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## Evidence – Privileged Communications Between Physician and Patient

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The Supreme Court in recent decisions has voiced the opinion that membership in or affiliation with subversive organizations, with *knowledge* of its subversive character is a necessary element which must be implicit in a loyalty oath,<sup>14</sup> but the instant case is the first in which such an oath has been held unconstitutional on that basis. Recognizing that membership in subversive organizations may be *innocent*, the Court held that constitutional protection does extend to arbitrary and discriminatory exclusion of public employees.<sup>15</sup> The Court reasoned that under the statute the fact of association, no matter how innocent, determines disloyalty and disqualification, and that the statute is therefore an arbitrary assertion of power which offends due process.

The writer feels that the instant case has established a requirement necessary to the practicability of loyalty oaths. Knowing membership in subversive organizations must be made implicit in loyalty oaths so that members ignorant of the real purpose of such organizations will be protected. It is not clear, under the instant case, whether a constitutional right to public employment exists, the Court having circumvented the problem. It is submitted that the decision is possibly a trend toward a view by the Supreme Court that public employment is "property" within the meaning of the due process clause.

John L. Remsen

### EVIDENCE—PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT

Plaintiff claimed privilege against the testimony of the doctor who had examined her prior to accident. *Held*, the statute<sup>1</sup> forbidding doctors to furnish reports of mental or physical examinations to others does not create a physician-patient privilege in Florida. *Morrison v. Malmquist*, 62 So.2d 415 (Fla. 1953).

The patient's privilege against the testimony of his physician did not exist at common law.<sup>2</sup> It is an American statutory innovation orig-

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additional oath since statute made persons who advocate overthrow of government by force or violence ineligible for public office). Loyalty oaths have been held unconstitutional in isolated cases. See, e.g., *United States v. Schneider*, 45 F. Supp. 848 (E.D. Wis. 1942) (non-communist oath required of applicants for employment); *Danskin v. San Diego Unified School District*, 28 Cal.2d. 506, 171 P.2d. 885 (1946) (loyalty oath required for use of school auditorium); *Clayton v. Harris*, 7 Nev. 64 (1871) (oath required as prerequisite to voting).

14. See *Adler v. Board of Education*, 342 U. S. 485, 494 (1952); *Garner v. Board of Public Works*, 341 U. S. 716, 723, 724 (1951); *Cerende v. Board of Elections*, 341 U. S. 56, 57 (1951).

15. See *United Mine Workers v. Mitchell*, 330 U.S. 75, 100 (1947).

1. FLA. STAT. § 458.16 (1951).

2. *Florida Power & Light Co. v. Bridgeman*, 133 Fla. 195, 182 So. 911 (1938); 8 WIGMORE, EVIDENCE § 2380 (3d ed. 1940).

inating in New York in 1828<sup>3</sup> which has since been followed by thirty of the United States.<sup>4</sup> The privilege does not exist if not created by statute.<sup>5</sup>

Where it has been created by statute, the privilege may be treated as remedial and subject to liberal interpretation and application,<sup>6</sup> or as being in derogation of the common law and subject to strict interpretation and application.<sup>7</sup> Perhaps because of the volume of criticism that has been leveled at the privilege, there is a general tendency to limit it, either by judicial or legislative action. This trend is exemplified by legislation that suit for personal injuries waives the privilege,<sup>8</sup> or decisions to the effect that the privilege exists only where the examination of the patient is for the purpose of treatment.<sup>9</sup> The privilege is also limited by making it applicable only to civil cases,<sup>10</sup> by refusing to extend its application to testimony of nurses<sup>11</sup> or other attendants<sup>12</sup> present at the time of consultation (unless they are specifically included in the statute creating the privilege), by exempting the privilege from actions on policies of insurance,<sup>13</sup> and by holding that detailed testimony by the patient as to condition and treatment waives the privilege.<sup>14</sup>

However, the privilege is not always limited, and it has been held to apply in hearings before an administrative agency as well as in judicial proceedings.<sup>15</sup> It has also been held that hospital records and documents are included within the scope of the privilege;<sup>16</sup> and that testimony of a physician, not excluded from evidence by the physician-patient privilege, will be excluded under the attorney-client privilege if the physician can be considered the agent of the attorney.<sup>17</sup>

3. N. Y. CIV. PRAC. ACT § 352.

4. For a discussion of the statutes consult 8 WIGMORE, EVIDENCE § 2380 (3d ed. 1940).

5. *Dyer v. State*, 241 Ala. 679, 4 So.2d 311 (1941); *Zeiner v. Zeiner*, 120 Conn. 161, 179 Atl. 644 (1935); *Florida Power & Light Co. v. Bridgeman*, 133 Fla. 195, 182 So. 911 (1938).

6. N. Y. *City Council v. Goldwater*, 284 N.Y. 296, 31 N.E.2d 31 (1940).

7. *Rhodes v. Metropolitan Life Ins. Co.*, 172 F.2d 183 (5th Cir.), *cert. denied*, 337 U.S. 930 (1949); *Southwest Metals Co. v. Gomez*, 4 F.2d 215 (9th Cir. 1925); *Meyers v. State*, 192 Ind. 592, 137 N.E. 547 (1922).

8. CAL. CODE CIV. PROC. § 1881.4 (1941); MICH. COMP. LAWS § 617.62 (1948).

9. *San Francisco v. Superior Court of San Francisco*, 37 Cal.2d. 27, 231 P.2d 26 (1951); *Bassil v. Ford Motor Co.*, 278 Mich. 173, 270 N.W. 258 (1936).

10. *Commonwealth v. Sykes*, 353 Pa. 392, 45 A.2d 43, *cert. denied*, 328 U.S. 847, *rehearing denied*, 328 U.S. 880 (1946).

11. *First Trust Co. of St. Paul v. Kansas City Life Ins. Co.*, 79 F.2d 48 (8th Cir. 1935); *Southwest Metals Co. v. Gomez*, 4 F.2d 215 (9th Cir. 1925); *Leusink v. O'Donnell*, 255 Wis. 627, 39 N.W. 675 (1949).

12. *Prudential Life Ins. Co. of America v. Kozlowski*, 226 Wis. 641, 276 N.W. 300 (1937); 13 N. Y. INS. LAW § 149 subd. 4 (interpreting this statute) *Roth v. Equitable Life Assurance Soc. of United States*, 186 Misc. 403, 59 N.Y.S.2d 707 (Sup. Ct. 1945), *aff'd*, 27 App. Div. 923, 61 N.Y.S.2d 612 (1st Dep't 1946).

14. *Friesen v. Reimer*, 24 Neb. 620, 247 N.W. 561 (1933); *Capron v. Douglas*, 193 N.Y. 11, 85 N.E. (1908); *Metropolitan Life Ins. Co. v. McKim*, 54 Ohio App. 66, 6 N.E.2d 9 (1935).

15. N. Y. *City Council v. Goldwater*, 284 N.Y. 296, 31 N.E.2d 31 (1940).

16. *Green v. Nirenberg Sons*, 166 Misc. 652, 3 N.Y.S.2d 81 (Sup. Ct. 1938).

17. *San Francisco v. Superior Court of San Francisco*, 37 Cal.2d 227, 231 P.2d 26 (1951).

Various reasons have been assigned to support the physician-patient privilege. Generally, the emphasis is placed on stimulating a full disclosure by the patient to his physician to allow the most effective medical treatment.<sup>18</sup> Other reasons given in support of the privilege are the protection of the sensibilities and right of privacy of the patient by preventing public disclosure of his maladies,<sup>19</sup> or a desire to give the patient complete control over information relative to his condition.<sup>20</sup>

Most legal scholars who have considered the privilege do not accredit the reasons advanced in its favor and have long been united in disapproval of creation of the privilege.<sup>21</sup> In practice the privilege is most often asserted in three major classes of litigation in which medical testimony is most essential for disclosure of the full truth — actions on life insurance policies where misrepresentations of the deceased as to health are at issue, actions for bodily injuries where the plaintiff's bodily condition is at issue, and testamentary actions in which the mental state and capacity of the testator are at issue.<sup>22</sup> Critics of the privilege hold that its usual effect is to obscure justice by suppressing the facts most revelant to the issue in the interest of protecting the patient against possible embarrassing disclosures.<sup>23</sup>

The interpretation given the 1951 Florida Statute is commendable. The value of the physician-patient privilege is, at most, doubtful. The statute itself gives no clear indication of a legislative intent to create such physician-patient privilege. Rather it appears designed to prevent an extra-judicial breach of the patient's confidence.

Milton S. Marcus

## INSURANCE—LOAN RECEIPT—REAL PARTY IN INTEREST

After a loss, the insurance company advanced to the insured the amount of the loss in return for which the insured executed a "loan receipt" repayable only to the extent of any net recovery he might make against any third party responsible for the loss. In an action by the insured, the defendant moved to have the insurance company joined as a necessary plaintiff. *Held*, the loan did not constitute a payment which

18. See *Arizona & New Mexico Ry. v. Clark*, 235 U.S. 669 (1915).

19. *Munzer v. Swedish American Line*, 35 F. Supp. 493 (S.D. N.Y. 1940); *Williams v. State*, 65 Okla. 336, 86 P.2d 1013 (1939).

20. *Woernley v. Electromatic Typewriters Inc.*, 271 N.Y. 228, 2 N.E.2d 638 (1936).

21. 1 GREENLEAF, EVIDENCE § 247(a) (16th ed. 1899); 8 WIGMORE, EVIDENCE § 2380(a) (3d ed. 1940); Chaffee, *The Progress of the Law, 1919-1922*, 35 HARV. L. REV. 689 (1922).

22. 1 GREENLEAF, EVIDENCE § 247(a); 8 WIGMORE, EVIDENCE § 2380(a).

23. Cud, *Privileged Communications Between The Doctor And His Patient—An Anomaly Of The Law*, 44 W.VA. L. Q. 165 (1937); Lipscomb, *Privileged Communications Statute—Sword And Shield*, 16 MISS. L. J. 181 (1944); Morgan, *Suggested Remedy For Obstructions To Expert Testimony By Rules Of Evidence*, 10 U. of CHI. L. REV. 285 (1944).