

# Physician-Patient Privilege Prevents Disclosure of Patient's Identity to Grand Jury Homicide Investigation

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## Recommended Citation

Moran, Mary Ellen (1984) "Physician-Patient Privilege Prevents Disclosure of Patient's Identity to Grand Jury Homicide Investigation," *St. John's Law Review*: Vol. 58 : No. 2 , Article 14.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol58/iss2/14>

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is suggested that the Court of Appeals reconsider this unnecessary impediment to the vindication of public employees' civil rights.

Kevin M. Berry

#### DEVELOPMENTS IN NEW YORK LAW

##### *Physician-patient privilege prevents disclosure of patient's identity to grand jury homicide investigation*

In 1828, New York became the first state to recognize a physician-patient privilege,<sup>138</sup> thus protecting all information and confidences regarding medical treatment and diagnosis.<sup>139</sup> Notwith-

<sup>138</sup> See 5 WK&M ¶ 4504.01, at 45-175 (1982). The statute of 1828 read as follows: No person duly authorized to practice physic or surgery, shall be allowed to disclose any information which he may have acquired in attending any patient, in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him, as a surgeon.

*Id.* (quoting N.Y. REV. STAT. 1828, 406 (pt. 3, ch. 7, tit. 3, art. 8, § 73)).

At common law, the prerequisites to the creation of a privilege were, *inter alia*, that the communication originated in an understanding of confidentiality, and that such confidentiality was essential in maintaining the relationship of the parties. 8 J. WIGMORE, EVIDENCE § 2285, at 531 (3d ed. 1940). For example, the communications between an attorney and client have received protection since the sixteenth century, making it the oldest of the privileged communications. *Id.* § 2290 at 547. Another common-law privilege, the spousal privilege, proscribes the testimony of the spouse of a party to an action. See RICHARDSON ON EVIDENCE § 445, at 437 (J. Prince 10th ed. 1973). Although the physician often was the recipient of his patient's confidences, no such privilege existed at common law for doctors. See 8 J. WIGMORE, *supra*, § 2380, at 802. Early English law indicated that neither a voluntary vow of secrecy nor the privacy of the relation alone were sufficient to establish a privileged communication. See C. DEWITT, PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT 10-12 (1958). In the 1776 trial of the Duchess of Kingston, Lord Mansfield ruled that a physician was bound to reveal a patient's secrets and "ha[d] no privilege, where it is a material question, in a civil or a criminal case . . ." *Id.* at 11-12 (quoting Duchess of Kingston's Trial, 20 How. St. Tr. 355 (1776)).

Although disclosures to a physician were not protected under the common law, the ethical principles of the medical profession, like those of the legal profession, compelled nondisclosure of the patient's confidences. See C. DEWITT, *supra*, at 22-23. The source of this ethical consideration is the Hippocratic Oath, which includes the following: "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 spoken of abroad, I will not divulge, as reckoning that all such should be kept secret." E. HAYT, L. HAYT & A. GROESCHEL, LAW OF HOSPITAL, PHYSICIAN, AND PATIENT 637 (1952); see Note, *Legal Protection of the Confidential Nature of the Physician-Patient Relationship*, 52 COLUM. L. REV. 383, 383 (1952).

<sup>139</sup> See CPLR 4504(a) (1963 & Supp. 1983). Generally, four prerequisites must be established by the person invoking the physician-patient privilege before it can be used to prevent disclosure: 1) the physician was authorized to practice medicine or is a professional falling within the statutory guidelines; 2) the information was necessary for treatment; 3) the information was acquired as a result of the physician-patient relationship; and 4) the

standing the existence of the privilege, however, a physician still may be required to disclose information if either the patient has waived the privilege,<sup>140</sup> or the situation is covered by one of the

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disclosure involved either "information" or a confidential "communication." Note, *supra* note 138, at 390; see 5 WK&M ¶ 4504.04, at 45-187. The test for confidentiality was enumerated in *People v. Decina*, 2 N.Y.2d 133, 145, 138 N.E.2d 799, 807, 157 N.Y.S.2d 558, 569 (1956), as "whether in the light of all the surrounding circumstances, and particularly the occasion for the presence of the third person, the communication was intended to be confidential . . ." *Id.*

"Information" has been defined as "not only communications received from the lips of the patient but such knowledge as may be acquired from the patient himself, from the statement of others who may surround him at the time, or from observation of his appearance and symptoms." *Edington v. Mutual Life Ins. Co.*, 67 N.Y. 185, 194 (1876). It has also been held that the privilege extends to information of the patient's mental or physical condition acquired by the physician even when the treatment was for an unrelated condition. See, e.g., *In re Coddington's Will*, 307 N.Y. 181, 188, 120 N.E.2d 777, 786 (1954) (information acquired of testatrix's mental condition during treatment for unrelated physical malady held privileged); *People v. Eckert*, 208 Misc. 93, 101-02, 142 N.Y.S.2d 657, 666 (Nassau County Ct. 1955), *modified*, 1 App. Div. 2d 903, 149 N.Y.S.2d 644 (2d Dep't), *aff'd*, 2 N.Y.2d 126, 138 N.E.2d 794, 157 N.Y.S.2d 551 (1956) (patient's admission to physician of knowledge that his driving was impaired due to medical condition held privileged); see *Massachusetts Mut. Life Ins. Co. v. Brei*, 311 F.2d 463, 469 (2d Cir. 1962) (general practitioner's testimony concerning patient's state of mind held inadmissible although physician only treated patient for varicose ulcer); 5 WK&M ¶ 4504.08, at 45-196 to -97 (requirement that information held by doctor must be necessary for his operating in professional capacity liberally applied by courts in general).

In accordance with the statute's purpose to provide assurances to the patient that his procurement of medical attention will not result in adverse disclosures, subsequent amendments have extended the privilege to include dentists and nurses as well. See CPLR 4504(a) (1963 & Supp. 1983). CPLR 4504(a) provides in relevant part:

(a) Confidential information privileged. Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing or dentistry shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity. The relationship of a physician and patient shall exist between a medical corporation . . . a professional service corporation . . . , and the patients to whom they respectively render professional medical services.

*Id.*

<sup>140</sup> CPLR 4504(a) (1963 & Supp. 1983); see WK&M ¶ 4504.09, at 45-204. "Although the privilege is normally first asserted by the physician when called as a witness, it has always been clear that it exists for the protection and benefit of the patient, who may abandon it." WK&M ¶ 4504.09, at 45-205 (footnote omitted); see C. DEWITT, *supra* note 138, at 46-47. Because of the potential for misuse of the statute upon the death of a patient, see *Renihan v. Dennin*, 103 N.Y. 573, 580, 9 N.E. 320, 322 (1886) (contestant of will prohibited from introducing testimony of physician to prove incompetency of testator), many New York courts held that the representatives of a patient may have authority to waive the privilege on the patient's behalf, see, e.g., *In re Frangeline's Will*, 14 App. Div. 2d 420, 424-25, 222 N.Y.S.2d 39, 42 (4th Dep't 1961) (attorney capable of waiving the privilege on behalf of decedent's brother); *Kossar v. State*, 13 Misc. 2d 941, 943, 179 N.Y.S.2d 71, 73 (Ct. Cl. 1958) (waiver of privilege by patient's guardian permitted). In response, the legislature amended

narrow exceptions to the privilege enumerated by statute.<sup>141</sup> It has been unclear whether information relating to the treatment of patients may be disclosed by a physician when a suspect's identity is being sought in a criminal investigation.<sup>142</sup> Recently, in *In re Grand Jury Investigation of Onondaga County*,<sup>143</sup> the Court of Appeals held that the identity of persons treated for knife wounds

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the statute to include a provision allowing the personal representative, surviving spouse, or next of kin to waive the decedent's privilege generally, and permitting any party in interest to waive the privilege either when the validity of the will is in question or when the court deems the interests of the personal representative adverse to those of the estate. CPLR 4504(c) (1963 & Supp. 1983); see WK&M ¶ 4504.19, at 45-227.

<sup>141</sup> Distinct statutory exceptions to the physician-patient privilege involve circumstances where crimes have been committed against the patient. See CPLR 4504(b) (1963 & Supp. 1983) (dental information must be disclosed for identification of patient); *id.* (information must be disclosed that indicates patient under sixteen has been a crime victim). In addition, section 265.25 of the New York Penal Law provides in part:

Every case of a bullet wound, gunshot wound, powder burn or any other injury arising from or caused by the discharge of a gun or firearm, and every case of a wound which is likely to or may result in death and is actually or apparently inflicted by a knife, icpick or other sharp or pointed instrument, shall be reported at once to the police authorities of the city, town or village where the person reporting is located . . . .

N.Y. PENAL LAW § 265.25 (McKinney 1980). There have been no reported cases in which section 265.25 of the Penal Law was directly involved. *Id.*, commentary at 513.

Other exceptions to the physician-patient privilege recognized by the New York Legislature involve issues of health. N.Y. PUB. HEALTH LAW §§ 3372-3373 (McKinney 1977) (physician required to report the names of addicts or habitual users of narcotics under his treatment); *id.* § 2101 (communicable diseases required to be reported). Child welfare has also been deemed paramount to the physician-patient privilege. See Soc. SERV. LAW § 384-b(3)(h) (McKinney 1983) (confidential communications not privileged in child custody proceeding); see also *In re Three "John" Children*, 61 Misc. 2d 347, 354, 306 N.Y.S.2d 797, 814-15 (Family Ct. New York County 1969) (hospital records indicating mother was a heroin addict admissible in custody proceeding seeking to remove mother's custody); *People ex rel. Chitty v. Fitzgerald*, 40 Misc. 2d 966, 967, 244 N.Y.S.2d 441, 442 (Sup. Ct. Kings County 1963) (medical records admissible in custody case where mental health of father in issue). In addition, the physician-patient privilege is not applicable in child abuse proceedings. See N.Y. FAM. CT. ACT § 1046(a)(vii) (McKinney 1983); *In re Fred S.*, 66 Misc. 2d 683, 686, 322 N.Y.S.2d 170, 173 (Family Ct. Richmond County 1971) (prior medical history of child found admissible in current child abuse case); *In re Blaine*, 54 Misc. 2d 248, 254, 282 N.Y.S.2d 359, 364 (Family Ct. Queens County 1967) (report of psychiatrist admissible in neglect proceeding). Finally, an exception exists regarding the determination in a probate proceeding of the mental state of a deceased. See CPLR 4504(c) (1963 & Supp. 1983) (physician required to disclose information pertaining to mental or physical condition of deceased patient).

<sup>142</sup> See *In re Grand Jury Investigation of Onondaga County*, 59 N.Y.2d 130, 133, 450 N.E.2d 678, 679, 463 N.Y.S.2d 758, 759 (1983). The lower court in *Onondaga County* viewed the physician-patient privilege as being subject to the discretion of the court in situations where the public interest in homicide investigations outweighed the policy considerations underlying the privilege. *Id.* In contrast, other cases have upheld the privilege even where the criminal investigation involved a homicide. See *infra* note 155.

<sup>143</sup> 59 N.Y.2d 130, 450 N.E.2d 678, 463 N.Y.S.2d 758 (1983).

fell squarely within the proscriptions of the privilege and was not subject to disclosure under a grand jury subpoena, since such disclosure would inherently reveal information relating to treatment and diagnosis.<sup>144</sup>

In *Onondaga County*, the District Attorney for Onondaga County had conducted an investigation into the stabbing death of a woman. Since evidence obtained in that investigation indicated that the victim may have stabbed her attacker, a grand jury subpoena was issued requesting the respondent hospital to produce the medical records of all persons they treated for stab wounds subsequent to the crime.<sup>145</sup> The hospital moved to quash the subpoena, asserting the physician-patient privilege.<sup>146</sup> The county court denied the motion, holding that the physician-patient privilege must yield to a criminal investigation because of the greater public interest in the latter.<sup>147</sup>

Pending the appeal, the District Attorney advised the hospital that his request would be limited to the names and addresses of persons treated for stab wounds.<sup>148</sup> The Appellate Division, Fourth Department, reversed the lower court, holding that the subpoenaed information necessarily would include the nature of the treatment and, therefore, constituted privileged information.<sup>149</sup> Additionally, the court reasoned that any exception to the privilege should more appropriately be created by the Legislature.<sup>150</sup>

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<sup>144</sup> *Id.* at 136, 450 N.E.2d at 681, 463 N.Y.S.2d at 761.

<sup>145</sup> *Id.* at 132-33, 450 N.E.2d at 679, 463 N.Y.S.2d at 759. On June 17, 1982, Onondaga County District Attorney, Richard A. Hennessey, Jr., issued a Grand Jury subpoena for the production of "any and all medical records pertaining to treatment of any person with stab wounds or other wounds caused by a knife, from June 15, 1982 to the present time." *Id.* at 133, 450 N.E.2d at 679, 463 N.Y.S.2d at 759.

<sup>146</sup> *Id.* The hospital contended that the records sought were "information" which were "acquired in attending a patient in a professional capacity, and which was necessary to enable [the physician] to act in that capacity." *In re Grand Jury Investigation of Onondaga County*, 90 App. Div. 2d 990, 990, 456 N.Y.S.2d 586, 586 (4th Dep't 1982), *aff'd*, 59 N.Y.2d 130, 450 N.E.2d 678, 463 N.Y.S.2d 758 (1983); see CPLR 4504(a) (1963 & Supp. 1983); *supra* note 138 and accompanying text.

<sup>147</sup> 59 N.Y.2d at 133, 450 N.E.2d at 679, 463 N.Y.S.2d at 758. The county court did, however, stay the enforcement of the subpoena while the hospital appealed. *Id.*, 450 N.E.2d at 679, 463 N.Y.S.2d at 759.

<sup>148</sup> *Id.*

<sup>149</sup> 90 App. Div. 2d at 990, 456 N.Y.S.2d at 586-87. The court responded to the District Attorney's argument that the sought-after information merely related to the fact of treatment by indicating that disclosure of the fact of treatment for a specific injury such as a stab wound would automatically reveal the nature of treatment provided. *Id.*; see *supra* notes 138-39 and accompanying text.

<sup>150</sup> 90 App. Div. 2d at 990, 456 N.Y.S.2d at 586-87.

On appeal, the Court of Appeals unanimously affirmed the Appellate Division,<sup>151</sup> holding that the privilege was properly raised by the hospital,<sup>152</sup> and, thus, that the subpoena should be quashed.<sup>153</sup> The Court noted that this statutory privilege should be interpreted broadly and "construed in accordance with its purpose—to encourage full disclosure by the patient so that he can secure appropriate treatment from the physician."<sup>154</sup> Addressing the District Attorney's claim of an overriding public interest in a homicide investigation, the Court reasoned that the physician-patient privilege already had been upheld where a patient-defendant was accused of murder.<sup>155</sup> Furthermore, the Court observed that it

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<sup>151</sup> 59 N.Y.2d at 136, 450 N.E.2d at 681, 463 N.Y.S.2d at 761. Judge Meyer authored the majority opinion in which Chief Judge Cooke and Judges Jasen, Jones, and Wachtler joined. Judge Simons did not take part in the decision.

<sup>152</sup> *Id.* at 135, 450 N.E.2d at 680, 463 N.Y.S.2d at 760. The Court conceded that the privilege belonged exclusively to the patient, but noted that a physician or hospital may assert the privilege to protect a patient who has not waived it. *Id.* The Court distinguished this from a situation where a physician, hospital or other party tries to assert the privilege to protect himself from prosecution for a crime committed against the patient. *Id.*; *see also In re Grand Jury Proceedings [Doe]*, 56 N.Y.2d 348, 351, 437 N.E.2d 1118, 1120, 452 N.Y.S.2d 361, 362 (1982) (hospital under grand jury investigation for crimes committed against patients may not properly assert physician-patient privilege to defeat a subpoena of hospital records); *People v. Lay*, 254 App. Div. 372, 373, 5 N.Y.S.2d 325, 326 (2d Dep't 1938), *aff'd*, 279 N.Y. 737, 18 N.E.2d 686 (1939) (criminal defendant may not raise the physician-patient privilege to exclude testimony of doctor who examined the alleged victim). In such a case, the courts generally have recognized that permitting this type of assertion directly contradicts the original purposes of the privilege. *See In re Grand Jury Proceedings [Doe]*, 56 N.Y.2d at 353, 437 N.E.2d at 1120, 452 N.Y.S.2d at 363 ("purpose of the privilege is to protect the patient, not to shield the criminal"); *People v. Lay*, 254 App. Div. at 373, 5 N.Y.S.2d at 326 (bullet wound exception "militates against a construction favorable to a defendant in a criminal cause"); *see supra* note 139 and accompanying text.

<sup>153</sup> 59 N.Y.2d at 135, 450 N.E.2d at 679, 463 N.Y.S.2d at 759. The Court noted that even though the District Attorney had limited the information sought under the subpoena to the names and addresses of knife wound patients, *see supra* note 148 and accompanying text, compliance with the demand would ultimately reveal "privileged information concerning diagnosis and treatment . . ." 59 N.Y.2d at 135, 450 N.E.2d at 680, 463 N.Y.S.2d at 760.

<sup>154</sup> 59 N.Y.2d at 134, 450 N.E.2d at 679, 463 N.Y.S.2d at 759 (citing *In re Grand Jury Proceedings [Doe]*, 56 N.Y.2d 348, 352, 437 N.E.2d 1118, 1120, 452 N.Y.S.2d 361, 363 (1982)). In determining that a broad construction of the privilege is necessary to implement its policy, the Court relied on *City Council v. Goldwater*, 284 N.Y. 296, 300, 31 N.E.2d 31, 33 (1940) (physician-patient privilege is applicable in respect to a subpoena from an investigatory committee as well as court hearing), and *People v. Decina*, 2 N.Y.2d 133, 143, 138 N.E.2d 799, 805-06, 157 N.Y.S.2d 558, 568 (1956) (privilege not destroyed by presence of third party at time communication made if the communication was intended to be confidential).

<sup>155</sup> 59 N.Y.2d at 135, 450 N.E.2d at 680, 463 N.Y.S.2d at 760. The Court observed that the privilege was successfully invoked in two homicide cases which involved the treatment

is the function of the Legislature to create exceptions to the privilege.<sup>156</sup> Finally, the Court examined the existing exceptions, in particular the knife-wound exception, and concluded that "less serious knife wounds are not within the mandate" of this or any exception.<sup>157</sup> In addition, the Court reasoned that since the Legislature had seen fit to create such a narrow exception to CPLR 4504, a public interest exception that would include the medical records of patients treated for any knife wound would be overly broad.<sup>158</sup>

The Court's observation that exceptions to the physician-patient privilege are within the legislative domain is fundamentally correct, since the legislature is the exponent of both the privilege and its exceptions.<sup>159</sup> Furthermore, case law reveals judicial intent not to disturb the privilege.<sup>160</sup> Notwithstanding this, it is submitted that the practical effect of the Court's decision to uphold the privilege will foster the disturbing effect the privilege was designed to guard against. Indeed, the District Attorney conceivably can circumvent the privilege by seeking the names and addresses of all

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of the defendant-patient. *Id.* In *People v. Decina*, 2 N.Y.2d 133, 135, 138 N.E.2d 799, 800-01, 157 N.Y.S.2d 558, 560-61 (1956), the defendant suffered an epileptic occurrence while operating an automobile, lost control, and killed four persons. *Id.* The Court found that the defendant's statements to the diagnosing doctor concerning his past medical history and his present seizure were privileged under the theory that they aided the doctor to function in a professional capacity. *Id.* at 143, 138 N.E.2d at 806, 157 N.Y.S.2d at 568. In *People v. Murphy*, 101 N.Y. 147, 4 N.E. 326 (1886), the defendant was accused of performing an abortion. *Id.* at 151, 4 N.E. at 327. The Court noted that the patient's statements to a subsequent treating physician were privileged since disclosure would "cast discredit and disgrace upon her." *Id.* at 150, 4 N.E. at 327.

<sup>156</sup> 59 N.Y.2d at 135-36, 450 N.E.2d at 681, 463 N.Y.S.2d at 761.

<sup>157</sup> *Id.* at 136, 450 N.E.2d at 681, 463 N.Y.S.2d at 761; see *supra* note 141 and accompanying text.

<sup>158</sup> See 59 N.Y.2d at 136, 450 N.E.2d at 681, 463 N.Y.S.2d at 761. Both the Appellate Division and Court of Appeals mentioned Penal Law § 265.25 *Id.* Each court apparently considered the knife wound exception as a possible basis for supporting the subpoena. See 59 N.Y.2d at 135-36, 450 N.E.2d at 679, 463 N.Y.S.2d at 759; 90 App. Div. 2d at 991, 456 N.Y.S.2d at 586.

<sup>159</sup> See 59 N.Y.2d at 136, 450 N.E.2d at 681, 463 N.Y.S.2d at 761; *supra* notes 139 & 141. There have been a number of decisions that have followed the principle that any exceptions to a statutory prohibition should be "confined to the specific exception created by it." *In re Investigation, Kings County*, 286 App. Div. 270, 274, 143 N.Y.S.2d 501, 507 (2d Dep't 1955) (hospital refused to disclose names of patients treated for abortions); see also *In re Coddington's Will*, 307 N.Y. 181, 190, 120 N.E.2d 777, 786 (1954) (statute should be construed only to permit disclosures obtained while not acting in a professional capacity). As the *Onondaga* Court correctly indicated, the present exceptions to the physician-patient privilege have all been codified by the legislature. See 59 N.Y.2d at 135-36, 450 N.E.2d at 680-81, 463 N.Y.S.2d at 760-61; see *supra* note 141 and accompanying text.

<sup>160</sup> See *supra* notes 154-55 and accompanying text.

persons treated at the hospital since such information, absent reference to stab wounds, would not be privileged.<sup>161</sup>

It is submitted that an exception to the physician-patient privilege is warranted when serious crimes, such as murder, are being investigated, and the District Attorney has specific knowledge directing his investigation to the possible assailant. The present exceptions to the physician-patient privilege were created in recognition of social policy and in the interest of protecting public welfare.<sup>162</sup> Such considerations should dictate similar treatment of the privilege in cases involving heinous crimes such as murder.

As protection against unreasonable intrusion upon the rights of individuals by an overzealous law enforcement investigation, the issuance of a grand jury subpoena is subject to court supervision,<sup>163</sup>

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<sup>161</sup> See *In re Albert Lindley Lee Memorial Hosp.*, 115 F. Supp. 643, 645 (N.D.N.Y.), *aff'd*, 209 F.2d 122 (2d Cir.), *cert. denied sub nom. Cincotta v. United States*, 347 U.S. 960 (1953) (names and addresses of a physician's patients not privileged since fact of attendance does not reveal nature of treatment). Although the nature of treatment historically has been privileged under the statute, *see, e.g., Edington v. Mutual Life Ins. Co.*, 67 N.Y. 185, 194 (1876), the mere fact of treatment is not privileged, *see Klein v. Prudential Ins. Co. of Am.*, 221 N.Y. 449, 453, 117 N.E. 942, 943 (1917) (fact that individual was the patient of a doctor, was sick, and was treated is not privileged); E. HAYT, L. HAYT & A. GROESCHEL, *supra* note 138, at 644 (dates of hospitalization not privileged). Indeed, "facts which are 'plain to the observation of anyone without expert or professional knowledge' are not within the privilege." 59 N.Y.2d at 134, 450 N.E.2d at 680, 463 N.Y.S.2d at 760 (quoting *Klein v. Prudential Ins. Co. of Am.*, 221 N.Y. 449, 453, 117 N.E. 942, 943 (1917)). The Court thus acknowledged that the statute would not be violated if photographs of patients were subpoenaed, or if the names and addresses of the patients of a specific doctor were subpoenaed. 59 N.Y.2d at 134, 450 N.E.2d at 680, 463 N.Y.S.2d at 760. For the District Attorney to subpoena the names of all patients treated, the mere showing of a legitimate reason and the absence of an intent to harass would be sufficient since such information does not enjoy protection of the physician-patient privilege.

<sup>162</sup> See 59 N.Y.2d at 135, 450 N.E.2d at 680, 463 N.Y.S.2d at 760; *supra* note 156 and accompanying text. The majority of exceptions deal with the disclosure of information recognized as paramount to the furtherance of the confidentiality of the physician-patient relationship. See *supra* note 140. These exceptions were brought about as a result of the early criticisms of the privilege and its tendency to prohibit the introduction of relevant testimony. *Id.*

<sup>163</sup> See *In re Seiffert*, 446 F. Supp. 1153, 1155 (N.D.N.Y. 1978). "The Court has the power to supervise the use of subpoenas, by the grand jury, to gain testimony and evidence in the course of investigations." *Id.* Judicial supervision is the by-product of both the prohibition of unreasonable searches and seizures, *United States v. Grand Jury Investigation*, 417 F. Supp. 389, 391 (E.D. Pa. 1976), and the "court's inherent ability to supervise the use of process to compel the presence of witnesses, and to oversee the grand jury which it empanels," *In re Seiffert*, 446 F. Supp. at 1155. The supervisory power of the court insures that the disclosures requested under a subpoena are neither "unreasonab[le] nor oppressive." *United States v. Loskocinski*, 403 F. Supp. 75, 77 (E.D.N.Y. 1975); *see also Hale v. Henkel*, 201 U.S. 43, 77 (1906) (necessity or materiality should be shown when requesting a large quantity of documents). While the standard of reasonableness in every case has similar fac-



and must be reasonable both in its issuance and its scope by specifying the requested objects of disclosure.<sup>164</sup> In light of this protection, it is submitted that an exception to the physician-patient privilege should be implemented through the use of a standard by which the District Attorney must furnish evidence to indicate probable cause<sup>165</sup> that the suspect would be seeking medical attention at the hospital. Since grand jury proceedings are inherently secret, the privacy rights of patients other than the accused would be protected, and thus, the disclosure of specific medical records

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tors, "[e]ach case must be judged according to the peculiar facts arising from the subpoena. . . ." *Loskocinski*, 403 F. Supp. at 77 (quoting *United States v. Medical Soc'y, D.C.*, 26 F. Supp. 55, 57 (D.D.C. 1938)).

<sup>164</sup> See *In re Rabbinical Seminary Netzach Israel Ramailis*, 450 F. Supp. 1078, 1084 (E.D.N.Y. 1978). When a subpoena is challenged for its unreasonableness, a three-part test has been utilized: "1) The documents requested must be shown to have some general relevance to the subject matter of a legitimate grand jury investigation, 2) [t]he subpoena must describe the materials to be produced with reasonable particularity, [and] 3) [t]he documents may not cover more than a reasonable period of time." *Id.*

"Relevance" has been easily met through a showing that the information "'may have some possible connection' to the subject matter." *Id.* (quoting *In re Grand Jury Subpoena Duces Tecum*, 391 F. Supp. 991, 997 (D.R.I. 1975)). The grand jury, however, need not establish the relevance of each individual document sought. 450 F. Supp. at 1084 n.4.

<sup>165</sup> A requirement of probable cause for subpoenas would put them on par with search warrants, which must meet a standard whereby the object and place of search is specifically identified and probable cause is shown to exist. See, e.g., *People v. Mangirolino*, 75 Misc. 2d 698, 701, 348 N.Y.S.2d 327, 332 (Monroe County Ct. 1973). The requirement of probable cause was designed to eliminate "untrammelled discretion" and to protect privacy rights. *People v. Dolan*, 95 Misc. 2d 470, 473, 408 N.Y.S.2d 249, 251 (Sup. Ct. Bronx County 1978); see also *People v. Cantor*, 36 N.Y.2d 106, 111, 324 N.E.2d 872, 877, 365 N.Y.S.2d 509, 514 (1975). When examining the legality of a search, for example, "[w]hether or not a particular search or seizure is to be considered reasonable requires weighing the government's interest in the detection and apprehension of criminals against the encroachment involved with respect to an individual's right to privacy and personal security." *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). The *Mangirolino* court underscored the distinction between "mere suspicion and probable cause." 75 Misc. 2d at 701, 348 N.Y.S.2d at 332. To establish probable cause, sufficient information is required to "reasonably justify the conclusion that certain property . . . is located in particular premises." *Id.* The court further noted that where probable cause is established, the need for information and its resulting benefits are balanced against the invasion of privacy, and in a close situation, privacy must yield. *Id.*

Many cases have held that the standard of probable cause must be considered in view of all surrounding facts and circumstances. See, e.g., *People v. Dolan*, 95 Misc. 2d 470, 473, 408 N.Y.S.2d 249, 251 (Sup. Ct. Bronx County 1978) (search without warrant was reasonable under the circumstances where defendant was accused of criminally negligent homicide); see *People v. Kreichman*, 37 N.Y.2d 693, 697, 339 N.E.2d 182, 186, 376 N.Y.S.2d 497, 502 (1975) (warrantless search of automobile reasonable under the circumstances). In addition, the need for evidence must be balanced with the public's interest in preserving the confidential privilege. *Id.* 339 N.E.2d at 186, 376 N.Y.S.2d at 502. In the present case, the exigency of the situation, the location of the hospitals in the area, and the nature of evidence that suggested the suspect was injured are all factors to be considered.

would not thwart the traditional policy considerations upon which the physician-patient privilege is founded.<sup>166</sup>

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<sup>166</sup> In *People v. Doe*, 107 Misc. 2d 605, 608, 435 N.Y.S.2d 656, 658 (Sup. Ct. Westchester County 1981), which involved the subpoena of hospital records of a specific physician's patients, the court balanced the purposes of disclosure against the "paramount right of the Grand Jury to investigate allegations of possible criminal activity." *Id.* The court in *Grand Jury Proceedings [Doe]*, 56 N.Y.2d 348, 353, 437 N.E.2d 1118, 1120, 452 N.Y.S.2d 361, 363 (1982), while concluding that the purposes of the physician-patient privilege would not be greatly affected by disclosure observed that "[t]he Grand Jury operates in secret, and the prospect that it might examine the files of a hospital in connection with allegations of crimes committed against the hospital's patients is unlikely to inhibit these patients from making candid disclosures . . ." *Id.*

The inherent secrecy of grand jury proceedings militates against the disclosure of the identity of persons collaterally obtained through the use of a subpoena. *See* H. ROTHBLATT, *CRIMINAL LAW OF NEW YORK* § 229, at 173 (1971). It is only after the indictment of the accused, which is "based upon evidence which would, if unexplained or uncontradicted, warrant a conviction," that information pertaining *only* to the accused would be released. *See id.* § 245, at 186-87. In the present case, the type of information revealed would simply be the identity of a patient treated for knife wounds where other evidence was present to warrant conviction at trial if uncontradicted.

Before a subpoena may be issued, the court must establish the relevance of the requested material to the investigation. *In re Rabbinical Seminary Netzach Israel Ramailis*, 450 F. Supp. 1078, 1084 (E.D.N.Y. 1978). In addition to its relevance, the requested material must be specifically identified such that the request is not overbroad. *Id.* In the present case, it is suggested that the District Attorney's request for the names of patients treated for knife wounds was certainly relevant. Moreover, the subpoena was sufficiently tailored to avoid overbreadth. 59 N.Y.2d at 133, 450 N.E.2d at 679, 463 N.Y.S.2d at 759. Finally, the period of time covered by the request was very reasonable since it was not more than two days. *Id.*