***** NOT FOR PUBLICATION *****

DISSENTING OPINION OF ACOBA, J.

I do not agree that a previously given limited waiver suffices to protect a patient's right of privacy.[1] That right of privacy would be effectively circumvented by requiring plaintiff-appellant Elsie Blossom Wang (Dr. Wang) to produce in discovery her patients' medical records without notice to, and the present consent of, the patients involved. For that reason, dismissal of the case for Dr. Wang's failure to produce such records without such qualifications would not be warranted. I would hold that a patient's waiver of confidentiality[2] must be seasonably current, or allow for some form of notice and withdrawal, because events intervening after the waiver is given -- oftentimes years later -- may substantially affect the basis upon which the agreement rested. Seven of the waivers are twenty-two years old or older (the oldest being thirty-seven years old), and four of the waivers are sixteen to thirteen years old. Inasmuch as only fifteen patients' records were requested from Dr. Wang, notifying

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[1] Inasmuch as this is a case of first impression involving fundamental privacy issues, I believe this case must be published in the public interest. See Torres v. Torres, 100 Hawai'i 397, 434, 60 P.3d 798, 835 (Dec. 17, 2002) (Appendix A) (Acoba, J., dissenting, joined by Ramil, J.).

[2] In essence, the waiver provides that an applicant for membership with defendant-appellee Hawai'i Medical Service Association (HMSA)

> authorize[s] HMSA to examine and copy any medical records of [the member] and [the member's] dependents for purposes of paying benefits, coordinating benefits with other plans, and conducting quality assurance and health education activities. (All such information shall be kept strictly confidential by HMSA unless the patient authorizes release.).

the patients and requesting current waivers from them would not have presented an undue burden on HMSA.

Additionally, while those of the patients who sought to intervene below did not pursue their claims an appeal, I believe the first circuit court (the court) should have permitted these HMSA members to intervene to protect the confidentiality of their own medical records.[3] Denying them intervention left their rights to be decided without the opportunity to comment or object. In Kim v. H.V. Corp, 5 Haw. App. 298, 688 P.2d 1158 (1984), the Intermediate Court of Appeals (ICA) examined the right to intervene and stated that a court must

> consider four factors in assessing [a petitioner's] right to intervene: a) whether the application was timely; b) whether [the petitioner] claims an interest relating to the property or transaction which is the subject of the action; c) whether the disposition of the action would, as a practical matter, impair or impede [the petitioner's] ability to protect that interest; and d) whether [the petitioner's] interest is inadequately represented by the existing [plaintiff].

Id. at 301; 688 P.2d at 1161 (reviewing Hawai'i Rules of Civil Procedure Rule 24(a)(2) (emphasis added)). I believe that all four of these factors were met in this case. Plainly, the patients had a concrete interest in protecting their own medical records and their interests may come into conflict with those of Dr. Wang's.

[3] The four patients who attempted to intervene did not appeal the court's final judgment denying their motion and granting HMSA's motion for sanctions, including dismissal. Inasmuch as I would remand this case for further proceedings, I believe it necessary to examine the court's determination to deny this motion to intervene.

I.

In my view, the interest of the patients in the confidentiality of their medical records implicates the constitutional protection of "informational privacy" afforded under article I, section 6 of the Hawai‘i Constitution.[4] In a parallel context, the United States Supreme Court has recognized that, under the federal constitution, the right of privacy extends to "the individual interest in avoiding disclosure of personal matters." Whalen v. Roe, 429 U.S. 589, 599 (1977). Medical records have been held to be "clearly within this constitutionally protected sphere." In re Search Warrant (Sealed), 810 F.2d 67, 71 (3rd Cir. 1987) (citations omitted); see also United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3rd Cir. 1980) ("There can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection.").

This court has extended privacy protection rights beyond that afforded by the federal constitution. In State v. Mallan, 86 Hawai‘i 440, 950 P.2d 178 (1998), this court held that, "'[a]s the ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawai‘i

[4] A constitutional analysis is applied to the case at hand, inasmuch as the court order in this case is state action involving the forced disclosure of otherwise protected material. Cf. Shelly v. Kraemer, 334 U.S. 1, 20 (1948) (holding that state action refers to "exertions of state power in all forms" including judicial proceedings and that "when the effect of that action is to deny rights subject to the protection of the [constitution], it is the obligation of this Court to enforce the constitutional commands").

Constitution, we are free to give broader privacy protection than that given by the federal constitution,'" and that, "unlike the federal constitution, our state constitution contains a specific provision expressly establishing the right to privacy as a constitutional right." Id. at 448, 950 P.2d at 186 (quoting State v. Kam, 69 Haw. 483, 491, 748 P.2d 372, 377 (1988) (emphasis omitted)). Directly applicable to the facts at hand, this court has acknowledged that article I, section 6 of our constitution protects "informational" privacy dealing with disclosure of "medical, financial, educational, or employment records." Id. at 443 n.4, 950 P.2d at 181 n.4 (citing State Org. of Police Officers v. Society of Prof'l Journalists-Univ. of Hawai'i Chapter, 83 Hawai'i 378, 927 P.2d 386 (1996); Painting Indus. of Hawaii Market Recovery Fund v. Alm, 69 Haw. 449, 746 P.2d 79 (1987); Nakano v. Matayoshi, 68 Haw. 140, 706 P.2d 814 (1985)) (emphasis added); see also id. at 485, 950 P.2d at 223 ("Another area of concern that may be alleviated by this right [of privacy] is the issue of informational privacy, or the ability of a person to control the privacy of information about himself [or herself]." (Quoting Stand. Comm. Rep. No. 69, reprinted in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 671, 673-75)) (Klein, J., concurring, joined by Nakayama, J.); Painting Indus., 69 Haw. at 453-54, 746 P.2d at 82 (noting a committee report from the constitutional convention stating that "[p]rivacy as used in this sense concerns the possible abuses in the use of *highly personal and intimate*

information in the hands of government or private parties[.]" (quoting Comm. Whole Rep. No. 15, in 1 Proceedings of the Constitutional Convention of Hawai‘i of 1978, at 1024) (emphasis in original).

Also, a physician has standing to raise the rights of his or her patients. See Singleton v. Wulff, 428 U.S. 106, 117 (1976) (allowing a physician to assert privacy rights of his or her patients); Griswold v. Connecticut, 381 U.S. 479, 481 (1965) (holding that a physician has standing to raise his or her patient's privacy rights). I believe that Dr. Wang has demonstrated a sufficient stake in the litigation to ensure the "'concrete adverseness which sharpens the presentation of issues[.]'" Westinghouse, 638 F.2d at 574 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)); see also Sierra Club v. Hawai‘i Tourism Auth., 100 Hawai‘i 242, 250, 59 P.3d 877, 885 (2002) ("The crucial inquiry with regard to standing is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his or her invocation of the court's jurisdiction and to justify exercise of the court's remedial powers on his or her behalf." (Citations omitted.))

II.

In addition, the Hawai‘i State Legislature has enacted an evidentiary rule of privilege that protects the right of privacy in physician and patient relationships. See Hawai‘i Rules of Evidence (HRE) Rule 504(b) ("A patient has a privilege

to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental, or emotional condition[.]").[5] This privilege may be raised by Dr. Wang, as the rule provides that "[t]he person who was the physician at the time of the communication is presumed to have authority to claim the privilege[.]" HRE Rule 504(c) (emphasis added).

III.

In light of these protections, I question whether it can be concluded that Dr. Wang's patients have effectively waived their rights to prohibit disclosure under the circumstances of this case.[6]

Waivers of constitutional rights, in particular, are construed strictly. "Constitutional rights may ordinarily be waived by clear and convincing evidence that the waiver is

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[5] HRE Rule 504(d)(4) creates an exception for "[p]roceedings against [a p]hysician[,]" but mandates that the "identifying data of the patients whose records are admitted into evidence shall be kept confidential unless waived by the patient." Here, there has not been any effort to keep Dr. Wang's patients' "identifying data" confidential, demonstrated by the fact that all of the patients' names have been released and made a part of the public record.

[6] Although not central to this discussion, I believe the majority has not completely addressed Dr. Wang's argument that the waiver is ambiguous. Utilized in the waiver is the language that, if accepted as a member, the person agrees "to authorize HMSA to examine and copy any medical records[.]" However, the waiver also indicates that "[a]ll such information shall be kept strictly confidential by HMSA unless the patient authorizes release." (Emphasis added.) The majority does not squarely address this ambiguity and, instead, interprets this language to indicate a present "authorization" rather than an agreement that the patient will authorize investigation into his or her medical records at some future point, if asked. Here, obviously, the information has been made public without the patients' authorization.

voluntary, knowing and intelligent." Brown v. Thompson, 91 Hawai'i 1, 10, 979 P.2d 586, 595 (1999) (quoting Davies v. Grossmont Union High School, 930 F.2d 1390, 1394 (9th Cir.), cert. denied, 501 U.S. 1252 (1991). In non-constitutional settings, a waiver has been defined as "an intentional relinquishment of a known right, a voluntary relinquishment of rights and the relinquishment or refusal to use a right." Best Place Inc. v. Penn Am. Ins. Co., 82 Haw. 120, 139, 920 P.2d 334, 353 (1996) (citation omitted) (emphasis added).

It is apparent that the language of authorization involved in the HMSA material fails entirely to inform the patient that he or she is waiving a constitutional and statutory right. In the absence of such notification, it is impossible to conclude that a patient knowingly waived his or her right to privacy. Thus, when signing the HMSA application, patients have not "intelligently" relinquished their right to confidentiality of private information.

A reasonable waiver of a constitutional or statutory right should be current and should require that a patient receive notification before the disclosure occurs. Already over fifteen patients' names have been released in a public record, in the context of an investigation for fraudulent medical billing without notification to many of the patients. The waiver was not supported by any promise on the part of HMSA to make every effort, in the event of litigation, to keep the medical records and names sealed.

In the present case, it is apparent that a great number of the waivers were signed over twenty years ago. Reviewing the record, it appears that the waivers in issue were signed in the following years: 1967; 1969; 1972; 1974; 1975; 1980; 1982; 1987; 1988; 1991; 1994; and 1995. One waiver was not even signed or dated, although there is a transfer date filled in by HMSA that states "6/1/70[.]" Considering events and circumstances that can occur over a twenty-year period, it would be unreasonable to impute "knowing and intelligent" waiver status to these authorization forms.

For example, a myriad of situations could occur that dictate against construing an old medical insurance application as a "knowing" waiver. Between the date of the signature and the actual disclosure, significant medical events could have occurred to the patient, such as the onset of acquired immunodeficiency syndrome or cancer or other disease or condition, that the patient wishes to keep confidential. Or, an application may be filled out by a parent for a minor who is now an adult. Cf. Leong v. Kaiser Found. Hosp., 71 Haw. 240, 249, 788 P.2d 164, 169 (1990) (recognizing that the legal analysis involving children who have not signed a medical contract is different from that of an adult, but allowing a parent's signature to bind a child to mandatory arbitration). This case thus raises the possibility that a waiver could have been signed by an individual for family members who did not themselves agree to disclosure of their medical records. See HMSA enrollment form ("If applying for a

family plan, list your spouse and/or all eligible children's names, and birthdates.") A knowing waiver of privacy or confidentiality can only be validly given when made in light of all relevant, pertinent facts. These authorization forms lack such indicia.

IV.

Accordingly, I must respectfully dissent from the majority's disposition and analysis in this case. I would vacate the court's amended final judgment granting in part HMSA's motion for summary judgment and remand the case for further proceedings consistent with this opinion.