

statute is broad). Additionally, the statute is open-ended, utilizing the language “may include, but is not limited to” to describe a communication. We find that Pleli’s course of treatment is privileged information and is protected by R.C. 2317.02(B)(1).

{¶17} Therefore, because the physician-patient privilege is applicable in this case, we find that the trial court abused its discretion when it denied appellees access to Pleli’s medical records while at the same time ordering appellants to provide information regarding the treatment received by Pleli. By allowing testimony concerning Pleli’s course of treatment, the trial court provided an unacceptable end-run around R.C. 2317.02(B)(1). Furthermore, the order was internally inconsistent in that it disallowed discovery of Pleli’s medical records, yet allowed deposition testimony on the very same information found in those records.

{¶18} Appellees have also argued that Health Insurance Portability and Accountability Act (“HIPAA”) has preempted R.C. 2317.02, thus allowing for discovery of Pleli’s privileged information. This argument is unpersuasive.

{¶19} Appellees point to Section 1320d-7, Title 42, U.S.Code for the proposition that HIPAA privacy regulations supersede contrary state laws. That section states:

(a)(1) Except as provided in paragraph (2), a provision or requirement under this part, or a standard or implementation specification adopted or established under sections 1320d-1 through

1320d-3 of this title, shall supersede any contrary provision of State law.

Nevertheless, as NONA correctly pointed out in its reply brief, the statute has created statutory exceptions to this general rule:

A provision or requirement under this part, or a standard or implementation specification adopted or established under sections 1320d-1 through 1320d-3 of this title, shall not supersede a contrary provision of State law, if the provision of State law\*\*\*.

(B) subject to section 264(c)(2) of the Health Insurance Portability and Accountability Act of 1996, relates to the privacy of individually identifiable health information.”

Section 1320d-7(a)(2)(B), Title 42, U.S.Code.

{¶20} Because the provision of state law at issue here relates to the privacy of individually identifiable health information, R.C. 2317.02(B)(1) is not superseded by Section 1320d-7. However, HIPAA also contains a preemption provision that must be reviewed. The applicable provision is found in Section 160.203, Title 45, C.F.R. and states:

A standard, requirement, or implementation specification adopted under this subchapter that is contrary to a provision of State law preempts the provision of State law. This general rule applies, except if one or more of the following conditions is met:

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(b) The provision of state law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter.

{¶21} The “Definitions” section found in Section 160.202, Title 45, C.F.R. is helpful in parsing out exactly what 160.203(b) states with regard to the

preemption of state law. A state law “[r]elates to the privacy of individually identifiable health information” when the state law has the “specific purpose of protecting the privacy of health information or affects the privacy of health information in a direct, clear, and substantial way.” Section 160.202, Title 45, C.F.R. A state law is “more stringent” under the exception of 160.203(b) when “[w]ith respect to use or disclosure” of individually identifiable health information, “the law prohibits or restricts a use or disclosure \*\*\* under which such use or disclosure otherwise would be permitted under this subchapter.” *Id.*

{¶22} We think it plain that R.C. 2317.02(B)(1) relates to the privacy of individually identifiable health information. The clear purpose of R.C. 2317.02(B)(1) is to codify the physician-patient privilege and protect the patient’s health information. Furthermore, R.C. 2317.02(B)(1) is more stringent because it prohibits use or disclosure of health information when such use or disclosure would be allowed under HIPAA. The HIPAA privacy regulation, found in Section 164.512, Title 45, C.F.R. allows disclosure of protected health information in the course of any judicial or administrative proceeding in response to a court order. HIPAA also allows for discovery of privileged health information by subpoena, discovery request, or by other lawful processes if the covered entity receives adequate assurances that the individual who is the subject of the health information has been given notice of the request or that reasonable efforts have been made to secure a protective order. Section 164.512(e), Title 45, C.F.R.

{¶23} In contrast, R.C. 2317.02(B)(1) allows disclosure in a civil case only under very specific circumstances: patient waiver, consent by spouse or executor if patient is deceased, civil actions filed by the patient, or civil actions concerning court-ordered treatments. R.C. 2317.02(B)(1)(a)(i) through (iii); R.C. 2317.02(B)(1)(b). We think it apparent that the regulations protecting the physician-patient privilege in Ohio are more stringent than those put forward in HIPAA. Therefore, because R.C. 2317.02(B)(1) relates to the privacy of individually identifiable health information and is more stringent than Section 164.512, Title 45, C.F.R., we find that HIPAA does not preempt R.C. 2317.02(B)(1).

{¶24} Finally, appellees have argued that a trial court may permit discovery of patient information when the personal information is redacted and when limitations are placed on access to the material. Appellees cite the recent decision of the First Appellate District in *Richards v. Kerlakian*, 1st Dist. No. C-040825, 2005-Ohio-4414, for the propositions that “the privilege afforded under R.C. 2317.02 is not absolute” and that discovery of confidential information is allowable “as long as the nonparty patient’s identity is sufficiently protected.” *Id.* at ¶5. This argument is unpersuasive in the context of the present facts, and appellees’ emphasis on this case is misplaced.

{¶25} First, *Richards* is distinguishable from the instant matter on the facts. In *Richards*, the trial court’s discovery order specified protective measures such as