The Right of Privacy in California Personal Injury Practice

by Howard A. Kapp

Of all of the issues encompassed within the scope of discovery, none has been the subject of more reported decisions than the right of privacy. Virtually all of the reported authorities find in favor of the litigant asserting the right of privacy. The reason for this should be self-evident: the right of privacy is a favored doctrine, at least at the appeals level. The right of privacy, in fact, is the only meaningful restraint on abusive, overly-expensive, frequently oppressive, and invasive discovery. As politicians decry the supposed and real abuses of the litigation system, the right of privacy stands out as a major vehicle to avoid the worst of such abuses.

While this article will touch on the sources, relevant history and nature of this vital consumer protection, this article will alert consumers' counsel to the moral, legal and practical methods for actively protecting this important constitutional right.

The Historical Backdrop

It is not the purpose of this article to exhaustively discuss the privacy case law in California; an adequate discussion of the subject would itself contain references to literally hundreds of cases.[1] It is remarkable that virtually every reported discovery case on the right of privacy has upheld the claim of privacy.

Since the early 1960s, California, following the adoption of the first Discovery Act, adopted an extraordinarily liberal standard of discovery, allowing parties the opportunity to investigate not only marginally or arguably relevant facts about the adverse party, but also matters which are supposedly "reasonably calculated to lead to the discovery of admissible evidence"—i.e., "discovery relevancy." *Greyhound Corp. v. Superior Court*, 56 Cal.2d 355, 15 Cal.Rptr. 90 (1961). In practice, this is really no standard at all; in practice, accident victims are subject to the most outrageously bizarre discovery simply because the adverse attorney is capable of theorizing some possible connection to the case.

Historically, the various evidentiary privileges—the attorney-client privilege (Evid. C. §950 *et seq.*), the physician-patient privilege (Evid. C. §990 *et seq.*), etc.—provided some limited protection. In the landmark case of *In re Lifschutz*, 2 Cal.3d 415, 435, 85 Cal.Rptr. 829 (1970), the Supreme Court analyzed the inherent tension of liberal discovery and the evidentiary privileges--in that case, the psychotherapist-patient privilege (Evid. C. §1010 *et seq.*)--and unmistakably held that, unless the patient (usually the plaintiff) affirmatively introduced ("tendered") the assertedly protected subject (e.g., specific body part) into the litigation, it remained protected.

This case was expanded in the watershed case of *Britt v. Superior Court*, 20 Cal.3d 844, 143 Cal.Rptr. 695 (1978). While *Britt* largely tracks the holdings of *Lifschutz*, it carefully analyzed the adoption, by the overwhelming vote of the People, of the right of privacy which had been incorporated into the State Constitution as one of the fundamental rights set forth in Article I, Section 1. While *Lifschutz* was necessarily limited to the narrow confines of the established statutory evidentiary privileges, *Britt* plainly applied those same protections against a wide variety of private matters which did not fit within the essentially inflexible evidentiary privileges. For example, a consumer's bank records are not subject to any statutory privilege, but they plainly are protected by the constitutional right of privacy. *Valley Bank v. Superior Court*, 15 Cal.3d 652, 658, 125 Cal.Rptr. 553 (1975). While the *effect* of these cases is exactly the same (i.e., protection from discovery unless tough burdens are overcome), the constitutional protection recognized in *Britt* now, in essence, subsumes the evidentiary privileges.

A careful reading of the discovery vs. privacy cases since *Britt* indicates that the party seeking protection (usually the plaintiff) has prevailed in virtually every reported case;[2] indeed, in most of those cases, the assertedly protected party was able to convince the appeals court to issue a rarely-granted extraordinary writ. It is, in the context of this overwhelming authority, inexcusable for plaintiffs' counsel to allow such discovery against his or her client.

Sadly, the right of privacy remains a vital, but largely overlooked, fundamental principle of California discovery practice. It is, in its own area of coverage, more important than the general "discovery relevancy" standard familiar to all. Shockingly, a high percentage of civil judges are largely ignorant of—or choose to ignore—these cases and their innumerable progeny; undoubtedly, due in part to the inadequate knowledge, or assertiveness, of many consumers' attorneys to protect this "abstract" right as well as some judges' distaste for more complex and time-consuming analysis required in privacy matters.

Howard A. Kapp is s member of the Consumer Attorneys Association of Los Angeles. His practice is based in Beverly Hills.

Changing the Mind-Set

Perhaps the single most destructive factor in allowing the defense to obtain non-discoverable private records is the inaction—for whatever reason—of plaintiffs' counsel. It may well be that this is the result of ignorance, laziness, indifference, unrealistic expectations of the possibility of settlement or a desire not to offend adverse counsel, the judge or the adjuster or to avoid charges of "obstructionism." None of these concerns excuse the failure to invoke the right of privacy in appropriate cases: certainly an injured victim is entitled to expect that his or her counsel will insist that the litigation be confined to the matters permitted by law.

Most, if not all, litigators have become acclimated to the virtually unlimited scope of "discovery relevancy"; indeed, experience has taught that many judges treat this as no standard at all. In these scattered courts, there is no limit on discovery beyond the imagination of adverse counsel. In those places, litigation costs are undoubtedly high and accident victims can be re-victimized at the pleasure of imaginative insurance counsel. Invariably, consumers' counsel must calculate the effects of bogus defenses based on records and evidence that should never have been exposed.

Overcoming the Usual Myths to Avoid the Privacy Protection

There are a number of myths about the right of privacy. Unfortunately, most of those work to the detriment of consumers. An ignorant lawyer's client will be effectively unprotected. Consider:

Myth No. 1: *The defendant may seek discovery of otherwise private matter based on speculation or the assumption that relevant materials MAY be discovered.* This is exactly the opposite of the law. *Vinson v. Superior Court*, 43 Cal.3d 833, 840, 239 Cal.Rptr. 292 (1987); *Davis v. Superior Court*, 9 Cal.App.4th 1008, 1017, 9 Cal.Rptr.2d 331 (1992).

Myth No. 2: *The defendant can seek the plaintiff's entire medical history—such as that maintained by a health insurer or a HMO.* This is contrary to established law. *Hill v. NCAA*, 7 Cal.4th 1, 41, 90, 26 Cal.Rptr.2d 834 (1994); *Paley v. Superior Court*, 18 Cal.App.4th 919, 932, 22 Cal.Rptr.2d 839 (1993); *Davis v. Superior Court*, 9 Cal.App.4th 1008, 1019, 9 Cal.Rptr.2d 331 (1992); *Heda v. Superior Court*, 225 Cal.App.3d 525, 529, 275 Cal.Rptr. 136 (1990); *Board of Medical Quality Assurance v. Gherardini*, 93 Cal.App.3d 669, 678, 156 Cal.Rptr. 55 (1979). This is doubly true of a woman's obstetrical-gynecological history. *See, e.g., Jones v. Superior Court*, 119 Cal.App.3d 534, 549, 174 Cal.Rptr. 148 (1981); *People v. Stockton Pregnancy Control Medical Group, Inc.*, 203 Cal.App.3d 225, 243, 249 Cal.Rptr. 762 (1988).

Myth No. 3: *The defense defines the scope of discovery of plaintiff's medical history.* This is contrary to the fundamental axiom of privacy: "[T]he scope of the inquiry permitted depends upon the nature of the injuries which the patient-litigant himself has brought before the court." *Britt v. Superior Court*, 20 Cal.3d 844, 864, 143 Cal.Rptr. 695 (1978) citing *In re Lifschutz*, 2 Cal.3d 415, 435, 85 Cal.Rptr. 829 (1970). *See also, Vinson v. Superior Court*, 43 Cal.3d 833, 839-840, 239 Cal.Rptr. 292 (1987); Weil & Brown, *California Practice Guide/Civil Procedure Before Trial*, "Discovery," ¶8:1553.

Myth No. 4: *Post-accident treatment is automatically discoverable.* This just isn't true. *See, e.g., Davis v. Superior Court*, 9 Cal.App.4th 1008, 9 Cal.Rptr.2d 331 (1992) (post-accident mental treatment not discoverable).

Myth No. 5: *In order to avoid waiving the right of privacy, the party still must comply with the general discovery rules, such as submitting timely objections.* The only case to consider the point has explicitly ruled that, since the right of privacy is a constitutional right, it is not subject to "mere statutes." *Boler v. Superior Court*, 201 Cal.App.3d 467, 247 Cal.Rptr. 185 (1987).

Myth No. 6: *The defense does not have to accept the plaintiff's representation that the subject matter is protected.* This is nonsense; the case law clearly demonstrates that the courts, in order to maintain the right of privacy, necessarily must accept the veracity of plaintiff's representations. *See, e.g., Heller v. Norcal Mut. Ins. Co.*, 8 Cal.4th 30, 60, 32 Cal.Rptr.2d 200 (1994), quoting approvingly from *Davis v. Superior Court*, 9 Cal.App.4th 1008, 1017, 9 Cal.Rptr.2d 331 (1992). Obviously if the plaintiff were required to specify why the matter is protected, the privacy protection would be rendered meaningless.

Privacy . . . cont. on page 24

Myth No. 7: *Privacy does not survive the death of a decedent.* Wrong. *Rittenhouse v. Superior Court*, 235 Cal.App.3d 1584, 1 Cal.Rptr.2d 595 (1991).

Myth No. 8: *When there is a conflict, privacy rights must yield to relevancy standards.* This is wrong. *Koshman v. Superior Court*, 111 Cal.App.3d 294, 168 Cal.Rptr. 558 (1980).

Myth No. 9: *There is something "obstructive" about invoking the right of privacy.* Undoubtedly the application of *any* privilege restricts the scope of discovery by definition. Of course, that is the explicit purpose of privileges and, in this context, the overriding public policy expressed in our State Constitution by the overwhelming vote of the People. *Koshman v. Superior Court*, 111 Cal.App.3d 294, 297-298, 168 Cal.Rptr. 558 (1980); *Britt v. Superior Court*, 20 Cal.3d 844, 143 Cal.Rptr. 695 (1978).

Myth No. 10: *A plaintiff who had tendered his or her "emotional distress" into a lawsuit is not entitled to protect "unrelated" mental health treatment or conditions.* Wrong again. *Roberts v. Superior Court*, 9 Cal.3d 330, 107 Cal.Rptr. 409 (1973); *Heller v. Norcal Mut. Ins. Co.*, 8 Cal.4th 30, 60, 32 Cal.Rptr.2d 200 (1994).

Protecting the Right of Privacy in the Pre-Litigation Period: The Use and Misuse of Medical Authorizations

Virtually every plaintiffs' counsel has received pre-litigation requests for information authorizations from the adverse insurance company. Some insurance companies routinely ask for, or demand, a list of unrelated medical care providers and/or medical authorizations which allow the defense to obtain medical records at any time in the future, regarding any health care provided at any time. These are invariably offered, either implicitly or explicitly, as a precondition to settlement. Many of these authorizations actually authorize—and direct—the health care provider to answer oral questions from defense investigators! These authorizations should be promptly and emphatically rejected, even if litigation is the only alternative.

Despite the protestations of the front line adjusters, such authorizations are essentially extortionist; the boilerplate promise to commence negotiations should be treated as illusory, if not a total sham. Counsel who agree to such an arrangement should not be surprised when, months later, defense counsel march into trial or arbitration with authorization-obtained records concerning events which are totally unrelated and which neither plaintiffs' counsel nor plaintiffs' experts have had a chance to evaluate. Cases should be settled based on their value, not on the plaintiff's attorney's willingness to submit to unlimited, abusive discovery, formal or otherwise.

If the plaintiffs' bar refuses to condone this extortion, the insurance side will learn. However, the insurance industry is more than willing to exploit the impatience, greed or ignorance of those lawyers who foolishly agree to allow the use of the insurer-prepared authorizations.

Providing Plaintiff's Attorney-Prepared Medical Authorizations to the Insurer

In many cases—but certainly not all—the insurer has a legitimate interest in evaluating specific medical records prior to beginning serious negotiations. An absolute refusal to cooperate with the insurer may well be self-defeating and contrary to the legitimate interests of the client and society in a prompt and fair settlement. While, as a general proposition, routine requests for medical authorizations should be refused, counsel may consider providing the insurer with authorizations prepared by the plaintiff's attorney containing, at least, the following conditions:

1. The authorization is strictly limited to a specific health care provider.

2. The authorization specifies a specific expiration date. Do not specify a calculated date (e.g., "60 days from the date of signature"); specify an actual date. This hard deadline will compel the adjuster to work quickly.

3. The authorization should be limited to a single use and specifically prohibit the use of photocopies.

4. The authorization should, if necessary, restrict the disclosure to specific medical conditions and/or be limited to a specific period of time. There is generally no point in refusing authorizations for the charts and records of the treatment for the present accident; however, in some cases, the patient may be treated by his or her established family doctor and the records may contain private and unrelated material, which should be excluded from discovery. In some cases, of course, the insurer may have a legitimate interest in getting copies of some strictly "unrelated" records, such as those from a prior accident claim.

5. It is virtual malpractice to provide an authorization which permits the defense to obtain the unrelated records of a general health provider or to permit the disclosure of health insurance or HMO records. This will only give the defense a road map to more and more irrelevant and protected materials and, of course, provide an opportunity for more delay and more requests for irrelevant and protected material.

6. The authorization should explicitly prohibit the health care provider from any action other than producing records (i.e., it should specify that the health care provider may not discuss the case with the defense).

These authorizations should not be provided unless counsel is convinced that there is a reasonable basis to believe that they will be helpful in expediting a fair and prompt settlement for your client. Specifically, there is rarely any benefit to delaying filing suit, or wishing for a quick settlement, when there are widely different views of liability. Moreover, authorizations should be automatically refused to carriers or defendants who have a reputation for playing hardball or for making lowball offers. There are, quite frankly, certain classes of potential defendants (e.g., most public entities, medical malpractice defendants, products manufacturers accused of design defects) that will almost never settle without litigation. Before you agree to provide authorizations, consider whether you are engaging in wishful thinking; if you are, you are not doing your client a favor by giving the defense a head start in discovery and delaying the inevitable filing of a lawsuit.

Overbroad Subpoenas of Protected Records

Many defense counsel are trained to believe that they are doing their duty by using the power of the subpoena to obtain copies of every set of medical records; a common practice now is to obtain the name of the plaintiff's insurer and then to subpoena the plaintiff's records directly from the insurer. In most cases, the defense's obtaining of the identity of the insurer is directly attributable to the result of neglect of counsel.[3] These subpoenas, unless explicitly limited to subjects tendered into the action by the litigant/patient, facially invade the right of privacy by attempting to obtain a broad and complete "medical history."

Overbroad Paper Discovery

It is self-evident that counsel should be sensitive to interrogatories and demands for document production (and, to a lesser extent, requests for admission) which may implicate the right of privacy. Virtually every set of defense counsel's boilerplate in-house "non-form" interrogatories, in our experience, contains many of these items. It is counsel's job to carefully read these items and object to those items that invade the right of privacy.

For example, the defense commonly demands a list or production of medical records or information "since the accident." This is facially invasive of the right of privacy since not all post-accident treatment is related. *See, Davis v. Superior Court*, 9 Cal.App.4th 1008, 9 Cal.Rptr.2d 331 (1992). Counsel should always object to these items and, depending on the larger context, refuse to provide any answer until the matter is properly limited or provide an answer subject to and incorporating the right of privacy limitations.

Several of the Judicial Council Form Interrogatories appear to invade the right of privacy. Depending on the circumstances, privacy objections would appear

Privacy . . . cont. on page 2

to be valid, in whole or in part, to Form Interrogatories 4.1,[4] 4.2, 10.2, 11.1, and 11.2. Moreover, the "background" type inquiry in some others may be objectionable under some older authority. *Smith v. Superior Court*, 189 Cal.App.2d 6, 13, 11 Cal.Rptr. 165 (1961). Of course, in dealing with form interrogatories, one should assume a conservative and respectful position.

The Plaintiff's Deposition

The dynamics of a deposition, in many cases, may encourage plaintiffs' counsel, in the "spirit of discovery" and/or in an attempt to avoid controversy with his or her adversary in front of the client, to withhold objections. A deposition is no place to abandon a client's interests in protecting his or her privacy.

It has been this author's experience that clients do need to be specifically prepared for the probability of objections, including those based on privacy. They need and deserve to be forewarned of the possibility of privacy-related controversies. Clients appreciate not having to worry about, or discuss, these truly irrelevant matters with their lawyers or strangers. After all, who wants to discuss a long-ago case of jock itch or vaginal yeast infection in the context of an automobile accident?

Certainly, adverse counsel can be expected to react negatively to any attempt, legitimate or otherwise, to restrict their ability to conduct unfettered discovery. It is predictable that adverse counsel may, and commonly do, threaten the usual "parade of horribles" in the context of privacy objections. That is undoubtedly unpleasant for an unsuspecting (read: unprepared) client. In our experience, however, such threats are rarely, if ever, carried out.[5]

There are valid reasons why such threats are almost always meaningless. First, of course, many defense counsel know that the right of privacy has this broad preclusive effect; this may be more a test of plaintiff's counsel resolve than a serious attempt to debate the matter. Secondly, virtually by definition, most of the material protected is of limited potential value anyway and unlikely to be worth the cost of further activity.[6] Third, assuming that plaintiff's counsel intelligently and appropriately interposed the privacy objections

at the deposition, it would be virtually impossible to draft a legally supportable motion to compel. There simply are no cases supporting a claim of an erroneous assertion of a limited privacy protection.

Counsel should be alert to questions which facially infringe on the right of privacy. Questions that relate to the plaintiff's medical background and are not specifically limited to the areas tendered into the case should be objected to.[7] Questions that ask for "family doctors" or health insurance (except in the cases where collateral source information is specifically relevant) should be objected to and the client instructed not to answer. Questions that are limited only by time (e.g., "doctors seen after the accident") are objectionable.

Creative defense lawyers will, commonly, try to "connect" the truly unrelated by using overbroad, totally theoretical scenarios. For example, it is not uncommon for the defense to argue that they have a "right to know" about untendered matters that "might" provide a defense or mitigation, such as a hypothesized shortened life expectancy (e.g., metastatic cancer) or some chronic medical condition which affects the wage loss claim (e.g., cancer, serious heart disease, diabetes). Unless the defense has some objective basis for such an assertion, this issue is governed by the privacy axiom that discovery is not permitted just because the defense hopes that something will show up. *Vinson v. Superior Court*, 43 Cal.3d 833, 840, 239 Cal.Rptr. 292 (1987); *Davis v. Superior Court*, 9 Cal.App.4th 1008, 1017, 9 Cal.Rptr.2d 331 (1992). Plaintiff simply has no duty to answer such questions.

The Defense Medical Examination

The defense medical examination is potentially a minefield of privacy abuse. Not only have the courts commented on the fact that the defense expert is presumably a biased agent of the defense attorney (*see, Mercury Casualty Co. v. Superior Court*, 179 Cal.App.3d 1027, 1033, 225 Cal.Rptr. 100 (1986)), there are reported cases demonstrating the extremes of behavior of some of these doctors. *See, e.g., Urbaniak v. Newton*, 226 Cal.App.3d 1128, 277 Cal.Rptr. 354 (1991). This is an area

Privacy . . . cont. on page 28

where prudence requires planning and diligence.

The Code essentially adopts the constitutionally mandated limitation as to scope by limiting the exam to portions of plaintiff's body or conditions that are "in controversy." CCP §2032(a). This important limitation, in practice, is largely ignored by the defense. Plaintiff's counsel is obliged to enforce it.

While plaintiff's counsel may attend the examination by statute (CCP §2032(g)(1)), counsel is statutorily prohibited from "participating or interfering" with the defense medical examination. CCP §2032(g)(1). Counsel's only remedy during the exam is to terminate the DME, which is a potentially sanctionable event (*see*, comments in Weil & Brown, *California Practice Guide/ Civil Procedure Before Trial*, "Discovery," ¶8:1579[8]) and potentially can cause serious delays in the processing of the case which may not be in the best interests of the plaintiff. Objections at the DME itself should be avoided if at all possible.

The code requires that adverse counsel formally demand the defense exam and that, *inter alia*, set forth the "manner, conditions, scope and nature of the examination . . . . " CCP §2032(c)(2). Counsel for the examinee (presumably the plaintiff) has the duty to formally respond to the Demand for Physical Examination. CCP §2032(c)(5). This is the opportunity to object to any defense attempt to obtain a "medical history," "complete" or limited. *See, e.g.*, Weil & Brown, *California Practice Guide/Civil Procedure Before Trial*, "Discovery," ¶8:1529.[9] This is the time to specify objections to any proposal to obtain a "medical history" and/or any requirement that the plaintiff-patient complete any paperwork for the defense doctor, as commonly requested. Counsel who do not make appropriate, timely and written objections are subjecting their clients to severe prejudice.

Not only is a proper formal response to the demand for physical examination necessary, but it is also necessary for either counsel or counsel's representative to appear at the examination and enforce the orders and/or agreements restricting the ability of the defense doctor to cross-examine the plaintiff. The representative should *always* be made sensitive to these issues and should have copies of the

appropriate agreements and/or orders available during the exam itself as the defense doctor may dispute this condition.[10]

It has long been this author's position,[11] that any medical history, as distinct from a patient's oral response to a particular stimulus during the exam (e.g., "Does that hurt?") during a statutorily-described "physical examination" is improper. While there are no cases directly on point, the case law has uniformly rejected attempts to expand the forms of discovery beyond those explicitly created by statute; many of these cases involved defense medical examinations.[12] A recent case on this point is *Stermer v. Superior Court*, 20 Cal.App.4th 777, 24 Cal.Rptr.2d 577 (1993), where the Second District Court of Appeal applied this doctrine strictly in overturning a trial court order requiring that a party-deponent "reenact" the deceased baby's position in the accident. In so doing, the court noted that "witnesses are commonly called upon by lawyers to perform physical reenactments at trial"; nonetheless, the court held that *"the courts are without the power to expand the methods of discovery beyond those authorized by statute"* and that *"[a]s a corollary to the above proposition, the power to compel discovery is circumscribed by statute and a trial court is without jurisdiction to compel a party to perform acts that are beyond the pale of the discovery act."* (Emphasis added.) The court then held that the use of the term "answer any question" in the statute was strictly limited to *verbal* responses and that reenactments could not be compelled by the trial court.

Likewise, the plaintiff's obligation to submit to a "physical examination" does not authorize a court to order a plaintiff to submit to a quasi-deposition under the guise of a "medical history." *Stermer* is essentially the "flip side" of this same issue.

The Mental Exam

While the principles of a physical exam and a mental exam are generally similar, the law, in the absence of a showing of good cause, bars the presence of a representative of the plaintiff. *Vinson v. Superior Court*, 43 Cal.3d 833, 844-847, 239 Cal.Rptr. 292 (1987). While *Vinson* reaffirms this unique restriction, it does so in the context of a showing of potential abuse. Moreover, the case plainly demonstrates that an "investigation by a psychiatrist into the private life of a plaintiff is severely constrained, and sanctions are available to guarantee those restrictions are respected". *Id.* at 847.

The case is a must-read for any attorney whose client's mental exam is demanded. (Mental exams can not be compelled on demand; they can only be obtained by stipulation or court order.) Counsel should not only make the appropriate, timely and specific objections, counsel must thoroughly educate the examinee as to these restrictions and make sure that the examinee is prepared to assert them during the examination.

The Trial

Virtually every consumer attorney who has tried a substantial and controversial injury case has little illusion about the creativity of a defense doctor motivated by the desire to provide "full service" to the defense. They know that no such professional witness has ever been prosecuted for perjured or quack opinions; they know that lay jurors rarely appreciate their financial motivation. Moreover, they know that there is no chance that they will suffer professional humiliation since their quack opinions will never reach outside of the courtroom. They know who's buttering their bread.

Under these circumstances, and with unlimited resources to explore whatever weird or non-scientific medical theor defense counsel can conjure, it should no be a surprise that the lawyer who has beer lax in protecting the plaintiff's privac rights may well be confronted witl unpredicted defenses based on bizarr and factually untrue misreadings of medi cal records that should never have beer made available in the first place. (Thi seems to be the rule in medical malprac tice cases.)

The Larger Context

Every practicing attorney knows tha "reasonably calculated" is strictly relate to counsel's ability to theorize a pretensefu connection. While many lay commenta tors—and many politicians—understan that this liberal discovery is a source o legitimate complaints about lawyers an the overly intrusive and expensive lega system, these concerns have been essen tially ignored by legislators and judge who continue to follow, as they must established general legal doctrine whicl holds "fishing expeditions" as the price t avoid the alleged former pre-1960s evil o surprise at trial.

As counsel for injury victims, it is ou clients who invariably are exposed to th most tangential and invasive discovery Abusive, aggressive discovery can be substantial deterrent to a victim's willing ness to prosecute a perfectly valid claim; i is counsel's job to use whatever tools ar

Privacy . . . cont. on page 3

available to protect the client/victim from being victimized again by such a defense. Moreover, such a client, even after an objectively "successful" result, may be likely unwilling to undergo such scrutiny again and therefore suffer without just compensation in the future. Clients who have been abused by "the system" are unlikely to be advocates for this otherwise extraordinary system, and are more likely to be susceptible to anti-tort and anti-lawyer propaganda. ■

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[1] For a substantive discussion of the right of privacy, the reader is referred to Weil & Brown, *California PracticeGuide/Civil Procedure Before Trial*, ¶8:293 *et seq.*, which is about the best, albeit truncated, secondary treatment of the subject generally available.

[2] A recent important example of a case where the court refused to apply privacy protection is *Hill v. National Collegiate Athletic Association*, 7 Cal.4th 1, 26 Cal.Rptr.2d 834 (1994). That case was not a discovery case at all; rather, it involved the obligation of student athletes to accept random drug testing. Notably, the otherwise conservative Supreme Court went out of its way to reassert its commitment to this line of cases.

[3] In general, the plaintiff's insurer identity is irrelevant collateral source information not subject to discovery, even against the not-uncommon defense attempt to point to the existence of collateral benefits as a motivation for supposed over-utilization or "malingering." *Hrnjak v. Graymar, Inc.*, 4 Cal.3d 725, 94 Cal.Rptr. 623 (1971). Of course, this authority would not apply in cases where the collateral source rule has been statutorily limited such as medical malpractice (Civ. C. §3333.1) or claims against governmental entities (Gov't C. §985).

[4] *Hrnjak v. Graymar, Inc.*, 4 Cal.3d 725, 94 Cal.Rptr. 623 (1971).

[5] In this author's experience of literally hundreds of such depositions, we cannot recall a single instance where adverse counsel actually filed a motion to compel further answers to such deposition questions.

[6] It is not uncommon for the carrier to reserve the right to itself to pre-approve discovery motions. While defense counsel may be sincerely interested in testing the parameters of the privacy protection, it is unlikely that the carrier has a similar academic interest. From a cost-benefit standpoint, there is virtually no chance that a fishing expedition in these tangential areas will be approved.

[7] It is within counsel's discretion whether or not to allow a limited answer to such a flawed question or to insist on a totally new question.

[8] Even if the objecting counsel is "right" on the merits, counsel, it may be argued, may still be subject to sanctions for failure to anticipate and resolve the controversies prior to the exam.

[9] Some typical examples of objections are set forth in Weil & Brown, *California Practice Guide/Civil Procedure Before Trial*, "Discovery," ¶8:1542.2.

Another common objection is that the defense has failed to set forth the "manner, conditions, scope and nature of the examination . . . " as required in CCP §2032(c)(2).

[10] It has been our experience that the defense doctors react with total disbelief as to this condition. This issue, however, is governed by legal principles, not what might be "good medicine" or what the defense doctor desires.

[11] *See*, Kapp, "Important New Limits on Defense Medical Exams," *Advocate* (Los Angeles Trial Lawyers Association, March 1988, at 5); republished in *Forum* (California Trial Lawyers Association (CTLA), March 1989, at 63).

[12] *See, e.g., Edminston v. Superior Court*, 22 Cal.3d 699, 704, 150 Cal.Rptr. 276 (1978) (videotaping of defense medical exams not permitted); *Bailey v. Superior Court*, 19 Cal.3d 970, 140 Cal.Rptr. 669 (1977) (under prior Act, improper to videotape depositions as not authorized); *Ramirez v. MacAdam*, 13 Cal.App.4th 1638, 16 Cal.Rptr.2d 911 (1993) (improper under current Act, to order videotaping of defense medical examinations); *County of Los Angeles v. Martinez*, 224 Cal.App.3d 1446, 1454-1455, 274 Cal.Rptr. 712 (1990) (improper to order disclosure of opinions of defendant physicians in medical malpractice case as "not authorized"); *Volkswagenwerk, etc. v. Superior Court*, 123 Cal.App.3d 840, 849, 176 Cal.Rptr. 874 (1981) (improper to compel party to advise its employees to "cooperate" by providing interviews to another party); *Browne v. Superior Court*, 98 Cal.App.3d 610, 159 Cal.Rptr. 669 (1979) (improper, under prior Act, to allow a defense examination by a non-physician licensed vocational rehabilitation counselor; *Reuter v. Superior Court*, 93 Cal.App.3d 332, 155 Cal.Rptr. 525 (1979) (improper (1) to allow defense medical by licensed psychologists and (2) to compel mental examination of guardian ad litem/mother of injured child as "collateral" to that of son, as is "customary").