

HOSPITAL RECORDS

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The use of hospital records as evidence is becoming more widespread because of the increasing volume of personal injury cases being filed, and also because of the many types of cases involving hospital treatment. With their increased use, increased problems arise concerning their admissibility and use in the preparation and trial of a case.

Upon the adoption in Ohio of the Uniform Business Records as Evidence Act,¹ hospital records became admissible as "business records." The Act specifically states:

As used in this section "business" includes every kind of business, profession, occupation, calling, or operation of institutions, whether carried on for profit or not.

In *Weis v. Weis*,² the leading Ohio case on the subject, the court said:

Under this and similar statutes, by the great weight of authority, those portions of hospital records made in the regular course of business and pertaining to the business of hospitalization and recording observable acts, transactions, occurrences or events incident to the treatment of a patient are admissible, *in the absence of privilege*, as evidence of the facts therein recorded, insofar as such records are helpful to an understanding of the medical or surgical aspects of the case, and insofar as relevant to the issues involved, provided such records have been prepared, identified and authenticated in the manner specified in the statute itself.

When a case arises, from the plaintiff's standpoint, one of the first steps for counsel is to see his client's hospital record, either by going in person to the hospital and reading it or, preferably, by requesting a photostatic copy from the hospital. With extremely few exceptions, counsel can usually obtain a photostatic copy of the client's hospital record by requesting it in writing, enclosing with the request a written authorization signed by the client, authorizing the hospital to release the information to the attorney, and an offer to pay the charge for photostating.

From the defendant's standpoint, the hospital will not release the information contained in a patient's record without the written consent of the patient. In today's practice, and especially in settlement negotiations conducted with insurance adjusters before suit, the

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¹ Ohio Rev. Code § 2317.40 (1953).

² 147 Ohio St. 416, 72 N.E.2d 245 (1947).

claimant's attorney, after first inspecting the records himself to be sure no damaging admissions by the patient have found their way into the record, and also after assuring himself that the history, as given by the patient, has been correctly recorded, will exhibit or even furnish the copy to the adjuster to convince him or prove to him and his company that the claimant received the injuries for which the claim is made. As has been said: If the insurance company is expected to buy a package it is certainly entitled to see what it is buying.

It is safe to say that a high percentage of claims are settled in this manner and never reach the courts, thus saving the time of the courts, expense to the taxpayers and, of equal importance, the time, energy and expenses of preparation and trial by the claimant's counsel.

When the trial date has been set, usually the plaintiff, but often the defendant, will issue a subpoena to the hospital to produce the records which should be sent to the courtroom in the possession of the hospital's record librarian. If the plaintiff calls the record librarian to the stand and, after proper identification, offers the record in evidence, any privilege attaching thereto is automatically waived and it only remains for the court, if objection is made by defense counsel, to determine which portion of the record, if not all, is admissible.

Self-serving statements and conclusions will be ruled out and if such statements or conclusions are contained on a separate page that can be taken out and handed back to the librarian without mutilating the record or eliminating relevant and admissible matter, this is usually done. If this cannot be accomplished in that manner, then the court and counsel for both sides usually collaborate to conceive some method of covering the objectionable portion so that it cannot be seen by the jury and the record is then admitted into evidence.

At this point, some plaintiffs' attorneys will excuse the record librarian and read excerpts from the record themselves, or sometimes lay the record aside for later reference, and frequently save it to be used during the examination of the physician, if the physician who attended the patient in the hospital is to be called.

However, from the plaintiff's standpoint, it has been found to be very effective, once the hospital records have been received in evidence, to have the record librarian read the *entire* record to the jury, nurse's notes, medication orders, laboratory reports, etc. In the first place, the librarian is accustomed to reading the handwriting of the physicians, which at times is not too legible. She is also familiar with the signs and symbols used and can tell the jury what they mean. But secondly, and more important, she is employed by the hospital, is the hospital's official representative in the courtroom and the average juror is more impressed by hearing the contents of the record from the lips

of the official representative of the hospital, than by hearing it read by the plaintiff's attorney, who may or may not be able to decipher it.

The most controversial issue in connection with hospital records is the matter of privilege. To what extent are the contents of a person's hospital record privileged? As has been stated, if plaintiff himself offers the record, the privilege is waived. But, there are many instances when the defendant seeks to gain access to the plaintiff's hospital record, either by deposition before trial, or introducing it in evidence at the trial, when plaintiff has, for some valid reason, not offered the record.

In such cases, the important question arises as to what portions of the hospital record are privileged and what portions are not.

The Ohio Revised Code provides:

The following persons shall not testify in certain respects:

(A) An attorney, concerning a communication made to him by his client in that relation or his advice to his client; or a physician, concerning a communication *made to him by his patient in that relation, or his advice to his patient.* (Emphasis added.)³

The Business Records Act⁴ is broadly worded so as to include hospital records as "business records." When this section is interpreted in the light of section 2317.02, above, the confusion then arises.

Section 2317.02 simply states that a physician may not testify ". . . concerning a communication made to him by his patient in that relation or his advice to his patient."

What is a "communication" made to a physician by a patient? The first impulse would be to turn to the dictionary for a definition of the word "communication." However, since our courts have the last word as to the meaning or "interpretation" of a word, as it is used in a statute, we will turn to the courts.

In *Ausdenmoore, Ex'r v. Holzback*,⁵ the Ohio Supreme Court said:

We hold that a communication by the patient to the physician may be not only by word of mouth but also by exhibiting the body or any part thereof to the physician for his opinion, examination or diagnosis, and that that sort of communication is quite as clearly within the statutes as a communication by word of mouth.

In *Baker v. Industrial Comm'n*,⁶ the court there said:

Privileged communications between patient and physician may be either (1) by exhibition of the body to a physician for examination or treatment, or (2) oral or written communications

³ Ohio Rev. Code § 2317.02 (1953).

⁴ Ohio Rev. Code § 2317.40 (1953).

⁵ 89 Ohio St. 341 (1914).

⁶ 135 Ohio St. 491, 21 N.E.2d 593 (1939).

between patient and physician. For manifest reasons the statute protects the patient in respect to both kinds. What the physician learns by exhibition of the body of the patient is sealed to the public and may not be testified to by the physician unless the patient has given express consent or has voluntarily testified on that subject.⁷

When is a communication by a patient considered as being a communication to a physician? If a patient goes to a physician's office, is seen personally by the physician and the physician takes the history and complaints, it is, without a doubt, a communication to a physician under the protection of section 2317.02. But, if the physician is busy, or out of his office and his nurse, secretary or office girl takes the history and complaints for him, writes it down and hands it to the physician, is this a communication made to a physician by a patient?⁸

If the physician sends the patient to a hospital and upon admission a nurse, employed by the hospital takes the patient's history and complaints, and incorporates them into the hospital record, is this a "communication made to a physician by his patient?"⁹

If the physician, after placing the patient in the hospital, feels that the patient is so seriously ill that he needs a private nurse and engages one, are transactions between that nurse and the patient "communications made to a physician by his patient?"¹⁰ On the other hand, if the patient's illness is not serious enough for, or the patient cannot afford to have, a private nurse and the regular hospital nurses are used, are transactions between the patient and the hospital nurses "communications made to a physician by his patient?"¹¹

In all cases the nurses are under the direction and follow the orders of the physician. Instead of the physician being present around the clock and administering to the patient and observing the patient's progress or reaction, the nurses do this for him, record the results and activities on the hospital chart and give it to the physician for study. The nurses are subject to the physician's orders and are, in effect, his agents. In the instance where the physician issues orders to the private nurse, the courts recognize her as the agent of the physician. In the other case, the hospital furnishes the nurses and the courts do not recognize them but in the end the patient, directly or indirectly, pays for both. Both perform the same service, both have the same obligation to the physician and both have the same obligation to the patient. Why, then, is a communication with one privileged but not with the

⁷ See also, *In re Roberto*, 106 Ohio App. 303, 159 N.E.2d 334 (1958).

⁸ *Humble v. John Hancock Life Ins. Co.*, 28 Ohio N.P. (n.s.) 481 (C.P. 1931).

⁹ *Weis v. Weis*, *supra* note 2.

¹⁰ *Humble v. John Hancock Life Ins. Co.*, *supra* note 8.

¹¹ *Weis v. Weis*, *supra* note 2.

other? Carrying it one step further, if a patient becomes suddenly ill and goes immediately to a hospital for treatment, without first seeing his private physician, and is accepted by the hospital (an intangible being) and treated by a physician employed by, and within the hospital and attended by nurses employed by the hospital to serve the physicians, then who is the patient's physician? Are the nurses the agents of the physicians? Does the patient lose and forfeit the benefit of privilege by entering the hospital and giving his history, etc. to a nurse?

Today there is a general tendency to resort to hospitals in cases which require surgical operations, or in cases of severe illness.¹²

The purpose of privilege is to protect one in need of medical aid against the disclosure and consequent publicity of his body ailments and to lend a sense of security and confidence to the relation so that a patient will not be reticent about disclosures that might be material to his physical welfare.¹³

The reason and purpose of privilege is thus stated very clearly and very broadly. Yet when it comes to the application of the statute the courts, in effect, draw a line between medical aid rendered by a physician, personally, and that rendered by his subordinates and assistants in a hospital, such as nurses, technicians, laboratory aides and the like. Yet, all of those are there specifically for the purpose of aiding the physician in his treatment and cure of the ill, and without which he, in some cases, could accomplish nothing. Is there logic and fairness to a rule that seals the lips of the operating surgeon, in order to protect the patient, yet which allows the nurses in attendance at the operation, to speak freely concerning the operation?

There seems to be a definite tendency on the part of the courts to look upon and speak of a hospital as a recognized entity, itself performing services, treating the sick and injured, rather than viewing it for what it is; a place where patients are housed and specialized equipment and a trained staff is maintained to assist the physicians in treatment of the sick and injured. A hospital cannot practice medicine.

De Witt has stated:

Generally speaking, staff physicians and other physicians in the employe of a hospital, public or private, enter into the relationship of physician and patient with every person who enters the hospital for the purpose of care and treatment. The principle applies as fully and effectually to a sick or injured person who is brought to a hospital unconscious, or in a helpless state mentally, as it does to one who enters of his own volition. Under and by virtue of their appointment, contract, or whatever arrangement

¹² Taylor v. Flower Deaconess Home & Hosp., 104 Ohio St. 61, 135 N.E. 287 (1922).

¹³ *In re* Loewenthal, 101 Ohio App. 355, 134 N.E.2d 158 (1956).

they may have made with the hospital, every physician serving it becomes the physician of each and every patient and they have no legal or moral right or authority to view, treat or operate upon any patient therein, except by virtue of that appointment or contract.

It is a matter of common knowledge that a hospital patient may be examined or cared for at times by medical men whom he has never seen and may never see again, submitting to their professional services in the confident belief that they are his physicians and that their examinations or ministrations are for the purpose of enabling them to properly prescribe for or treat his malady or injury. It is altogether right and proper, therefore, that the principles of medical ethics and the rule of privilege, applicable to the individual physician selected by the patient, should apply with equal force and effect to the group of physicians selected and employed by the hospital of which the sick or injured person is a patient. Accordingly, it may be regarded as a general rule that a patient, unless fully and frankly informed to the contrary, has a perfect right to assume, and to rely upon the assumption, that any physician who enters his ward or room is rightfully there and has authority to act in his behalf and to examine his person or question him concerning his disease or injury; and the physician will not afterwards be heard to say that he was not connected with the hospital and had no authority to examine or interrogate him. The moment he undertakes to consult with or examine the hospital's patient, the relationship of physician and patient exists, and whatever confidential information the physician may have so acquired is privileged and may not be disclosed in court without the consent of the holder of the privilege.¹⁴

The above statement is well documented by citations from numerous states, although no Ohio decisions have been found. In the light of the existing holdings of the Ohio courts upon the general subject of patient-physician privilege it is reasonable to assume that up to this point the Ohio courts would concur.

But there remains a serious and vital leak in the protective armor of patient-physician privilege and that concerns the relationship of patient and nurse.

The Ohio courts are committed to the doctrine that section 2317.02,¹⁵ making communications between certain persons privileged, being in derogation of the common law, must be strictly construed and since the relationship of nurse and patient was not named in the statute, no privilege is extended to communications between a patient and his nurse.

But is section 2317.02 of the Revised Code of Ohio to be strictly construed? Section 2317.03,¹⁶ bearing the unofficial heading "Cases in

¹⁴ De Witt, *Privileged Communications* § 40 (1958).

¹⁵ *Supra* note 3.

¹⁶ Ohio Rev. Code § 2317.03 (1953).

which a party shall not testify," provides, and concludes, with the following words:

. . . When a case is plainly within the reason and spirit of this section and sections 2317.01 and 2317.02 of the Revised Code, though not within the *strict letter*, their principles shall be applied. (Emphasis added.)

What did the Ohio General Assembly mean or intend when it said:

When a case is plainly within the reason and spirit of this section and sections 2317.01 and 2317.02 of the Revised Code though not within the strict letter their principles shall be applied?

In *Cockley Milling Co. v. Bunn, Admx.*,¹⁷ the Ohio Supreme Court in speaking of the provisions of these statutes said:

These various disqualifying provisions were treated as exceptions as to the statute removing the disqualification and consequently were strictly construed. In 1880 these provisions of the code appear as Sections 5240, 5241, 5242, Revised Statutes, and it was provided in Section 5242 that "when a case is plainly within the law and spirit of the last three sections, though not within the strict letter, their principles shall be applied." It will be observed that the law is not that the exceptions are to be multiplied by judicial construction, but that the principles of the three sections shall be applied when a case, not within the letter, is plainly within their reason and spirit.

In *Powell v. Powell*,¹⁸ the Ohio Supreme Court said:

We have found it difficult sometimes to enforce this clause, because of its very indefinite character.

In *Cochran v. Almack*,¹⁹ the court said:

What is the scope of the clause under consideration it would be difficult to say in advance of cases as they may arise. It calls for the application of the principles of the three preceding sections, only when the case is not provided for by either of these sections. If the case is not within the letter but is plainly within the reason or spirit of these sections their principles shall be applied.

Considering then the question of nurse-patient relationship, or more broadly, the relationship between any or all hospital employees or attendants and the patient, it is clear that nurses and others are not specifically named or included within the "letter" of the law, but do they not come within the "reason and spirit of law?" To begin with, the patient resorts to the hospital for medical treatment. In order to

¹⁷ 75 Ohio St. 270, 79 N.E. 478 (1906).

¹⁸ 78 Ohio St. 331, 339 (1908).

¹⁹ 39 Ohio St. 314, 316 (1883).

have a full understanding of his ailment and to adequately treat him, he must give a complete history and make full disclosure of his ailments.

A hospital is defined as a place where sick and injured are cared for. By law, individuals may bind themselves together into a legal entity for the operation of a hospital, or the "place." But in this "place" there must be physicians to actually treat the sick and injured. The physicians must have nurses, technicians and many others in the modern day organization to assist them in carrying out the objectives of the hospital, to-wit: the treatment of the sick and injured.

Consequently, there is no difference in principle between the two examples—one, where the patient goes to the physician's office and is there treated for a minor ailment, with the help of the nurse employed by the physician and second, where the physician sends the patient to a hospital where he can have greater and more adequate facilities for treating his patient and where the patient will be under constant observation by nurses, internes and the like. In both instances, the physician is in charge of the patient; the patient has placed himself in the hands of his physician and looks to him for advice and treatment. In the first instance, the patient is fully protected on the question of privilege but in the second instance, he loses an important part of it with regard to the nurses, technicians and all attendants who are not actually licensed physicians. Why? Is it not within the reason and spirit of the law that persons offering themselves for medical treatment, whether in a doctor's office or in a hospital, shall be secure in the knowledge that all communications by them to their medical attendants, be they nurse or physician, and any advice given or observations made or recorded in the course of, or in connection with their treatment shall be privileged?

A hospital is an institution for the care of the sick and infirm. Hospital care is the care of the sick and infirm in a hospital. . . . The services included in reasonably adequate hospital care are determined by the state of contemporary medical science, by standards prevailing in the practice of the art of medicine, by nursing standards established by law or local custom, and by legally defined or generally accepted requirements for the safety, protection, and comfort of the sick in hospitals or for the satisfaction of their essential needs. . . .

The essence of medical practice is diagnosis and treatment. *Hospital care divorced from diagnosis and treatment is inconceivable*, but no institution can "diagnose, treat, operate, or prescribe." Making a diagnosis or ordering or administering treatment is a personal act. Medicine is practiced "in" a hospital, never "by" a hospital. When the courts say that a public or charitable hospital may practice medicine because it is expressly organized for that purpose, they can only mean that such hospitals, to the extent

authorized by law, may employ or appoint physicians to treat the sick. The hospital employs or appoints the physician; the physician diagnoses, prescribes, or operates. . . .

The theory that an institution can take the place of a thinking and acting human being is presumably based on the legal fiction that a corporation is a person. . . .

A hospital, required to give adequate care, must arrange for medical service, and it can only do so with the cooperation of medical practitioners. . . . Medical organizations and local government authorities, undertaking to define minimum standards of a safe and acceptable hospital, demand that hospitals furnish or arrange for competent auxiliary professional services. Typical requirements include resident physicians, qualified laboratory diagnosticians, and certain categories of therapeutic specialists.

Under circumstances and conditions determined by medical men, tests are made by laboratory experts and nurses who report their findings to the clinician, the responsible practitioner in charge of the case; the physician then makes the diagnoses.

How many physicians actually participate in the hospital care of a single patient? Examination of a series of clinical histories in a well conducted hospital revealed that in some cases as many as twelve or fifteen separate medical functions were in some cases performed in the process of diagnosis alone; the number of required services is further increased by therapeutic indications. Services of a medical nature required in hospital practice may be supplied directly and exclusively by physicians; others of fact-finding character with clinical bearing may be furnished by non-medical personnel, who in turn are supervised by physicians. Some of the required services are grave and time consuming, some are slight and brief of duration, but all reflect the demands of medical practitioners and are presumed to be indispensable to effective practice. (Emphasis supplied.)²⁰

However, the Board of Trustees, the Administrator and the medical staff, and all others in the hospital whose relationships must be considered in the scheme of organization, have a primary obligation to the patient which must be dominant in all their activities and must serve as the touchstone for the entire plan of hospital organization. . . . The patient is the individual on whom all service is focused. He is the social entity without whom the three groups would have no reason for existence.²¹

The courts seem to have difficulty with names and terms and since the word "nurse" is not mentioned in the statute, the courts hold that they are without power to broaden the statute to include nurses. Of course, the courts are without authority to broaden the statute to include contractors, accountants or grocers. But nurses are in every instance directed by physicians, assist physicians, and are in effect "the physicians' good right arm." The nursing profession came into

²⁰ 12 Hospitals 11-16 (July, 1938).

²¹ Bluestone, 36 Mod. Hosp. 83-86 (June, 1931).

being for that very purpose and they are required, by law, to have special training and to be licensed for that specific purpose, yet prohibited by law from actually treating the sick. Nurses, then, may be said to depend wholly upon physicians and, to a major extent, especially in hospitals, physicians are dependent upon nurses. How, then, can the two be separated as it affects the patient's privilege and extend it to the one and not to the other?

When a patient goes voluntarily to a hospital for treatment, or is taken there by ambulance after an accident, he does not engage any specific physician, nor does he (only in exceptional cases) engage a private nurse. The facilities of the hospital are at his service and the cost of the nurses, technicians, etc., is included in his bill as part of his medical treatment.

To extend the "privilege" to physicians and to all those who assist in the treatment of the patient would not be usurping the function of the legislature by writing something into the law but rather would be applying the law to cases "*plainly within the reason and spirit of the law . . . though not within the strict letter.*" (Emphasis added.)²²

Insofar as it pertains to this discussion, *Weis v. Weis*²³ holds:

3. Hospital records, in the absence of privilege, are admissible in evidence, insofar as there is compliance with the requirements and conditions imposed by Section 21202-23, General Code [Uniform Business Records and Evidence Act] . . . and

4. Section 11494, General Code²⁴ making privileged communications between certain persons, being in derogation of the common law, must be strictly construed, and consequently such section affords protection only to those relationships which are specifically named therein. The relationship of nurse and patient not being named in the statute, no privilege is extended to communications between a patient and his nurse and

5. Where hospital records include communications between the patient and his physician, such portions of the records are, in the absence of waiver of privilege, inadmissible in evidence by virtue of the express provisions of Section 11494²⁵ General Code.

In *Humble v. John Hancock Life Ins. Co.*,²⁶ a private nurse employed by a physician was prohibited from testifying on the grounds that her testimony, like that of the physician by whom she was employed, was privileged. The court in the opinion said:

The nurse in question in this case was the private nurse of Dr. Gilfillen and the only thing that she knew with reference to

²² *Supra* note 16.

²³ *Supra* note 2.

²⁴ *Supra* note 3.

²⁵ *Ibid.*

²⁶ 3 Ohio Supp. 373 (1931), *aff'd* 31 N.E.2d 887 (1932), motion to *cert. den.* 32 N.E.2d 425 (1932).

the condition of the deceased was what she learned as an assistant of the doctor through communications between the patient and the physician or diagnosis and treatment of the physician. She had no independent knowledge about the deceased's condition and as such we think her lips were sealed by the statute. Gen. Code Sec. 11494.²⁷

This case is one of first impression in this state upon this point. The statute, itself, does not grant any privilege to communications between the nurse and patient and it was so held in the *Wills* case, *supra*.²⁸ The relation in that case, however, was the independent relation of a public health nurse and patient and clearly not the same question as is involved here.

The court in the *Humble* case then quoted from the opinion in the case of *Culver v. Union Pac. R.R.*,²⁹ and concluded by saying:

We consider the Nebraska case to be the better reasoned opinion. Most modern doctors are assisted in their office by nurses, a practice which should be encouraged rather than discouraged, and the nurse becomes the agent of the physician. If the privilege granted by the statute is to be effective, it must extend to the nurse in her capacity as an assistant to the physician so that she can not disclose what she learns in such capacity when the physician, himself, cannot disclose it.

In the *Culver* case the superintendent of nurses at a hospital was called as a witness but her testimony was excluded. The court there said:

At the time the Nebraska statute was enacted the profession of graduate or registered nurse had scarcely come into being. Observing that the reasons which caused the extension of the privilege to physicians applied with equal force to professional nurses, New York and Arkansas have amended their statutes so as to include "a professional or registered nurse." But the legislature of Nebraska has not included such persons within the privileged class, and a nurse, merely as such, is not within such class. A different rule prevails where the nurse acts as one of the agents *or assistants* of the physician in charge. A nurse is often necessarily present at conversations between the patient and the doctor with respect to the ailment or condition of a patient, and little good would be subserved if the lips of the doctor might be sealed by the statute as to such conversations but the nurse or attendant might freely testify to all that was said and everything that was done. The purpose of the law is to protect the right of privacy, and while its scope should not be unduly extended, its very intention might be completely thwarted by the admission of testimony from this class of witness [hospital nurse]. In such case if she received or heard confidential communications from a patient "necessary and

²⁷ *Supra* note 3.

²⁸ *Wills v. National Life & Acc. Co.*, 28 Ohio App. 497, 162 N.E. 822 (1928).

²⁹ 112 Neb. 441, 199 N.W. 794 (1924).

proper to enable him [the physician] to discharge the functions of his office according to the usual course of practice," then the privilege extended to the physician extends equally to the nurse.³⁰

The Ohio Supreme Court recognizes that the attendants, nurses and physicians collaborate to make the hospital record of a patient.³¹ Yet if this is done in the physician's office the records so made are privileged but if the doctor moves the patient to the hospital, automatically the nurse's notes and acts of other attendants lose their status and are not privileged.

The nurse's notes are a most important part of a hospital chart. They are compiled by the nurses specifically for the physicians' information and guidance in treating the patient.

Hospital charts of the patients are the records of the attending physician: the information is acquired by the physician in a confidential capacity. There is as good reason that the contents of the hospital chart be kept free from curious and prying eyes as there is that the physician be compelled to keep the same information a secret.³²

It will be remembered that this same section of the Ohio code,³³ dealing with the privilege between physician and patient, also provides for privilege as to "an attorney concerning a communication made to him by his client in that relation, or his advice to his client."

The Ohio courts hold that in connection with attorney-client privilege, where information is obtained in preparation for trial it is privileged.³⁴

It is quite apparent that persons assisting an attorney in gathering information and preparation for trial are not named in the statute yet the privilege has been extended by the Ohio courts to cover them. If the statute is extended, or "interpreted" to cover persons assisting an attorney in preparation for trial, why can it not be extended, or "interpreted" to cover persons assisting a physician in preparation for medical treatment? If the court possesses the latitude to extend the statute in the one instance, surely it must and does possess the same latitude in the other instance.

The Ohio Supreme Court has officially stated that in connection with the attorney-client relationship it extended the privilege to an instance beyond those named in the statute and the decision stands today as the law of this State.

³⁰ *Id.* at 450, 199 N.W. at 797.

³¹ *Weis v. Weis*, *supra* note 2.

³² Hayt, "The Hospital in Modern Society," Bachman, *Legal Aspects of Hospital Practices* 131 (1958).

³³ *Supra* note 24.

³⁴ *In re Bates*, 167 Ohio St. 46, 146 N.E.2d 306 (1957).

In the case of *In re Story*,³⁵ after relating that the Ohio Supreme Court had held that where records were compiled and turned over to attorneys they were privileged, the court said:

However, there are no statutory provisions which provide against the production of such reports or records or testimony concerning them by the party, his non-attorney employees, or anyone else. It is apparent, therefore, that this court extended the privilege against testifying or producing evidence to an instance beyond those supported by statutory or constitutional provisions.

Thus the court is in the position of holding that when the attorney-client relationship is involved, the privilege is extended to persons, not attorneys, assisting in the preparation for trial, although such persons are not named in the statute, but that as concerns the physician-patient relationship, the privilege against testifying is not extended to them because they are not specifically named in the statute and that as regards this particular relationship, the statute, being in derogation of the common law, must be strictly construed.

It would seem that the court followed the proper and more reasonable interpretation with respect to its holding on the attorney-client relationship and rightfully extended the privilege to cover persons assisting an attorney in preparation for trial and has statutory justification for such a holding in that such a case "is plainly within the reason and spirit of . . . Section 2317.02 of the Revised Code, though not within the strict letter."³⁶

On the other hand, if the Ohio Supreme Court, upon the re-examination of the issues, were to reverse itself,³⁷ and extend the privilege to the entire hospital chart, and particularly the nurse's notes, so long as the chart was prepared and kept under the supervision, and at the direction of a physician, it would be giving effect to the very purpose of the statute, to-wit: grant the privilege against testifying to the physician and all persons assisting him or collaborating with him in the diagnosis and treatment of the patient whether in his office, in a hospital or wherever such treatment might take place. In this way the patient could be assured that he would be protected against disclosure of his bodily ailments and that what is learned by statements to a nurse in a hospital, the exhibition and examination of his body in a hospital, the recording of his reactions to medication and treatment, or the like, be sealed to the public and no part of the hospital record testified to unless the patient himself should waive the privilege.

³⁵ 159 Ohio St. 144, 111 N.E.2d 385 (1953).

³⁶ *Supra* note 16.

³⁷ *Weis v. Weis*, *supra* note 2.

It may be true that an act of the legislature specifically containing such provisions would correct the situation but this seems unnecessary when the Ohio Legislature has already given the courts this authority, even to the extent of it being a directive when it enacted section 2317.03³⁸ and stated that the principles (of privilege) *shall* apply when a case is plainly within the reason and spirit of section 2317.02, even if not within the strict letter.

³⁸ *Supra* note 16.