

# Transfusion-Related Aids Litigation: Permitting Limited Discovery from Blood Donors in Single Donor Cases

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# NOTES

## TRANSFUSION-RELATED AIDS LITIGATION: PERMITTING LIMITED DISCOVERY FROM BLOOD DONORS IN SINGLE DONOR CASES

### I

#### INTRODUCTION

The emergence of acquired immunodeficiency syndrome<sup>1</sup> (AIDS) as a major cause of death during the 1980s<sup>2</sup> has spawned numerous legal issues. One such issue arises in the discovery proceedings of blood transfusion and blood bank litigation.<sup>3</sup> Blood

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<sup>1</sup> Acquired immunodeficiency syndrome is a fatal disease resulting from infection with human immunodeficiency virus (HIV). Centers for Disease Control, *AIDS and Human Immunodeficiency Virus Infection in the United States: 1988 Update*, 38 MORBIDITY & MORTALITY WEEKLY REP. NO. S-4, 1 (1989) [hereinafter *1988 Update*]. The virus renders the body unable to fight diseases. CENTERS FOR DISEASE CONTROL, U.S. PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, NO. (CDC) HHS-88-8404, UNDERSTANDING AIDS 2 (1988) [hereinafter UNDERSTANDING AIDS]. AIDS represents "the clinical endpoint of the continuum of infection with HIV." *1988 Update, supra*. For additional information on the history, causes, symptoms, treatment, and social ramifications of AIDS, refer to the October 1988 edition of Scientific American, which is entirely devoted to the subject of AIDS. *What Science Knows About AIDS*, SCI. AM., Oct. 1988.

<sup>2</sup> The United States Department of Health and Human Services has identified AIDS as "one of the most serious health problems that has ever faced the American public." UNDERSTANDING AIDS, *supra* note 1, at 2. According to the Centers for Disease Control in Atlanta, provisional data indicate that through November 1990 a total of 157,525 AIDS cases had been reported in the United States. CENTERS FOR DISEASE CONTROL, HIV/AIDS SURVEILLANCE REPORT 9 (Dec. 1990) [hereinafter HIV/AIDS SURVEILLANCE REPORT].

<sup>3</sup> Several commentators have addressed the issue of discovery from blood donors in the context of transfusion-related AIDS litigation. See Richard C. Bollow & Daryl J. Lapp, *Protecting the Confidentiality of Blood Donors' Identities in AIDS Litigation*, 37 DRAKE L. REV. 343 (1987-1988); Robert K. Jenner, *Identifying HIV-Infected Blood Donors*, TRIAL, June 1989, at 47; Karen Shoos Lipton, *Blood Donor Services and Liability Issues Relating to Acquired Immune Deficiency Syndrome*, 7 J. LEGAL MED. 131 (1986); Note, *AIDS: Anonymity in Donation Situations - Where Public Benefit Meets Private Good*, 69 B.U.L. REV. 187 (1989) (authored by Marla S. Kirsh) [hereinafter Note, *Anonymity in Donation Situations*]; Note, *The Privacy Interests of AIDS-Infected Blood Donors - Rasmussen v. South Florida Blood Service* 18 CUMB. L. REV. 267 (1987) (authored by Suzette Lewis Davie); Note, *AIDS-Related Litigation: the Competing Interests Surrounding Discovery of Blood Donors' Identities*, 19 IND. L. REV. 561 (1986) (authored by Denise Clare Andresen) [hereinafter Note, *Competing Interests*]; Note, *AIDS: A Threat to Blood Donor Anonymity*, 66 NEB. L. REV. 863 (1987) (authored by Cheryl R. Zwart) [hereinafter Note, *AIDS: A Threat*]; see also Diane Wyatt, Martha Payne, Lynn Ingram & Eva Quinley, *AIDS: Legal and Ethical Concerns for the Clinical Laboratory*, 4 J. MED. TECH. 108, 110-11 (1987) [hereinafter *Legal and Ethical Concerns*] (the devastating and discriminatory effects of AIDS require both education as to infection control procedures and a balancing of privacy rights against the maintenance of a safe blood supply). See generally CHARLES S. DALE, NANCY L. JONES, JAY R. SHAMPANSKY, THE LIBRARY OF CON-

transfusions, although a relatively minor source of HIV transmission,<sup>4</sup> have involved blood banks in at least two distinct forms of lawsuits.

In one type of lawsuit, referred to in this Note as a multiple donor case, an HIV-infected plaintiff seeks to prove that he acquired the virus from blood transfusions. This type of case arises in two different contexts. In the first, the plaintiff sues a defendant in negligence for causing physical injuries, the treatment of which necessitated blood transfusions. Here, the infected plaintiff seeks to prove that he contracted AIDS from the blood transfusions; any damage award would then include compensation for his infection with AIDS.<sup>5</sup> In the second context, the plaintiff sues the blood bank for negligently failing to screen out an HIV-infected donor. Here, too, the plaintiff must prove that the transfusions provided by the blood bank caused him to acquire AIDS.<sup>6</sup> In both contexts, the plaintiff seeks discovery of the identities of all the blood donors from whom he received transfusions. To prove that he contracted HIV from the transfusions, the plaintiff must show that at least one donor carries HIV or suffers from AIDS. The plaintiff may need to question the donors to obtain this information.

In a second type of lawsuit, referred to in this Note as a single donor case, a recipient of HIV-infected blood sues the blood bank for negligence. Unlike the multiple donor case, however, neither causation nor the donor's HIV status is at issue. Here, the blood bank has acknowledged that it provided the recipient with HIV-infected blood, because the bank identified the original donor as HIV-infected when the donor attempted a repeat donation. The transfusion recipient seeks to prove that the blood bank acted negligently in failing to screen out the HIV-infected donor. He therefore may

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GRESS, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS PUB. NO. 87-738 A, BLOOD TESTING FOR ANTIBODIES TO THE AIDS VIRUS: THE LEGAL ISSUES (1987) (discussing the legal issues surrounding blood testing, including constitutional and statutory bases for protecting public health, privacy, testing accuracy, and for protecting against discrimination); NANCY L. JONES, LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH REPORT FOR CONGRESS PUB. NO. 87-236 A, ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS): A BRIEF OVERVIEW OF THE MAJOR LEGAL ISSUES (1987) (discussing AIDS-related issues including those pertaining to federal statutes, discrimination, education, employment, and criminal law).

<sup>4</sup> Sexual contact and the sharing of drug needles represent the main sources of virus transmission. UNDERSTANDING AIDS, *supra* note 1, at 2. According to provisional data collected by the Centers for Disease Control as of November 1990, a cumulative total of 3874 cases of AIDS have resulted from transfusions of blood, blood components, or receipt of tissue; the total includes 905 new cases reported between December 1989 and November 1990. HIV/AIDS SURVEILLANCE REPORT, *supra* note 2, at 8.

<sup>5</sup> See *Rasmussen v. South Fla. Blood Serv.*, 500 So. 2d 533 (Fla. 1987) (exemplifying the first variation of the multiple donor case).

<sup>6</sup> See *Krygier v. Airweld, Inc.*, 137 Misc. 2d 306, 520 N.Y.S.2d 475 (Sup. Ct. 1987) (exemplifying the second variation of the multiple donor case).

need to question the donor to determine whether the blood bank followed its own screening guidelines in accepting the particular donation.<sup>7</sup>

In both types of lawsuits, the blood bank alone knows the identity of the donor. The blood bank typically provides the plaintiff with any documentation generated during the screening process, but refuses the plaintiff's discovery request for identifying information, including the donors' names, addresses, and telephone numbers.

In determining whether to grant discovery, courts balance the competing interests of the plaintiff and the donor. In the multiple donor case, the plaintiff asserts his interest in obtaining information necessary either to receive full compensation for injuries suffered (the first context) or to prove negligence (the second context). In the single donor case, the plaintiff's interest always lies in obtaining information necessary to prove negligence. In both types of cases, the blood bank asserts the donor's interest in confidentiality and society's interest in maintaining an adequate volunteer blood supply. Although all courts have analyzed the question of compelling discovery within this balancing framework, their conclusions vary. Some courts have flatly denied discovery; others have permitted different forms of limited discovery. While the particular facts surrounding each discovery request certainly influence the courts' decisions, the variations in judicial decisions reflect differing weights that courts accord to the competing interests. Just as significantly, these variations indicate a judicial failure adequately to appreciate the distinctions between multiple and single donor cases.

This Note explores both the distinctions between the multiple and single donor cases and the competing interests. The Note argues that courts should deny discovery from a blood donor in multiple donor cases but should permit limited discovery from a blood donor in single donor cases, provided the plaintiff demonstrates a need to depose that donor. Courts can craft such discovery under Rule 26(c) of the Federal Rules of Civil Procedure<sup>8</sup> to protect the donor's identity from public disclosure, while enabling the plaintiff to collect the information necessary to prove his claim. Such limited discovery should have no appreciable impact on the nation's volunteer blood supply.

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<sup>7</sup> See *Boutte v. Blood Sys.*, 127 F.R.D. 122 (W.D. La. 1989) (exemplifying the single donor case). For background information on this type of litigation, see Gregory N. Woods & Ann V. Thornton, *Deadly Blood: Litigation of Transfusion-Associated AIDS Cases in Texas*, 21 TEX. TECH L. REV. 667 (1990).

<sup>8</sup> See *infra* notes 9-44 and accompanying text.

## II BACKGROUND

### A. Discovery and Protective Orders Under Rule 26(c)

The rules of discovery, set forth in Rules 26 through 37 of the Federal Rules of Civil Procedure, specify the means by which litigants collect information before trial.<sup>9</sup> The Rules include provisions regarding both the scope and the methods of discovery. The central purpose of discovery is to enable litigants to conduct a wide search for facts and other material that may help them prepare and present their cases.<sup>10</sup>

Pursuant to this purpose, Rule 26(b)(1) allows for a broad scope of discovery.<sup>11</sup> The Rule permits discovery, unless limited by court order, of any information that meets the tests for relevance and absence of legal privilege.<sup>12</sup> Courts view the relevance requirement with flexibility.<sup>13</sup> The legal privilege referred to in the Rule relates to evidentiary privileges.<sup>14</sup> The Rule further states that inadmissibility at trial does not in itself limit the scope of discovery.<sup>15</sup>

Rule 26(b), however, does not operate in a vacuum. Rather, Rule 26(c) of the Federal Rules of Civil Procedure enables a district court to limit the expansive scope of discovery that Rule 26(b) would otherwise permit. Specifically, Rule 26(c) authorizes a court to issue protective orders designed to safeguard persons or parties

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<sup>9</sup> 4 JAMES W. MOORE, JAY D. LUCAS & GEORGE J. GROTHEER, JR., *MOORE'S FEDERAL PRACTICE* ¶ 26.02 (2d ed. 1989).

<sup>10</sup> FED. R. CIV. P. 26(b) advisory committee's notes on 1946 amendment, *reprinted in* FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 78 (West 1989) [hereinafter *FEDERAL CIVIL PROCEDURE*]; *see also* *Heat & Control, Inc. v. Hester Indus., Inc.*, 785 F.2d 1017, 1024 (Fed. Cir. 1986).

<sup>11</sup> FED. R. CIV. P. 26(b) advisory committee's note (1946), *reprinted in* FEDERAL CIVIL PROCEDURE, *supra* note 10, at 78; *see also* *First Sav. & Loan Ins. Corp. v. Alexander*, 590 F. Supp. 834, 840 (D. Haw. 1984).

<sup>12</sup> FED. R. CIV. P. 26(b). Rule 26(b) provides, in pertinent part: "Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (I) . . . Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . ."

<sup>13</sup> *See* *Herbert v. Lando*, 441 U.S. 153, 177 (1979); *Schlagenhauf v. Holder*, 379 U.S. 104, 114 (1964); *Hickman v. Taylor*, 329 U.S. 495, 507 (1947); *Truswal Sys. Corp. v. Hydro-Air Eng'g, Inc.*, 813 F.2d 1207, 1211 (Fed. Cir. 1987); *see also* *Springer v. Seamen*, 821 F.2d 871, 882 (1st Cir. 1987) (where documents "may well be relevant" to plaintiff's burden of proof, the district court improperly denied discovery on the basis of irrelevancy).

<sup>14</sup> *United States v. Reynolds*, 345 U.S. 1, 6 (1953); *Armour Int'l Co. v. Worldwide Cosmetics*, 689 F.2d 134, 135 (7th Cir. 1982); JAMES W. MOORE, 1 *MOORE'S FEDERAL PRACTICE RULES PAMPHLET* 304 (1990).

<sup>15</sup> FED. R. CIV. P. 26(b)(1). The Rule provides, in pertinent part: "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *See* FED. R. CIV. P. 26(b) advisory committee's notes on 1946 amendment, *reprinted in* FEDERAL CIVIL PROCEDURE, *supra* note 10, at 78.

from a wide range of abusive discovery:<sup>16</sup> "Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense . . . ."<sup>17</sup>

In implementing Rule 26(c), a trial judge retains considerable discretion to determine, on the facts of a particular case, whether and how to restrict discovery.<sup>18</sup> The party seeking a protective order (either the plaintiff or the defendant) bears the burden of showing the existence of "good cause," as stated in the text of the Rule.<sup>19</sup> Moreover, a showing of good cause must rest on demonstrable facts, not just "stereotyped and conclusory statements."<sup>20</sup>

In determining whether to issue a protective order, a court does not confine its perspective to the party seeking protection. The court also considers "the relative hardship to the non-moving party should the protective order be granted."<sup>21</sup> In practice, district courts balance the interests of the parties or persons involved.<sup>22</sup> The Rule itself does not explicitly incorporate a balancing process; however, the Eleventh Circuit Court of Appeals has explained: "While Rule 26(c) articulates a single standard for ruling on a protective order motion, that of 'good cause,' the federal courts have superimposed a somewhat more demanding balancing of interests

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<sup>16</sup> See 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2035, at 260 (1970) [hereinafter WRIGHT & MILLER].

<sup>17</sup> FED. R. CIV. P. 26(c).

<sup>18</sup> *Richards of Rockford, Inc. v. Pacific Gas & Elec.*, 71 F.R.D. 388, 389 (N.D. Cal. 1976); WRIGHT & MILLER, *supra* note 16, § 2036, at 268; Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 2 (1983).

<sup>19</sup> *In re Agent Orange Prod. Liab. Litig.*, 821 F.2d 139, 145-46 (2d Cir.), *cert. denied*, 484 U.S. 953 (1987); *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974); *see also Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984) (Rule 26(c) requires a showing of good cause).

<sup>20</sup> *General Dynamics Corp.*, 481 F.2d at 1212 (quoting WRIGHT & MILLER, *supra* note 16, § 2035, at 264-65).

<sup>21</sup> *Id.*

<sup>22</sup> *Marrese v. American Academy of Orthopaedic Surgeons*, 692 F.2d 1083, 1088 (5th Cir. 1982) (en banc). In *Marrese*, Judge Posner stated:

In ruling on a motion under Rule 26(c) to limit discovery, the district court must compare the hardship to the party against whom discovery is sought, if discovery is allowed, with the hardship to the party seeking discovery if discovery is denied. Not only the magnitude of this hardship, but its nature, must be considered.

*Id.*; *see Heat & Control, Inc. v. Hester Indus., Inc.*, 785 F.2d 1017, 1025 (Fed. Cir. 1986); *Keyes v. Lenoir Rhyne College*, 552 F.2d 579, 581 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977); *General Dynamics Corp.*, 481 F.2d at 1212; *Farnsworth v. Procter & Gamble Co.*, 101 F.R.D. 355 (N.D. Ga. 1984), *aff'd*, 758 F.2d 1545 (11th Cir. 1985); *Carlson Cos., Inc. v. Sperry & Hutchinson Co.*, 374 F. Supp. 1080, 1088 (D. Minn. 1973); *see also Seattle Times*, 467 U.S. at 36 ("The trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery.").

approach to the Rule."<sup>23</sup>

The interests weighed by the court vary with the facts of each case. If the plaintiff seeks discovery, he obviously expresses an interest in proving his claim. Similarly, a defendant may have an important interest in preparing his trial defense.<sup>24</sup> The party or person from whom discovery is sought may have an interest in avoiding delay,<sup>25</sup> excessive expense,<sup>26</sup> or an infringement of confidentiality.<sup>27</sup> For example, Rule 26(c)(7) recognizes an interest in the confidentiality of trade secrets by providing a basis for their protection from disclosure.<sup>28</sup>

A court weighing these interests will carefully consider whether and to what degree the party needs the information sought. In general, the court's willingness to limit discovery increases to the extent the party seeking discovery fails to show a need for the information.<sup>29</sup> Other factors include whether the information is sought from a party or nonparty, and whether it could be obtained from other sources.<sup>30</sup>

If the court decides to issue a protective order, it can tailor the limitation on discovery as it sees fit.<sup>31</sup> As stated by Wright and Miller: "[A] court may be as inventive as the necessities of the case require."<sup>32</sup> Rule 26(c) itself sets forth a nonexclusive list of eight types of protective orders, including complete denial of discovery, limitations as to subject matter, and a limitation on persons present to those designated by the court.<sup>33</sup> Only very rarely will the court

<sup>23</sup> *Farnsworth*, 758 F.2d at 1547 (citations omitted).

<sup>24</sup> *Id.*

<sup>25</sup> *See Seattle Times*, 467 U.S. at 34-35.

<sup>26</sup> FED. R. CIV. P. 26(c); *see Seattle Times Co.*, 467 U.S. at 35.

<sup>27</sup> *See Seattle Times*, 467 U.S. at 35.

<sup>28</sup> FED. R. CIV. P. 26(c)(7).

<sup>29</sup> WRIGHT & MILLER, *supra* note 16, § 2036, at 270; *see Farnsworth v. Procter & Gamble Co.*, 101 F.R.D. 355 (N.D. Ga. 1984), *aff'd*, 758 F.2d 1545 (11th Cir. 1985); *see also United Airlines v. United States*, 26 F.R.D. 213, 219 (D. Del. 1960) (no discovery permitted given government's interest in secrecy where plaintiff seeking discovery showed only a minimal need for the information).

<sup>30</sup> *Richards of Rockford, Inc. v. Pacific Gas & Elec. Co.*, 71 F.R.D. 388, 390 (N.D. Cal. 1976).

<sup>31</sup> Marcus, *supra* note 18, at 1.

<sup>32</sup> WRIGHT & MILLER, *supra* note 16, § 2036, at 270.

<sup>33</sup> FED. R. CIV. P. 26(c). The Rule specifies the following types of orders:

(1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not

entirely deny a request for a deposition;<sup>34</sup> use of limitations is much more common. As one appellate court stated: "It is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error."<sup>35</sup>

Important to the analysis of discovery from blood donors, Rule 26(c) implicitly protects the privacy of the person from whom discovery is sought.<sup>36</sup> Although nowhere does the language of Rule 26(c) provide that a court may limit discovery to protect privacy, the United States Supreme Court stated in *Seattle Times Co. v. Rhinehart* that "discovery also may seriously implicate privacy interests of litigants and third parties."<sup>37</sup> The Court acknowledged that public disclosure of information obtained through discovery "could be damaging to reputation and privacy" and added that "[t]he government clearly has a substantial interest in preventing this sort of abuse of its processes."<sup>38</sup>

In *Seattle Times*, the Court recognized that a religious group had a privacy interest in limiting public disclosure of its members and sources of financial support.<sup>39</sup> Accordingly, the Court affirmed the Supreme Court of Washington, which had upheld a trial court's decision to limit discovery by prohibiting the discovering party from publicly disseminating the discovered information.<sup>40</sup> Additionally, other courts have recognized the privacy interests of participants in scientific research studies<sup>41</sup> and sexual partners of plaintiffs in a products liability action.<sup>42</sup>

In instances where a party seeks a protective order for reasons of privacy or for any other reason, the court faces the inherent tension between Rules 26(b) and 26(c). The Supreme Court, address-

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be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

*Id.*

<sup>34</sup> *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979); *Medlin v. Andrew*, 113 F.R.D. 650, 653 (M.D.N.C. 1987); *In re Arthur Treacher's Franchise Litig.*, 92 F.R.D. 429, 437 (E.D. Pa. 1981); *WRIGHT & MILLER, supra* note 16, § 2037, at 135 (Supp. 1989); *see also CBS v. Ahern*, 102 F.R.D. 820, 822 (S.D.N.Y. 1984) (despite extremely busy schedule, deposition permitted); *Haviland & Co. v. Montgomery Ward & Co.*, 31 F.R.D. 578, 580 (S.D.N.Y. 1962) (despite physical illness, deposition permitted).

<sup>35</sup> *Salter*, 593 F.2d at 651.

<sup>36</sup> *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 n.21 (1984).

<sup>37</sup> *Id.* at 35.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 37.

<sup>40</sup> *Id.* at 26.

<sup>41</sup> *Farnsworth v. Procter & Gamble Co.*, 785 F.2d 1545, 1547 (11th Cir. 1985); *Andrews v. Eli Lilly & Co.*, 97 F.R.D. 494, 499 (N.D. Ill. 1983); *Lampshire v. Procter & Gamble Co.*, 94 F.R.D. 58, 60 (N.D. Ga. 1982).

<sup>42</sup> *Allen v. G.D. Searle & Co.*, 122 F.R.D. 580, 582 (D. Or. 1988).

ing mushrooming litigation costs in *Herbert v. Lando*,<sup>43</sup> expressed this tension between the goals of promoting liberal discovery and preventing abusive discovery. The Court stated:

[We have] more than once declared that the deposition-discovery rules are to be accorded a broad and liberal treatment to effect their purpose of adequately informing the litigants in civil trials. [But] . . . the district courts should not neglect their power to restrict discovery where "justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." Rule 26(c). With this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process.<sup>44</sup>

The cases that follow demonstrate several courts' efforts to resolve this tension in the blood donor context.

### B. Multiple Donor Cases

In 1987, state courts decided three cases in which plaintiffs sought discovery from multiple blood donors to prove that they acquired AIDS from blood transfusions: *Rasmussen v. South Florida Blood Service*,<sup>45</sup> *Krygier v. Airweld, Inc.*,<sup>46</sup> and *Tarrant County Hospital District v. Hughes*.<sup>47</sup> In each of these cases the blood bank opposed the plaintiff's discovery efforts.

In *Rasmussen*, the Florida Supreme Court denied discovery of donor identities under the Florida equivalent of Rule 26(c).<sup>48</sup> In 1982, the plaintiff Rasmussen received fifty-one units of blood after he was hit by a car.<sup>49</sup> Approximately one year after he sued the driver for his personal injuries, Rasmussen developed AIDS.<sup>50</sup> In an effort to establish that he contracted AIDS via the postaccident transfusions, his estate asked South Florida Blood Service, the source of the blood, for information identifying all fifty-one blood donors.<sup>51</sup> The trial court ordered disclosure; the intermediate appellate court reversed and denied discovery.<sup>52</sup> The Florida Supreme Court upheld the appellate court's decision.<sup>53</sup> In balancing the competing interests, the court placed particular emphasis on the donors' privacy rights. The court stated that discovery of blood

<sup>43</sup> 441 U.S. 153 (1979).

<sup>44</sup> *Id.* at 177 (citations omitted).

<sup>45</sup> 500 So. 2d 533 (Fla. 1987).

<sup>46</sup> 137 Misc. 2d 306, 520 N.Y.S.2d 475 (Sup. Ct. 1987).

<sup>47</sup> 734 S.W.2d 675 (Tex. Ct. App. 1987).

<sup>48</sup> *Rasmussen*, 500 So. 2d at 535-38.

<sup>49</sup> *Id.* at 534.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 535.

donor identities “implicates constitutionally protected privacy interests.”<sup>54</sup> The court did not apply the federal constitutional right to privacy, concluding only that, under “some circumstances,”<sup>55</sup> it protects personal matters from disclosure. Instead, the court relied on a provision of the Florida Constitution that provides an explicit right of privacy.<sup>56</sup> Additionally, the court found that disclosure of donor identities could prove extremely damaging to the donors.<sup>57</sup>

Agreeing with the lower appellate court, the court concluded that “society’s interest in a strong and healthy blood supply will be furthered by the denial of discovery in this case.”<sup>58</sup> The court also stated: “In light of this, it is clearly ‘in the public interest to discourage any serious disincentive to volunteer blood donation.’”<sup>59</sup>

With respect to the plaintiff’s interest, the *Rasmussen* court viewed the probative value of the discovery sought as minimal.<sup>60</sup> The plaintiff sought to prove a causal link between the personal injuries he received in the accident and his subsequent contraction of AIDS.<sup>61</sup> The court acknowledged his interest in obtaining full recovery for his injuries by establishing this link, but found this interest greatly outweighed by “[t]he potential of significant harm to most, if not all, of the fifty-one unsuspecting donors.”<sup>62</sup>

A New York trial court faced a similar multiple donor discovery issue in *Krygier v. Airweld, Inc.*<sup>63</sup> and, like *Rasmussen*, denied discovery of donor identities.<sup>64</sup> The *Krygier* court based its denial of discovery of the donors’ identities on New York Abuse of Discovery rules and society’s interest in an adequate blood supply.<sup>65</sup> The court, however, also stated that the rationale underlying the physician-patient privilege—protection of patient privacy and fostering of free communication between patient and physician—applied in the blood

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<sup>54</sup> *Id.* at 537.

<sup>55</sup> *Id.* at 536.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 537.

<sup>58</sup> *Id.* at 538.

<sup>59</sup> *Id.* (quoting the intermediate appellate court in *South Fla. Blood Serv. v. Rasmussen*, 467 So. 2d 798, 804 (Fla. Dist. Ct. App. 1985)).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 534.

<sup>62</sup> *Id.* at 538.

<sup>63</sup> 137 Misc. 2d 306, 520 N.Y.S.2d 475 (Sup. Ct. 1987).

<sup>64</sup> *Id.* at 309, 520 N.Y.S.2d at 477. In *Krygier*, the decedent’s wife sued several defendants, including the blood bank, for injuries received in an explosion. *Id.* at 307, 520 N.Y.S.2d at 476. The plaintiff’s decedent received transfusions of 21 units of blood, some of which, the plaintiff alleged, were infected with HIV. *Id.* at 308, 520 N.Y.S.2d at 476. The decedent contracted AIDS. *Id.* The plaintiff sought discovery of the identity of the donors in an effort to prove that the blood actually was infected. *Id.* at 307-08, 520 N.Y.S.2d at 476.

<sup>65</sup> *Id.* at 309, 520 N.Y.S.2d at 477.

donor context.<sup>66</sup> The court found this rationale especially compelling where, as here, the donors acted altruistically yet could suffer embarrassment through disclosure of their identities.<sup>67</sup>

Although the *Rasmussen* and *Krygier* courts completely denied discovery, in *Tarrant County Hospital District v. Hughes*<sup>68</sup> an intermediate appellate court upheld a trial court's order compelling a hospital to disclose donor identities.<sup>69</sup> The order, however, prohibited the plaintiff from either directly or indirectly contacting any donors without prior permission from the court.<sup>70</sup> In contrast to the underlying lawsuits in *Rasmussen* and *Krygier*, in *Tarrant* the plaintiff sued the hospital for allegedly providing transfusions that resulted in the decedent's development of AIDS and subsequent death.<sup>71</sup> The hospital denied the allegations and did not acknowledge that any of the donors had AIDS or had tested positive for HIV.<sup>72</sup>

The *Tarrant* court saw the plaintiff's interest in blood donor identities as legitimate, reasoning that, absent such information, "it is unlikely the plaintiff will be able to prosecute her cause of action."<sup>73</sup> Disclosure of donor identities, the court stated, did not represent a violation of their privacy rights, nor did the record show that the donors' need for confidentiality outweighed the plaintiff's need for the information.<sup>74</sup> Finally, the court found that the hospital had failed to establish that the discovery permitted would adversely impact the blood supply.<sup>75</sup> In the court's view, the hospital's argument that disclosure would hurt the blood supply was just as speculative as the argument that disclosure would benefit the blood supply by discouraging blood donations by HIV-infected donors.<sup>76</sup>

### C. Single Donor Cases

#### 1. *Single Donor Cases Permitting Limited Discovery*

In three relatively recent single donor cases, in which the plaintiff sued a blood bank for negligence, the courts permitted limited discovery from a donor who had tested positive for the antibody to

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<sup>66</sup> *Id.* at 308-09, 520 N.Y.S.2d at 476-77.

<sup>67</sup> *Id.* at 309, 520 N.Y.S.2d at 477.

<sup>68</sup> 734 S.W.2d 675 (Tex. Ct. App. 1987).

<sup>69</sup> *Id.* at 676.

<sup>70</sup> *Id.* at 679.

<sup>71</sup> *Id.* at 676-77.

<sup>72</sup> *Id.* at 676, 680.

<sup>73</sup> *Id.* at 679.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 680.

<sup>76</sup> *Id.* For a case factually similar to *Tarrant* where the court permitted discovery of donor identities, see *Gulf Coast Regional Blood Center v. Houston*, 745 S.W.2d 557 (Tex. Ct. App. 1988).

HIV: *Boutte v. Blood Systems*,<sup>77</sup> *Belle Bonfils Memorial Blood Center v. District Court*<sup>78</sup> and *Mason v. Regional Medical Center*.<sup>79</sup>

*Boutte v. Blood Systems*<sup>80</sup> illustrates the facts that typically give rise to this single donor discovery problem. During surgery in July 1987, plaintiff Otto Boutte received transfusions of fifteen units of blood.<sup>81</sup> Earlier that month, a volunteer had donated blood at Blood Systems, a nonprofit blood bank.<sup>82</sup> Blood Systems tested that donor's blood for the HIV antibody; the blood tested negative.<sup>83</sup> A Blood Systems technician also screened the volunteer to determine his eligibility to donate.<sup>84</sup> As part of this screening process, Blood Systems provided each prospective donor with an information sheet describing the risk profile for AIDS.<sup>85</sup> The technician then conducted a screening interview in which he asked the donor personal history questions, including whether the donor had sexual contact with either AIDS sufferers or individuals in high risk categories.<sup>86</sup> The questionnaire used in the interview indicated that the donor answered negatively to all questions relating to exposure to AIDS.<sup>87</sup> In September 1987, the donor gave a second unit of blood at Blood Systems; this unit tested positive for the HIV antibody.<sup>88</sup> The blood bank reacted by notifying the hospital that had received the prior donation.<sup>89</sup> Boutte, who had received the donor's blood, subsequently tested positive for the presence of the HIV antibody.<sup>90</sup>

Boutte and his wife sued Blood Systems, alleging negligence in donor screening and blood testing.<sup>91</sup> The plaintiffs sought the identity of the donor in order to depose him and thus determine whether the Blood Systems technician adhered to the blood bank's

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<sup>77</sup> 127 F.R.D. 122 (W.D. La. 1989).

<sup>78</sup> 763 P.2d 1003 (Colo. 1988).

<sup>79</sup> 121 F.R.D. 300 (W.D. Ky. 1988). In another single donor case, *Stenger v. Lehigh Valley Hospital Center*, 386 Pa. Super. 574, 587, 563 A.2d 531, 537 (1989), the appellate court issued a vague order instructing the trial court to fashion a discovery order that would permit the plaintiffs to learn, from the donor, what screening procedure the blood bank adhered to, but that would also protect the identity and confidentiality of the donor.

<sup>80</sup> 127 F.R.D. 122 (W.D. La. 1989).

<sup>81</sup> *Id.* at 123.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 124.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 124-25.

<sup>88</sup> *Id.* at 123.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* In 47 states, by statute, blood banks are liable only in negligence. Lipton, *supra* note 3, at 135.

screening guidelines during the interview.<sup>92</sup> Blood Systems refused to provide the plaintiffs with the donor's identity, but did provide copies of the questionnaire used in the donor interview.<sup>93</sup> Here, as in several previous cases, the donor alone could address the issue of whether the blood bank adhered to the guidelines in that particular interview.<sup>94</sup> The interviewing technician, because of the large number of donors he screened, lacked a specific recollection of the donor in question.<sup>95</sup> Further, only the donor could reveal whether he understood the AIDS-related questions.<sup>96</sup>

Blood Systems sought a protective order barring the plaintiffs' request for discovery of the donor's identity.<sup>97</sup> Blood Systems based its arguments on the blood donor's constitutional right to privacy<sup>98</sup> and society's interest in maintaining an adequate supply of blood.<sup>99</sup>

The court recognized the donor's privacy interest as protected by Rule 26(c) of the Federal Rules of Civil Procedure, but also found that the plaintiffs needed to gain access to the donor in order to prove their claims.<sup>100</sup> Addressing society's interest in the volunteer blood supply, the court reconciled the interests of society and the plaintiffs: "[T]he infected donor is one of only two people who knows whether the screening procedures were followed . . . . [T]his information will . . . ensure that blood suppliers establish and implement only the highest standards in collecting and selling blood . . . ." <sup>101</sup> The court balanced the competing interests in ordering, under Rule 26(c), that the plaintiff could conduct limited discovery of the donor.<sup>102</sup> To safeguard the donor from public disclosure, the court: (1) restricted permissible discovery to a Rule 31 deposition upon written questions;<sup>103</sup> (2) permitted the donor to refrain

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<sup>92</sup> *Boutte*, 127 F.R.D. at 125. The plaintiffs sought to question the donor on matters including the following:

- 1) Did Blood Systems ask him the questions contained in the questionnaire prior to accepting his donation of blood?;
- 2) Did the donor actually receive the two information sheets given prior to the questionnaire?

*Id.*

<sup>93</sup> *Id.* at 123.

<sup>94</sup> *Id.* at 124-26.

<sup>95</sup> *Id.* at 124.

<sup>96</sup> *Id.* at 125.

<sup>97</sup> *Id.* at 123.

<sup>98</sup> *Id.* at 125.

<sup>99</sup> *Id.* at 126.

<sup>100</sup> *Id.* at 125-26.

<sup>101</sup> *Id.* at 126.

<sup>102</sup> *Id.*

<sup>103</sup> FED. R. CIV. P. 31. The Rule provides, in pertinent part:

- (a) . . . A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and

from providing identifying information; and (3) allowed Blood Systems' counsel to make arrangements to secure the donor's confidentiality.<sup>104</sup>

In *Belle Bonfils Memorial Blood Center v. District Court*,<sup>105</sup> in which the facts closely paralleled those in *Boutte*,<sup>106</sup> the Colorado Supreme Court permitted discovery from a single blood donor in the form of a deposition upon written questions.<sup>107</sup> The *Belle Bonfils* court added a confidentiality safeguard, not included in *Boutte*, by requiring the plaintiffs to route the questions through the clerk of the court.<sup>108</sup>

Like the *Boutte* court, the court in *Belle Bonfils* acknowledged the donor's interest in confidentiality and society's interest in the blood supply.<sup>109</sup> The court noted, however, that the plaintiffs and society shared an interest in "maintaining a safe blood supply."<sup>110</sup> The court added: "Bonfils cannot claim absolute immunity from discovery when it is in the business of providing a product capable of transmitting disease."<sup>111</sup> The court stated that the screening documentation that the blood bank provided the plaintiffs lacked enough information about the screening process to enable plaintiffs to prosecute their case.<sup>112</sup> Accordingly, the court found that discovery

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address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person . . . and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. . . . (b) . . . A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the witnesses in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by the officer.

*Id.*

<sup>104</sup> *Boutte*, 127 F.R.D. at 126.

<sup>105</sup> 763 P.2d 1003 (Colo. 1988).

<sup>106</sup> In *Belle Bonfils*, the plaintiff/wife received six units of blood products as part of an emergency hysterectomy. *Id.* at 1004. The donor of one of those units subsequently tested positive for the HIV antibody when he attempted to donate blood again. *Id.* The blood bank notified the hospitals that had received the donor's blood. *Id.* Ultimately, the plaintiff tested positive for the HIV antibody. *Id.* at 1005. The transfusion recipient and her husband sued the blood bank, alleging negligence in screening the donor and testing his blood. *Id.* at 1004. The blood bank had received the donation in March 1985, only weeks before it implemented the highly effective enzyme-linked immunosorbant assay (ELISA) test for HIV antibodies. *Id.* at 1006. Plaintiffs sought discovery of all the donors' identities, but only that of the infected donor was at issue in the reported case. *Id.* at 1005. Plaintiffs sought to determine from the donor whether the blood bank adhered to its own guidelines during the screening interview. *Id.* at 1007.

<sup>107</sup> *Id.* at 1013.

<sup>108</sup> *Id.* at 1014.

<sup>109</sup> *Id.* at 1012.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 1012-13.

<sup>112</sup> *Id.* at 1013.

from the donor was necessary and that the plaintiffs' interests outweighed those of the donor.<sup>113</sup> The court concluded that limited discovery in the form of a deposition upon written questions, routed through the clerk of the court, would enable the plaintiffs "to obtain the information they require, without risking the potentially adverse consequences of disclosing publicly the identity of the donor and without . . . infringing upon society's interests in a safe, adequate, voluntary blood supply."<sup>114</sup>

In *Mason v. Regional Medical Center*,<sup>115</sup> factually similar to both *Boutte* and *Belle Bonfils*,<sup>116</sup> the court permitted the plaintiff to depose the donor, but sought to safeguard the donor from public disclosure by imposing a different limitation on discovery.<sup>117</sup> Specifically, the court relied on its discretion under Rule 26(c) to prohibit all persons involved in the discovery from disclosing the donor's identity and to limit knowledge of his identity to one attorney for each side.<sup>118</sup> The court rejected the medical center's claim that the United States Constitution protected the donor's privacy.<sup>119</sup> With respect to society's interest in the volunteer blood supply, the court found little in the record to indicate how disclosure of donor identity would affect blood collections.<sup>120</sup> The court also expressed its reluctance to "venture into the realm of public policy, that being the province of other branches of government."<sup>121</sup>

In each of these single donor cases, the court considered the three interests at stake and permitted discovery, albeit with significant limitations. In other single donor cases, however, courts have rejected plaintiffs' requests for donor discovery.

## 2. *Single Donor Cases Denying Discovery*

Recent single donor cases that have denied donor discovery include *Doe v. American Red Cross Blood Services*<sup>122</sup> and *Doe v. University of Cincinnati*.<sup>123</sup>

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 1014.

<sup>115</sup> 121 F.R.D. 300 (W.D. Ky. 1988).

<sup>116</sup> In *Mason*, the plaintiff received blood transfusions necessitated by a hysterectomy. *Id.* at 301. Four of the units of blood products received by the plaintiff did not undergo testing for the HIV antibody. Only after the plaintiff received transfusions did tests on retained samples indicate that one unit contained the AIDS-causing virus. *Id.* The plaintiffs, as in similar cases, sought to depose the donor in order to evaluate the predonation screening he underwent. *Id.*

<sup>117</sup> *Id.* at 303-04.

<sup>118</sup> *Id.* at 304.

<sup>119</sup> *Id.* at 303.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> 125 F.R.D. 646 (D.S.C. 1989).

<sup>123</sup> 42 Ohio App. 3d 227, 538 N.E.2d 419 (1988). Another single donor case in

In *Doe v. American Red Cross Blood Services*, the court flatly prohibited any form of discovery from a blood donor known to have donated the contaminated blood.<sup>124</sup> In contrast to *Boutte*, in which the plaintiffs sought to determine what occurred during the screening process,<sup>125</sup> the plaintiffs here acknowledged that they wanted to ask the donor "intimate details of his health history and how he believes that he became infected with the virus that causes AIDS."<sup>126</sup> Addressing the donor's interest in confidentiality, the court stated that, given the "hysterical" public reaction to AIDS and discrimination against AIDS victims, public "disclosure of the donor's identity could literally devastate his life."<sup>127</sup> The court stated that "[t]he erosion of confidentiality" could negatively affect the quantity and quality of the volunteer blood supply.<sup>128</sup> Significantly, the court found that the donor's testimony would not, in all likelihood, prove helpful in determining whether the blood bank should have permanently deferred the donor.<sup>129</sup> The court stated: "Plaintiffs here, unlike the plaintiff in *Belle Bonfils*, stand little, if anything, to gain in questioning the donor."<sup>130</sup>

In *Doe v. University of Cincinnati*,<sup>131</sup> an appellate court held that the trial court had abused its discretion in compelling disclosure of a donor's identity.<sup>132</sup> The court, in denying discovery, found *Rasmussen's* rationale persuasive; it held that disclosure "implicated constitutionally protected privacy interests which outweighed plaintiff's

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which the court denied discovery was *Coleman v. American Red Cross*, 130 F.R.D. 360 (E.D. Mich. 1990). The court based its denial of discovery almost exclusively on the view that court-ordered disclosure would have "a serious impact on volunteer blood donations." *Id.* at 362.

<sup>124</sup> *Doe v. American Red Cross Blood Servs.*, 125 F.R.D. at 657. The plaintiff received a unit of infected blood during abdominal surgery. *Id.* at 647. The plaintiff had the HIV virus and suffered from AIDS-related complex when he and his wife brought suit. *Id.* The plaintiffs alleged that the blood bank failed to permanently screen out the donor based on personal history he provided to the blood bank. *Id.* Specifically, the plaintiffs alleged that the blood bank should have disqualified the donor based on his statement concerning a test for hepatitis. *Id.* at 648-49. The court stated that the plaintiffs sought the donor's testimony in order to "help them make a more solid case." *Id.* at 649.

<sup>125</sup> *Boutte v. Blood Sys.*, 127 F.R.D. 122, 126 (W.D. La. 1989).

<sup>126</sup> *Doe v. American Red Cross Blood Servs.*, 125 F.R.D. at 651.

<sup>127</sup> *Id.* at 652.

<sup>128</sup> *Id.* at 653.

<sup>129</sup> *Id.* at 655.

<sup>130</sup> *Id.*

<sup>131</sup> 42 Ohio App. 3d 227, 538 N.E.2d 419 (1988).

<sup>132</sup> *Id.* at 233, 538 N.E.2d at 426. The plaintiff received a transfusion infected with HIV in 1984, prior to the development of an effective blood test; he subsequently tested positive for the presence of HIV. *Id.* at 227-28, 538 N.E.2d at 420-21. The plaintiff sought disclosure of the donor's identity, arguing that the donor alone could provide information as to whether the blood bank followed its own screening procedures. *Id.* at 232, 538 N.E.2d at 424.

interests."<sup>133</sup> The court saw no reason to compel disclosure when the plaintiff failed to show that he could obtain the information only from the donor.<sup>134</sup> In the court's view, denial of discovery would serve "a vital public interest" in maintaining the volunteer blood supply.<sup>135</sup> Finally, the court stated that while altruistic motivations should not immunize a donor from discovery, "the charitable act that is involved when a person donates his or her blood must be recognized."<sup>136</sup>

### III ANALYSIS

#### A. Potential Bases for Denial of Discovery

When seeking protective orders, blood banks have argued that donors' identities should remain confidential. Blood banks have asserted several legal theories, independent of Rule 26(c), that ostensibly require denial of donor discovery. These theories include the constitutional right to privacy and the physician-patient privilege.<sup>137</sup>

<sup>133</sup> *Id.* at 232, 538 N.E.2d at 424.

<sup>134</sup> *Id.* at 233, 538 N.E.2d at 425.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Statutes restricting disclosure of HIV-related information, particularly HIV test results, may provide an additional source of authority for the protection of donor confidentiality. N.Y. PUB. HEALTH LAW §§ 2780-2787 (McKinney 1989) defines HIV-related information broadly but enables a court to order limited disclosure upon a showing of a compelling need for the information in a civil proceeding. *Id.* § 2785. California also has a statute regulating disclosure of HIV blood tests. CAL. HEALTH & SAFETY CODE §§ 199.20-.28 (West Supp. 1989).

In *Belle Bonfils Memorial Blood Center v. District Court*, 763 P.2d 1003 (Colo. 1988), the court held that Colorado statutes regulating disclosure of HIV testing information, COLO. REV. STAT. §§ 25-4-1404, -1409 (1987 Supp.), did not apply, because the donor tested positive and the plaintiffs sought disclosure prior to the effective date of the statute. *Belle Bonfils*, 763 P.2d at 1009. In *Doe v. American Red Cross Blood Services*, 125 F.R.D. 646 (D.S.C. 1989), the court held that the South Carolina Code regarding the confidentiality of HIV-infected individuals, S.C. CODE ANN. §§ 44-29-80, -90, -135 (Law Co-op. Supp. 1988), did not operate to bar discovery in a negligence suit against a blood bank. *Doe v. American Red Cross Blood Servs.*, 125 F.R.D. at 651. The precise applicability of these and similar statutes to donor discovery is beyond the scope of this Note.

Additionally, in *Doe v. University of Cincinnati*, 42 Ohio App. 3d 227, 538 N.E.2d 419 (1988), the court found that a legitimate expectation of privacy protected the blood donor. *Id.* at 233, 538 N.E.2d at 425. The court addressed this expectation of privacy in the Rule 26(c) balancing process, rather than as a truly independent basis for denying discovery. *Id.* The court found the donor "protected by the expectation of privacy which arose during the blood-donation screening process." *Id.* The court explained that donors receive assurances of confidentiality, which give rise to this expectation of confidentiality. *Id.* The Ohio court is the only court that raised this argument for donor confidentiality. Given their discretion under Rule 26(c), courts can include this factor in assessing the donor's interest in confidentiality when they balance the competing interests. See *supra* notes 9-44 and accompanying text.

No court has based its discovery decision explicitly on either of these theories. Rather, all courts that have denied discovery have relied on Rule 26(c) or a state equivalent.<sup>138</sup> These legal theories and the policies that underlie them, however, may bear on the courts' decisions under Rule 26(c), and therefore merit discussion.

### 1. *Federal or State Constitutional Right to Privacy*

Several courts have discussed whether blood donor discovery implicates the constitutional right to privacy. No court, however, has specifically stated that donor discovery would violate either the federal or a state constitution. In *Rasmussen*,<sup>139</sup> the court found that disclosure of donor identities would enable the plaintiff to investigate the donors' personal backgrounds.<sup>140</sup> The potential for this probing, in conjunction with the stigma and discrimination associated with even the suspicion of AIDS, led the court to conclude in dictum that "the disclosure sought here implicates constitutionally protected privacy interests."<sup>141</sup> The court, however, denied discovery solely under the Florida equivalent of Rule 26(c); the constitutional analysis only defined the donors' interest in confidentiality.<sup>142</sup>

Similarly, in neither *Doe v. University of Cincinnati*<sup>143</sup> nor *Taylor v. West Penn Hospital*<sup>144</sup> (both single donor cases), did the court rely on the constitutional right to privacy to deny discovery. In *Doe v. University of Cincinnati*, the court explicitly recognized the *Rasmussen* concern that discovery implicates constitutional interests.<sup>145</sup> The court, however, denied discovery under Ohio's equivalent of Rule 26(c).<sup>146</sup>

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<sup>138</sup> In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), the Supreme Court held that a protective order, which restricted the party seeking the information from disseminating it publicly, did not violate the first amendment. *Id.* at 37. A Washington state trial court had issued the protective order pursuant to Washington Superior Court Civil Rule 26(c). *Id.* at 25-26. The Washington Rule mirrors the language of Federal Rule of Civil Procedure 26(c), except it states "the court in the county," WASH. SUPER. CT. CIV. R. 26(c) (emphasis added), where the Federal Rule provides "the court in the district." FED. R. CIV. P. 26(c) (emphasis added). The Supreme Court stated that Washington Superior Court Civil Rule 26(c) "is typical of the provisions adopted in many states." *Seattle Times*, 467 U.S. at 26 n.7. The Court also stated that "[m]ost States, including Washington, have adopted discovery provisions modeled on Rules 26 through 37 of the Federal Rules of Civil Procedure." *Id.* at 29.

For several examples of state equivalents to Federal Rule 26(c), see C.R.C.P. 26(c) (Colorado); FLA. R. CIV. P. 1.280(c); N.Y. CIV. PRAC. L. & R. 3103; OHIO CIV. R. 26(c); PA. R.C.P. 4011(b).

<sup>139</sup> 500 So. 2d 533 (Fla. 1987).

<sup>140</sup> *Id.* at 537.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 535-38; see also *Doe v. University of Cincinnati*, 42 Ohio App. 3d 227, 232, 538 N.E.2d 419, 424 (1988).

<sup>143</sup> 42 Ohio App. 3d 227, 538 N.E.2d 419 (1988).

<sup>144</sup> 48 Pa. D. & C.3d 178 (C.P. 1987).

<sup>145</sup> *Doe v. University of Cincinnati*, 42 Ohio App. 3d at 232, 538 N.E.2d at 424.

<sup>146</sup> *Id.* at 233, 538 N.E.2d at 425.

In *Taylor v. West Penn Hospital*,<sup>147</sup> the court, although it acknowledged that the scope of the discovery sought by the plaintiffs differed from the discovery at issue in *Rasmussen*, described the claim of constitutional protection as "substantial."<sup>148</sup> Ultimately, the court declined to decide the constitutional issue, relying instead on the Pennsylvania equivalent of Rule 26(c) as the basis for its denial of discovery.<sup>149</sup>

All three of the courts mentioned above relied in large measure on *Whalen v. Roe*<sup>150</sup> in determining the contours of the constitutional right to privacy.<sup>151</sup> In *Whalen*, the United States Supreme Court described the right to privacy as divisible into two types of interests: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."<sup>152</sup> The plaintiff in *Whalen* challenged a New York statute requiring recipients of certain prescription drugs to submit a form containing their names, addresses, and ages to the New York State Department of Health in order to obtain their prescriptions.<sup>153</sup> In upholding the statute, the Court acknowledged that although it posed a threat to the plaintiff's constitutional interest in nondisclosure, it was not "a sufficiently grievous threat to . . . establish a constitutional violation."<sup>154</sup> *Whalen's* analytical framework apparently requires a determination of first, whether a constitutional privacy interest is at stake<sup>155</sup> and second, whether the disclosure, given its purpose, amounts to an "impermissible invasion of privacy."<sup>156</sup>

The *Whalen* analytical methodology underwent further refinement in *United States v. Westinghouse Electric Corp.*,<sup>157</sup> in which the Court of Appeals for the Third Circuit applied it to medical records. In *Westinghouse*, relied on by both the *Taylor* and the *Doe v. University of Cincinnati* courts, the court found that employee medical records, sought as part of an investigation by the National Institute for Occupational Safety and Health (NIOSH), fell within *Whalen's* "personal

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147 48 Pa. D. & C.3d 178 (C.P. 1987).

148 *Id.* at 185.

149 *Id.* at 186.

150 429 U.S. 589 (1977).

151 See *Rasmussen v. South Fla. Blood Serv.*, 500 So. 2d 533, 535 (Fla. 1987); *Doe v. University of Cincinnati*, 42 Ohio App. 3d at 231, 538 N.E.2d at 423; *Taylor*, 48 Pa. D. & C.3d at 185.

152 *Whalen*, 429 U.S. at 599-600 (footnotes omitted).

153 *Id.* at 591-93.

154 *Id.* at 600.

155 *Id.* at 599-602.

156 *Id.* at 602.

157 638 F.2d 570 (3d Cir. 1980).

matters” zone of constitutional protection.<sup>158</sup> The court, however, weighed the competing interests and held that the “strong public interest” in the NIOSH research justified the “minimal intrusion into the privacy which surrounds the employees’ medical records.”<sup>159</sup>

Several commentators have addressed the constitutional dimensions of the donor’s privacy interests. A student commentator<sup>160</sup> argues that the blood donor has a fundamental right to privacy,<sup>161</sup> based upon (1) the reasoning (if not the holdings) of cases including *Whalen* and *Westinghouse*, (2) the invasiveness into a donor’s personal life, and (3) the donor’s expectation of confidentiality.<sup>162</sup> This commentator finds no compelling state interest, as required by *Griswold*<sup>163</sup> and its progeny, to justify the infringement that disclosure would cause.<sup>164</sup> In contrast, another commentator terms *Rasmussen*’s view of the constitutional right to privacy as “a broad extension of the Supreme Court’s interpretation,”<sup>165</sup> explaining that “the Supreme Court has never upheld the disclosural right to privacy.”<sup>166</sup>

Not only has the Supreme Court never upheld the disclosural right to privacy, but no court has explicitly extended the constitutional right to privacy to blood donors. The court in *Mason v. Regional Medical Center*<sup>167</sup> explicitly rejected the claim of constitutional protection.<sup>168</sup> The *Mason* court stated that “the claim of constitutionally protected blood donor privacy, under the facts of this case, is a claim beyond the boundaries of the right of privacy.”<sup>169</sup> Resolving whether the constitutional right to privacy *should* be extended to blood donors is unnecessary given the adequate protection afforded blood donors by Rule 26(c). As the court stated in *Boutte v. Blood Systems*,<sup>170</sup> because “the interests of both parties may be adequately protected under the Federal Rules of Civil Procedure . . . a constitu-

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158 *Id.* at 577.

159 *Id.* at 580.

160 Note, *Anonymity in Donation Situations*, *supra* note 3.

161 *Id.* at 205.

162 *Id.* at 195-97, 203-05.

163 *Id.* at 203 n.114. *Griswold v. Connecticut*, 381 U.S. 479 (1965), is a seminal case in the development of the constitutional right to privacy. In *Griswold*, the Court found a state statute that prohibited contraceptive use unconstitutional because it swept too broadly into the privacy rights of married couples. *Id.* at 479.

164 Note, *Anonymity in Donation Situations*, *supra* note 3, at 205.

165 Note, *Competing Interests*, *supra* note 3, at 587.

166 *Id.*

167 121 F.R.D. 300 (W.D. Ky. 1988).

168 *Id.* at 303.

169 *Id.*

170 127 F.R.D. 122 (W.D. La. 1989).

tional analysis need not be applied."<sup>171</sup>

## 2. Physician-Patient Privilege

During litigation, the physician-patient privilege operates to suppress facts learned by a physician while treating a patient.<sup>172</sup> Applied through the Federal Rules of Civil Procedure or their state equivalents, it prevents a party from discovering privileged information.<sup>173</sup> For example, Rule 26(b) provides that "[p]arties may obtain discovery regarding any matter, *not privileged*, which is relevant."<sup>174</sup>

The physician-patient privilege has no common-law basis.<sup>175</sup> Rather, it exists solely by statute in over forty states.<sup>176</sup> These statutes vary, but generally require the existence of three things: "a physician, a patient and a communication."<sup>177</sup> The statutes also include numerous exceptions and waiver provisions.<sup>178</sup> One of the most common exceptions exists in malpractice actions against the physician.<sup>179</sup> Because of its exclusively statutory nature, courts strictly construe the privilege.<sup>180</sup> The main purpose of the privilege is to insure that the patient receives proper treatment by encouraging him to disclose fully his medical background and symptoms to his physician.<sup>181</sup> A more recently asserted, subsidiary rationale views the privilege as a way of protecting the confidentiality of the patient's communications.<sup>182</sup>

In several donor discovery cases, courts have held that the phy-

<sup>171</sup> *Id.* at 125; *see also* Taylor v. West Penn Hosp., 48 Pa. D. & C.3d 178, 186 (1987) ("it is not necessary to decide whether plaintiffs' discovery request is constitutionally barred.").

<sup>172</sup> MCCORMICK ON EVIDENCE § 98 (Edward W. Cleary 3d ed. 1984).

<sup>173</sup> Bollow & Lapp, *supra* note 3, at 346.

<sup>174</sup> FED. R. CIV. P. 26(b)(1) (emphasis added).

<sup>175</sup> Whalen v. Roe, 429 U.S. 589, 602 n.28 (1977); MCCORMICK ON EVIDENCE, *supra* note 172, § 98.

<sup>176</sup> 8 JOHN HENRY WIGMORE, EVIDENCE § 2380 (John T. McNaughton rev. ed. 1961).

<sup>177</sup> Jenner, *supra* note 3, at 51; *see, e.g.*, Doe v. University of Cincinnati, 42 Ohio App. 3d 227, 229, 538 N.E.2d 419, 422 (1988) (physician, patient, and communication are the three essential elements of the privilege).

<sup>178</sup> Whalen, 429 U.S. at 602 n.28.

<sup>179</sup> Lipton, *supra* note 3, at 168.

<sup>180</sup> Belle Bonfils Memorial Blood Center v. District Court, 763 P.2d 1003, 1009 (Colo. 1988) (quoting Williams v. People, 687 P.2d 950, 953 (Colo. 1984)); Doe v. University of Cincinnati, 42 Ohio App. 3d at 229, 538 N.E.2d at 422; Weis v. Weis, 147 Ohio St. 416, 428-29, 72 N.E.2d 245, 252 (1947).

<sup>181</sup> Ziegler v. Superior Court, 131 Ariz. 250, 640 P.2d 181 (1982); MCCORMICK ON EVIDENCE, *supra* note 172, § 98.

<sup>182</sup> MCCORMICK ON EVIDENCE, *supra* note 172, § 105; *see* Krygier v. Airweld, Inc., 137 Misc. 2d 306, 520 N.Y.S.2d 475 (Sup. Ct. 1987); Charles L. Black, Jr., *The Marital and Physician Privileges—A Reprint of a Letter to a Congressman*, 1975 DUKE L.J. 45, 50; Thomas G. Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61, 92 (1973).

sician-patient privilege did not bar discovery from blood donors. In *Doe v. University of Cincinnati*,<sup>183</sup> the court held that the Ohio privilege statute did not apply because (1) the blood donation was not drawn by a physician; (2) a blood donor is not considered a patient under the statute; and (3) the information provided by the donor did not serve to facilitate his treatment, therefore it did not fall within the statutory definition of "communication."<sup>184</sup> In *Belle Bonfils*,<sup>185</sup> the court found the Colorado privilege inapplicable because the donor received neither medical care nor treatment by a doctor; only medical technicians attended the donor.<sup>186</sup>

By contrast, the *Krygiel v. Airweld, Inc.* court found the rationales behind the privilege—encouragement of patient-physician communication and protection of patient privacy—applicable in the blood donor context.<sup>187</sup> The court, however, based its denial of discovery on New York's equivalent to Rule 26(c).<sup>188</sup> No other court that has addressed this discovery problem has found the privilege applicable in any way.

Noted commentators generally view the privilege with scorn. Wigmore has stated: "It is certain that the practical employment of the privilege has come to mean little but the suppression of useful truth—truth which ought to be disclosed."<sup>189</sup> McCormick favors "[c]omplete abolition of the privilege."<sup>190</sup> Several recent commentators nevertheless find the privilege's rationale compelling specifically in the blood donor context. Although Lipton acknowledges both the severe difficulties in applying physician-patient privilege statutes to blood donors as well as the nonexistence of cases where courts have extended the privilege to blood donors, she urges judicial extension of the privilege because she finds one of its rationales—protection of patient privacy—applicable to blood donors.<sup>191</sup>

Application of the physician-patient privilege in the blood donor context would eliminate courts' discretion in determining

<sup>183</sup> 42 Ohio App. 3d 227, 538 N.E.2d 419 (1988).

<sup>184</sup> *Id.* at 229-30, 538 N.E.2d at 422-23.

<sup>185</sup> 763 P.2d 1003 (Colo. 1988).

<sup>186</sup> *Id.* at 1009; see *Tarrant County Hosp. Dist. v. Hughes*, 734 S.W.2d 675, 677 (Tex. Ct. App. 1987) ("[T]he physician-patient privilege . . . is not applicable . . . . Nothing in the record reflects that the blood donors were seen by a physician or received medical care when they donated blood.").

<sup>187</sup> 137 Misc. 2d 306, 308-09, 520 N.Y.S.2d 475, 476-77 (Sup. Ct. 1987).

<sup>188</sup> *Id.* at 309, 520 N.Y.S.2d at 476-77.

<sup>189</sup> J. WIGMORE, *supra* note 176, § 2380a.

<sup>190</sup> MCCORMICK ON EVIDENCE, *supra* note 172, § 105.

<sup>191</sup> Lipton, *supra* note 3, at 165-69. Note that Lipton serves as Assistant General Counsel to the American Red Cross. *Id.* at 131. For several other commentators who have echoed her view, see Bollow & Lapp, *supra* note 3, at 346-51; Note, *Anonymity in Donation Situations*, *supra* note 3, at 194-95; Note, *AIDS: A Threat*, *supra* note 3, at 877-82.

whether to permit discovery.<sup>192</sup> Specifically, invoking the privilege would prevent a court from considering the plaintiff's need for the information and interest in recovery. It would operate to bar discovery regardless of the facts of the case. Rule 26(c) renders this drastic result inadvisable, because a court can consider protection of patient privacy, the only potentially applicable rationale of the privilege, when it balances the competing interests.<sup>193</sup>

Additionally, from a practical perspective, the question of extending the privilege is academic. Given commentators' general distaste for the privilege<sup>194</sup> and the courts' tendency to strictly construe it,<sup>195</sup> no court will likely extend the privilege so as to bar discovery of donor identities absent legislative action. As one court has stated:

[B]ecause evidentiary privileges contravene the fundamental principle that "the public . . . has a right to every man's evidence," exceptions to the obligation of every man to testify are neither "lightly created nor expansively construed, for they are in derogation of the search for the truth." Thus, absent a "compelling justification for a new privilege," weighty judicial authority counsels against the creation of a rule that will presumptively impinge upon the truth finding process.<sup>196</sup>

## B. Rule 26(c) and the Competing Interests at Issue

### 1. Rule 26(c)

Rule 26(c) of the Federal Rules of Civil Procedure (or a state equivalent)<sup>197</sup> provides the soundest basis for protecting donor confidentiality because it enables a court to weigh all the competing interests and either bar discovery, as in *Doe v. American Red Cross Blood Services*<sup>198</sup> and *Doe v. University of Cincinnati*,<sup>199</sup> or craft limited discovery with a confidentiality safeguard, as in *Belle Bonfils Memorial Blood Center v. District Court*<sup>200</sup> and *Boutte v. Blood Systems*.<sup>201</sup>

In determining whether to permit, limit, or deny discovery under Rule 26(c), courts balance the competing interests. In the blood donor context, courts weigh the plaintiff's interest in collect-

<sup>192</sup> Bollow & Lapp, *supra* note 3, at 346.

<sup>193</sup> See *supra* notes 9-44 and accompanying text.

<sup>194</sup> See *supra* notes 189-90 and accompanying text.

<sup>195</sup> See *supra* text accompanying note 180.

<sup>196</sup> *Solarex Corp. v. Arco Solar, Inc.*, 121 F.R.D. 163, 168 (E.D.N.Y. 1988) (citations omitted).

<sup>197</sup> See *supra* note 138 and accompanying text.

<sup>198</sup> 125 F.R.D. 646 (D.S.C. 1989).

<sup>199</sup> 42 Ohio App. 3d 227, 538 N.E.2d 419 (1988).

<sup>200</sup> 763 P.2d 1003 (Colo. 1988).

<sup>201</sup> 127 F.R.D. 122 (W.D. La. 1989).

ing information needed to prove his claim against the donor's interest in confidentiality and society's interest in the volunteer blood supply. A proper balancing of the competing interests requires analysis of each interest at stake.

## 2. *The Plaintiff's Interest in Obtaining Donor Discovery*

In both single and multiple donor cases, the plaintiff's interest lies in collecting information necessary to prove his claim and recover damages. In the multiple donor case, the plaintiff may need the information to prove that he contracted AIDS via transfusions. Questioning the donors represents a starting point in proving this claim. In *Rasmussen v. South Florida Blood Service*,<sup>202</sup> for example, the plaintiff sought to prove that he contracted AIDS through transfusions to show that injuries from the original accident ultimately resulted in his acquisition of AIDS.<sup>203</sup>

In the single donor case, the plaintiff needs to depose the donor in an effort to prove negligent screening by the blood bank. Several courts have acknowledged not only that the plaintiff needs to know, from the donor's perspective, whether the blood bank adhered to its screening procedures, but that other sources of information are insufficient to meet the plaintiff's needs.<sup>204</sup>

The plaintiff's interest in discovering necessary information accords with the purpose of discovery. According to the Advisory Committee to the Federal Rules of Civil Procedure, in its Notes on the 1946 Amendments: "The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case."<sup>205</sup> This search for facts, though, merely serves as a vehicle for the core rationale behind discovery: the search for truth and the just determination of lawsuits based on truth.<sup>206</sup> Additionally, Rule

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<sup>202</sup> 500 So. 2d 533 (Fla. 1987).

<sup>203</sup> See *supra* notes 48-62 and accompanying text.

<sup>204</sup> See *Boutte v. Blood Sys.*, 127 F.R.D. 122, 125 (W.D. La. 1989); *Mason v. Regional Medical Center*, 121 F.R.D. 300, 303 (W.D. Ky. 1988); *Belle Bonfils Memorial Blood Center v. District Court*, 763 P.2d 1003, 1007, 1013 (Colo. 1988). *But see Doe v. University of Cincinnati*, 42 Ohio App. 3d 227, 233, 538 N.E.2d 419, 425 (1988) (plaintiffs failed to show that they could not obtain the information from other sources).

<sup>205</sup> FED. R. CIV. P. 26(b) advisory committee's notes on 1946 amendment, reprinted in *FEDERAL CIVIL PROCEDURE*, *supra* note 10, at 78-79; see also *Farnsworth v. Procter & Gamble Co.*, 101 F.R.D. 355, 357 (N.D. Ga. 1984) ("[T]he general philosophy of the Federal Rules of Civil Procedure favors full disclosure of relevant information prior to trial."), *aff'd*, 758 F.2d 1545 (11th Cir. 1985).

<sup>206</sup> Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1298 (1978) (quoting *Monier v. Chamberlin*, 35 Ill. 2d 351, 361, 221 N.E.2d 410, 417 (1966) and Hon. Irving R. Kaufman, *Judicial Control Over Discovery*, 28 F.R.D. 111, 125 (1952)); see *Gray v. Board of Higher Educ.*, 692 F.2d 901, 903 (2d Cir. 1982) (quoting *Gray v. Board of Higher Educ.*, 92 F.R.D. 87, 90

I underscores this notion that determinations based on truth represent an overarching goal of the discovery system. Rule 1 provides, in pertinent part, that the Federal Rules of Civil Procedure "shall be construed to secure the just . . . determination of every action."<sup>207</sup> Furthermore, under Rule 26(b)(1), the scope of discovery regarding nonprivileged matter is very broad.<sup>208</sup>

Additionally, the United States Supreme Court, in the "seminal"<sup>209</sup> opinion of *Hickman v. Taylor*,<sup>210</sup> expressed its belief in the need for full discovery: "civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial."<sup>211</sup> The Court continued: "[T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts. . . . Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."<sup>212</sup>

The purpose of the Rules, their language, and the Supreme Court's view in *Hickman* lie behind the presumption, expressed when courts seek to resolve discovery disputes, that "the public is entitled to every person's evidence."<sup>213</sup> Of course, the limits imposed by Rule 26(b) (relevance and the absence of a legal privilege) and the existence of Rule 26(c) (protective orders) demonstrate that this presumption will not always apply. The presumption should require, though, that the court permit discovery absent a transcending basis for curtailing the search for truth.<sup>214</sup> The remainder of this

(S.D.N.Y. 1981)) (" '[R]ight to discovery . . . stems from society's interest in a full and fair adjudication of the issues . . . .'").

<sup>207</sup> FED. R. CIV. P. 1.

<sup>208</sup> See discussion of Rule 26(b) at *supra* notes 11-15 and accompanying text.

<sup>209</sup> *Brazil*, *supra* note 206, at 1298.

<sup>210</sup> 329 U.S. 495 (1947).

<sup>211</sup> *Id.* at 501.

<sup>212</sup> *Id.* at 507.

<sup>213</sup> *Richards of Rockford, Inc. v. Pacific Gas & Elec. Co.*, 71 F.R.D. 388, 389 (N.D. Cal. 1976) (citing *Blackmer v. United States*, 284 U.S. 421 (1932)); see *Branzburg v. Hayes*, 408 U.S. 665, 688 (1971); *United States v. Bryan*, 339 U.S. 323, 331 (1950); *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545 (11th Cir. 1985), *aff'g* 101 F.R.D. 355 (N.D. Ga. 1984); *Solarex Corp. v. Arco Solar, Inc.*, 121 F.R.D. 163 (E.D.N.Y. 1988) (quoting *Bryan*, 339 U.S. at 331); *Farnsworth*, 101 F.R.D. at 357.

<sup>214</sup> See *In re Dinnan*, 661 F.2d 426, 429 (5th Cir. 1981), *cert. denied*, 457 U.S. 1106 (1982). In *In re Dinnan*, the court affirmed an order compelling discovery despite a claim for protection based on legal privilege. *Id.* at 433. The court quoted the Supreme Court in *Trammel v. United States*, 445 U.S. 40, 49 (1980), as follows: "[privileges should be accepted] only to the very limited extent that [there exists] . . . a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Id.* at 429-30; see *Gray v. Board of Higher Educ.*, 692 F.2d 901, 904 (2d Cir. 1982).

Note will show that in the single donor case, neither the donor's interest in confidentiality nor society's interest in a volunteer blood supply provides such a basis for denying discovery and curtailing the search for truth.

### 3. *The Donor's Interest in Maintaining Confidentiality*

In both the single and multiple donor cases, donors have an interest in avoiding discovery.<sup>215</sup> Important differences exist, however, between these two types of cases. These differences help to define the interests of the donor and a thorough understanding of them can help a court properly balance the competing interests under Rule 26(c).

Single and multiple donor cases differ in their potential impact on the donor's privacy. The donor's interest in maintaining confidentiality varies with the degree to which discovery would intrude on the donor's personal life. The intrusiveness of discovery, in turn, depends in part on the type of information that the plaintiff seeks when he requests identifying information.

In a multiple donor case, the plaintiff essentially wants to know whether any of the donors have AIDS, carry HIV, or belong to a high risk group.<sup>216</sup> This information will help the plaintiff prove that he contracted AIDS via the transfusions.<sup>217</sup> To determine, for example, whether the donor is in a high risk group, the plaintiff will likely ask questions that center on the donor's personal life.<sup>218</sup> Moreover, as the court pointed out in *Rasmussen v. South Florida Blood Service*,<sup>219</sup> disclosure of the donor's identity creates "the possibility that a donor's co-workers, friends, employers, and others may be queried as to the donor's sexual preferences, drug use or general lifestyle."<sup>220</sup> Such an inquiry, the court stated, "could be extremely disruptive and even devastating to the individual donor"<sup>221</sup> because it could "lead to discrimination in employment, education, housing and even medical treatment."<sup>222</sup>

In a single donor case, the information sought by the plaintiff differs in kind from the information sought in a multiple donor case. In a single donor case, whether the donor has AIDS or carries HIV

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<sup>215</sup> *Mason v. Regional Medical Center*, 121 F.R.D. 300, 301 (W.D. Ky. 1988); *Rasmussen v. South Fla. Blood Serv.*, 500 So. 2d 533, 537 (Fla. 1987).

<sup>216</sup> *Rasmussen*, 500 So. 2d at 537.

<sup>217</sup> *See id.* at 534.

<sup>218</sup> *See Note, Anonymity in Donation Situations*, *supra* note 3, at 201.

<sup>219</sup> 500 So. 2d 533 (Fla. 1987).

<sup>220</sup> *Id.* at 537.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* (quoting *Rasmussen v. South Fla. Blood Serv.*, 467 So. 2d 798, 802 (Fla. Dist. Ct. App. 1985)).

is not at issue because the blood bank has acknowledged that a donor provided HIV-infected blood. The plaintiff wants to identify and depose the donor to learn more about what occurred during that donor's screening. As the court stated in *Boutte v. Blood Systems*,<sup>223</sup> the plaintiffs wanted to know "whether, from the donor's perspective, the screening procedures were followed."<sup>224</sup> An inquiry focusing on what procedures the blood bank followed during the screening process involves far less intrusion into the privacy of the donor than an inquiry aimed at determining a donor's HIV status. In *Boutte*, the plaintiffs' questions regarding the screening process included: (1) whether the donor received the information sheets describing persons at risk for AIDS; (2) whether the blood bank interviewer asked the questions on the questionnaire; and (3) whether the donor understood those questions.<sup>225</sup> Whether, for example, the donor lied about his behavior during the screening process is irrelevant, because the veracity of his responses does not address the issue of the blood bank's adherence to the screening procedures. Thus, the single donor inquiry is rather benign and certainly represents less of an intrusion than that which would likely occur in the multiple donor case.<sup>226</sup> Accordingly, in single donor cases, the donor has less of an interest in keeping his identity confidential than he does in multiple donor cases.

In single donor cases, courts have permitted discovery while limiting it with confidentiality safeguards. These safeguards should minimize the inconvenience or harm a donor may suffer. They seek to prevent public disclosure of the donor's HIV status—the donor's greatest concern. These safeguards have included a Rule 31 deposition upon written questions routed through the clerk of the court;<sup>227</sup> a Rule 31 deposition upon written questions at which the donor could conceal his identity from the court reporter and the

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<sup>223</sup> 127 F.R.D. 122 (W.D. La. 1989).

<sup>224</sup> *Id.* at 126; see *Mason v. Regional Medical Center*, 121 F.R.D. 300, 303 (W.D. Ky. 1988); *Belle Bonfils Memorial Blood Center v. District Court*, 763 P.2d 1003, 1013 (Colo. 1988); *Doe v. University of Cincinnati*, 42 Ohio App. 3d 227, 232, 538 N.E.2d 419, 424 (1988). In single donor cases, the court can prevent the plaintiffs from questioning the donor on personal matters by permitting discovery but limiting the scope of the questioning to whether, from the donor's perspective, the blood bank adhered to its screening procedures. See FED. R. CIV. P. 26(c)(4). Under Rule 26(c)(4) the court may make a protective order stating "that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters." *Id.*

<sup>225</sup> *Boutte*, 127 F.R.D. at 125.

<sup>226</sup> *But see* *Coleman v. American Red Cross*, 130 F.R.D. 360, 362 (E.D. Mich. 1990) (in single donor case where court denied discovery, plaintiff sought to question donor as to membership in groups at high risk for AIDS); *Doe v. American Red Cross Blood Servs.*, 125 F.R.D. 646, 651 (D.S.C. 1989) (plaintiffs sought discovery of "intimate details of [the donor's] health history"); see also *supra* note 123.

<sup>227</sup> *Belle Bonfils*, 763 P.2d at 1013-14.

blood bank's counsel;<sup>228</sup> and a court limitation on the persons who learn the donor's identity during discovery, coupled with a court order prohibiting them from disclosing their knowledge.<sup>229</sup>

A risk does exist, despite these safeguards, that public disclosure could occur. As the court stated in *Doe v. American Red Cross Blood Services*, the courts that sought to both permit discovery and maintain a measure of donor confidentiality "could offer the donors no guarantees."<sup>230</sup> A Rule 31 deposition upon written questions, routed through the clerk of the court, can minimize the risk of public disclosure because nobody on the plaintiff's side of the litigation ever learns the identity, address, or telephone number of the donor.

Beyond the safeguards that should satisfy the donor's interest in confidentiality, these single donor cases contain an element of donor responsibility that should affect the court's willingness to protect the donor's confidentiality. This notion of blood donor responsibility, or at least donor participation, enters the calculus when the blood bank has identified the repeat donor from whom the plaintiff received HIV. The donor, perhaps unwittingly, played an important causal role in the plaintiff's acquisition of the disease. One study, though, indicates that sixty-nine percent of donors who tested positive were aware of their own risk of HIV infection prior to donating.<sup>231</sup>

This notion of donor responsibility or participation suggests that the court view the donor as a party to the litigation in determining whether to permit discovery. One commentator, however, who does not distinguish between multiple and single donor cases, argues that blood donors' status as "merely third parties" provides "[a]n additional reason to protect blood donors from discovery."<sup>232</sup> This argument stems from case law stating that where the subject of discovery is a nonparty, that status weighs towards nondisclosure.<sup>233</sup>

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<sup>228</sup> *Boutle*, 127 F.R.D. at 126.

<sup>229</sup> *Mason*, 121 F.R.D. at 303-04.

<sup>230</sup> *Doe v. American Red Cross Blood Servs.*, 125 F.R.D. 646, 652 (D.S.C. 1989).

<sup>231</sup> L. Doll, *HIV-Seropositive Persons—Why They Donate Blood*, abstracted in 29 TRANSFUSION 80S (Supp. 1989). Some blood donors may have known of the risks they posed to transfusion recipients. *Id.* A recent study by researchers at the Centers for Disease Control in Atlanta revealed that 69% of blood donors who later tested HIV-positive were aware of their own risk of HIV infection prior to donation. *Id.* Reasons for donation included pressure to donate at the workplace (29%), desire to undergo testing (12%), and failure to thoroughly read educational materials encouraging self-deferral (44%). *Id.* The study concluded: "Educational programs should help donors counter pressure to donate, not rely solely on printed materials, and provide stronger, clearer messages to enhance risk perception." *Id.*

<sup>232</sup> Note, *Anonymity in Donation Situations*, *supra* note 3, at 194.

<sup>233</sup> *Truswal Sys. Corp. v. Hydro-Air Eng'g*, 813 F.2d 1207, 1210 (Fed. Cir. 1987); *Farnsworth v. Procter & Gamble Co.*, 101 F.R.D. 355, 357 (N.D. Ga. 1984), *aff'd*, 758

or more limited discovery.<sup>234</sup> In *Allen v. G.D. Searle & Co.*,<sup>235</sup> for example, the court permitted the defendant's discovery of aspects of the plaintiffs' sexual histories, yet denied the same inquiry into the lives of the plaintiffs' sexual partners.<sup>236</sup> The court stated that it was "concerned about the potential for intrusion on the privacy rights of third parties who are strangers to these lawsuits."<sup>237</sup>

In multiple donor cases, where no donor necessarily carries HIV nor suffers from AIDS, the donors may well be third parties, strangers to the lawsuits. By contrast, in single donor cases, the donor is no stranger. Indeed, but for the donor's action, the plaintiff would have suffered no injury nor would any lawsuit have arisen. The court need not view the donor's role in terms of creating donor liability. Rather, the court should take into account the donor's role in the lawsuit and view him as a party, thereby creating another factor weighing in favor of permitting limited discovery under Rule 26(c).

Pursuant to the doctrine of "imperfect rescue," the altruistic motivation of the donor should in no way influence a court's decision on whether to infringe on the donor's privacy. In *Krygier v. Airweld, Inc.*,<sup>238</sup> the court cited the donor's altruism as relevant to the applicability of the physician-patient privilege.<sup>239</sup> Similarly, in balancing the interests under the Ohio equivalent of Rule 26(c), the court in *Doe v. University of Cincinnati*<sup>240</sup> stated that "the charitable act that is involved when a person donates his or her blood must be recognized."<sup>241</sup>

Under the common-law principle of "imperfect rescue," voluntary assistance by an altruistic actor can render him liable to the individual he assists if, by his efforts, he either leaves the individual in worse condition or forecloses potential assistance by others.<sup>242</sup>

F.2d 1545 (11th Cir. 1985); *Richards of Rockford, Inc. v. Pacific Gas & Elec.*, 71 F.R.D. 388, 390 (N.D. Cal. 1976).

<sup>234</sup> *Collins & Aikman Corp. v. J.P. Stevens & Co.*, 51 F.R.D. 219, 221 (D.S.C. 1971); see *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1277 (7th Cir. 1982).

<sup>235</sup> 122 F.R.D. 580 (D. Or. 1988).

<sup>236</sup> *Id.* at 582.

<sup>237</sup> *Id.*; see *Solarex Corp. v. Arco Solar, Inc.*, 121 F.R.D. 163, 179 (E.D.N.Y. 1988) (status as a nonparty is significant in determining whether discovery would represent an undue burden), *aff'd*, 870 F.2d 642 (Fed. Cir. 1989).

<sup>238</sup> 137 Misc. 2d 306, 520 N.Y.S.2d 475 (Sup. Ct. 1987).

<sup>239</sup> *Id.* at 308-09, 520 N.Y.S.2d at 476-77.

<sup>240</sup> 42 Ohio App. 3d 227, 538 N.E.2d 419 (1988).

<sup>241</sup> *Id.* at 233, 538 N.E.2d at 425.

<sup>242</sup> See *United States v. Devane*, 306 F.2d 182, 186 (5th Cir. 1962) (where Coast Guard in its discretion undertook rescue efforts for lost ship, it acquired a duty to use reasonable care in the rescue operation); *Parvi v. City of Kingston*, 41 N.Y.2d 553, 559, 362 N.E.2d 960, 964, 394 N.Y.S.2d 161, 165 (1977) (The plaintiff alleged that the police acted negligently in transporting him, while he was intoxicated, to an area adjacent to a

As Judge Richard Posner explained in *Jackson v. City of Joliet*:<sup>243</sup> “[T]here is of course no general common law duty to rescue a stranger in distress . . . . But if you do begin to rescue someone you must complete the rescue in a nonnegligent fashion . . . .”<sup>244</sup> The actor’s altruistic action gives rise to a duty of care and potential tort liability for a breach of that duty. Consequently, the actor’s altruistic motivation in no way immunizes him from liability.

Applying this notion to the blood donor who provided the distressed plaintiff with infected blood, the donor has effectively prevented the plaintiff from receiving healthy blood. Of course, the donor may have acted non-negligently in donating blood. The point, however, is that good intentions can give rise to a duty of care, the breach of which can create liability. Just as altruism will not shield an actor from tort liability, neither should it immunize him from submission to a deposition—especially when that questioning could enable an injured plaintiff to receive compensation from another.

Finally, in single donor cases, the court should evaluate the donor’s interest in confidentiality in light of his current health. The discovery request may come before the court several years after the donor has suffered exposure to the virus that causes AIDS, particularly because the bulk of the cases will arise from pre-1985 transfusions.<sup>245</sup> By this time, the donor may suffer AIDS-related complex<sup>246</sup> or full-blown AIDS, rendering his ailment obvious to those around him. Under these circumstances, the donor has a reduced need to maintain the confidentiality of his identity.<sup>247</sup> If the donor’s

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superhighway where he was struck and injured by an automobile. The court stated: “[t]he case law is clear that even when no original duty is owed to the plaintiff to undertake affirmative action, once it is voluntarily undertaken, it must be performed with due care.”; 3 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, THE LAW OF TORTS § 18.6, at 722 (2d ed. 1986); see also RESTATEMENT (SECOND) OF TORTS § 323 (1966); PROSSER AND KEETON ON THE LAW OF TORTS, LAWYER’S EDITION § 56, at 378 (W. Page Keeton 5th ed. 1984).

<sup>243</sup> 715 F.2d 1200 (7th Cir. 1983), cert. denied, 465 U.S. 1049 (1984) (state officers allegedly acted negligently by stopping at the scene of an auto accident but failing to render needed assistance).

<sup>244</sup> *Id.* at 1202.

<sup>245</sup> For data on projections, see *infra* notes 266-71 and accompanying text.

<sup>246</sup> AIDS-related complex (ARC) is a condition caused by HIV whose symptoms include “intermittent or persistent fever, fatigue, weakness, diarrhea, malaise, weight loss, . . . and generalized swelling of the lymph nodes . . . in the neck, armpits, or groin.” 1 THE NEW ENCYCLOPAEDIA BRITANNICA 67 (1987). ARC may develop into AIDS, which involves a fatal deterioration of the body’s immune system. *Id.* For general information on AIDS, see *supra* notes 1-2.

<sup>247</sup> Bruce A. McDonald, *Ethical Problems for Physicians Raised by AIDS and HIV Infection: Conflicting Legal Obligations of Confidentiality and Disclosure*, 22 U.C. DAVIS L. REV. 557, 577 (1989).

disease is obvious to those around him, the court should permit limited discovery.

In sum, factors including the narrow scope of the inquiry, the privacy safeguards and the notion of donor responsibility indicate that limited discovery will not unduly or unjustifiably infringe upon the donor's interest in confidentiality in single donor cases.

#### 4. *Society's Interest in a Safe and Adequate Blood Supply*

In both single and multiple donor cases, blood banks have asserted society's interest in a safe and adequate volunteer blood system. Blood banking experts and legal commentators agree that a volunteer blood system is far superior to a paid blood collection system because donors motivated by money are often indigent and therefore more likely to carry infectious diseases than the public at large.<sup>248</sup> In deciding whether to permit discovery in other contexts, courts consider societal interests (as opposed to the litigant's interests). Examples include society's interest in the integrity of the peer review process,<sup>249</sup> the maintenance of a unique data bank of medical records,<sup>250</sup> the promotion of academic public policy research,<sup>251</sup>

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<sup>248</sup> For views of several experts, see National Blood Policy, 39 Fed. Reg. 32,702 (1974) (supporting the development of an all-volunteer blood system); *Protection of Confidentiality of Records of Research Subjects and Blood Donors: Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. 184 (1985) [hereinafter *Hearings*] (statement of Robert W. Reilly, President, American Blood Resources Association) (volunteer blood system enables selection of safest donors); *id.* at 177 (testimony of Dr. Joseph R. Bove, M.D., Professor of Laboratory Medicine at Yale University School of Medicine and Director of Blood Banking at Yale-New Haven Hospital) (volunteer blood ensures the adequacy of the blood system); see also Charles Marwick, *Six-Year Slowing Noted in Previously Growing Rate of U.S. Blood Collections, Transfusions*, 261 J. A.M.A. 968, 969 (1989) (current system is highly effective). For the views of several legal commentators, see Bollow & Lapp, *supra* note 3, at 371; Lipton, *supra* note 3, at 160-61; Note, *Anonymity in Donation Situations*, *supra* note 3, at 206-07.

<sup>249</sup> See *University of Pennsylvania v. EEOC*, 110 S. Ct. 577 (1990) (finding tenure decisions not subject to common-law privilege under Federal Rule of Evidence 501); *Gray v. Board of Higher Educ.*, 692 F.2d 901 (2d Cir. 1982) (Where college instructor, denied tenure but not provided with reasons, sought discovery of tenure committee votes in order to prove intentional discrimination, district court improperly denied discovery despite legitimate concerns that such discovery would chill candid peer evaluations and could potentially disrupt both faculty harmony and academic freedom.).

<sup>250</sup> *Andrews v. Eli Lilly & Co.*, 97 F.R.D. 494 (N.D. Ill. 1983). In *Andrews*, the court denied defendant discovery of "the Registry," a continually updated repository of data concerning the conditions of 500 patients suffering from clear cell adenocarcinoma of the genital tract. *Id.* at 499-502. The court reasoned that not only did the defendant have merely a speculative interest in obtaining the data, but disclosure would cause both doctors and their patients to withhold their records from the Registry, thus destroying it and depriving society of a unique and vital resource. *Id.*

<sup>251</sup> *Richards of Rockford, Inc. v. Pacific Gas & Elec.*, 71 F.R.D. 388, 390 (N.D. Cal. 1976) (court denied discovery of documents concerning confidential research interviews because of the supplementary nature of the information sought and the public interest

and the confidentiality of government informants.<sup>252</sup> None of these societal interests, however, seems to provoke as much disagreement as exists in the blood donation context.

Courts disagree on whether disclosure of blood donor identities will affect the volunteer blood system. Numerous courts have argued that disclosure will negatively affect the system.<sup>253</sup> In *Doe v. American Red Cross Blood Services*,<sup>254</sup> the court stated that disclosure of donor identities could seriously hurt the volunteer blood system because the prospect of donor questioning and disclosure creates the type of disincentive that could discourage donations<sup>255</sup> and would render some donors reluctant to answer truthfully to questions posed in the screening process.<sup>256</sup> By contrast, other courts have argued that disclosure will either not hurt the volunteer system, or will improve the safety of the blood system; others have asserted that such concerns about the system lie outside of the province of the judiciary.<sup>257</sup>

Like the courts, commentators disagree on the effect donor disclosure will have on the volunteer blood supply. Lipton and a student commentator, echoing the concerns voiced in *Doe v. American*

in maintaining open channels of communication between academic researchers and their sources).

<sup>252</sup> See *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303 (5th Cir. 1972) (Secretary of Labor may withhold discovery of informant's identity to further society's interest in effective enforcement of a statute).

<sup>253</sup> See *Doe v. American Red Cross Blood Servs.*, 125 F.R.D. 646, 652-53 (D.S.C. 1989); *Rasmussen v. South Fla. Blood Serv.*, 500 So. 2d 533, 537-38 (Fla. 1987); *Krygier v. Airweld, Inc.*, 137 Misc. 2d 306, 309, 520 N.Y.S.2d 475, 477 (Sup. Ct. 1987); *Taylor v. West Penn Hosp.*, 48 Pa. D. & C.3d 178, 186-90 (1987). Several courts, including *Doe v. American Red Cross Blood Servs.*, cite testimony before a House subcommittee, *Hearings, supra* note 248, at 111-202, in which blood banking experts testified that maintaining the confidentiality of AIDS-exposed blood donors was essential to the system. *Doe v. American Red Cross Blood Servs.*, 125 F.R.D. at 652 n.8.

<sup>254</sup> 125 F.R.D. 646 (D.S.C. 1989).

<sup>255</sup> *Id.* at 653.

<sup>256</sup> *Id.*

<sup>257</sup> *Boutte v. Blood Sys.*, 127 F.R.D. 122, 126 (W.D. La. 1989); *Mason v. Regional Medical Center*, 121 F.R.D. 300, 303 (W.D. Ky. 1988); *Belle Bonfils Memorial Blood Center v. District Court*, 763 P.2d 1003, 1012-13 (Colo. 1988); *Tarrant County Hosp. Dist. v. Hughes*, 734 S.W.2d 675, 680 (Tex. Ct. App. 1987). Both *Boutte* and *Belle Bonfils* argue that disclosure will have an effect consistent with society's interest in a safe blood supply. *Boutte*, 127 F.R.D. at 126; *Belle Bonfils*, 763 P.2d at 1012-13. As the court stated in *Boutte*, permitting limited discovery from the donor "will ensure that blood suppliers establish and implement only the highest standards in collecting and selling blood." *Boutte*, 127 F.R.D. at 126. *Tarrant* argues that a judicial determination that disclosure will hurt the blood supply remains just as speculative as the assertions that discovery would benefit society by discouraging undesirable donors from donating. *Tarrant*, 734 S.W.2d at 680. Finally, the court in *Mason* found little in the record to justify any position on how disclosure would impact the blood supply. *Mason*, 121 F.R.D. at 303. The court stated its reluctance "to venture into the realm of public policy" because that is the "province of other branches of government." *Id.*

*Red Cross Blood Services*, argue that disclosure will harm the blood supply.<sup>258</sup> In opposition, Jenner argues that disclosure will not have this adverse effect.<sup>259</sup> He points out that the blood banking industry has proffered no studies, reports, or surveys to ground its argument that the possibility of disclosure would deter blood donations.<sup>260</sup> He adds that given possible disclosure, donors not at risk for HIV infection would continue to donate while those at risk would properly refrain.<sup>261</sup> Jenner states that blood banks, by refusing disclosure, seek to immunize themselves from liability, thus escaping judicial scrutiny of their operations.<sup>262</sup>

Another student commentator<sup>263</sup> uses a more subtle approach, arguing that the existence, since 1985, of a highly accurate test for the presence of HIV has rendered the blood bank's argument "virtually insignificant."<sup>264</sup> She explains that because testing will screen out 99.8% of the HIV-infected blood, prospective donors will face virtually no threat of questioning by a transfusion recipient—hence, no deterrence.<sup>265</sup> Medical research data lend support to this commentator's thesis that a prospective blood donor would now face little threat of disclosure if courts permitted discovery. Blood banks implemented a highly effective blood test, known as the ELISA procedure, in 1985.<sup>266</sup> This improvement has dramatically decreased the incidence of transfusion-related HIV infection,<sup>267</sup> but will not eliminate it because of the occurrence of false negatives and the latency period between infection and the appearance of the an-

<sup>258</sup> Lipton, *supra* note 3, at 160-61; Note, *Anonymity in Donation Situations*, *supra* note 3, at 206-09.

<sup>259</sup> Jenner, *supra* note 3, at 50.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* Jenner also states that "[t]he depleted-blood-supply argument may simply be a theoretical one advanced in order to prevent disclosure." *Id.* at 51.

<sup>263</sup> Note, *Competing Interests*, *supra* note 3.

<sup>264</sup> *Id.* at 573.

<sup>265</sup> *Id.* Kirsh responds by stating that because so few of these donor cases will arise, denial of disclosure can maintain a safe and adequate blood supply without foreclosing recovery to a large group of plaintiffs. Note, *Anonymity in Donation Situations*, *supra* note 3, at 209. Kirsh describes the alternative, permitting discovery for a small number of plaintiffs, as "potentially devastating the quality and quantity of the nation's blood supply." *Id.*

<sup>266</sup> John C. Petricciani & Jay S. Epstein, *The Effects of the AIDS Epidemic on the Safety of the Nation's Blood Supply*, 103 PUB. HEALTH REP. 236, 237 (1988); see also *Is the Blood Supply Safe?*, 1987 CONSUMER REP. 596, 596 ("The ELISA test, or 'enzyme-linked immunosorbent assay,' detects an antibody to the AIDS virus, indicating that the prospective donor has been exposed to infection. The test, which is now performed on all donated blood, is designed for maximum sensitivity . . .").

<sup>267</sup> John W. Ward, et al., *Transmission of Human Immunodeficiency Virus (HIV) by Blood Transfusions Screened as Negative for HIV Antibody*, 318 NEW ENG. J. MED. 473, 476 (1988) [hereinafter Ward].

tibody.<sup>268</sup> Estimates of the current annual rate of HIV infection via transfusions of tested blood range from approximately 100 to 460 recipients per year, of which only 40% will survive the condition for which they received blood.<sup>269</sup> By contrast, predictions of the ultimate number of AIDS cases attributable to blood transfusions prior to July 1985 range much higher. One study estimates that eventually between 14,300 and 15,000 cases of AIDS will result from these transfusions.<sup>270</sup> The Centers for Disease Control estimate that in 1984 alone transfusions infected 7200 persons with HIV.<sup>271</sup> These data indicate that very few plaintiffs will seek discovery from current or future donors (hence no deterrent effect going forward), but the potential exists for a significant number of discovery requests related to lawsuits arising from pre-1985 donations.

The conflicting arguments and absence of studies indicate that it remains unclear, if not speculative, whether disclosure of donor identities has the potential to devastate or even impact the nation's blood supply. If disclosure of donor identities does have any effect on the blood supply, it would likely occur only in the multiple and not in the single donor case.

First, in the multiple donor case, the plaintiff seeks discovery from the donor of each unit of blood he received. In *Rasmussen v. South Florida Blood Service*, for example, the plaintiff sought discovery from all fifty-one donors.<sup>272</sup> In the single donor case, the plaintiff seeks discovery from only the one donor identified as HIV-positive. The fewer number of donors affected should minimize whatever total deterrent effect might result.

Second, if courts permit disclosure in multiple donor cases, a donor who had no reason to perceive himself at risk and who is not HIV-positive could undergo discovery; this judicial policy could possibly deter healthy donors. By contrast, in the single donor case, only the HIV-positive donor must submit to discovery, precisely the type of donor that blood banks would like to deter from donating. The truly healthy donor, not at risk, could rest assured that no recipient will question him, and thus he would not be deterred.

Third, in the multiple donor cases, because the inquiry focuses on whether the donor is HIV-positive, the probing nature of the inquiry could have more of a deterrent effect. In the single donor case in which the court limits the inquiry to the screening process, this

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268 *Id.*; *Legal and Ethical Concerns*, *supra* note 3, at 110.

269 *Ward*, *supra* note 267, at 476.

270 J.D. Kalbfleisch & J.F. Lawless, *Estimating the Incubation Time Distribution and Expected Number of Cases of Transfusion-Associated Acquired Immune Deficiency Syndrome*, 29 *TRANSFUSION* 672, 672 (1989).

271 *1988 Update*, *supra* note 1, at 3.

272 500 So. 2d 533, 534 (Fla. 1987).

less intrusive discovery should have less, if any, deterrent effect.<sup>273</sup>

In sum, limited discovery with adequate safeguards, in single donor cases, should have no effect on the quality and quantity of the nation's volunteer blood supply.

#### IV

#### PROPOSAL AND CONCLUSION

The differences between single donor cases, in which the blood bank has identified a donor as HIV-positive and has traced the donation to the plaintiff, and multiple donor cases, in which only one (or even none) of the donors may carry HIV, require different judicial responses. In the single donor case, because the information sought focuses on the screening process, discovery intrudes less on the donor's privacy than in the multiple donor case, in which each donor's HIV status is at issue. In the single donor case, the court should not view the donor as a stranger to the litigation, but in the multiple donor case most donors will be HIV-negative and therefore have no relationship to the litigation.

These differences, in conjunction with safeguards that create only a minimal risk that discovery will lead to public disclosure of the donor's identity, demonstrate that in single donor cases the plaintiff's interest in discovering information necessary to prove his claim outweigh the donor's interest in remaining free from discovery. Additionally, the potential impact on the blood supply remains speculative. Any minimal impact on the blood supply that may result from limited disclosure of donor identities in single donor cases in no way tips the balance in favor of complete denial of discovery. Accordingly, in single donor cases, courts should permit limited discovery when the plaintiff shows a need for it.

By contrast, discovery in multiple donor cases could significantly infringe upon the donors' privacy, highlighted by the probability that the plaintiff will seek personal information from both donors and third parties and that public disclosure will result. Further, the scope of discovery in this context increases the poten-

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<sup>273</sup> Even if one accepts the testimony of blood banking experts before a congressional committee as the best evidence, those experts directed their concern to the effects of discovery in multiple donor cases. *Hearings, supra* note 248, at 111-201. The focus of the hearing was on the need for protective legislation. *Id.* Virtually all of the testimony concerning the confidentiality of blood donors referred to the dangers of the type of discovery that subjected the donor to public disclosure and delved deeply into his personal life, as would result in a multiple donor case. *Id.* None of the experts addressed the type of limited discovery, strictly confined to the screening process and shielded from public disclosure, sought in the typical single donor case.

tial for harm to the volunteer blood supply. Accordingly, in multiple donor cases, courts should deny discovery.

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