonymity. People who expect privacy to surround their most personal decisions will be less likely to seek out necessary medical services and treatment if they believe their confidential information will be compromised by those outside the physician-patient relationship.

The OSMA is a non-profit professional association founded in 1835 and is comprised of approximately 20,000 physicians, medical residents, and medical students in

the State of Ohio. OSMA's membership includes most Ohio physicians engaged in the private practice of medicine, in all specialties. The OSMA strives to improve public health through education, to encourage interchange of ideas among members, and to maintain and advance the standards of practice by requiring members to adhere to the concepts of professional ethics. The OSMA is committed to protecting the confidentiality of physician-patient communications.

The AMA, an Illinois nonprofit corporation, is the largest professional association of physicians, residents, and medical students in the United States. It has approximately 240,000 members who practice in every state and in every medical specialty. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health.¹

The ACOG is a nonprofit educational and professional organization. Founded in 1951, ACOG is the leading professional association of physicians who specialize in the health care of women. Its more than 53,000 members, including more than 1900 in Ohio, represent approximately 94% of all board-certified obstetricians and gynecologists practicing in the United States. ACOG supports confidential access to women's health services, including to sexually active adolescents, and supports strong legal protection for records that contain private medical information.² ACOG is concerned that the discovery

¹ The AMA and the OSMA are participating in this brief in their own capacity and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies ("Litigation Center"). The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary, non-profit state medical societies to represent the views of organized medicine in the courts.

² Because the medical records of minor patients who sought an abortion are at issue, ACOG directs the Court's attention to medical literature that reflects that abortion has an extremely low complication rate. Studies indicate that serious complications from a surgical abortion, requiring hospitalization, occur in only 0.07% of patients (study of

sought in this case, if allowed, will jeopardize the health of Ohio women by compromising their right to confidential care.

Amici curiae urge the Court to affirm the decision of the First District Court of Appeals.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth in the Merit Brief of Appellees.

STATEMENT OF FACTS

Amici adopt the Statement of Facts set forth in the Merit Brief of Appellees.

LAW AND ARGUMENT

APPELLANTS' PROPOSITION OF LAW IV: The disclosure of redacted nonparty medical records necessary for plaintiffs to establish their claims outweighs the need for protection provided by the physician-patient privilege.

Amici file this brief, focusing on Appellants' Proposition of Law No. IV. This proposition of law and Amici's concerns relate to civil discovery of confidential medical information and records generally. But certain types of confidential medical information are more sensitive than others. Here, the Roes seek discovery of the medical records of every minor who sought an abortion from Planned Parenthood Southwest Ohio Region

170,000 first-trimester abortions performed between 1971 and 1987) to 0.08% (information maintained by the National Abortion Federation [NAF] of 240,000 abortions performed at all gestational ages) to .27% (NAF information on approximately 72,000 abortions where patient follow-up was reported). See Henshaw, *Unintended Pregnancy and Abortion: A Public Health Perspective* (1999), *Clinician's Guide to Medical and Surgical Abortion* 18 at 20. Moreover, extensive reviews have concluded that there are no documented negative medical sequelae to abortion among teen-aged women. American Academy of Pediatrics (AAP), Committee on Adolescence, *The Adolescent's Right to Confidential Care When Considering Abortion* (May 1996), 97 *Pediatrics* 746, 748 (discussing first-trimester abortions, which account for more than 90% of U.S. abortions). And, minors who obtain an abortion are not at greater risk of complications in future pregnancies or future medical problems. See Alan Guttmacher Institute, *Facts in Brief: Induced Abortion in the United States* (2005), Henshaw, *supra*, n. 2 at 20.

over a ten-year period. Plainly, the confidential medical records sought are of a highly sensitive nature. The request that such records be provided to strangers – even if redacted – should be rejected.

Amici ask the Court to make clear that nonparty medical records are not subject to broad discovery in civil lawsuits simply because they exist, can be redacted, and a party requests them. Nonparty medical records should be treated with the utmost confidentiality and, to the extent they are discoverable, discovery should be based on narrowly-tailored requests designed to provide necessary information to those who have a legitimate interest in the health of the patient whose records are sought. The physician-patient relationship and the confidentiality of medical records of people who are bystanders to the litigation should not be jeopardized, particularly without a compelling need for such information.

A. Preliminary Statement Regarding the Discovery at Issue

Amici represent health care providers who care for minors and adolescents and who are committed to the safety and well-being of their patients. Amici's members are subject to mandatory reporting laws and take their obligations very seriously. Amici recognize that mandatory child abuse reporting laws -- like R.C. 2151.421 -- are an important component of child protection systems. The Roes' lawsuit, however, is a dramatic departure from the traditional use and intent of mandatory reporting. The Roes argue that the failure to report abuse in their own situation gives them the right to obtain the privileged and highly confidential medical records of every minor who sought an abortion from Planned Parenthood Southwest Ohio Region spanning ten years.

Amici fully support the goal of protecting minors and adolescents from sexual abuse. To advance this goal, it is imperative that medical professionals be allowed to exercise their professional judgment and discretion based on the information they have at

the time a patient presents for treatment. When patients are reluctant to seek health care services or to provide complete and accurate information to their medical providers for fear that their very private information will be shared with others who have no legitimate interest in their health care, public policy goals of protecting minors and promoting their well-being are undermined.

Ironically, if allowed, the discovery sought by the Roes likely will have precisely the opposite effect of protecting adolescents and promoting their health and well-being. There is a strong relationship between confidentiality and the quality of medical care provided. See, *infra*, at 5-9. Protecting adolescents and promoting their good health entails reinforcing, rather than weakening, the confidentiality of the physician-patient relationship. The discovery sought by the Roes undermines confidentiality in communications between physicians and their adolescent patients and, thus, may harm adolescents under the guise of protecting them.

B. Confidentiality Between Patients and Their Physicians is an Essential Component of Health Care

1. Historically, confidentiality between patients and their physicians has been of paramount importance in the provision of medical care.

The fundamental tenet of confidentiality of communications between medical professionals and their patients finds one of its oldest expressions in the Hippocratic Oath, written in the fourth or fifth century B.C.: "Whatever, in connection with my professional practice, or not in connection with it, I see or hear in the life of men, which ought not to be spoke abroad, I will not divulge, as reckoning that all such should be kept secret." 3 Capron & Bimbaum, *Treatise on Health Care Law* (2004), Section 16.02[I][a]. Many physicians today have sworn to the Hippocratic Oath. *Id.*

The principle of confidentiality espoused in the Hippocratic Oath is still a fundamental tenet in contemporary medical codes. For example:

- The Principles of Medical Ethics of the American Medical Association mandate that "[a] physician ... shall safeguard patient confidences and privacy within the constraints of the law."³ The American Medical Association's Code of Medical Ethics states that "[t]he information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree. The patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services."⁴
- The American College of Obstetricians and Gynecologists Code of Professional Ethics provides that "[t]he patient-physician relationship has an ethical basis and is built on confidentiality, trust, and honesty" and the "obstetrician-gynecologist must respect the rights and privacy of patients... and safeguard patient information and confidences within the limits of the law."⁵

Thus, for centuries, confidentiality between patients and their physicians has been of paramount importance in the provision of medical care.

³ Available at <http://www.ama-assn.org/ama/pub/category/2512.html>.

⁴ Available at <http://www.ama-assn.org/ama/pub/category/8353.html>.

⁵ Available at <http://www.acog.org/fromhome/acogcode.pdf>.

2. Confidentiality is especially important in providing health care services to adolescents.

Adolescents are not excluded from the codes of confidentiality that bind health care professionals. Several national and state associations of health care professionals, including Amici herein, agree that confidentiality is an essential component of providing health care services to adolescents.⁶ In fact, in 2004, four prominent national medical societies -- the American Academy of Family Physicians, the American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, and the Society for Adolescent Medicine -- reaffirmed the importance of confidentiality in the context of reporting adolescent sexual activity, stating "[i]t is critical that adolescents who are sexually active receive appropriate confidential health care and counseling." Position Paper of Am. Acad. of Family Physicians, Am. Acad. of Pediatrics, Am. Coll. of Obstetricians and Gynecologists, & Soc. for Adolescent Medicine, *Protecting Adolescents: Ensuring Access to Care and Reporting Sexual Activity and Abuse* (2004), 35 J. Adolescent Health 420, 420 (the "Provider Position Paper," attached hereto as Exhibit A).

The AMA endorsed the Provider Position Paper, stating that "[m]andatory reporting laws can lead to outcomes that are unintended and potentially damaging to the health of adolescents" and that the Provider Position Paper "ensures that adolescents who are sexually active receive the health care they need and identifies adolescents who have been sexually abused or exploited and protects them from harm[.]" See Am. Med. Assn. Policies H-60.938 and H-60.965 (Nov. 2007) (attached hereto as Exhibit B). The AMA

⁶ Generally, Amici's members encourage adolescents to involve family members in their health decisions. But confidentiality must be assured when family involvement is not in the best interest of the adolescent or will prevent the adolescent from seeking care.

independently has "reaffirm[ed] that confidential care for adolescents is critical to improving their health." *Id.*

It is well-documented that many adolescents forego or delay seeking needed health care if they are not assured that they will receive confidential services. Ford & English, *Limiting Confidentiality of Adolescent Health Services: What are the Risks?* (Aug. 14, 2002), 288:6 *J. Am. Med. Assn.* 752-53; Adams, *Mandatory Parental Notification: The Importance of Confidential Health Care for Adolescents* (2004), 59:2 *J. Am. Med. Women's Assn.* 87; *Provider Position Paper* at 422. Studies consistently document that teens will not seek services for sexual health concerns if they think the information they share will not be kept confidential. *Id.* As is true for the general patient population, open communication is essential for effective screening, accurate diagnosis, and risk reduction counseling for adolescents.

Confidentiality plays a significant role in adolescents' decisions both to seek care in the first instance and to remain in care after beginning treatment. See English & Ford, *The HIPAA Privacy Rule and Adolescents: Legal Questions and Clinical Challenges* (Mar./Apr. 2004), 36:2 *Perspectives on Sexual & Reproductive Health*, at 80; Reddy et al., *Effect of Mandatory Parental Notification on Adolescent Girls' Use of Sexual Health Care Services* (Aug. 14, 2002), 288:6 *J. Am. Med. Assn.* 710-14; Wright, *Riskier behavior linked to notification: Teens would shun sexual health clinics if parents were informed* (Oct. 2002), *Nation's Health*, at 29. Not surprisingly, it is widely accepted among providers of health care services to adolescents that confidentiality is essential.

Confidentiality of communications between a physician and patient, which has been a cornerstone of effective health care services for centuries, is important to all

patients, including adolescent patients. Patients want and expect confidentiality in their medical care and will be less likely to seek out diagnostic services, counseling, and treatment if they believe that their medical history will be shared with outsiders. The need for confidentiality is especially crucial in the context of personal information concerning sex and reproduction. Such information is particularly sensitive and should be vigilantly protected from unjustified intrusion. See *Carey v. Population Servs. Internatl.* (1977), 431 U.S. 678, 684, 97 S.Ct. 2010, 52 L.Ed.2d 675 (holding that individual decisions in matters of childbearing are protected as privacy rights by the Due Process Clause); *Eisenstadt v. Baird* (1972), 405 U.S. 438, 453-54, 92 S.Ct. 1029, 31 L.Ed.2d 349 (holding that privacy rights include the right of an individual, married or not, to be free from unwarranted governmental intrusion in childbearing decisions); *Griswold v. Connecticut* (1965), 381 U.S. 479, 485, 85 S.Ct. 1678, 14 L.Ed.2d 510 (describing a penumbra of implicit privacy rights in the Third, Fourth, Fifth and Ninth Amendments).

C. Ohio Courts Should Vigilantly Protect Nonparties' Confidential Medical Records from Unjustified Intrusion

1. Privileged medical records do not fall within the general scope of discovery in civil lawsuits.

Discovery in civil lawsuits generally is governed by Rule 26 of the Ohio Rules of Civil Procedure:

B) Scope of discovery.

Unless otherwise ordered by the court in accordance with these rules, the scope of discovery is as follows:

(1) In general.

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, . . .

Ohio Civ.R. 26(B)(1).

Despite this clear mandate that privileged matters do not fall within the scope of civil discovery, the Roes sought discovery of the privileged, confidential medical records of all minors who sought an abortion at Planned Parenthood Southwest Ohio Region over a ten-year period.

It is beyond dispute that medical records are “communications” subject to the protection of the physician-patient privilege. See, e.g., *Richards v. Kerlakian*, 162 Ohio App. 3d 823, 824 2005-Ohio-4414, 835 N.E.2d 768; *Cepeda v. Lutheran Hospital*, 8th Dist. No. 90031, 2008- Ohio-2348 at ¶ 15 (“The questions regarding the billing statements of all patients sent to Medicare and Medicaid for the past five years are undeniably confidential and privileged under the patient-physician privilege.”); *Wozniak v. Kombrink*, 1st Dist. No. C-89053, 1991 Ohio App. LEXIS 606 (information regarding a patient’s diagnosis, condition, or treatment is covered by the physician-patient privilege). Because medical records are privileged communications, they do not fall within the category of documents that are discoverable under Rule 26 of the Ohio Rules of Civil Procedure. Despite Rule 26’s clear extraction of privileged documents from the scope of civil discovery, some Ohio courts have allowed the discovery of nonparty medical records.

2. Any judicially created exception permitting discovery of confidential medical records of nonparties must be narrowly construed and sparingly applied.

Often, lower courts have applied *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 402, 1999-Ohio-115, 715 N.E.2d 518, when addressing the discovery of nonparty medical records.⁷ But, *Biddle* does not involve discovery of privileged medical records and it does not instruct lower courts regarding discovery issues. Rather, *Biddle* addresses the issue of whether liability lies against a hospital for the unauthorized out-of-court disclosure of medical records to the hospital's counsel without the consent of the patient.

In *Biddle*, for more than two and a half-years a hospital routinely disclosed to its attorneys all of the patient registration forms it received for the purpose of determining whether any of the patients were eligible for Social Security benefits to pay their medical bills. In determining whether the hospital could be held liable for this disclosure of confidential patient information, *Biddle* made clear that in Ohio, "an independent tort exists for the unauthorized, unprivileged disclosure to a third party of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship." *Id.*, paragraph one of the syllabus. The Court then determined the circumstances under which such liability will be found, holding:

In the absence of prior authorization, a physician or hospital is privileged to disclose otherwise confidential medical information in those special situations where disclosure is made in accordance with a statutory mandate or common-law duty, or where disclosure is necessary to protect

⁷ See, e.g., *Richards*, supra; *Roe v. Planned Parenthood of Southeast Ohio Region*, supra; *Med. Mut. of Ohio v. Schlotterer*, 8th Dist. No. 89388, 2008-Ohio-49, at ¶ 32 (court of appeals vacated order of the trial court that compelled production of redacted medical records pursuant to a qualified protective order, finding that plaintiff's interest in obtaining the privileged records -- which was purely pecuniary -- did not fall within any exception to the attorney-client privilege).

or further a countervailing interest that outweighs the patient's interest in confidentiality.

Id., paragraph two of the syllabus.

Thus, *Biddle* sets forth the general rule -- that liability lies against a physician (or hospital) who discloses confidential medical records of patients without the patients' prior authorization -- and the exception to the general rule for recognized "special situations."

[T]here may be special situations where the interests of the patient will justify the creation of a privilege to disclose. However, the only interest that has been recognized in this regard is the patient's interest in obtaining medical care and treatment, and disclosure is limited to those who have a legitimate interest in the patient's health. (Citations omitted.) Otherwise, it is for the patient -- not some medical practitioner, lawyer, or court -- to determine what the patient's interests are with regard to personal confidential medical information.

Biddle at 408. When the "special situation" exception is applicable, the physician or hospital is "privileged" to make the unauthorized disclosure and, thus, may not be held liable for doing so. Although *Biddle* recognizes that the physician-patient privilege is not absolute, it did not hold that privileged confidential medical records of nonparties are discoverable in private personal injury lawsuits.

The balancing test set forth in *Biddle* has not been confined to matters involving unauthorized out-of-court disclosures of confidential medical information. Rather, this well-meaning principle of *Biddle* has been radically transformed by lawyers and some lower courts and now serves as a basis for expanding discovery in civil lawsuits to compel the production of confidential medical records of nonparties. See, e.g., *Cepeda*, 2008-Ohio-2348, at ¶ 30 ("This is not one of those 'speacial situations' envisioned by the Ohio Supreme Court in *Biddle*. . . .") (Blackmon, dissenting); *Richards*, supra, at 825. Thus, instead of being used to establish liability for unauthorized disclosure of privileged

information, *Biddle* is being used to open doors to discovery of privileged information that previously were closed. The consequence of *Biddle*'s broadening is to allow a private plaintiff to request and, potentially to obtain, nonparty patients' privileged confidential medical information in every garden-variety personal injury case. *Biddle* does not sanction this result and neither should this Court.

To the extent that *Biddle* provides a judicial exception to the well-recognized physician-patient privilege in the context of civil discovery, such exception should be narrowly construed and only applied in limited recognized "special situations."⁸ See, e.g., *Med. Mut. Of Ohio v. Schlotterer*, 8th Dist. No. 89388, 2008-Ohio-49, at ¶27 ("The language used in *Biddle* was intended to be narrow in scope, and the Supreme Court recently reiterated the admonition that judicially created exceptions to statutory privileges are disfavored.") (citing *Jackson v. Greger*, 110 Ohio St.3d 488, 2006-Ohio-4968, 854 N.E.2d 487, at ¶13). To hold otherwise -- and allow every patient who sues a doctor or health care organization to obtain the medical records of nonparties -- would completely undermine the confidentiality that historically has been afforded to physician-patient

⁸ In the alternative, Amici suggest that rather than adopting the "balancing test" set forth in *Biddle*, the Court adopt a more stringent standard to be used in the context of discovery of nonparty medical records in private civil lawsuits. For instance, the Court could require the requesting party to show a "compelling need" for the information sought, such as is sometimes required by the government when it seeks information that invades an individual's right of privacy. *McMaster v. Iowa Bd. of Psychology Exam'rs* (Iowa 1993), 509 N.W.2d 754, 759-60; *State v. Pilcher* (Iowa 1976), 242 N.W.2d 348, 359 ("Before the state can encroach into . . . the personal right of privacy, there must exist a subordinating interest which is compelling and necessary, not merely related, to the accomplishment of a permissible state policy."). A "compelling need" test also has been applied in the context of civil lawsuits by private parties. See, e.g., *Arnold v. American Natl. Red Cross* (1994), 93 Ohio App.3d 564, 578, 639 N.E.2d 484 (holding that a compelling need for disclosure must be demonstrated by clear and convincing evidence in order for the identity of a blood donor to be released); *Coleman v. American Red Cross* (E.D.Mich.1990), 130 F.R.D. 360, 363 (ruling that plaintiff failed to demonstrate either a compelling need or special circumstance militating in favor of disclosing a blood donor's identity);

communications. This Court should reject the routine discovery of confidential nonparty medical records.

Courts have recognized that disclosure of an individual's confidential medical records could cause a variety of harms:

First, the breach may produce direct negative consequences for the patient. . . . Second, the patient may suffer harm simply from knowing that elements of the intimate details of his life have been laid bare for the uninvited viewer. Third, the patient may suffer harm to his public image that, if the public disclosures are true, cannot be rehabilitated through legal action. . . . Finally, the patient-doctor relationship, founded as it is on trust, may be irredeemably shattered.

Ms. B. v. Montgomery County Emergency Serv. (E.D.Pa.1992), 799 F.Supp. 534, 538, affirmed sub nom. *Ms. B. v. United States Postal Serv.* (C.A.3, 1993), 989 F.2d 488; *Schlotterer*, at ¶35 (recognizing that compelled disclosure of redacted medical records may result in privacy invasion). For instance, disclosed medical information can be misused, resulting in employment or other discrimination, or social stigmatism. The risk of harm occurring from the disclosure of medical records is perhaps even more likely in cases involving the rights of patients who sought abortions.

And, as set forth below, the fact that the names, addresses, and other “identifying” information can be redacted does not render otherwise inappropriate discovery appropriate. In other words, privileged records are not suddenly discoverable simply because names, addresses, and social security numbers have been blacked out or otherwise removed.

3. Redaction of personal patient information does not effectively protect the identity of unrepresented nonparty patients.

The Roes seek discovery of the medical records of every minor who sought an abortion from Planned Parenthood over a ten year period, arguing (without citation to any authority) that redaction of these privileged records somehow divests them of their

privileged status. It does not. Nor does redaction fully protect the identities of the unrepresented nonparty patients.⁹ Simply put, redaction of “identifying information” is ineffective to protect patient confidentiality.

Even when medical records are redacted, patients’ identities may not be protected. For example, in *Wozniak*, supra, the court reversed an order allowing the production of privileged nonparty medical records, noting that:

the risk of disclosing a patient's identity cannot be entirely eliminated by the masking of a patient's name or identifying personal data such as telephone or social security numbers. A patient's identity can be ascertained from a unique juxtaposition of a variety of circumstances.

Id. at *12. The First District Court below in this case emphasized this danger, noting that “[a]n abortion patient’s privacy right can be encroached by the nonconsensual review of redacted abortion records” in the same way “a voyeur observing in secret invades the subject’s privacy – even if the subject's identity is not known...” *Roe v. Planned Parenthood Southwest Ohio Region*, 173 Ohio App.3d 414, 425, 2007-Ohio-4318, 878 N.E.2d 1061. Recently, the Eighth District reached a similar conclusion, finding that disclosure of confidential medical records was improper because, even with redactions, such disclosure would result in an invasion of privacy. *Schlotterer*, at ¶ 35.

Courts outside of Ohio have cited similar concerns. For example, the Northern District of California denied a request of the Department of Justice for third party medical records of patients who had abortions, finding that even after redaction, the “records nonetheless [may] contain other potentially identifying information of an extremely personal nature, including, among others, types of contraception, sexual abuse or rape, marital status, and the presence or absence of sexually transmitted diseases.” *Planned*

⁹ See Appellants’ Motion in Support of Jurisdiction, at 6.

Parenthood v. Ashcroft (N.D.Cal.2004), 2004 U.S. Dist. LEXIS 3383, at *6, overruled on other grounds by *Gonzales v. Carhart* (2007), 127 S.Ct. 1610, 167 L.Ed.2d 480.

Similarly, in a case involving a government subpoena for medical records of women who sought an abortion, the United States Court of Appeals for the Seventh Circuit rejected the government's arguments that documents should be produced because there would be no hardship to the medical provider producing the records or the patients since only a limited number of patient records were requested and the identifying information of the patients would be redacted. *Northwestern Mem. Hosp. v. Ashcroft* (C.A.7, 2004), 362 F.3d 923, 928. The court recognized "the natural sensitivity that people feel about the disclosure of their medical records" and explained that even after redaction of identifying information, patients' records contain other information regarding their medical history, diagnoses and treatment that "can make the possibility of recognition very high." *Id.* at 929 (citing *Parkson v. Central DuPage Hosp.* (Ill.1982), 105 Ill. App.3d 850, 855, 435 N.E.2d 140, 144). In light of its concerns regarding patient confidentiality and potential identification of patients who sought an abortion, the Seventh Circuit affirmed the district court's decision quashing the subpoena that requested the patient records.

The Seventh Circuit went on to note that even if there were no possibility that a patient's identity might be learned from a redacted medical record, an invasion of privacy would nonetheless result. *Id.* Permitting the highly personal, intimate details contained in the record of an abortion patient to be viewed by strangers is in itself an impermissible invasion of privacy—even if the patient's identity remains concealed.¹⁰ *Id.*

¹⁰ The Seventh Circuit likened the disclosure of redacted medical abortion records to a scenario in which "nude pictures of a woman uploaded to the Internet without her consent, though without identifying her by name, were downloaded in a foreign country by people

Medical database privacy researchers confirm the courts' fears. Although one might assume that patient identities are protected where all explicit personal identifiers are redacted from a medical record (such as name, address, telephone number, and social security number), the remaining data in the record can, in most cases, be used to re-identify individual patients."¹¹ Ad hoc de-identification methods do not guarantee the anonymity of medical records.¹²

A recent article published in the *Journal of Health Law*, reached a similar conclusion:

Even if the data are redacted and all identifying data are seemingly removed, the individual's identity is not necessarily safely preserved. Redacted data contain information that can lead to the discovery of a person's identity[.] Making data truly anonymous is much more difficult than simply marking over people's names. The degree to which records can be anonymized depends on the specificity of the data needed, but no set of data is completely untraceable. If a certain combination of two fields in a record is unique to one person, then that person can be identified.¹³

Data privacy research, then, confirms the concerns of the court of appeals herein and of other courts that redaction of patient identifying information in medical records is insufficient to fully protect the identity of patients when medical records are disclosed.

who will never meet her[.] She would still feel that her privacy had been invaded." *Id.* The Seventh Circuit notes that the revelation of the intimate details contained in the record of an abortion patient "may inflict a similar wound." *Id.*

¹¹ Sweeney, *Weaving Technology and Policy Together to Maintain Confidentiality* (1997), 25 *J. of Law, Medicine & Ethics* 98.

¹² Malin & Sweeney, *A Secure Protocol to Distribute Unlinkable Health Data* (2005), *AMIA Symposium Proceedings* 485 (citing Sweeney, *Guaranteeing Anonymity When Sharing Medical Data, the Datafly System* (1997), *AMIA Symposium Proceedings* 51-55 and Malin, *An Evaluation of the Current State of Genomic Data Privacy In a Distributed Network: Using Trail Re-identification to Evaluate and Design Anonymity Protection Systems* (2004), 37 *J. Biomed. Info.* 179-192).

¹³ Silfen, *I Want My Information Back: Evidentiary Privilege Following the Partial Birth Abortion Cases* (2005), 38 *J. of Health Law* 121.

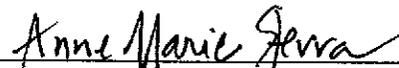
The highly sensitive nature of the documents requested, coupled with the very real possibility that the identity of the patients can be determined even when the documents are redacted, militates against their discovery.

CONCLUSION

Nonparty medical records are privileged and should be treated with the utmost confidentiality. To the extent medical records of innocent bystanders to litigation are discoverable by private parties in civil lawsuits, discovery should be based on narrowly-tailored requests designed to provide necessary information to those who have a legitimate interest in the health of the patient whose records are sought or to those who demonstrate a compelling need for the information. Amici believe that any result which allows strangers to routinely obtain the medical records of others -- even if redacted -- will have the unintended consequence of adversely impacting the quality of healthcare in Ohio.

Amici urge this Court to affirm the decision of the First District Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

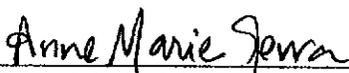
I hereby certify that a true copy of the foregoing Merit Brief of Amici Curiae Ohio State Medical Association, American Medical Association and American College of Obstetricians and Gynecologists, in Support of Appellees was sent via regular U.S. mail, postage prepaid this 13th day of June 2008, to the following:

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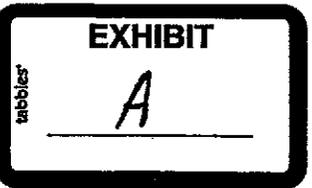
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Protecting Adolescents: Ensuring Access to Care and Reporting Sexual Activity and Abuse

Position Paper of the American Academy of Family Physicians, the American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, and the Society for Adolescent Medicine

Position Statement

As physicians and other health care professionals, we have an ethical obligation to provide the best possible care for our adolescent patients. A key tenet for all health professionals is to ensure that adolescents have access to the health services they need, including sexual and reproductive health services. A medical evaluation that addresses sexual and reproductive health includes a careful assessment for abusive or unwanted sexual encounters and the reporting of such cases to the proper authorities. Protection of children and adolescents from predatory, coercive, or inappropriate sexual contact is an important goal of all physicians and health professionals. In meeting our ethical obligations to our adolescent patients, as well as to all of our patients who are children under the age of majority, we rely on our professional judgment, informed by clinical assessment, training, and experience, to address a patient's health conditions or a sensitive situation.

As the primary providers of health care to adolescents, we also have an obligation to make every reasonable effort to encourage adolescents to involve parents in their decisions, as parental support can, in many circumstances, increase the potential for dealing with the adolescent's needs on a continuing basis. If communication between the adolescent and parent cannot be facilitated, access to confidential health care for the adolescent patient must be ensured.

Laws requiring the reporting of sexual abuse exist in every state. There has been a recent trend in using

these laws to require the reporting of adolescents' consensual sexual activity. In keeping with the medical and ethical responsibilities that we uphold, the American Academy of Family Physicians, American Academy of Pediatrics, American College of Obstetricians and Gynecologists, and the Society for Adolescent Medicine support the following guidance and principles for our professional members and for broad consideration in the development of public policy:

- Sexual activity and sexual abuse are not synonymous. It should not be assumed that adolescents who are sexually active are, by definition, being abused. Many adolescents have consensual sexual relationships.
- It is critical that adolescents who are sexually active receive appropriate confidential health care and counseling.
- Open and confidential communication between the health professional and the adolescent patient, together with careful clinical assessment, can identify the majority of sexual abuse cases.
- Physicians and other health professionals must know their state laws and report cases of sexual abuse to the proper authority, in accordance with those laws, after discussion with the adolescent and parent, as appropriate.
- Federal and state laws should support physicians and other health care professionals and their role in providing confidential health care to their adolescent patients.
- Federal and state laws should affirm the authority

of physicians and other health care professionals to exercise appropriate clinical judgment in reporting cases of sexual activity.

Supporting Commentary

State Requirements for Reporting Sexual Abuse and Sexual Activity Vary

Every state has laws that require the reporting of child abuse, including sexual abuse, and every state also has laws that specify when sexual activity with a minor is illegal. Most states use age parameters in defining whether consensual sexual intercourse with a minor is illegal under the state's criminal code; these laws are often referred to as "statutory rape" laws. The state child abuse reporting laws vary widely in terms of whether or not they require reporting consensual sexual activity of a minor—or "statutory rape"—as child abuse.

Most states have laws allowing minors to consent to selected categories of medical care without parental consent. Examples include reproductive health services leading to the diagnosis and treatment of sexually transmitted infections (STI) and the diagnosis of pregnancy. These laws give physicians and other health care professionals the opportunity to practice medicine that responds to the best interest of their patients.

State Requirements Have a Significant Impact on Adolescents, Their Health and Their Families

Physicians and other health care professionals confront difficult choices in meeting their ethical obligations and complying with applicable laws. They are bound by their state reporting requirements. They also have an ethical obligation to ensure that their patients are protected from harm and that they will receive essential health care and support at present and in the future. Often, state reporting requirements do not allow sufficient opportunity for health care professionals to exercise sound medical judgment to meet these ethical obligations.

Well-intentioned but rigid laws can lead to outcomes that are both unintended and potentially damaging to the health of an adolescent. When a state's laws require that sexual intercourse with a minor be reported to law enforcement or child welfare agencies, a sexually active adolescent in a consensual relationship may be placed in the untenable situation of forgoing essential health care (e.g., con-

traception, screening or treatment for sexually transmitted diseases, etc.) or, if he or she seeks that care, being reported to state authorities. Also, the laws often do not take into consideration varying circumstances such as cases in which parents know about the relationship in which the adolescent is involved. In these situations, the legal implications for the parent may be considerable. A parent who knows about an adolescent's consensual sexual relationship and assists him or her in seeking health care may be reported under state abuse or neglect laws. Laws should not interfere with either an adolescent's access to confidential health care or a parent's ability to provide health supervision to his or her child.

A Significant Number of Adolescents are Sexually Active

According to the 2003 Youth Risk Behavior Surveillance Survey, 32% of 9th graders, 41% of 10th graders, 52% of 11th graders, and 61% of 12th graders have ever had sexual intercourse [1]. Among adolescent girls who are sexually active, more than two-thirds have sexual partners who are the same age or only a few years older [2,3]. Enforcement of "statutory rape" and child abuse reporting laws could potentially affect a very large number of adolescents.

Open Communication between the Health Professional and the Adolescent is Essential

Physicians and other health professionals should ensure that the adolescent has not voiced or otherwise indicated to his or her partner that sexual activity was unwanted or undesirable and that the partner is not placing physical or emotional pressure on the adolescent. Physicians and other health professionals should encourage communication about sexual decision-making between adolescents and their families, and should counsel sexually active adolescents about potential health risks.

The Vast Majority of Reportable Cases of Sexual Abuse and Sexual Coercion are Identifiable through Careful Clinical Assessment

These cases include adolescents in a sexual relationship with a family member, a person of authority (e.g., teacher, leader of a youth organization, etc.), or a member of the clergy. Also included are adolescents who are incapacitated by mental illness, mental retardation, drugs, or alcohol, and are unable to

comprehend, make informed decisions about, or consent to, sexual activity. In addition, any intimate relationships that are violent should be considered abusive. Physicians and other health professionals must know their state laws and report such cases to the proper authority, in accordance with state law, after discussion with the adolescent and parent, as appropriate.

The age of the sexually active adolescent, the degree to which the adolescent understands the consequences and responsibilities of sexual activity, and the discrepancy in years between the age of the adolescent and his or her partner are important considerations that must factor into reporting decisions. Although a wide discrepancy in age between partners is of concern when caring for the adolescent patient, partner age by itself is not indicative of exploitation or abuse. Verbal and physical coercion, as well as alcohol and drugs, are some of the strategies used by sexual predators to victimize adolescents. However, sexual abuse and exploitation of an adolescent may occur in any relationship, including those where the partners are the same age, younger, or older.

It is Essential that Adolescents Have Access to Confidential Health Care

The issue of confidentiality of care is a significant access barrier to health care. A recent study of girls under age 18 attending family planning clinics found that 47% would no longer attend if their parents had to be notified if they were seeking prescription birth control pills or devices, and another 10% would delay or discontinue sexually transmitted infection (STI) testing and treatment [4]. Mandatory reporting of sexual activity will likely raise barriers and prevent adolescents from seeking health care, thereby exposing them to preventable health risks (e.g., pregnancy, sexually transmitted disease, suicide). The long-term consequences of limiting access to health care for sexually active adolescents may include an increase in the prevalence of STIs, a rise in unintended teen pregnancy, and escalation in the number of mental and behavioral health issues, including the potential of partner violence. If these and other conditions are not diagnosed early and treated appropriately, adolescents may suffer adverse health outcomes.

Adolescents can have a range of problems, including some of such severity as to jeopardize their development and health, their future opportunities, and even their lives. These issues may be indepen-

dent of, or related to, sexual activity. However, until a physician or health professional can meet with and make a professional assessment of the individual adolescent, these issues cannot be identified or addressed.

Legal Requirements and Interpretation of Laws that Impede the Provider/Patient Relationship are Detrimental to Adolescents

The medical community has a long-standing commitment to ensure appropriate protection of confidentiality for their adolescent patients. Physicians and other health care professionals are on the front line in assessing the individual emotional, physical, and behavioral needs of adolescent patients. From this unique vantage point, we are able to provide care and counseling to our young patients and to determine the appropriate course of action required in each circumstance, including whether and when to abrogate an adolescent patient's confidentiality. Federal and state laws should allow physicians and other health care professionals to exercise appropriate clinical judgment in reporting cases of sexual activity, (e.g., life-threatening emergencies, imminent harm, and/or suspected abuse). Ultimately, the health risks to adolescents are so compelling that legal barriers should not stand in the way of needed health care.

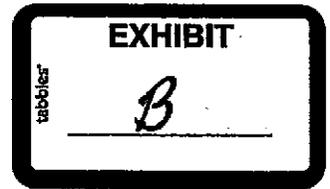
Further Reading

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3. National Campaign to Prevent Teen Pregnancy. 14 and Younger: The Sexual Behavior of Young Adolescents. Washington, DC: National Campaign to Prevent Teen Pregnancy, 2003.
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H-60.965 Confidential Health Services for Adolescents



Our AMA:

- (1) reaffirms that confidential care for adolescents is critical to improving their health;
- (2) encourages physicians to allow emancipated and mature minors to give informed consent for medical, psychiatric, and surgical care without parental consent and notification, in conformity with state and federal law;
- (3) encourages physicians to involve parents in the medical care of the adolescent patient, when it would be in the best interest of the adolescent. When, in the opinion of the physician, parental involvement would not be beneficial, parental consent or notification should not be a barrier to care;
- (4) urges physicians to discuss their policies about confidentiality with parents and the adolescent patient, as well as conditions under which confidentiality would be abrogated. This discussion should include possible arrangements for the adolescent to have independent access to health care (including financial arrangements);
- (5) encourages physicians to offer adolescents an opportunity for examination and counseling apart from parents. The same confidentiality will be preserved between the adolescent patient and physician as between the parent (or responsible adult) and the physician;
- (6) encourages state and county medical societies to become aware of the nature and effect of laws and regulations regarding confidential health services for adolescents in their respective jurisdictions. State medical societies should provide this information to physicians to clarify services that may be legally provided on a confidential basis;
- (7) urges undergraduate and graduate medical education programs and continuing education programs to inform physicians about issues surrounding minors' consent and confidential care, including relevant law and implementation into practice;
- (8) encourages health care payers to develop a method of listing of services which preserves confidentiality for adolescents; and
- (9) encourages medical societies to evaluate laws on consent and confidential care for adolescents and to help eliminate laws which restrict the availability of confidential care.

H-60.938 Adolescent Sexual Activity

1. Our AMA (a) endorses the joint position "Protecting Adolescents: Ensuring Access to Care and Reporting Sexual Activity and Abuse"; and (b) supports the following principles for consideration in development of public policy: (i) Sexual activity and sexual abuse are not synonymous and that many adolescents have consensual sexual relationships; (ii) It is critical that adolescents who are sexually active receive appropriate confidential health care and screening; (iii) Open and confidential communication between the health professional and adolescent patient, together with careful clinical assessment, can identify the majority of sexual abuse cases; (iv) Physicians and other health care professionals must know their state laws and report cases of sexual abuse to the proper authority in accordance with those laws, after discussion with the adolescent and/or parent as appropriate; (v) Federal and state laws should support physicians and other health care professionals in their role in providing confidential health care to their adolescent patients; and (vi) Federal and state laws should affirm the authority of physicians and other health care professionals to exercise appropriate clinical judgment in reporting cases of sexual activity.

2. Our AMA will (a) develop and disseminate to national medical specialty societies and state medical associations information that includes guidance on removing barriers faced by sexually active adolescents who seek confidential health care; and (b) develop model legislation which supports AMA policy regarding adolescent sexual activity and confidentiality.