

October 1960

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### Recommended Citation

Walter L. Oblinger, *Privileged Communications between Physician and Patient in Illinois*, 37 Chi.-Kent L. Rev. 97 (1960).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol37/iss2/2>

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## PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT IN ILLINOIS

Walter L. Oblinger\*

THE 71ST GENERAL ASSEMBLY, at the suggestion of the Illinois State Medical Society, enacted legislation designed to afford a measure of protection to disclosures made to physicians by their patients. The Act is as follows:

No physician or surgeon shall be permitted to disclose any information he may have acquired in attending any patient in a professional character, necessary to enable him professionally to serve such patient, except only (1) in trials for homicide when the disclosure relates directly to the fact or immediate circumstances of the homicide, (2) in all mental illness inquiries, (3) in actions, civil or criminal, against the physician for malpractice, (4) with the expressed consent of the patient, or in case of his death or disability, of his personal representative or other person authorized to sue for personal injury or of the beneficiary of an insurance policy on his life, health, or physical condition, (5) in all civil suits brought by or against the patient, his personal representative, a beneficiary under a policy of insurance, or the executor or administrator of his estate wherein the patient's physical or mental condition is an issue, (6) upon an issue as to the validity of a document as a will of the patient, or (7) in any criminal action where the charge is either murder by abortion, attempted abortion or abortion.<sup>1</sup>

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This article previously appeared in the Illinois Medical Journal, Vol. 117, No. 3, March, 1960, under the title: "Now Disclosures Made to the Physician Are Privileged."

<sup>1</sup> Laws 1959, Vol. 2, p. 1940, H. B. 1280; Ill. Rev. Stats. 1959, Vol. 1, Ch. 51, § 5.1.

The first thing to bear in mind is that the privilege belongs exclusively to the patient and may not be waived by the physician.<sup>2</sup> As written, the prohibition against disclosure by the physician may be waived only under one of the seven exceptions enumerated in the statute.

A review of existing statutes in other states discloses that the privilege as it exists elsewhere contains one or more of the exceptions enumerated in the Illinois statute.<sup>3</sup> Of course, the privilege did not exist at common law.<sup>4</sup> The only privilege that did exist at common law was that between attorney and client,<sup>5</sup> the purpose being to encourage the employment of professional advisers by persons in need of legal services and to promote absolute freedom of consultation by removing all fears on the part of the client that his attorney might be compelled to disclose in court the communications of the client or other information developed by the attorney during the course of his representation.<sup>6</sup> Practically all of the states have statutes embodying this common law rule.

<sup>2</sup> McCormick, *Handbook of the Law of Evidence* (West Publishing Co., St. Paul, 1954), § 105, p. 216. Professor McCormick points out: ". . . the rule which excludes disclosures to physicians is not a rule of incompetency of evidence serving the end of protecting the adverse party against unreliable or prejudicial testimony. It is a rule of privilege protecting the extrinsic interest of the patient and designed to promote health not truth. It encourages free disclosure in the sick-room by preventing such disclosure in the courtroom. The patient is the person to be encouraged and he is the holder of the privilege" See also, Wigmore, *Evidence* (3d Ed., 1940), Vol. 8, § 2386, p. 828, and a Note, "Legal Protection of the Confidential Nature of the Physician-Patient Relationship," 52 *Colum. L. Rev.* 383 (1952).

<sup>3</sup> Statutes are compiled in Wigmore, *Evidence* (3d Ed., 1940), Vol. 8, § 2380, p. 803, footnote 5, and in De Witt, *Privileged Communications Between Physician and Patient* (Charles C. Thomas Publisher, Springfield, Illinois, 1958), Appendix, p. 447.

<sup>4</sup> Wigmore, *Evidence* (3d Ed., 1940), Vol. 8, § 2380, p. 802; *Clearly Handbook of Illinois Evidence* (Little, Brown and Company, Boston, 1956), § 4.16, p. 56; McCormick, *Handbook of the Law of Evidence*, § 101, p. 211; *Model Code of Evidence* (American Law Institute, Philadelphia, 1942), Foreword by Edmund M. Morgan, at page 28 and Rule 221, comment at page 161.

In the *Duchess of Kingston's Trial*, 20 *How. St. Trials* 573 (1776), when a doctor raised the question before Lord Mansfield whether a physician was required to disclose professional confidences, the Chief Justice made it clear: "If a surgeon was voluntarily to reveal these secrets, to be sure, he would be guilty of a breach of honor and of great indiscretion; but to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever."

<sup>5</sup> Wigmore, *Evidence*, (3d Ed., 1940), Vol. 8, § 2290; p. 547 (history of the privilege). Illinois clearly recognizes the privilege in the lawyer-client relationship. *Dickerson v. Dickerson*, 322 Ill. 492, 153 N. E. 740 (1926).

<sup>6</sup> Wigmore, *Evidence*, (3d Ed., 1940), Vol. 8, § 2291, p. 550 (policy of the privilege).

## FIRST STATUTE

The first state to enact a statute protecting disclosures made to a physician appears to be New York, which in 1828 adopted language that served as a model for many other states. It provided:

No person duly authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient, in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him, as a surgeon.<sup>7</sup>

Of course, the purpose of the statute was to encourage the patient, as a matter of public policy, to make full disclosures to his physician so that he could be properly and fully treated.<sup>8</sup> Thus, it would appear, that the legislature decided that public policy required that its citizens be free to seek treatment for their injuries and ailments and that this consideration was more important than the need to get at the truth in a lawsuit.

With the passage of this type of legislation, many unconsidered problems arose which worked to the disadvantage of the patient. Other problems arose wherein the needs of justice outweighed the need for absolute privacy of communication between physician and patient. Hence, the legislatures began to enact exceptions to the absolute privilege.

<sup>7</sup> N. Y. Stats. 1827-28 (Published in 1829), Vol. II, Part III, Ch. 7, Tit. 3, art. eight, § 73, p. 406. Another early Act, widely copied, is the California Code of Civil Procedure of 1872, § 1881, par. 4: "A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient."

For a list of the states which have enacted this legislative privilege in some form, see footnote 3, ante. States maintaining the common law position denying any privilege for information disclosed to medical practitioners are listed in Chafee, "Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?" 52 Yale L. J. 607 (1943).

<sup>8</sup> McCormick, Handbook of the Law of Evidence, § 101, p. 211 and § 108, p. 221; Model Code of Evidence, Foreword by Edmund M. Morgan, p. 28.

## PATIENT, PHYSICIAN, PUBLIC SERVED

As summarized in the Illinois statute, the patient's best interests are served under exception 2, where the patient is in need of mental treatment and his physician is the best person available to inform the court. Again, under exception 4, it seemed wise to permit the patient to expressly waive his privilege or his executor or personal representative to sue upon a policy of insurance or on a personal injury claim where he was either dead or under some form of legal disability. Exception 5, as originally drawn and submitted to the legislature, stipulated that the privilege was impliedly waived when the patient brought a civil suit wherein his physical or mental condition was an issue and the physician's testimony was relevant to that issue. The legislature, in its wisdom, however, insisted that the ends of justice required that the physician testify also in those cases where suit was brought against the patient and his physical or mental condition was an issue and struck the relevancy test, thereby leaving it exclusively to the courts to decide on which matters the physician should testify.

One of the problems sought to be overcome, *i. e.*, one which caused trouble to courts in other states where the privilege existed, was the lack of expert medical testimony in will contests. It would appear to be in the best interest of the patient that his physician be permitted to testify as to his mental condition at the time he executed the document sought to be admitted in probate as his will. This, then, was made an exception to the privilege under exception 6. Exceptions 1 and 7 were enacted as a matter of public policy so that in cases of murder, murder by abortion or abortion, the courts could have the benefit of medical testimony. The purpose of exception 3 is to permit the physician to protect himself in cases of malpractice by permitting him to testify, produce medical records, or use other medical evidence in his defense. One authority<sup>9</sup> flatly states that if this exception did not exist, a physician would absolutely be at the mercy of an unscrupulous patient. Thus

<sup>9</sup> De Witt, *Privileged Communications Between Physician and Patient*, p. 251.

exception 3 attempts to prevent the use of the courts to reach an unjust result and may be justified on the basis of public policy.

That a need existed for this type of legislation has been well known to the medical profession for many years. Two of the principal problems have been, (1) the disclosure of admissions made by patients to physicians in lawsuits, for example, in divorce and separate maintenance actions, and (2) disclosure of admissions made by patients to physicians involving ailments not directly related to the lawsuit at hand.

#### APPLICATION OF THE LAW

In the first instance, several cases have arisen in Illinois, as illustrated by one case in the Circuit Court of Cook County,<sup>10</sup> wherein the plaintiff sought to question his wife's psychiatrist in a suit brought for alienation of affections. The physician claimed that any disclosures made were privileged. The court, without benefit of enabling legislation, sought to give the privilege status and upheld the physician and refused to permit him to answer.<sup>11</sup> The case was not appealed, however, and the Supreme Court of Illinois has never had an opportunity to pass upon the question. If the problem had been presented to the Supreme Court, there is no question that it would have overruled the lower court and followed the common law rule.

It might be observed that the psychiatrist occupies a position quite similar to that of the attorney<sup>12</sup> in consultations involving problems that evidence themselves in the form of neuroses and psychoses. Both the lawyer and the psychiatrist must receive

<sup>10</sup> *Binder v. Ruvell*, Civil Docket (Law) 52 C 2535, Circuit Court of Cook County, Illinois, June 24, 1952. See note on this case, 47 Nw. U. L. Rev. 384.

<sup>11</sup> The file, Civil Docket (Law) 52 C 2535, Circuit Court of Cook County, Illinois, contains a nine page statement of Trial Judge, Harry M. Fisher, setting forth reasons for upholding the privilege.

<sup>12</sup> Judge Fisher, in the trial court memorandum in the case of *Binder v. Ruvell*, ante, footnotes 10 and 11, likened the position of the psychiatrist with his patient to that of the priest-penitent relationship. Wigmore also supports this privilege (priest-penitent), Wigmore, *Evidence* (3d Ed., 1940), Vol. 8, § 2396, p. 850, while opposing the physician-patient privilege, § 2285, p. 532.

from the patient information which may involve him in illegal, immoral, or other activity that may be detrimental to the patient if the information is made public or is disclosed to unauthorized persons. That the psychiatrist should be free to delve into all facets of the patient's life in an effort to solve his medical problems would appear to be self-evident.<sup>13</sup> All too frequently however, the problems confronting the patient have legal ramifications, as in the case of extra-marital relationships. It was intended, and it is hoped, that the statute will serve to protect the psychiatrist-patient relationship and render the psychiatrist immune from court inquiry, saving exceptions 1, 2, 3, 4, 6 and 7 above.

Inasmuch as exception 5 provides that the issue before the court in the civil action must be one "wherein the patient's physical or mental condition is an issue," it would appear that the psychiatrist would not be permitted to testify in the divorce or separate maintenance situation or in other actions where the admission or disclosure is not directly related to the cause of action. However, it would appear that the psychiatrist would be subject to testifying in causes of action wherein the cause of action is on an issue directly affecting the patient's mental or physical condition, for example, cases involving traumatic neurosis, or other neuroses growing out of injury or wrongs committed against the patient.

#### INCOMPLETE SOLUTION

Insofar as disclosures made to physicians involving ailments not directly related to the lawsuit is concerned, it would appear that this statute falls short of complete solution. The classic case in point is the case involving a lawsuit brought by the patient for damages for injuries suffered through negligence of the defendant. The plaintiff claims that his back ailment or his broken leg was directly caused by the negligence of the defendant. The

<sup>13</sup> Extended discussion in Note, 47 Nw U. L. Rev. 384 (1952), and Guttmacher and Weihofen, "Privileged Communications Between Psychiatrist and Patient," 28 Ind. L. J. 32 (1952).

defendant, during the course of pre-trial discovery, seeks to obtain the complete medical history of the patient, which includes complete recovery from venereal disease, no ill effects being observable or demonstrable.

If the defendant is permitted to bring out this history, the lawsuit may have to be abandoned, since the disclosure may result in unfavorable personal publicity, marital difficulties, etc. To permit the doctor to testify under these circumstances would certainly prejudice the plaintiff and might prevent recovery on a meritorious claim. However, not to permit the physician to testify might prevent the defendant from obtaining a medical history related to the injury, thereby resulting in a miscarriage of justice. Further, it appears that the problem, whether a particular medical history might have a bearing on the injury, is primarily a medical one.

Just how far the courts will go in the search for the truth in this situation is speculative.<sup>14</sup> Regardless of the form of the statute, it is probably safe to say that the courts will jealously guard their right to determine what is relevant and material, and that they probably will permit testimony on both sides before ruling on the question of submitting the matter to the jury.

That the statute has created some problems is not unexpected. The first problem is whether or not the physician is precluded from asserting his lien for medical services under a new statute<sup>15</sup> also passed by the 71st General Assembly. For the reasons outlined in a previous article,<sup>16</sup> it would appear that the physician may comply with the so-called Physician's Lien Act and furnish information concerning the injury, treatment, and medical his-

<sup>14</sup>Two authorities delineate this area of speculation. In the Foreword to the Model Code of Evidence, at page 7, Edmund M. Morgan says: "If a privilege to suppress the truth is to be recognized at all, its limits should be sharply determined so as to coincide with the limits of the benefits it creates." Wigmore, *Evidence* (3d Ed., 1940), Vol. 8, § 2285, p. 531: "The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation."

<sup>15</sup>Laws 1959, Vol. 2, p. 2205, S. B. 1001; Ill. Rev. Stats. 1959, Vol. 2, Ch. 82, § 101.1 et seq.

<sup>16</sup>Oblinger, "The Physician's Lien," 117 Ill. Med. Journal 81 (Feb., 1960).

tory as related to him by the patient, *provided* the same appears on the doctor's medical records.

Another problem is whether the notations made on the medical records of the patient in a hospital fall within the purview of the privilege. Attention is called to the case of *Newman v. Blom*,<sup>17</sup> wherein the court in upholding the privilege, said:

The policy of the statute is to provide for great freedom of disclosure by a patient to his physician, for the patient is often in no position to know what disclosures may or may not be necessary for his proper treatment. . . . We [have also held] that the statute should receive a liberal construction designed to carry out its manifest purpose to make consultation by a patient with his physician entirely confidential and free from anticipation or fear that this confidence will be broken by the examination of the physician, directly or indirectly, as a witness in some legal proceeding. Clearly, then, such a statute is intended to cover any information gathered from the patient and placed in a record by an attending, consulting, or treating physician, whether done intentionally, willfully, or under a law requiring its preservation. It is our conclusion that any such information placed upon such hospital records should be and is covered under [the statute] as privileged to the same extent that the knowledge and information of the examining or treating physician is privileged.<sup>18</sup>

Whether Illinois will follow the law as enunciated by the Iowa Supreme Court remains to be seen.<sup>19</sup>

#### TESTIMONY FOR HOMICIDE VICTIMS

Another problem with interesting legal sidelights involves the construction of the language in exception 1. Note that the physician is free to testify in homicide cases but that his testi-

<sup>17</sup> 249 Ia. 836, 89 N. W. (2d) 349 (1958).

<sup>18</sup> *Newman v. Blom*, 249 Ia. 836, 843, 844, 89 N.W. (2d) 349, 354, 355 (1958).

<sup>19</sup> In other jurisdictions, the cases are divided on this point. See, McCormick, *Handbook of the Law of Evidence*, § 104 at pp. 214-5 and § 290 at pp. 609 and 613. Compare, *Frederick v. Federal Life Insurance Company*, 13 Cal. App. (2d) 585, 57 P. (2d) 235 (1936), noted in 25 Cal. L. R. 108 (1936).

mony is limited to disclosures relating "directly to the fact or immediate circumstances of the homicide." It would appear that this poses no problem for the physician conducting an autopsy on the deceased; a private relationship between physician and patient never existed and, of course, the privilege never arises. Furthermore, autopsies done under these circumstances would undoubtedly be ordered by the coroner and are provided for by statute.<sup>20</sup> Insofar as the physician treating the deceased prior to death is concerned, it would appear that he could testify objectively on the cause of death.

Would he be permitted to testify as to a dying declaration wherein the victim names the defendant as his assailant?<sup>21</sup> It is generally held by the courts that the defendant in a criminal prosecution may not invoke the privilege of the victim and thus exclude relevant evidence which the victim's physician is in a position to give. No confidential relationship existed between the physician and the defendant; hence, no privilege exists.<sup>22</sup>

In the case of *Davenport v. State*,<sup>23</sup> the defendant was convicted of manslaughter. Physicians who had attended the victim testified for the state, over objection by the defendant, on the nature of the victim's wound, treatment given, and the cause of death. There was no evidence showing consent or waiver of the privilege by the victim. A majority of the court, in a split decision, held that the defendant could not claim the privilege of the victim; therefore, testimony of the physicians was admissible.<sup>24</sup>

<sup>20</sup> Ill. Rev. Stats. 1959, Vol. 1, Ch. 31, § 10.2. See note, 12 Minn. L. Rev. 390.

<sup>21</sup> Since this situation seems to be covered by exception in the statute, no problem should arise.

<sup>22</sup> See De Witt, *Privileged Communications Between Physician and Patient*, ante, footnote 9, p. 50 (discussion and footnote cases).

<sup>23</sup> 143 Miss. 121, 108 So. 433, 45 A. L. R. 1348 (1926).

<sup>24</sup> The Mississippi statute involved, read: "All communications made to a physician or surgeon by a patient under his charge or by one seeking professional advice, are hereby declared to be privileged, and such physician or surgeon shall not be required to disclose the same in any legal proceeding, except at the instance of the patient." The three judges who dissented indicated that the statute's wording, "in any legal proceeding," applied to criminal prosecutions.

The court, in the hypothetical situation above, might hold that the presence of the physician at the deathbed was incidental and that the victim's purpose and intention in making the statement was not for the purpose of being treated but to see justice done.

#### TESTIMONY FOR DEFENDANTS

A greater problem is posed for the physician who treats the defendant. Could a psychiatrist, for example, be compelled to testify on the homicidal tendencies of his patient when his opinion is based on observations and conferences extending over a considerable period of time prior to the act? What about admissions in the nature of a confession occurring after the fact? Likewise, there would seem to be a problem in the factual situation where the defendant expresses hostility to the victim and makes statements indicating that the defendant intended to do bodily harm to the victim. This might be construed to be a disclosure directly relating to the fact of homicide. What about observations as to the defendant's state of mind or physical characteristics upon which the physician might reasonably conclude that this was a dangerous man but without any indication that he intended to do harm to any particular person, especially the victim? These are questions the courts must pass upon.<sup>25</sup> The courts might very well exclude any testimony not directly related to the fact or to the immediate circumstances of the homicide disclosed to the physician in his capacity as a physician for the purpose of treatment.

Exception 7 does not appear to be limited in any way. It simply provides that in criminal cases where the charge is either murder by abortion, or abortion, that the privilege does not exist. In these cases, then, it would appear that the physician must testify as to any facts he may have competent to prove the charge.

<sup>25</sup> Some of the questions are answered in an Editorial Note, citing cases, in *Selected Writings on the Law of Evidence and Trial*, edited by William T. Fryer (West Publishing Co., St. Paul, 1957), pp. 258-9.

CONCLUSION

Aside from the protection to the psychiatrist-patient relationship, just what has the statute accomplished? First of all, the principle of privileged communication for the physician-patient relationship has been established. Secondly, the law has recognized the principle of medical ethics against the disclosure of matters received by the physician in the very private relationship between him and his patient. Thirdly, the physician is prohibited from making any disclosure in most legal situations including all criminal matters except murder or abortion, unless the privilege is waived through some conduct of the patient as enumerated in the statute.