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## CONFIDENTIALITY BETWEEN PHYSICIAN AND PATIENT*

By RIGNAL W. BALDWIN†

There is a substantial difference in the strictly legal aspects of professional confidences in the physican-patient as against the lawyer-client relationship. However, the ethics of both the medical and legal professions in this regard are, and should be, identical. It is the absolute duty of the physician or surgeon and of the lawyer to preserve inviolate all confidences reposed in him by the patient or client — at least until requested by the patient or client or compelled by legal process to divulge such secrets. But the question of the extent to which information given to either a doctor or a lawyer in confidence should be permitted to be suppressed by the law, where the public good or search for truth and justice is involved, is a much debated field.

As a matter of ethics, it is apparent that ordinarily no lawyer or doctor should voluntarily disclose facts he has learned in his professional capacity which conceivably could be embarrassing to or affect the reputation of his client or patient. Yet we all know that this basic natural rule often is violated in club, bar and drawing room conversation and in professional contacts. A large proportion of malpractice cases can be traced directly to ill-considered gossip or criticism of our confreres and competitors.[1]

Inexcusable as is voluntary disclosure of confidences for lawyers and physicians and surgeons, it appears that

* Author's Note: This paper was prepared as a talk delivered at the Medicolegal Symposium of the Medical and Chirurgical Faculty of Maryland, April 4, 1962, sponsored by the Symposium Committee of the Medicolegal Committee of the Baltimore City and Maryland State Bar Associations and the Medical and Chirurgical Faculty of Maryland, and, consequently, is cast in the direction of appeal to physicians and surgeons rather than as a strictly legal article.

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[1] Discussed in an address before the Medicolegal Symposium of the Faculty, April 26, 1961 by G. C. A. Anderson, Esq. of the Baltimore, Md. Bar, counsel for the Medical and Chirurgical Faculty of Maryland.

the client or patient involved has no real redress at law. Such disclosure is not a crime, and in the only appellate decision found of a case brought by a patient against a doctor for voluntary disclosure of secrets learned in the professional relationship, the patient did not recover.[2] Against voluntary disclosure the only relief of the patient or client is to look elsewhere for a more worthy guardian of his legal affairs or medical welfare, though disciplinary action for suspension or even revocation of the right to practice might well succeed in an aggravated case.[3]

Fortunately it is rare in the practice of most physicians, surgeons or lawyers that they are called upon to divulge involuntarily information which their patients or clients wish withheld. Short of legal compulsion, I would think that the practical reaction by the medical practitioner, and by hospitals also, to requests for such information is extremely simple. A written authorization signed by the patient should be required in every such instance with the same degree of routine as in respect of consent to operations.[4] Every doctor and hospital should make this requirement a cardinal and inviolable rule. In fact, up to the point of having to answer to a validly issued subpoena, I do not see how a doctor or a hospital can be forced to divulge information or records, even if the patient should both request and authorize disclosure.[5] This statement must except a few particular instances where medical facts and records are required by law to be divulged by the physician. Autopsy records are public documents under a ruling by the Attorney General of Maryland.[6] The Uniform Narcotic Drug Act[7] provides that confidences given to unlawfully procure narcotic drugs or their administration "shall not be deemed a privileged communication."[8] Physicians are required to re-

[2] Simonsen v. Swenson, 104 Neb. 224, 177 N.W. 831 (1920), where physician, after warning patient to vacate a hotel, reported to owner that his "guest" probably was afflicted with a "contagious disease."

[3] However, the Maryland Court of Appeals recently recognized "the right to redress for wrongful invasion of privacy" by unwarranted verbal disclosure of information which resulted in loss of plaintiff's employment. Carr v. Watkins, 227 Md. 578, 177 A. 2d 841 (1962).

[4] See *Consent to Operative Procedures* by Kenneth C. Proctor, Esq. of the Towson, Md. Bar. *Infra*, p. 190 *et seq.*

[5] At least as to permitting *unofficial* inspection or use of case histories. Securing routine authority to use records for intra-hospital or research purposes might be desirable.

[6] 24 Op. Atty. Gen., 650 (1939).

[7] 3 MD. CODE (1957) Art. 27, § 276 et seq.

[8] 3 MD. CODE (1957) Art. 27, § 295(b).

port certain communicable[9] and occupational[10] diseases to the local health officer. They must fill out and file birth and death certificates.[11] Also they may be guilty of a criminal act if they clandestinely treat cases such as gunshot, stab or other similar wounds, attempted suicides, or abortions, without notifying the authorities.[12]

We come now to consideration of the circumstances under which conditions observed by and confidences given to a physician or surgeon may be compelled to be divulged. Here exists the difference between the legal and medical profession.

Early at common law there appeared a general privilege of confidentiality invokable by any witness in a lawsuit based on his conception of "honor among gentlemen". This was quaintly illustrated in *Lord Grey's Trial,* a 1682 British criminal case.[13] The charge was for abducting and debauching Lady Henrietta Berkeley. Lady Henrietta testified for the defendants that she left her parents' house voluntarily. Asked who was with her, she replied, "I shall not give any account of that, for I will not betray anybody for their kindness to me."[14]

But such personal privilege did not prevail in the development of the common law, and finally the English courts upheld the privilege of confidentiality only in the lawyer-client and husband-wife relationships.[15] The former is based in part on the fact that, unlike the doctor-patient relationship, the lawyer and his client must look toward an ultimate court proceeding, and it is felt the client should not be curtailed in his freedom to make frank

[9] 4 MD. CODE (1957) Art. 43, §§ 56 and 78 require written notice to local health officer of deaths due to, and of living cases of contagious or infectious diseases dangerous to public health.

[10] To State Board of Health. 4 MD. CODE (1957) Art. 43, § 11.

[11] 4 MD. CODE (1957) Art. 43, §§ 18 and 20. The State Board of Health may "furnish any applicant for proper purposes a certified copy." § 26. Penalty for unlawful communication in respect of information. § 28(c). § 27 provides that "certified copies of such certificates, shall be prima facie evidence of the facts therein stated."

[12] There appears to be no State statute on this. Dr. Russell S. Fisher, Chief Medical Examiner for the State of Maryland, states there are applicable local laws in some counties. However, it is submitted that a physician or surgeon should report to the police all cases which appear to involve serious criminal acts and incurs great risk in not doing so.

[13] 9 How. St. Tr. 127 (1682).

[14] *Id.*, 175.

[15] In Maryland statutory privilege has been accorded to: (1) journalists as to source of news (4 MD. CODE (1957) Art. 35, § 2); (2) public accountants (7 MD. CODE (1957) Art. 75A, § 11); and (3) clergymen and priests (7 MD. CODE (1957) Art. 35, § 13). The American Bar Association Committee on the Improvement of the Law of Evidence voted overwhelmingly against so-called "novel privileges" (1) and (2) above; 8 WIGMORE, EVIDENCE (McNaghten Rev. ed. 1961) § 2286, pp. 536-7.

disclosure of adverse facts by the specter of his lawyer being compelled later to divulge adverse facts disclosed in confidence. As to husband and wife, the basis was and is to protect and encourage domestic tranquility. In other words a general public good was considered as being served in only these two relationships by affording a privilege of absolute confidentiality.

The leading early British case in which a patient was not privileged to require confidentiality as to facts imparted to his physician was the *Duchess of Kingston's Trial.*[16] The charge was bigamy. Mr. Hawkins, a physician who attended the accused and her alleged husband, when asked whether he knew from the parties of any marriage between them, replied "I do not know how far anything that has come before me in a confidential trust in my profession should be disclosed, consistent with my professional honour."[17] To this Lord Chief Justice Mansfield replied:

> "[I]f all your lordships will acquiesce, Mr. Hawkins will understand, that it is your judgment and opinion, that a surgeon has no privilege, where it is a material question, in a civil or criminal cause, to know whether parties were married, or whether a child was born, to say that his introduction to the parties was in the course of his profession, and in that way he came to the knowledge of it. * * * If a surgeon was voluntarily to reveal these secrets, to be sure he would be guilty of a breach of honour, 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."[18]

This doctrine ever since has been accepted by the British courts. Professor Wigmore states that it probably would have been acknowledged as a common law principle in every American court had not New York adopted in 1828 a statutory innovation establishing a privilege between physician and patient, which, to a greater or less extent, has been since enacted in about two-thirds of the states.[19]

Our Maryland courts have adhered to the common law[20] and the General Assembly has made no statutory change.

[16] 20 How. St. Tr. 355 (1776).
[17] *Id.*, 572.
[18] *Id.*, 573.
[19] WIGMORE, EVIDENCE (McNaughton Rev. ed. 1961), § 2380, p. 819.
[20] Benzinger v. Hemler, 134 Md. 581, 583, 107 A. 355 (1919); O'Brien v. State, 126 Md. 270, 284, 94 A. 1034 (1915), where the Court of Appeals

A recent federal decision recognized the Maryland law in this respect.[21]

The leading authorities on the law of evidence draw a sharp line between the reasons for the lawyer-client privilege as against a similar physician-patient privilege. Professor Edmund Morgan, author of the American Bar Association & American Law Institute 1961 treatise for basic study of evidence, has said: "[T]he existence of the lawyer-client privilege can be the basis of no sound argument for the creation of a privilege covering communications between physician and patient."[22]

However, many members of the medical profession quite naturally take the view that there is as much reason for confidentiality in their relationship with patients as in the case of lawyer and client, if not more. The result has been that the legislatures of about thirty five states have been persuaded to enact statutes giving such privilege in varying degrees in relationships involving professional medical or surgical attention. The results of such legislation are chaotic in that there is great conflict in the decisions under the variegated privilege statutes. In New York the statute is twelve lines long and in 1942 it took eight pages of small type just to summarize the judicial decisions interpreting these lines.[23] In four states without general physician-patient statutes, psychologists successfully lobbied passage of such a statute for their clients.[24] In others psychiatrists only have secured the right to have their patients seal their lips. Cases have arisen as to whether dentists,[25] internes, nurses, osteopaths, chiropractors, Christian Science practitioners, phychologists, hospital attendants, druggists and veterinaries are within the coverage of general physician-patient privilege statutes.[26]

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said, "Communications made to medical men in their professional capacity were not at common law privileged and they have not been made so by statute in this State."

[21] Chief Judge Thomsen, U.S. District Court for Md., in Leszynski v. Russ, 29 F.R.D. 19 (1961).

[22] Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence*, 10 U. of Chi. Law Rev. 285, 290 (1943).

[23] Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?* 52 Yale L.J. 607, 616, n. 42. See also CLEVENGER'S, ANNUAL PRACTICE OF NEW YORK (1961).

[24] 8 WIGMORE, EVIDENCE (McNaughton Rev. ed. 1961), § 2286, n. 23, § 2382, n. 5. Georgia affords privilege in psychologist-client and psychiatrist-patient relationships only.

[25] The N.Y. statute, N.Y.R. Civ. Prac. 352, includes dentists and nurses. Wigmore states such statutes "should include a dentist," but the cases exclude where not specifically covered. WIGMORE, *op. cit. supra*, n. 24, § 2382.

[26] Generally patients of "licensed practitioners" of medicine are covered. WIGMORE, *op. cit. supra*, n. 24, § 2382.

The most important fact in connection with this entire subject, generally not understood, is that *such privilege*, whether at common law or by statute, *is solely the privilege of the patient or client*[27] *and not that of the lawyer, physician or surgeon.* Unless the client or patient forbids, the lawyer or doctor under court compulsion must testify. It is difficult therefore to see how this issue was raised in a case involving a veterinarian[28] but so it was even though the patient was a horse named "Bravo". In addition, to being equine rather than human, unhappily he was also dead at the time, and so could not have asserted such a privilege anyway! This leads me to add here that a corpse ordinarily is held not entitled to the statutory privilege since the physician making an autopsy is not a "treating physician."[29]

The outstanding authorities on the law of evidence are unanimous against any extension of such a privilege,[30] and I wholeheartedly agree with them. Some even hold that the lawyer-client relationship justifies privilege no more than that of patient and physician and should be curtailed.[31] The basis of this viewpoint is the giving of first consideration to public interest or the welfare of the community as a whole, as against that of the individual client or patient, doctor or lawyer. Again, it must be understood that the privilege is that of the individual patient or client — not that of the doctor or lawyer — and what is good and proper for him must be balanced against the public good and the prevailing requirements of justice. The legal writers feel, and I agree, that such a privilege can too often be used more as a sword than as a shield.

What is a lawsuit for? It is to lay bare the relevant facts so as to arrive at the truth and thereby accomplish justice. What is such a privilege for? It is to suppress

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[27] Including his executor, administrator or heir, who ordinarily may waive it. WIGMORE, *op. cit. supra*, n. 24, §§ 2391 and 2386.

[28] Hendershott v. Western Union Tel. Co., 106 Iowa 529, 76 N.W. 828 (1898).

[29] WIGMORE, *op. cit. supra*, n. 24, § 2382, p. 841 and cases cited in n. 11 therein. It is contra where autopsy physician had treated deceased when alive.

[30] 8 WIGMORE, EVIDENCE (McNaughton Rev. ed. 1961) § 2380(a). Apparently subscribed to by Professor John T. McNaughton, Harvard Law School, revisor of the extraordinarily excellent 1961 ed. of Vol. 8. Chafee, *op. cit. supra*, n. 23, 616. Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence*, 10 U. of Chi. Law Rev. 285, 289 (1943).

[31] Professor Morgan strongly maintains that the lawyer-client privilege also is an inducement to dishonesty and fraud, *op. cit. supra*, n. 30, 287-290. See also WIGMORE, *op. cit. supra*, n. 30, §§ 2291 and 2380a, p. 830; Chafee, *op. cit. supra*, n. 23, 609.

facts and the ascertainment of the truth for personal reasons, and often thereby to suppress justice.

Take a simple example — a damage suit for alleged personal injuries where the first treating physician found no injury. By claiming statutory privilege the plaintiff may completely deny the defendant the right to call the first physician as a witness, while producing others to whom he later reported grievous injuries.

The late Professor Wigmore, of Harvard, pre-eminent author and authority, states in his monumental work on evidence:

> "[T]he practical employment of the privilege has come to mean little but the suppression of useful truth — truth which ought to be disclosed * * *. Ninety-nine per cent of the litigation in which the privilege is invoked consists of three classes of cases — actions on policies of life insurance where the deceased's misrepresentations of his health are involved, actions for corporal injuries where the extent of the plaintiff's injury is at issue, and testamentary actions where the testator's mental capacity is disputed. In all of these the medical testimony is absolutely needed for the purpose of learning the truth. In none of them is there any reason for the party to conceal the facts, except as a tactical maneuver in litigation. * * *
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> "There is little to be said in favor of the privilege, and a great deal to be said against it. The adoption of it in any other jurisdiction is earnestly to be deprecated."[32]

Another eminent authority, Professor Zechariah Chafee, Jr. stated:

> "Some doctors may feel that it is an unfair discrimination against their profession if lawyers' secrets are protected from disclosure in court and yet physicians' secrets must be laid bare. Perhaps lawyers as well as doctors should be forced to divulge information when the judge thinks disclosure essential to the public interest, and proposals are now under consideration for extensive modifications of the attorney-and-client privilege. However, the success or failure of these proposals ought not to affect the question whether medical secrets should be inviolable in court. The relation between lawyer and client does

[32] WIGMORE, *op. cit. supra*, n. 30, § 2380a, p. 831.

> differ materially from the relation between doctor and patient, and each privilege should be judged on its own merits. The administration of justice ought not to be shaped by inter-professional jealousies and trivial claims to prestige. Indeed, we can all agree that it is a misfortune when a lawsuit is won by the party who would lose it if all the facts were known, and that we increase the risk of such a miscarriage of justice whenever we allow an important witness to keep any helpful facts away from the judge and jury. Secrecy in court is prima facie calamitous, and it is permissible only when we are very sure that frankness will do more harm than good. With doctors' secrets as with any other kind of secrets, the only proper test is the welfare of the community. Courtroom secrecy in the particular case must produce a public good which more than offsets the risks resulting from concealment of truth and from the lies which can be made with less fear of detection. If the doctor-patient privilege should prove to be socially undesirable, the doctors, possessing a high professional sense of public welfare, should be among the first to oppose it."[33]

Among the reasons usually advanced for extending the privilege of silence to the medical profession is that if a patient knows his confidences may be divulged in future litigation, he will hesitate to obtain needed medical aid. As to this, Professor Morgan has said:

> "Have the physically afflicted shunned the famous physicians and surgeons of Baltimore because Maryland denies any such privilege? No one has the temerity to assert that progress in medical science in England, in Maryland, in Massachusetts has been deterred in the slightest degree by their adherence to the common law rule, or that the development of the science and art of healing has been advanced in any measure in any state by the presence of the privilege. In short, there is nothing to demonstrate any benefit to the public in the privilege, while the law books are full of instances where its application has prevented the discovery of the truth to the damage of honest litigants."[34]

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[33] Chafee, *op. cit. supra*, n. 23,. 608-9.

[34] Chafee, *op. cit. supra*, n. 23, 609-10; Morgan, *op. cit. supra*, n. 30, 291,

The principal pressure for enactment of a statutory privilege appears to come from the psychiatrists and psychologists. In fact a Bill proposing legal privilege of communications between psychiatrists and their patients in Maryland has been prepared for introduction at the 1963 session of the General Assembly.[35] While there may be some reason to separate psychiatrists[36] as a class from surgeons and some specialists, how can they — or rather their patients — logically be singled out for special consideration as against patients of the family physician of the "old school" or the country doctor, who learns all of the secrets of the entire family?[37] I, for one, emphatically would not change the law toward any such extension of legal privilege but, rather, toward restriction of all existing privileges which tend to suppress truth and justice.

The conclusion that may be drawn is that doctors and lawyers must be especially alert not to disclose voluntarily information they have observed or have been told in confidence by patients and clients — unless obtaining express written consent; that is, usually, not until and unless required to do so in Court. In short, that each should strictly observe the high ethics of his respective profession in all matters of confidentiality just as far as permitted to do so by law. As Lord Mansfield said in the revered year 1776:

> "If a surgeon was voluntarily to reveal these secrets, to be sure he would be guilty of a breach of honour, 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."[38]

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[35] Item 117 before the 1961 Legislative Council, according to Dr. Carl Everstine, Chief, Bureau of Legislative Reference.

[36] A persuasive case is made for this exception in *"Psychiatry and The Law"* (Norton, 1952), by Dr. Manfred S. Guttmacher, Psychiatrist to the Supreme Bench of Baltimore, and Professor Henry Weihofen, Univ. of N.M. Law School. See Ch. 12, *"The Patient's Privilege of Silence."*

[37] By a 2-1 vote, the Court of Appeals of the District of Columbia sustained objection to entering into evidence a hospital record containing the opinion of an attending psychiatrist. New York Life Ins. Co. v. Taylor, 147 F. 2d 297 (1945). However, in *"Basic Problems of Evidence,"* published by the Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association, (Vol. 2 (1961) 313), Professor Morgan states "this decision has been subject to criticism, judicial and otherwise, and is contrary to the ruling of the New York Court of Appeals," citing Buckminster's Estate v. Commissioner of Int. Rev., 147 F. 2d 331, (2nd Cir. 1944); People v. Kohlmeyer, 284 N.Y. 366, 31 N.E. 2d 490 (1940); 59 Harv. L. Rev. 563-65 (1946); 54 Yale L.J. 868, 876 (1945).

[38] Duchess of Kingston's Trial, 20 How. St. Tr. 355, 573 (1776).