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# Privileged Communications Between Physician and Patient, by Clinton Dewitt

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PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT.  
By Clinton DeWitt. Springfield, Ill.: Charles C. Thomas, 1958. Pp.  
xviii, 528. \$11.50.

Professor Clinton DeWitt, of the School of Law of Western Reserve University and an experienced practitioner, has given in this volume a full scale treatment of a thorny set of problems for lawyers in about two-thirds of the states of the United States—states in which the legislatures have followed the lead of New York in creating a privilege for communications between physicians and patients which was not recognized at common law.

Professor DeWitt's text answers a definite need, for this is a subject which, in view of its practical importance for so large a segment of the legal profession, receives too little attention in the curricula of today's law schools. It is the subject of a four-page note at the very end (pp. 839-842) of Morgan Maguire and Weinstein's "Cases and Materials on Evidence," 3rd ed. (1957). However, this note gives a more comprehensive view of the problems raised by this privilege than do the single cases with accompanying notes in Professor Charles W. McCormick's casebook, 2nd ed. (see pages 269-278) or in Dean Mason Ladd's casebook (see pages 168-173).

The organization of the subject-matter of the book is to be commended. In general, the book proceeds from the history of the privilege, through the policy and philosophy underlying it, to valuable discussions of the exact scope of the privilege, the methods of its application in legal proceedings, and the ways in which it may be waived. Professor DeWitt is careful to point out that problems of scope, application, and waiver must be considered in the light of the exact language of the statutes applicable in the jurisdictions where the problems arise. Much of the value of the book for the practitioner is found in the exhaustive citations of cases, and the appendix giving the texts of the statutes of the various states which recognize the privilege. These enable the practitioner rapidly to compare the statutes under which the various cases are decided with the statute in his state, and so to decide how useful a particular case in another jurisdiction may be as a persuasive authority in his jurisdiction.

Deserving special comment are several chapters. Chapter XI, entitled "Mode of Attempted Introduction-Immaterial,"<sup>2</sup> discusses the application of the privilege to hospital records, physicians' office records, pub-

lic health records, proofs of death, proofs of loss, etc. Chapters XVI, XVII, and XVIII deal with various aspects of waiver of the privilege—often the most important problem for the trial lawyer in a personal injury case. Mention must also be made of Chapter IV, Section 11, on “Criticism of the Privilege.” Here Professor DeWitt agrees with Wigmore<sup>1</sup> and the great majority of modern legal scholars,<sup>2</sup> that the over-all effect of this privilege is unfortunately to thwart justice in many cases. It is, of course, impossible to justify logically a different rule in cases of personal injury tried in court, and similar cases tried before an administrative tribunal such as an Industrial Board or Workmen’s Compensation Commission. Yet many states, such as Indiana, which scrupulously apply this privilege in litigated matters,<sup>3</sup> refuse to permit its utilization in workmen’s compensation cases<sup>4</sup> or occupation diseases cases.<sup>5</sup>

Defects in printing unfortunately mar the first half of the book, for footnotes are interspersed in the text at a number of places.<sup>6</sup>

The reviewer has lived and practiced both in Indiana, where this privilege exists, and in Illinois, where the common law, which does not recognize this privilege, is in force on this subject. Such personal experience leads to the conclusion that physicians and patients behave identically under either legal rule, and that the sole effect of this privilege is to hamper the lawyer who is seeking to prove the actual facts concerning injury, disease, or mental condition. Thus, Professor DeWitt’s conclusion as to the merits of this privilege is read with sympathetic concurrence:

Honest patients have little to fear, for they will not hide the truth, whether the privilege exists or not. Except in rare cases, only the dishonest litigant will attempt to shut out truth. It is high time to abolish the physician-patient privilege, but this may not be possible within a reasonable length of time. . . .<sup>7</sup>

Until this privilege is abolished, Professor DeWitt’s book will be valuable both intrinsically and as a time-saving point of departure in re-

1. 8 WIGMORE, EVIDENCE § 2380A (3d ed. 1940), esp. at 814.

2. *Id.*, § 2380a, n. 3; McCORMICK, EVIDENCE, 211-224, esp. at 223, 224 (1954); Chafee, *Is Justice Served or Obstructed by Closing the Doctor’s Mouth on the Witness Stand?* 52 YALE L. J. 607 (1943); Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence*, 10 U. OF CHI. L. REV. 285, 287-291 (1943).

3. IND. ANN. STAT. §§ 2-1714, 9-1602 (1933).

4. IND. ANN. STAT. § 40-1227 (1933).

5. IND. ANN. STAT. §§ 40-2212, 40-2213 (1933).

6. See, for examples, p. 54, n. 9; p. 55, n. 11; p. 131, n. 2, 3, 4, 5; p. 196, n. 1.

7. DEWITT, PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT 39 (1958).

search for lawyers in states where the legislatures have enacted statutes creating the privilege.

AUSTIN V. CLIFFORD†

LAWYERS' MEDICAL CYCLOPEDIA OF PERSONAL INJURIES AND ALLIED SPECIALTIES. Editors: Charles J. Frankel, M.D., L.L.B.; J. W. Holloway, Jr., L.L.B.; Paul E. McMaster, M.D.; Kenneth R. Redden, L.L.B. Indianapolis: Allen Smith Co., 1958. Six volumes: Pp. xiv, 662; xxi, 771; xxv, 727; volumes four-six remain to be published. \$24.50 per volume.

Because of the increasing emphasis which is currently being placed upon medical issues in the trial of the vast majority of litigated personal injury cases, the proper utilization of medical evidence assumes a most important role. The experienced advocate, charged with the responsibility of effectively presenting either side of the controversy, recognizes at once the importance of adequate medical research in his investigation and marshalling of medical evidence. Medical writers have provided a wealth of material in the medical-legal field, but for the busy practitioner whose time is forever at a premium, the laborious task of delving into this mass of literature in the search for scientific truth assumes astronomical proportions.

The need for an inter-professional conduit between the medical and legal professions has long been recognized, through which correct information could be obtained and in turn made known to the triers of the facts. One of the barriers to an intelligent understanding of the medical facts in the trial of personal injury litigation arises from a lack of understanding by counsel of the subject matter involved and the inability to translate the technical information supplied by the medical witness into understandable language for the judge and jury.

The editors and authors of this comprehensive work have, in the opinion of the writer, contributed immeasurably to the field of medical-legal jurisprudence and have provided a working tool which should prove invaluable to those who will avail themselves thereof. Practitioners utilizing this work will be aided in understanding the true nature of the injury involved, the possible implications of the treatment and proper evaluation of the injury. As stated by the authors in their preface: "In sim-

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