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Article 14

Agency - Communications Between Physician and Patient Within Attorney-Client Relationship

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AGENCY–COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT WITHIN ATTORNEY-CLIENT RELATIONSHIP

Defendant brought a mandamus action to compel the trial court in his personal injury action to order a physician consulted by plaintiff to testify. Plaintiff claims the communications are privileged as confidential. The Supreme Court of California held that since the injured party consulted the physician at the request of his attorneys for the purpose of informing them of the nature and extent of his injuries, the physician was in fact an agent of the attorneys and a sub-agent of the injured party and the communications made to him were privileged under the attorney-client relationship. *The City and County of San Francisco v. Superior Court*, 231 P. 2d 26 (Cal., 1951).

Plaintiff had also contended that the communications came within the physician-patient privilege but the California Supreme Court held that no such relationship existed.

The concept that communications between physician and patient are privileged as confidential did not exist at common law[1] and, thus, in the states where it does exist, it is only by statute. The general rule in jurisdictions having such statutes is that where a physician or surgeon is consulted for the purpose of examination only, and not for treatment, communications made to him, in the course of such examinations, are not privileged.[2] The confidence that is protected is only that which is given to a professional physician during a consultation with a view to curative treatment; for it is that relation which the law desires to facilitate.[3] Thus, although California has a statute creating the physician-patient privilege, a mere examination without treatment or advice of some sort is not sufficient to establish that relationship which is required before the privilege attaches to the communications of the parties. Also, under the California statute, the institution of the suit by the injured party would have constituted a waiver of the privilege had it existed.[4] The purpose of these

[1] Wimberly v. State, 217 Ark. 130, 228 S.W. 2d 991 (1950); New York Life Ins. Co. v. Newman, 311 Mich. 368, 18 N.W. 2d 859 (1945); Dyer v. State, 241 Ala. 679, 4 So. 2d 311 (1941); Frederick v. Federal Life Ins. Co., 13 Cal. App. 2d 585, 57 P. 2d 235 (1936).

[2] Travelers' Ins. Co. of Hartford, Conn. v. Bergeron, 25 F. 2d 680 (C.A. 8th, 1928), cert. denied 278 U.S. 638 (1928); State v. Fouquette, 221 P. 2d 404 (Nev., 1950); McGinty v. Brotherhood of Railway Trainmen, 166 Wis. 83, 164 N.W. 249 (1917); McMillen v. Industrial Commission of Ohio, 68 Ohio App. 459, 37 N.E. 2d 632 (1941).

[3] In re Baird's Estate, 173 Cal. 617, 160 Pac. 1078 (1916); People v. Dutton, 62 Cal. App. 2d 862, 145 P. 2d 676 (1944); 8 Wigmore, Evidence § 2382 (3rd. ed., 1940).

[4] Cal. Code of Civil Procedure (1949) § 1881(4).

statutes is to conform to the physician's ethical canon of secrecy, on the theory that the personal privacy of the patient's body is entitled to be respected.[5] However, when the patient brings a suit in which he must prove his injuries and make his ailments known to the public, the privilege no longer has any foundation and its should properly be presumed to be waived.[6]

In holding that the physician was an agent of the plaintiff's attorneys and a sub-agent of the plaintiff, and that the communication thus came within the attorney-client privilege, the California court advanced a theory which has not yet been adjudicated in Illinois. In general, any communication made by a client to his attorney in the course of his professional employment is privileged, provided it is not made in the presence of third persons other than the attorney's secretary or clerk.[7] In addition, the client's freedom of communication requires a liberty of employing other means than his own personal action, and communications between an attorney and the agent of his client are thus entitled to the same protection from disclosure as those passing directly between the attorney and his client.[8] This includes communications through an interpreter[9] and also communications through a messenger or any other agent of transmission, as well as communications originating with the client's agent and made to the attorney.[10] It follows that communications of the attorney's agent to the attorney are within the privilege because the attorney's agent is also the client's sub-agent and is acting as such for the client.[11]

The important thing is that the use of an agent be reasonably necessary to facilitate the communication between the client and the attorney. In *Lalance and Grosjean Mfg. Co. v. Haberman Mfg. Co.*,[12] a communication between an attorney and a scientific expert employed by the client to

[5] Wimberly v. State, 217 Ark. 130, 228 S.W. 2d 991 (1950); Williams v. State, 65 Okla. 336, 86 P. 2d 1015 (1939); Life and Casualty Ins. Co. v. Walters, 180 Miss. 384, 177 So. 47 (1937); 8 Wigmore, Evidence § 2380(a) (3rd. ed., 1940).

[6] Ballard v. Pacific Greyhound Lines, 28 Cal. 2d 357, 170 P. 2d 465 (1946); Phillips v. Powell, 210 Cal. 39, 290 Pac. 441 (1930); Moreno v. New Guadalupe Mining Co., 35 Cal. App. 744, 170 Pac. 1088 (1918); 8 Wigmore, Evidence § 2380(a) (3rd. ed., 1940).

[7] Doyle v. Reeves, 112 Conn. 521, 152 Atl. 882 (1931); In re Busse, 322 Ill. App. 258, 75 N.E. 2d 36 (1947); State v. Loponio, 85 N.J.L. 357, 88 Atl. 1045 (S. Ct., 1913).

[8] Becher v. U.S., 5 F. 2d 45 (C.A. 2d, 1924), cert. denied 267 U.S. 602 (1925); Foley v. Poshke, 137 Ohio St. 593, 31 N.E. 2d 845 (1941); Webb v. Francis J. Lewald Coal Co., 214 Cal. 182, 4 P. 2d 532 (1931); Le Long v. Siebrecht, 196 App. Div. 74, 187 N.Y.S. 150 (1921).

[9] Maas v. Bloch, 7 Ind. 202 (1885).

[10] 8 Wigmore, Evidence § 2317 (3rd. ed., 1940).

[11] Webb v. Francis J. Lewald Coal Co., 214 Cal. 182, 4 P. 2d 532 (1931); 8 Wigmore, Evidence § 2317 (3rd. ed., 1940).

[12] 87 Fed. 563 (S.D. N.Y., 1898).

assist in the presentation of the case was held to be privileged. In *State v. Loponio*,[13] the defendant, who was unable to write, employed another to write a letter to his attorney and the communication was held to be privileged. Also, communications made to an attorney in the presence of his clerk and stenographers do not come within the general rule that communications made in the presence of third persons are not privileged because the use of these agents is indispensable to the attorney's work.

In a situation such as the one here presented, it is definitely necessary to employ the agency of a physician to interpret the injured person's symptoms and conditions and determine the nature and extent of his injuries. Without such an examination a person cannot adequately pursue his remedy at law. Insurance companies will not consider the settlement or payment of a claim without a medical report.

Thus, in jurisdictions, such as Illinois, which do not have statutes creating the physician-patient privilege, communications made to a physician may come within the attorney-client relationship and be privileged as confidential. The attorney-client privilege does not depend on a statute for its existence as it is one recognized by common law and protected throughout the United States. It would seem to be a useless right if agents of the client and the attorney, necessarily employed by them, did not come within the privilege. It would confuse the client and hamper the ends of justice if only certain agents of the client or attorney were protected; the client would be hesitant to entrust any agent with information for fear it could be brought out in open court to his detriment. Therefore, the mere fact that a state does not have a statute creating a physician-patient privilege should not prevent communications made to a physician from being privileged under the attorney-client relationship where it is necessary to employ such an agent.

CONSTITUTIONAL LAW–DAMAGES FOR BREACH OF RESTRICTIVE COVENANTS

Plaintiffs sought to enforce racial restrictive covenants against white sellers and negro purchasers of restricted land. The Supreme Court of Oklahoma ruled that a state court could not enforce racial restrictive agreements in such a way as to work a forfeiture of land validly purchased by these restricted parties. However, the court said that a state court could enforce an action for damages against the defendants because they had conspired to evade these covenants. *Correll v. Early*, 237 P. 2d 1017 (Okla., 1951).

In *Shelley v. Kraemer*,[1] the landmark case in regard to racial restrictive

[13] 85 N.J.L. 357, 88 Atl. 1045 (S. Ct., 1913).

[1] 334 U.S. 1 (1948).