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## The Physician-Patient Privilege in Virginia

JAMES W. PAYNE, JR.

It seems settled that at common law there was no privilege whereby either a patient or a physician could suppress evidence of communications made by one to the other. Most commentators have argued that there is no justification for such a privilege. See, *e.g.*, Chafee, "Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?", 52 Yale L. J. 607 (1942). Professor Charles T. McCormick, who urges that there should be no such privilege, makes the following comment:

It seems that the only purpose that could possibly justify the suppression in a law suit of material facts learned by the physician is the encouragement of freedom of disclosure by the patient so as to aid in the effective treatment of disease and injury. To attain this objective, the immediate effect of the privilege is to protect the patient against the embarrassment and invasion of privacy which disclosure would entail. But if this were the only interest involved it is hard to suppose that the desire for privacy would outweigh the need for complete presentation of the facts in the interest of justice. McCormick, *Evidence* 212 (1954).

The physician, however, is usually considered, at least by his patients, as under an ethical duty not to divulge the patients' confidential disclosures. This factual situation has been recognized in more than two-thirds of the states by statutes of varying scope which create a privilege to suppress evidence of such confidences or of information gained by the physician as a result of the confidential relationship. Virginia enacted such a statute in 1956, the text of which is as follows:

*Communications between physicians and patients.*—  
Except at the request of, or with the consent of, the patient, no duly licensed practitioner of any branch of

the healing arts shall be required to testify in any civil action, suit or proceeding at law or in equity respecting any information which he may have acquired in attending, examining or treating the patient in a professional capacity if such information was necessary to enable him to furnish professional care to the patient; provided, however, that when the physical or mental condition of the patient is at issue in such action, suit or proceeding or when a judge of a court of record, in the exercise of sound discretion, deems such disclosure necessary to the proper administration of justice, no fact communicated to, or otherwise learned by, such practitioner in connection with such attendance, examination or treatment shall be privileged and disclosure may be required. This section shall not be construed to repeal or otherwise affect the provisions of §65-88 relating to privileged communications between physicians and surgeons and employees under the Workmen's Compensation Act; nor shall the provisions of this section apply to information communicated to any such practitioner in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug. Va. Code Ann. § 8-289.1 (1950).

The purpose of this discussion is to note the more obvious limitations on the privilege as set out in the statute; to attempt clarification of some of the ambiguities in the statute; and, finally, to consider and make recommendations with reference to some of the situations in which the trial judge may be called upon to exercise his discretion to allow or disallow a claim of the privilege. Consider the following topics suggested by the statute:

1. *Relationship required.*

(a) What professional class is brought within the scope of the statute? The section speaks of a "duly licensed practitioner of any branch of the healing arts" and is to be contrasted with other state acts which usually speak of "physician"; "physician and surgeon"; "licensed physician or surgeon"; or, as in North Carolina, "person duly authorized to practice physic or surgery." Under the statutes in other states such persons

as chiropractors, druggists, dentists, nurses (who are not in attendance as the physician's assistant), and veterinarians have been excluded from the scope of the privilege. See cases in Annot., 39 A.L.R. 1421 (1925); Annot., 68 A.L.R. 176 (1930); Annot., 169 A.L.R. 678 (1947). It is entirely possible that the Virginia statute may be interpreted as including such persons, with the exception of veterinarians, who would probably not be acting in a professional capacity within the meaning of the statute in "attending, examining or treating" a human patient with the purpose of furnishing professional care to such a patient. It might be interesting to note that in *Steinbeck v. Metzger*, 63 F. 2d 74 (1933), a chiropractor was held to be within the phrase "healing art."

(b) Who is a "patient" within the meaning of the statute? Aside from the references to the Workmen's Compensation Act and to the "patient" who seeks unlawfully to procure a narcotic drug or an administration thereof, which are self-explanatory, it is clear from the statute that only the patient who seeks the services of the physician or healer to obtain "professional care" or treatment is entitled to claim the privilege, and then, only information gained by the physician in "attending, examining or treating" such a patient is covered by the privilege. It would seem clear, therefore, that the privilege would not apply in such illustrative instances as the following: Where the physician is appointed by the court; where the physician is employed by an insurance company to examine the "patient" as an applicant for life insurance; where the physician gains his information before the patient comes to him for treatment or after the patient has been discharged; where the physician obtains information during an autopsy; where the physician examines the patient at the instance of the patient or the police to determine intoxication; or where the patient is sent to the physician by his lawyer for an examination as an aid to the lawyer in his preparation for trial. However, in the last case noted there is a strong possibility that the attorney-client privilege would operate to seal the physician's lips, and in this event the dis-

cretion of the trial judge could not operate in any such free-wheeling fashion as that suggested by the Virginia statute dealing with the physician-patient privilege. That the attorney-client privilege may be involved in such a situation is suggested by such cases as *San Francisco v. Superior Court*, 37 Cal. 2d 227, 231 P. 2d 26, 25 A.L.R. 2d 1418 (1951). Briefly, the reasoning is as follows: The physician is an intermediate agent for communication between the client and his attorney. If the client himself describes his condition to the attorney there can be no doubt that the communication is privileged. It is no less the client's communication when it is given by the client to an agent for transmission to the attorney, and this is true whether the agent is the agent of the attorney, the client, or both. See also 8 Wigmore, *Evidence* § 2317 (3d ed. 1940).

2. *Who may claim the privilege?* (See McCormick, *Evidence* § 105 (1954) for a discussion of this problem generally and as authority for the ensuing discussion.)

Generally, the patient is the holder of the privilege and has the exclusive right to claim or waive it. Consequently, if the patient is in a position to assert his claim of the privilege and fails to do so, there is a waiver, and no one else may assert the privilege for him. However, the trial judge, in his discretion, may invoke the privilege if the patient is absent. In any event, the privilege being personal, the adverse party cannot claim error because of the erroneous denial of the patient's privilege.

Professor McCormick notes :

A rule that the privilege terminated with the patient's death would have reached a common sense result which would have substantially lessened the obstructive effect of the privilege. The courts, however, have not taken this tack but hold that the privilege continues after death. Nevertheless, in contests of the survivors in interest with third parties, e.g., actions to recover property claimed to belong to the deceased, actions for the death of the deceased, or actions upon life insurance policies, the personal representative, heir or next of kin, or the beneficiary in the policy may waive the privilege, and by the same

token, the adverse party may not effectively assert the privilege. In contests over the validity of a will, where both sides—the executor on the one hand and the heirs or next of kin on the other—claim under and not adversely to the decedent, the assumption should prevail that the decedent would desire that the validity of his will should be determined in the fullest light of the facts. Accordingly in this situation either the executor or the contestants may effectively waive the privilege without the concurrence of the other.

Three comments might be made with reference to McCormick's summary of the status of the privilege after the patient's death: (a) The Virginia statute would seem to authorize the trial judge, as an exercise of sound discretion, to disallow the privilege in almost any conceivable case after the death of the patient. (b) In many or most of these cases the physical or mental condition of the patient might be in issue so that under the express terms of the statute the privilege could not be invoked. (c) In the last case noted by Professor McCormick a useful analogy might be drawn from the status of the attorney-client privilege in a will contest. In *Hugo v. Clark*, 125 Va. 126 (1919), the Virginia court required an attorney, in effect, to testify over the objection of the proponents of a will, that the testator had executed a later document revoking the will offered for probate. The court suggested that generally the privilege does not apply in litigation, after the client's death, between parties all of whom claim under the client. The court states at p. 129:

The reason for excluding such communications, stated succinctly, is that it is essential to the administration of justice that clients should feel free to consult their legal advisers without any fear that their disclosures will be thereafter revealed to their detriment. As a matter of public policy, this rule should be rigidly enforced in order that men may secure legal advice, after frank disclosures to their counsel without which they would be unable to defend themselves from threatened wrong. After the death of the client, however, it has been held that the privilege may be waived when the character and reputa-

tion of the deceased are not involved, by his executor or administrator, or in will contests by his heirs or legatees. The deceased has no longer any interest in the matter.

3. *In what kind of proceeding is the privilege applicable?*

This question may be answered very briefly. The statute expressly excepts Workmen's Compensation proceedings; and, with this exception, the privilege applies only in a "civil action, suit or proceeding." (Emphasis added.) Also it might be suggested that in malpractice proceedings the physical or mental condition of the patient would be in issue so as to permit the physician to speak in his defense. The same reasoning would be applicable to eliminate the privilege in lunacy proceedings or in some will contests, *e.g.*, where it is alleged that the testator lacked testamentary capacity or perhaps that he executed the will under duress.

4. *A consideration of some circumstances in which the trial judge may be called upon to exercise discretion in allowing or disallowing the privilege:*

Professor Morgan notes:

In 1938 the American Bar Association adopted a recommendation of its Committee on Improvements in the Law of Evidence stating that the North Carolina statute prescribes a salutary rule and should be adopted in other states. This provides that the trial judge may require the disclosure by a physician of a privileged communication from a patient if in the opinion of the judge such disclosure is necessary to a proper administration of justice. Morgan, *Basic Problems of Evidence* 109 (1954).

Virginia has adopted this suggestion in substance, adding only that the exercise of discretion must be "sound"—which would have been implicit anyway. The salutary effect of this rule will obviously depend upon the attitude of the trial judge administering the rule. The principal danger here might well be an undue sentimental attachment to the privilege which has been granted limited scope in both the Model Code of Evidence and in the Uniform Rules of Evidence. Many problems may beset the conscientious trial judge who is called upon to exer-

cise the discretion under discussion. The following are suggested as illustrative:

(a) Would the privilege apply when the patient consults the physician in furtherance of a wrong? When the purpose of the patient in consulting the physician is unlawful, it would seem that the privilege should not attach to information gained by the physician as a result of such a consultation. This is simply not the kind of relationship between patient and physician that the law purports to protect in granting the privilege. The statute perhaps points in the direction of this general policy position in the specific provision that it shall not apply to "information communicated to any such practitioner in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug." Thus, by way of example, the privilege should not attach when the patient approaches the physician in an effort to procure an unlawful abortion or when the patient is a fugitive from justice and seeks the aid of the physician in avoiding arrest. See McCormick, *Evidence* § 102 (1954).

(b) Is it necessary that the information gained by the physician be confidential to come within the scope of the privilege? Professor McCormick notes that even where statutes codifying the marital communication privilege and the attorney-client privilege have omitted the requirement that the communications involved be confidential, the courts have read this requirement into the statutes as a prerequisite to the privilege. McCormick, *Evidence* § 104 (1954). He urges the desirability of such a limitation in the physician-patient relationship, noting that the privilege is at best obstructive to the truth and that the purpose of encouraging disclosure of facts which the patient might otherwise be reluctant to reveal to his physician will be served adequately despite such a limitation. The reasoning seems convincing. If such a limitation is read into the statute, the presence of a third person not an intimate member of the patient's family and not a necessary attendant at the examination might well preclude a finding

that the disclosure was confidential and thus eliminate the privilege.

The reasoning thus far applies to voluntary communications from the patient to the physician. The Virginia statute, however, speaks in terms of "any information" gained by the physician. The statute also adds the qualification that such information be necessary to enable the physician to furnish professional care to the patient. Keeping this language in mind, it would seem that information as to facts concerning the condition of the patient which would be obvious to casual lay observation would not be within the scope of the privilege. The divulgence of such facts would not be dependent upon the physician-patient relationship. However, other facts of a more "subtle" character, not discernible from casual observation, such as the mental condition of the patient, or even the fact that he is under the influence of alcohol when the physician is summoned to give treatment after an accident, may be treated as privileged. This is true if such facts are necessary to enable the physician to furnish professional care. The question of necessity, in turn, may be a question of fact varying according to the circumstances of each case, but Professor McCormick notes decisions in which the latter case mentioned has been made to turn on this question. McCormick, *Evidence* § 103 n.3 (1954).

Finally, it might be queried, as a slight departure from the topic suggested by this section heading, whether or not the statute requires that the information gained be in fact necessary to enable the physician to treat the patient. This literal requirement would force the uninformed patient to guess at his peril and, consequently, would seem to be destructive of the policy supporting the privilege. Accordingly, Professor Morgan states: "It is believed that the test should be whether the patient or physician reasonably believed the matter to be necessary or helpful." Morgan, *Basic Problems of Evidence* 111-12 (1954).

(c) What circumstances constitute a waiver of the privilege? The Virginia statute expressly eliminates one of the

major obstacles to approval of the privilege by providing that the privilege is inapplicable when the physical or mental condition of the patient is in issue. The provision precludes the spectacle of the patient who flaunts his physical or mental condition before the court in an action for damages and at the same time forecloses inquiry into these matters from the adverse party by claiming the privilege. In the absence of such a provision, some cases have held that the patient does not waive his privilege if he testifies as to his condition without revealing privileged disclosures. See, *e.g.*, *Harpman v. Devine*, 133 Ohio St. 1, 10 N.E. 2d 776, 114 A.L.R. 789 (1937). On the other hand, Professor McCormick notes with disapproval that the mere fact that the patient reveals privileged matter on cross-examination without claiming the privilege is generally held not to be a waiver of the privilege so as to permit further inquiry of the physician by the patient's adversary. The notion here is that the patient's disclosures were not "voluntary." McCormick, *Evidence* § 106 (1954). It might also be noted that under the fairly emphatic language of the Virginia statute the fact that the patient's physical or mental condition is in issue should abrogate the privilege not only when the patient is a party but also in a proceeding in which such condition is a factor of the claim or defense of one claiming through the patient. The Model Code of Evidence so provides in Rule 223 § 3. Finally, it is generally agreed that a contractual waiver of the privilege is valid and binding. This might occur, for example, in an application for insurance. Morgan, *Basic Problems of Evidence* 107 (1954).

5. *Should an unfavorable inference from the claim of the privilege be permitted?*

Professor Morgan suggests that the rules applicable to the attorney-client privilege should be applicable here. Morgan, *Basic Problems of Evidence* 114 (1954). However, the rules referred to by Morgan are unsettled and the cases conflicting. The problem can arise in three ways: (a) Should one party be permitted to place his opponent's physician on the stand to press an inquiry and thus force a claim of the privilege in the

presence of the jury or, perhaps accomplish the same result by asking the party himself in examination if he intends to claim the privilege to prevent his physician from testifying? (b) Should counsel be permitted to comment in argument to the jury on his opponent's claim of the privilege? (c) Should the trial judge be permitted to charge the jury to the effect that they may draw an unfavorable inference from the conduct of a party in claiming the privilege? McCormick, *Evidence* § 80 (1954). Va. Code Ann. § 19-238 (1950), which deals with the right of the accused to testify, provides that "his failure to testify shall create no presumption against him, nor be the subject of any comment before the court or jury by the prosecuting attorney." However, this is an aspect of the privilege against self-incrimination, which is not entirely analogous to our physician-patient privilege, and Va. Code § 8-289 (1950), which creates a privilege for marital confidence, does not contain any such stipulation. The Uniform Rules of Evidence, in Rule 39, prohibit generally any comment on the exercise of a privilege, except that comment is allowed on the failure of the accused in a criminal case to testify under Rule 23(4), but the Model Code of Evidence is contra in Rule 233, which allows both the judge and counsel to comment on the claim of a privilege. The weight of authority prohibits such comment. Uniform Rules of Evidence, Rule 39, Comment. Professor McCormick, too, makes the convincing point that if

one conceives that some of the privileges answer an effective demand that will persist and thus that the main cost of keeping out crucial facts essential to a case or defense will continue to be paid, then the small change of inference had better be sacrificed also, in the interest of practical trial administration. The pull-and-haul of argument about why the blinders were put on the horse will divert time and attention that the jury could better spend in considering the evidence that did get in. McCormick, *Evidence* § 81 (1954).

This thought, however, would not seem to force an assumption that the privilege will be claimed and thereby prevent one party from at least taking the step of calling the other party's

physician as a witness. In the first place, the privilege may not be claimed by the patient. In the second place, if it is claimed it may not be allowed under the express language of the statute or allowed under an exercise of discretion by the trial judge.