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**THE SCOPE OF DISCOVERY IN LEAD EXPOSURE LITIGATION:
FAMILY MATTERS**

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THE SCOPE OF DISCOVERY IN LEAD EXPOSURE LITIGATION: FAMILY MATTERS

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The scope of discovery in child lead exposure litigation is shifting away from traditional plaintiff-centered discovery toward nonparty discovery, including discovery regarding family members of plaintiffs. Indeed, “[t]here is a growing trend amongst the defense bar in lead injury cases to seek intelligence quotient (“IQ”) examinations and the medical, educational and employment records of nonparties, such as parents and siblings, in order to dispute causation or to limit damages.”¹ Commentators have observed that the disclosure of nonparty records in lead exposure cases departs from the discovery rulings in the infamous DES litigation in the 1990s.² In 800 consolidated DES cases, the Supreme Court of New York prohibited the defendant manufacturers of the anti-nausea drug from obtaining the plaintiffs’ mothers’ medical records on the grounds that the plaintiffs’ waiver of their own physician-patient privileges was not equivalent to a waiver of their relatives’ privileges and, therefore, the maternal medical records were not discoverable.³

In recent years, the scope of discovery in child lead exposure cases has expanded beyond that plaintiff-centered framework.⁴ In many lead exposure cases, defendants have argued successfully that nonparty records are critical in evaluating and challenging causation where a plaintiff seeks damages for cognitive, behavioral, and/or developmental problems,⁵ all of which are injuries plaintiffs in lead cases typically attribute to their lead exposure. Medical experts have concluded that injuries that plaintiffs claim are associated with elevated blood lead levels, including lower IQ, learning disabilities, decreased growth, and behavioral problems such as hyperactivity and attention deficit disorder, are

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¹ Van Epps v. County of Albany, 706 N.Y.S.2d 855, 859 (N.Y. Sup. Ct. 2000).

² Jennifer Wriggins, *Genetics, IQ, Determinism, and Torts: The Example of Discovery in Lead Exposure Litigation*, 77 B.U.L. REV. 1025, 1056 (1997).

³ *Id.*

⁴ *Id.* at 1056-57.

⁵ See Melissa Rosenthal, Note, *Liberal Discovery of Non-Party Records, In Defense of the Defense*, 7 CARDOZO WOMEN’S L.J. 59, 68 (2000).

attributable to various biological, socioeconomic, and/or other environmental factors.⁶ Such confounding variables make it difficult to determine whether a plaintiff's alleged injuries were caused by lead exposure or were the result of these alternative causal factors. Consequently, defendants in lead exposure cases frequently seek information and documents relating to the academic, medical and socioeconomic histories of nonparty parents and siblings in order to reach a better evaluation of causation and a plaintiff's claimed damages.

Denying access to records or information relating to the confounding variables to which a plaintiff's alleged deficiencies may be attributable does not provide defendants with an adequate opportunity to investigate and present every possible defense.⁷ Recognizing this detrimental impact, while earlier Virginia cases reflect hesitancy to order discovery of nonparty information,⁸ more recent decisions show a movement toward broader discovery.⁹ Although this shift from plaintiff-centered discovery to nonparty discovery of familial academic, medical, and environmental/socioeconomic information has raised issues concerning privilege, privacy, and the administration of justice, the trend toward more expansive discovery in lead exposure cases continues. Although this trend is most visible in lead exposures cases, nonparty discovery is equally important for defense attorneys in any type of case facing claims of damages for the same cognitive, behavioral, and/or developmental deficits asserted by plaintiffs in lead cases.

I. VIRGINIA PERMITS DISCOVERY OF NONPARTY ACADEMIC RECORDS AND INTELLIGENCE QUOTIENT TEST RESULTS

In studies of lead-exposed children, cognitive function as reflected in measured intelligence is the most studied health statistic.¹⁰ Plaintiffs in lead exposure cases frequently claim that their lead exposure caused brain injury, resulting in various cognitive, behavioral, and academic problems. Researchers, however, have cautioned against attributing cognitive deficits to lead exposure without considering possible socioeconomic factors such as parental education and/or income.¹¹ The Centers for Disease Control and Prevention, in its August 2005 report entitled *Preventing Lead Poisoning in Young Children*, warned that

⁶ *Bunch v. Artz*, 71 Va. Cir. 358, 361 (Cir. Ct. City of Portsmouth 2006).

⁷ Rosenthal, *supra* note 5, at 68.

⁸ See, e.g., *Wilson v. Rogers*, No. L98-1676 (Cir. Ct. City of Portsmouth Aug. 30, 2000) (ruling that the academic records of the mother and siblings of an infant plaintiff were outside the scope of discovery); *Blackwell v. Portsmouth Redevelopment & Hous. Auth.*, No. L98-681 (Cir. Ct. City of Portsmouth Aug. 5, 1999) (holding that the academic records of a plaintiff's father were not discoverable despite fact that the discovery ruling "could go either way").

⁹ See, e.g., *Long v. Shelton*, No. CL05-173 (Cir. Ct. City of Fredericksburg Apr. 3, 2007) (ordering disclosure of familial academic, employment, medical, criminal, and social services records); *Bunch*, 71 Va. Cir. at 361 (permitting disclosure of familial academic records).

¹⁰ Centers for Disease Control and Prevention, U.S. Dep't of Health and Human Services, *Preventing Lead Poisoning in Young Children* 23 (August 2005).

¹¹ *Id.*

“[f]ailure to adjust for the confounding effect of socioeconomic factors will result in confounding that overstates the harmful effect of lead on IQ because the socioeconomic effect will be mixed with any true effect of lead exposure.”¹² Genetic factors also may result in confounding that overstates the effects of lead.¹³ Medical research has established that maternal IQ is “a significant predictor of” a child’s mean level of cognitive performance¹⁴ and is a particularly important variable when considering the “threshold effects” of lead.¹⁵

For these reasons, defendants in lead exposure cases seeking to identify and explore the existence and influence of confounding variables on a plaintiff’s alleged injuries have sought in discovery academic records, including grades and IQ tests, and information regarding any parental or sibling history of learning disabilities or participation in special education. Plaintiffs often object to this discovery on the grounds the information is privileged under state and federal law and not relevant or material to the subject matter at issue. A number of courts, however, have rejected these arguments in favor of defendants’ rights to prepare their alternative causation and damages defenses.

A. NEITHER FEDERAL NOR STATE LAW CLOAKS ACADEMIC RECORDS WITH PRIVILEGE FROM DISCOVERY

Virginia courts have expressly rejected the argument that academic records are privileged under federal and/or state law. In *Bunch v. Artz*, a lead exposure case, the Circuit Court for the City of Portsmouth considered a motion to quash a subpoena duces tecum for familial academic records on the grounds that Virginia Code section 22.1-287(A) and The Family Educational Rights and Privacy Act of 1974 (“FERPA”), 20 U.S.C. § 1232(g), created a privilege for educational records.¹⁶ Virginia Code section 22.1-287(A) states that “no teacher, principal, or employee of any public school nor any school board member shall permit access to any records concerning any particular pupil enrolled in the school in any class to any person except under judicial process unless the person” falls into one of the specified categories.¹⁷ In addition, FERPA provides that:

¹² *Id.*

¹³ See, e.g., Karin Koller *et al.*, *Recent Developments in Low-Level Lead Exposure and Intellectual Impairment in Children*, 112 ENVTL. HEALTH PERSP. 987, at <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1247191> (last visited Oct. 6, 2008) (noting that maternal IQ and home environment are “key confounders” in studies on the effects of lead exposure).

¹⁴ Margaret R. Burchinal *et al.*, *Intervention and Mediating Processes in Cognitive Performance of Children of Low-Income African American Families*, 68 CHILD DEV. 935, 947 (1997); see also Tom Greene *et al.*, *Contributions of Risk Factors to Elevated Blood and Dentine Lead Levels in Preschool Children*, 115 THE SCIENCE OF TOTAL ENV’T 239, 251 (1992) (noting that maternal IQ and parental education had a reasonably strong correlation with a child’s cognitive development). See generally Langdon E. Longstreth *et al.*, *Separation of Home Intellectual Environment and Maternal IQ as Determinants of Child IQ*, 17(5) DEV. PSYCHOL. 532 (1981).

¹⁵ Stephen R. Schroeder *et al.*, *Separating the Effects of Lead and Social Factors on IQ*, 38 ENVTL. RES. 144, 146 (1984).

¹⁶ *Bunch*, 71 Va. Cir. at 364-67.

¹⁷ VA. CODE ANN. § 22.1-287(A) (2008).

[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as permitted under paragraph (1) of this subsection unless . . . such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that the parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.¹⁸

The *Bunch* court concluded that Virginia Code section 22.1-287 “expressly permits court-ordered disclosure, and contains no specific language preventing use of [educational records] in court proceedings” and, thus, the statute “does not create an evidentiary privilege.”¹⁹ The court also noted that the purpose of the ban on disclosure and publication is to prevent sharing private information with the public—not to prohibit discovery—and that full access to relevant information by courts and litigants is critical to the administration of justice.²⁰ Regarding FERPA, the court ruled that the Act does not create a privilege, noting that FERPA “provides even less support for a privilege argument than the Virginia statute because it does not prohibit disclosure of the covered information . . . [T]he statute does not use the word ‘privilege’ and it expressly permits court-ordered disclosure of such information.”²¹ Thus, the plaintiffs’ claims of statutory privilege or protection under FERPA and Virginia Code section 22.1-287 are without merit.

B. DEFENDANTS IN VIRGINIA MUST SHOW THROUGH EXPERT EVIDENCE THAT NONPARTY ACADEMIC AND INTELLIGENCE TEST RECORDS ARE RELEVANT AND MATERIAL TO THE ISSUES IN LEAD PAINT CASES

Under Rule 4:1(b)(1) of the Supreme Court of Virginia, discovery sought must be relevant to the subject matter involved in the pending action. In Virginia, information is relevant if it has “any logical tendency, however slight, to prove a fact at issue in the case.”²² Virginia courts have ruled in lead exposure cases that nonparty familial academic records meet this relevancy standard. Courts are most likely to reach this conclusion when the defense proffers competent expert evidence specifically explaining how and why such nonparty information is relevant.

In *Bunch*, the defendant’s expert, Dr. Lawrence Charnas, testified that the educational records of the plaintiff’s mother “could provide information that would tend to prove whether plaintiff’s alleged lead poisoning and deficits are

¹⁸ 20 U.S.C.S. § 1232g(b)(2) (2008).

¹⁹ *Bunch*, 71 Va. Cir. at 365.

²⁰ *Id.* at 364-65.

²¹ *Id.* at 366.

²² *Id.* at 368.

the result of genetic inheritance, biological factors, or some environmental factor other than lead poisoning.”²³ Of the possible factors that could have caused the plaintiff’s cognitive, behavioral, academic, and emotional deficits, lead poisoning ranked at the bottom of the expert’s list.²⁴ More specifically, Dr. Charnas testified that “reading and language disabilities are hereditary and are not associated with lead exposure.”²⁵ The plaintiff’s own expert opined that approximately eighteen percent of a child’s IQ is attributable to the mother’s educational history.²⁶ Based on the experts’ testimony, the court concluded that the mother’s educational information was relevant to the subject matter of the case and reasonably likely to lead to the discovery of admissible evidence.²⁷ Further, the court rejected the plaintiff’s argument that discovery of such information would be unduly burdensome and only lead to more questions, explaining that the very reason for discovery is “to shed light on existing questions and lead to information that will help answer such questions.”²⁸

A number of other Virginia courts have ordered disclosure of familial academic records in lead exposure cases. For example, in *Mitchell v. Fowkes*, the Circuit Court for the City of Richmond ordered that the plaintiff produce maternal academic records pertaining to IQ and school grades to the parties’ experts.²⁹ In *Mutz v. Whitehead*, the Circuit Court for the City of Lynchburg granted the defendant’s motion to compel production of all documents relating to any IQ or other intelligence tests taken by the mother, all records relating to any familial mental disorders or cognitive deficiencies, and all records relating to familial psychological tests.³⁰ Similarly, in *Long v. Shelton*, after hearing testimony from one of the defendants’ experts, the Circuit Court for the City of Fredericksburg ordered disclosure of the academic and intelligence and IQ test results and records of the plaintiffs’ biological parents, siblings, and half-siblings of the plaintiffs.³¹ In addition, Virginia courts have compelled responses to questions relating to familial educational history during depositions. In another lead exposure case, *Peebles v. Cuthrell*, for example, the Portsmouth Circuit Court identified the need to balance the privacy of the plaintiff’s family members with the scope of discovery and concluded that the defendant was entitled

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 361.

²⁶ *Id.* at 368.

²⁷ *Id.* at 370-71.

²⁸ *Id.* at 371.

²⁹ *Mitchell v. Fowkes*, Nos. LM-1184-3 and LM-2714-3 (Cir. Ct. City of Richmond Apr. 9, 2002).

³⁰ *Mutz v. Whitehead*, No. CL04024842-00 (Cir. Ct. City of Lynchburg June 15, 2005).

³¹ *Long v. Shelton*, No. CL05-173 (Cir. Ct. City of Fredericksburg Apr. 3, 2007). The court ordered that third-party subpoenas be returned to the court for initial review by plaintiff’s counsel and then, barring an objection to the release of specific records, produced to defendant’s counsel.

to inquire about and obtain information during depositions regarding parental and nonparty siblings' educational histories.³²

A few older Virginia lead exposure cases depart from the recent cases permitting disclosure of nonparty academic records. In *King v. Manchester Tank & Equipment Co.*, for example, the Circuit Court for the City of Petersburg denied the defendants' motion for the production of maternal and sibling academic records.³³ The court provided little explanation for its decision but did state that it did not "want to open the door to argue because her Mama got a C in physical education that [plaintiff] was physically uncoordinated."³⁴ Similarly, in *Wilson v. Rogers*, the Circuit Court for the City of Portsmouth granted the plaintiffs' motion to quash a subpoena duces tecum for maternal academic records.³⁵ It is important to note, however, that these cases predate the above-cited Virginia cases permitting discovery of nonparty academic records. Thus, in the past few years, Virginia courts have authorized discovery of familial academic records, particularly when the defense sufficiently demonstrates the relevancy and materiality of the information through expert evidence.

C. JURISDICTIONS OUTSIDE VIRGINIA HAVE LIKEWISE CONCLUDED THAT FAMILIAL ACADEMIC RECORDS ARE NOT PRIVILEGED AND ARE DISCOVERABLE UPON A SHOWING THAT THE INFORMATION IS RELEVANT AND MATERIAL

Courts allowing access to broader, family-based discovery of academic records exist in jurisdictions beyond Virginia. The Supreme Court of Iowa, for example, has held that state law does not create a privilege for academic information.³⁶ Iowa Code section 622.10(5) provides that

a practicing attorney, counselor, physician, surgeon, physician assistant, advanced registered nurse practitioner, mental health professional, or the stenographer or confidential clerk of any such person who obtains information by reason of one's employment, or member of the clergy, shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline.³⁷

³² *Peebles v. Cuthrell*, No. CL0499-00 (Cir. Ct. City of Portsmouth Feb. 28, 2005).

³³ No. 730CL96000256 (Cir. Ct. City of Petersburg 1998).

³⁴ *Id.*

³⁵ *Wilson v. Rogers*, No. L98-1676 (Cir. Ct. City of Portsmouth Aug. 30, 2000); *see also* *Cooper, Mayo & Warren v. Penn.*, No. L96-4595 (Cir. Ct. City of Norfolk 1999) (granting plaintiffs' motion to quash subpoenas duces tecum for maternal academic records).

³⁶ *Poole v. Hawkeye Area Cmty. Action Program, Inc.*, 666 N.W.2d 560, 564-65 (Iowa 2003).

³⁷ IOWA CODE § 622.10(5) (2008).

Iowa Code section 22.7, known as the state's Freedom of Information Act, requires that certain public records, including school records pertaining to current, former or prospective students, shall be kept confidential "unless otherwise ordered by a court."³⁸ In *Poole*, a lead exposure case, the Supreme Court of Iowa held that neither Iowa Code section 22.7 nor section 622.10(5) rendered inadmissible the school records of a plaintiff's siblings.³⁹ The court further observed that a subpoena was a sufficient court order under section 22.7(1) "to allow a party to obtain possession of records to allow a court an opportunity to assess their relevance and materiality."⁴⁰ Ultimately, the court upheld the lower court's order admitting the siblings' school records.⁴¹

Many New York courts in lead exposure cases also have held that nonparty academic records are not privileged and, upon a sufficient showing of relevancy, are discoverable. For example, in *Adams v. Rizzo*, the Supreme Court of New York, Onondage County, rejected the plaintiff's argument that a mother's education records, including special education records, were privileged under federal and state law and therefore not discoverable.⁴² The court found that the federal statute, FERPA, and the state statute, New York Education Law section 4005, expressly permit disclosure pursuant to a judicial order or lawfully issued subpoena.⁴³ Relying on *Andon v. 302-304 Mott Street Associates*, which actually reached a contrary conclusion, the *Adams* court explained that no blanket rule could be applied to prohibit certain types of discovery in lead exposure litigation and that discovery requests must be considered on a case-by-case basis "with due regard for the strong public policy supporting open disclosure."⁴⁴

In another New York case, *Whitehurst v. Gandy*, the plaintiff alleged injuries from lead poisoning, including neurological damage, diminished cognitive functioning and intelligence, irreversible brain damage, neurobehavioral injuries, behavioral problems, developmental deficiencies, ADHD, learning disabilities, memory deficits, speech and language delays, and cognitive disturbances.⁴⁵ The Supreme Court of New York, Oneida County, granted the defendants' motion for disclosure of parental educational, employment, and psychological records based on an expert affidavit testifying to the relevancy and materiality of the records to the plaintiff's claimed disabilities and developmental impairments.⁴⁶

³⁸ *Id.* § 22.7.

³⁹ *Poole*, 666 N.W.2d at 564-65.

⁴⁰ *Id.* at 565.

⁴¹ *Id.*

⁴² *Adams v. Rizzo*, 2006 N.Y. Misc. LEXIS 3280, at ***58 (N.Y. Sup. Ct. Nov. 13, 2006).

⁴³ *Id.* at ***55-58.

⁴⁴ *Id.* at ***8.

⁴⁵ *Whitehurst v. Gandy*, 801 N.Y.S.2d 244, 244 (N.Y. Sup. Ct. 2004).

⁴⁶ *Id.*; see also *Caban v. 600 E. 21st St. Co.*, 200 F.R.D. 176, 182-83 (E.D.N.Y. 2001) (ordering in camera inspection of nonparty siblings' academic records); *Anderson v. Seigel*, 680 N.Y.S.2d 587, 589 (N.Y. App. Div. 1998) (finding lower court erred in denying defendants' request for maternal and sibling academic records and ordering in camera disclosure of same).

In the earlier case of *Wepy v. Shen*, the Supreme Court of New York, Appellate Division, concluded that the defendant had adequately demonstrated the relevancy of the plaintiff's nonparty siblings' academic records and thus ordered production of the same.⁴⁷ In ordering disclosure of the siblings' academic records, the court relied upon the affidavit of a medical expert opining that "a possible connection existed between the neurological problems of the plaintiff and those of her siblings, which would support a defense that the injuries sustained by the plaintiff have a genetic cause."⁴⁸

New York courts addressing nonparty discovery issues in medical malpractice litigation have reached the same conclusion. In *Davis v. Elandem Realty Co.*, the Supreme Court of New York, Appellate Division, ruled that academic and school records generally are not privileged "and may be discoverable upon a demonstration that they are relevant and material to the action."⁴⁹ The court found that the defendants had made such a demonstration and thus ordered disclosure of the infant plaintiff's siblings' academic records.⁵⁰ In *Salkey v. Mott*, the same court affirmed a lower court ruling compelling the plaintiff's mother to submit to IQ testing and to provide authorizations to enable the defendants to obtain her academic records.⁵¹ Likewise, the Arizona Court of Appeals allowed discovery of a nonparty sibling's special education records in a medical malpractice case.⁵²

A few New York cases have prohibited defendants from compelling a plaintiff's family member to submit to intelligence testing or from obtaining discovery of nonparty academic records, finding that the defense failed to demonstrate a sufficient need for the information to overcome the privacy of the nonparties. In *Monica v. Milevoi*, the Supreme Court of New York, Appellate Division (First Department), prohibited IQ testing of nonparty siblings because the defendants failed to produce an affidavit by an expert "to demonstrate that the extent to which the adverse effects of lead exposure contributed to the mental and physical condition of the infant plaintiffs cannot be ascertained by reference to the objective clinical criteria and expert testimony."⁵³ In *Andon v. 302-304 Mott Street Associates*, the same court reversed the lower court's ruling granting the defendant's motion to compel the plaintiff's mother to submit to an IQ test.⁵⁴ Despite expert testimony that "information regarding maternal IQ is extremely relevant to the assessment of whether a child is performing according to his or her potential," the court held that the correlation between a mother's IQ

⁴⁷ *Wepy v. Shen*, 571 N.Y.S.2d 817, 818 (N.Y. App. Div. 1991).

⁴⁸ *Id.*

⁴⁹ *Davis v. Elandem Realty Co.*, 641 N.Y.S.2d 72, 73 (N.Y. App. Div. 1996).

⁵⁰ *Id.*

⁵¹ *Salkey v. Mott*, 656 N.Y.S.2d 886, 887 (N.Y. App. Div. 1997).

⁵² *Catrone v. Miles*, 160 P.3d 1204, 1216 (Ariz. Ct. App. 2007).

⁵³ 685 N.Y.S.2d 231, 234 (N.Y. App. Div. 1999).

⁵⁴ *Andon v. 302-304 Mott Street Assocs.*, 690 N.Y.S.2d 241, 245 (N.Y. App. Div. 1999).

and a child's intelligence was insufficient.⁵⁵ The court reasoned that "[i]n our view . . . since so many variables are involved, the test result will raise more questions than it will answer and will hardly aid in the resolution of causality."⁵⁶ In *Nieves v. 1845 7th Avenue Realty Associates*, the Supreme Court of New York, New York County, denied discovery of siblings' academic records because "neither plaintiffs nor defendants [had] made a sufficient showing that the siblings' academic records [were] relevant or material to the question of whether the infant plaintiff's cognitive deficits and emotional behavior problems are causally related to his ingestion of lead paint."⁵⁷ Finally, in *Van Epps v. County of Albany*, the Supreme Court of New York, Albany County, held that the defendants were not entitled to discovery of parental and sibling academic records or information because they had failed to demonstrate a need for the disclosure of the nonparty academic records sufficient to outweigh the need for protection of the nonparties' privacy.⁵⁸

In addition to finding that the defendants had failed to make a sufficient showing of the relevancy of nonparty academic records, the courts in the foregoing cases expressed hesitancy to compel production of such information because to do so would open the door to more questioning rather than narrow and focus the scope of the litigation.⁵⁹ These cases reflect concern that the expansion of discovery beyond plaintiffs will "dramatically broaden the scope of litigation . . . contrary to current trends in litigation, which aim to streamline and limit discovery procedures."⁶⁰ Despite this concern, however, as the above discussion demonstrates, more recent rulings by New York courts addressing the discoverability of nonparty academic records have relied upon the *Andon* decision and ordered disclosure of familial academic records upon a sufficient showing of need for the information.

⁵⁵ *Id.* at 243.

⁵⁶ *Id.* at 244.

⁵⁷ *Nieves v. 1845 7th Ave. Realty Assocs., L.P.*, 710 N.Y.S.2d 782, 786 (N.Y. Sup. Ct. 2000).

⁵⁸ *Van Epps*, 706 N.Y.S.2d at 862, 865.

⁵⁹ See *Andon*, 690 N.Y.S.2d at 244 ("In our view, however, since so many variables are involved, the test result will raise more questions than it will answer and hardly aid in the resolution of the question of causality. Even if maternal IQ may be a factor in determining a child's intelligence, extending the inquiry into this area would dramatically broaden the scope of the litigation . . . turning the fact-finding process into a series of mini-trials regarding, at a minimum, the factors contributing to the mother's IQ and, possibly, that of other family members. There is no logical end to the litigation inquiry once individual boundaries are crossed.") (citations omitted). See also *Milevoi*, 685 N.Y.S.2d at 234 ("Defendants have not established that the line of inquiry they seek to pursue will avail them of any useful information relevant to the cause of the infant plaintiffs' impairment."); *Van Epps*, 706 N.Y.S.2d at 865 ("[I]f the requested disclosure is allowed, defendants will merely embark on a highly intrusive and, yet, never-ending foray into the realm of speculation, that offers no hope of achieving a resolution of any causality issue.").

⁶⁰ *Wiggins*, *supra* note 2, at 1060.

II. VIRGINIA COURTS PERMIT DISCOVERY OF NONPARTY MEDICAL RECORDS

In addition to requesting academic records, defendants in lead exposure cases have requested familial medical records to discover information regarding genetic factors as contributing and/or causal factors to a plaintiff's alleged injuries. Although medical records are privileged by statute in Virginia,⁶¹ the existence of the privilege does not end the inquiry. Pursuant to Virginia Code section 8.01-399(B), when the physical or mental condition of the patient is at issue in a civil action, the patient waives her physician-patient privilege.⁶² While this language leaves little doubt that an injured plaintiff's medical records are not privileged, controversy and confusion arise when a court is dealing with persons who are not parties to the lawsuit. Arguably, a plaintiff suing as a mother or guardian of an infant in a representative capacity does not place his or her own medical condition in issue and, thus, does not waive the physician-patient privilege under section 8.01-399(B). Nevertheless, courts typically permit discovery of maternal prenatal and birth records relating to the infant plaintiff and frequently order disclosure of other nonparty medical records for good cause.

A. PRENATAL AND BIRTH RECORDS ARE GENERALLY DISCOVERABLE

Courts in Virginia and other jurisdictions have consistently held that prenatal and birth records are discoverable on the basis that an infant plaintiff's prenatal history cannot be severed from the mother's medical history. As the Supreme Court of New York, New York County, recently explained in *NCP v. City of New York* after rejecting the plaintiff's claim that prenatal records were protected from disclosure by the physician-patient privilege,

[w]here a child's medical condition is at issue, the courts have held that a mother's medical records pertaining to the period when the infant was *in utero* are discoverable on the ground that there can be no severance of the infant's prenatal history from the mother's medical history for that period of time.⁶³

Such records are also discoverable in Virginia. In *Mitchell*, the Circuit Court for the City of Richmond ordered production of all maternal medical records spanning two years before the infant plaintiffs' births and continuing through the mother's entire hospitalization following the births.⁶⁴ To address privacy concerns, the court ordered that the documents be produced under seal and delivered to the parties' medical experts for review.⁶⁵ Similarly, the Circuit Court for

⁶¹ VA. CODE ANN. § 8.01-399 (2008).

⁶² *City of Portsmouth v. Cilumbrello*, 129 S.E.2d 31, 34 (Va. 1963).

⁶³ 841 N.Y.S.2d 827, 827 (N.Y. Sup. Ct. 2007).

⁶⁴ *Mitchell v. Fowkes*, Nos. LM-1184-3 and LM-2714-3 (Cir. Ct. City of Richmond Apr. 9, 2002).

⁶⁵ *Id.*

the City of Portsmouth ordered production of maternal prenatal, labor and delivery, and postpartum records in *Wilson*,⁶⁶ and in *Jordan v. Tidewater Investment Properties*, the Norfolk Circuit Court ordered production of maternal prenatal and birth records.⁶⁷

B. OTHER NONPARTY MEDICAL RECORDS ARE DISCOVERABLE WHEN NECESSARY TO THE ADMINISTRATION OF JUSTICE OR UPON A SHOWING OF GOOD CAUSE

In accordance with Virginia Code section 8.01-399(B), Virginia courts in child lead exposure cases have held that defendants can overcome the physician-patient privilege associated with other nonparty medical records by demonstrating that the requested information is necessary to the administration of justice and reasonably calculated to lead to the discovery of admissible evidence. Further, Virginia Code section 32.1-127.1:1:03(D)(2) instructs that healthcare entities may disclose patient records in compliance with a subpoena or pursuant to a court order upon a showing of good cause.⁶⁸ For example, in *Mutz v. Whitehead*, the Circuit Court for the City of Lynchburg held that production of the medical records of the plaintiff's mother and nonparty sibling was reasonably calculated to lead to the discovery of admissible evidence and necessary to the administration of justice.⁶⁹ The court addressed the plaintiff's confidentiality concerns by ordering the parties to submit a protective order to maintain the confidentiality of the documents during the course of the litigation.⁷⁰ Similarly, in *Long*, the Fredericksburg Circuit Court permitted discovery of the medical records of the infant plaintiffs' parents, siblings and half-siblings.⁷¹

Several other states have permitted discovery of nonparty medical records upon a showing of relevancy and where sufficient measures are taken to protect the rights of the nonparties. For example, Florida has allowed discovery of nonparty medical records where measures such as redaction of nonparty identifying information are undertaken to protect the privacy interests of the nonparties.⁷² In *Whitehurst*, the New York court ordered in camera disclosure in a lead exposure case of parental psychological records.⁷³ And, in *Palmer v. Asarco, Inc.*, the United States District Court for the Northern District of Oklahoma ordered production of the medical records of siblings dismissed from a lead dust inhalation class action suit on the grounds that "medical information concerning non-

⁶⁶ *Wilson v. Rogers*, No. L98-1676 (Cir. Ct. City of Portsmouth 2000).

⁶⁷ *Jordan v. Tidewater Inv. Props.*, No. L98-2660 (Cir. Ct. City of Norfolk Jan. 11, 2000).

⁶⁸ VA. CODE ANN. § 32.1-127.1:1:03(D)(2) (2008).

⁶⁹ *Mutz v. Whitehead*, No. CL04024842-00 (Cir. Ct. City of Lynchburg June 15, 2005).

⁷⁰ *Id.*

⁷¹ *Long v. Shelton*, No. CL05-173 (Cir. Ct. City of Fredericksburg Apr. 3, 2007).

⁷² *Age Inst. of Fla., Inc. v. McGriff*, 884 So.2d 512, 514 (Fla. Dist. Ct. App. 2004).

⁷³ 801 N.Y.S.2d at 244.

party siblings is relevant or may lead to admissible evidence regarding the cause of the cognitive disabilities alleged herein.”⁷⁴

Other states, however, have rejected this approach, finding that the physician-patient privilege enjoyed by nonparties outweighs a defendant’s need to obtain the requested medical information. In *Dierickx v. Cottage Hospital Corp.*, a medical malpractice case, the Court of Appeals of Michigan considered whether to compel production of the medical records of plaintiff’s nonparty siblings so that the defendants could explore whether the infant plaintiff’s condition had a genetic cause.⁷⁵ The court concluded that the records were privileged, that the privilege had not been waived by the nonparty siblings, and that “the force of the statutory privilege outweigh[ed] defendants’ concern over plaintiffs’ use of it to gain a strategic advantage.”⁷⁶ In *John Pierce, PPA v. Whitney Street Associates*, the Superior Court of Connecticut (Fairfield) held that the “bare assertion” that defendants were entitled to the mother’s medical history as part of an exploration of all possible biological, psychological and environmental factors contributing to the plaintiffs’ injuries allegedly caused by lead-based paint exposure was insufficient to overcome the statutory privilege.⁷⁷ The court emphasized the defendants’ failure to cite any case-specific facts or provide an expert opinion that would demonstrate the relevancy and necessity of the information.⁷⁸ Similarly, in *Muniz v. Preferred Associates*, the Supreme Court of New York (First Department) held that the medical records of the plaintiff’s half-sibling were privileged, and the privilege was not waived and “could not be waived by any party to [the] action on his behalf.”⁷⁹ In *Van Epps*, the Supreme Court of New York, Albany County, concluded that the nonparty parents and siblings had not waived their privilege, either implicitly or explicitly and, therefore, information regarding their medical histories was not discoverable.⁸⁰ In reaching its decision, the court explained that “[e]stablishing relevance involves a balancing of interests of the parties and public policy. Discovery requests that tend to broaden the scope of litigation and intrude upon rights to privacy should not be permitted unless there is a showing that the need for disclosure outweighs the importance of protecting nonparties’ privacy.”⁸¹

⁷⁴ *Palmer v. Asarco, Inc.*, 225 F.R.D. 258, 262 (N.D. Okla. 2004).

⁷⁵ *Dierickx v. Cottage Hosp. Corp.*, 393 N.W.2d 564, 565 (Mich. Ct. App. 1986).

⁷⁶ *Id.* at 567.

⁷⁷ 2000 Conn. Super. LEXIS 1533, at *3 (Conn. Super. Ct. 2000).

⁷⁸ *Id.* at *7.

⁷⁹ 592 N.Y.S.2d 734 (N.Y. App. Div. 1993); *see also Wepy*, 571 N.Y.S.2d at 818 (finding that defendants had not demonstrated entitlement to sibling medical records).

⁸⁰ *Van Epps*, 706 N.Y.S.2d at 861.

⁸¹ *Id.* at 860.

III. RECORDS PERTAINING TO ENVIRONMENTAL CAUSATION FACTORS ARE DISCOVERABLE IN LEAD EXPOSURE CASES

Defendants in lead exposure cases also frequently seek documents and information pertaining to the plaintiff's living environment, such as social services records, housing records, parental employment records, parental criminal records, and child protective services records. Defendants use such information to identify possible environmental or socioeconomic factors that may have caused or contributed to the infant plaintiff's alleged cognitive and behavioral deficits. Scientists have discovered that socioeconomic status impacts intelligence through factors such as parental stimulation, nutrition, and resources available in the home.⁸² Moreover, with respect to parental employment records, research shows that a mother's employment status can affect the behavioral and cognitive development of her children.⁸³ Department of Social Services ("DSS") and Child Protective Services ("CPS") records are also important, as research has shown "the essential importance of specifically considering the caretaking environment when evaluating the effects of low-level lead exposure on cognitive development."⁸⁴ Furthermore, whether a child plaintiff has been abused clearly is relevant to issues of causation and damages in child lead exposure cases.

Although plaintiffs often argue that the above information is confidential, many courts have held that such information is discoverable. In *Long*, for example, the Circuit Court for the City of Fredericksburg ordered disclosure of parental employment and criminal records and DSS and CPS records.⁸⁵ Likewise, in *Archie v. Smith*, the court ordered disclosure of the infant plaintiff's and plaintiff's mother's social services records that were relevant to the issues of contributory negligence or proximate cause, as determined by counsel for plaintiff and the court.⁸⁶ In addition, the Circuit Court for the City of Norfolk permitted in camera inspection of DSS records in *Jordan*.⁸⁷

Outside Virginia, the Maryland Court of Appeals in *Baltimore City Department of Social Services v. Stein*, a case of first impression, considered "whether . . . a state's interest in the confidentiality of its social services record must yield to the civil defendant's right to discover favorable evidence bearing on his threatened loss of property" in a child lead exposure case.⁸⁸ The defendant ar-

⁸² Centers for Disease Control, *supra* note 10, at 23.

⁸³ See Aurora P. Jackson, *The Effects of Family and Neighborhood Characteristics on the Behavioral and Cognitive Development of Poor Black Children: A Longitudinal Study*, 32 AM. J. COMMUNITY PSYCHOL. 175 (Sept. 2003).

⁸⁴ Greene *et al.*, *supra* note 14, at 256; see also Burchinal *et al.*, *supra* note 14, at 947, 950-51 (finding that "cognitive performance was strongly associated with the degree of responsive, stimulating care available to the child at home").

⁸⁵ *Long v. Shelton*, No. CL05-173 (Cir. Ct. City of Fredericksburg Apr. 3, 2007).

⁸⁶ No. 2936-3 (Cir. Ct. City of Richmond 2003)

⁸⁷ Hearing Tr. in *Jordan v. Tidewater Inv. Props.*, No. L98-2660 (Cir. Ct. City of Norfolk Nov. 19, 1999).

⁸⁸ 612 A.2d 880, 891 (Md. 1992).

gued that the DSS records at issue could reveal information such as child abuse or neglect or other psychological or psychiatric problems that would be directly relevant to the case.⁸⁹ The court, finding that the defendant had demonstrated a plausible link between the records sought and the plaintiff's action, affirmed the lower court's ruling compelling disclosure of DSS records, while protecting the plaintiff's confidentiality concerns by instructing that "there should be no greater disclosure allowed than is necessary."⁹⁰

New York courts also have permitted similar discovery, noting the strong policy favoring open disclosure. In *Adams v. Rizzo*, the court granted the defendants' motion to compel the plaintiff's nonparty mother to respond to deposition questions regarding participation in any social services and rental assistance programs.⁹¹ The court also noted that deposition questions regarding parental employment histories were relevant to determining whether others, such as child care providers, might have witnessed the condition of the property.⁹² With respect to questions regarding prior residences, the court concluded that no privilege prevented disclosure of such information, and that the questions were aimed at identifying all school districts in which the plaintiff resided.⁹³ In *Anderson*, the court reversed a lower court decision denying production of employment records, holding that the mother's employment records were likely to lead to the discovery of admissible or relevant evidence.⁹⁴ Likewise, in *Salkey*, the court held that the mother's employment records were not privileged and ordered their production.⁹⁵

IV. CONCLUSION

In child lead exposure cases, courts in Virginia and elsewhere have permitted discovery relating to nonparty family members of the minor plaintiff. A growing number of courts now recognize that familial information is relevant and necessary to a defendant's mitigation and alternative causation defenses, for without such information, defendants cannot explore the existence and influence of scientifically recognized alternative genetic, medical, and/or environmental causes to a plaintiff's alleged injuries. Courts are most likely to authorize discovery pertaining to third-party family members when a defendant has proffered expert evidence specifically demonstrating the relevancy of the familial information to the causation issues in the case.

Accordingly, defense attorneys in child lead exposure cases—and indeed, in any type of case involving claims of similar cognitive and behavioral-type defi-

⁸⁹ *Id.* at 881.

⁹⁰ *Id.* at 894-95.

⁹¹ *Adams*, 2006 N.Y. Misc. LEXIS at ***82, 88.

⁹² *Id.* at ***85.

⁹³ *Id.* at ***84-85.

⁹⁴ 680 N.Y.S.2d at 589.

⁹⁵ *Salkey*, 656 N.Y.S.2d at 887.

cits—should issue discovery requests and subpoenas to obtain familial academic, medical, employment, criminal, and social services history information and documents to identify and explore whether the infant plaintiff's alleged injuries were caused by genetic and/or environmental factors rather than lead exposure as claimed. Defense attorneys also should ask deposition questions on these subjects. In conducting such discovery, defense attorneys should be prepared to rebut a plaintiff's "fishing expedition" argument with persuasive case law and expert evidence reinforced by sound scientific/medical literature demonstrating the information's relevancy. Without access to familial educational, medical, and social information, defendants in lead exposure cases are severely handicapped in their abilities to rebut and defend against the plaintiffs' causation theories and claimed damages. Thus, the defense bar must continue to arm courts with the information necessary to justify the emerging trend toward broader, family-based discovery in child lead exposure cases.
