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## WITNESSES - PRIVILEGED PROFESSIONAL COMMUNICATIONS AS AFFECTED BY THE PRESENCE OF THIRD PARTIES

Dan K. Cook  
*University of Michigan Law School*

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WITNESSES — PRIVILEGED PROFESSIONAL COMMUNICATIONS AS AFFECTED BY THE PRESENCE OF THIRD PARTIES — Interesting problems arise in regard to privileged communications when made to the professional confidant in the presence of a third person. Such problems are concerned with the manner and degree in which the privilege is altered or destroyed by the presence of such third persons. It is the purpose of this comment to discuss the attorney-client and physician-patient privileges as affected by the presence of a third person, where

the professional confidant and his client or patient are aware of such presence.

I.

Generally speaking, all confidential communications directed to an attorney by his client are privileged and not admissible in evidence, when such communications are made for the purpose of professional advice and assistance, and when they properly pertain to matters which are the subject of professional employment.<sup>1</sup> The operation of this privilege is affected in a variety of ways when a third party enters into the general picture of the attorney-client relationship. The general rule in regard to this situation is that whenever the communications from the client to the attorney are made in the presence of a third party, such communications are then removed from the privilege and may be admitted in evidence.<sup>2</sup> There is some authority for the view that the privilege remains to the extent that the attorney is not permitted to testify as to the communications, although the third party is permitted to testify freely as to what he heard.<sup>3</sup> This latter distinction would seem to be unsound, in view of the fact that if the third party is permitted to testify, little good (and possibly some harm) is then done by sealing the lips of the attorney.

Although there is a large number of authorities in support of this rule by which the presence of a third party destroys the privilege, a careful examination of the cases reveals the fact that the rule is far from universal in its application, and that there are many well-founded qualifications of it.<sup>4</sup> The first general qualification of the rule presents

<sup>1</sup> On the general subject of privileged communications between attorney and client, see 5 WIGMORE, EVIDENCE, 2d ed., 11 (1923); 5 JONES, EVIDENCE, 2d ed., 4079 (1926); 1 TAYLOR, EVIDENCE, 11th ed., 618 (1920); 66 Am. St. Rep. 217 (1899); 6 L. R. A. 481 (1890); 28 R. C. L. 553 (1921).

<sup>2</sup> See cases collected in 70 C. J. 433 (1935); 28 R. C. L. 553 (1921); Ann. Cas. 1913A 18; 66 Am. St. Rep. 224 (1899). Some of the more recent cases include: *In Re Quick's Estate*, 161 Wash. 537, 297 P. 198 (1931); *Machnofsky v. Smith*, 101 Pa. Super. 578 (1931); *People v. White*, 102 Cal. App. 647, 283 P. 368 (1929); *Crawford v. Raible*, 206 Iowa 732, 221 N. W. 474 (1928); *Whigham v. Bannon*, 21 Ohio App. 496 (1926); *Livezey v. United States*, (C. C. A. 5th, 1922) 279 F. 496, cert. den. 260 U. S. 721, 43 S. Ct. 12 (1922).

<sup>3</sup> *Hartness v. Brown*, 21 Wash. 655, 59 P. 491 (1899); *Blount v. Kimpton*, 155 Mass. 378, 29 N. E. 590 (1892).

<sup>4</sup> The case which in its dictum seems to tend most strongly toward a literal, blanket-like application of the rule is that of *Goddard v. Gardner*, 28 Conn. 172 at 174 (1859), where the court stated: "No reason of necessity requires that any witness (save an interpreter) should ever be present at a consultation between the client and his attorney, and if the client procures or submits to the presence of such a witness, he voluntarily confides his secrets, not to his attorney only, but also to the witness, in whose custody the law cannot protect them, when the interests of justice require that they should be disclosed."

itself when the third party, who is present when the communications take place, is an employee of either the attorney or the client.<sup>5</sup> It should be noted in this connection that there is abundant authority for the proposition that the privilege extends to communications made by the client to a law clerk of the attorney.<sup>6</sup> Therefore it is not strange that the privilege should also extend to the law clerk when he is present at the conference between the client and the attorney.<sup>7</sup> In regard to stenographers or personal secretaries of the attorney, although there seems to be no authority for the privilege attaching when the client makes his communications to the stenographer privately, it seems quite clear that the privilege does attach to the stenographer when she is present at the attorney-client conference.<sup>8</sup> Probably the clearest example of the extension of the privilege to a third party, who is an employee either of the attorney or the client, is the case where it is necessary that an interpreter be present at the conference to facilitate communication between the attorney and his client. There is decided authority for the proposition that in such a situation the privilege is extended to the interpreter.<sup>9</sup> As one case so aptly puts it, although in a statement that is not literally true, "The privilege only extends to the attorney and persons who are the media of communication between the client and the attorney."<sup>10</sup> A final example of those cases which extend the privilege to a third party who is an employee,

<sup>5</sup> 5 JONES, EVIDENCE, 2d ed., 4141 (1926); 1 TAYLOR, EVIDENCE, 11th ed., 626 (1920); 70 C. J. 433 (1935); 23 AM. & ENG. ENCYC. LAW, 2d ed., 66 (1903).

<sup>6</sup> See cases collected in 53 A. L. R. 369 (1928). Also, *Sibley v. Waffle*, 16 N. Y. 180 (1857); *Taylor v. Forster*, 2 Car. & P. 195, 172 Eng. Rep. 89 (1825); *Bowman v. Norton*, 5 Car. & P. 177, 172 Eng. Rep. 929 (1831); *Re Arnott*, 60 L. T. R. (Q. B. Div.) 109 (1888).

<sup>7</sup> *Brand v. Brand*, 39 How. Pr. (N. Y.) 193 (1870); *In re Putnam's Will*, 257 N. Y. 140, 177 N. E. 399 (1931). *Contra*: *Morton v. Smith*, (Tex. Civ. App. 1898) 44 S. W. 683.

<sup>8</sup> Although only a few cases have been found in support of the proposition above stated, no cases contra to the proposition have been discovered. The cases follow: *Taylor v. Taylor*, 179 Ga. 691, 177 S. E. 582 (1934); *State v. Brown*, 16 Del. 380, 36 A. 458 (1896); *Ratzlaff v. State*, 122 Okla. 263, 249 P. 934 (1926). In this latter case, the attorney was the county prosecutor, and a deputy sheriff was present, when the prosecutor was consulted. The case holds that the prosecutor could not testify as to his consultant's communications, although the decision is unsatisfactory in that it is not clear as to whether the deputy sheriff would have been permitted to testify as to the communications.

<sup>9</sup> *Du Barre v. Livette*, Peake 108, 170 Eng. Rep. 96 (1791); *State v. Loponio*, 85 N. J. L. 357, 88 A. 1045 (1913). (It is this latter case which takes the rather liberal view that the privilege extends to the agent of either attorney or client, when such agent is confidentially used to transmit the communication.) For dictum holdings, see cases collected in: 1 TAYLOR, EVIDENCE, 11th ed., 626 (1920); 23 AM. & ENG. ENCYC. LAW, 2d ed., 66 (1903).

<sup>10</sup> *Morton v. Smith*, (Tex. Civ. App. 1898) 44 S. W. 683 at 684.

either of the client or the attorney, is the case in which the third party who is present at the attorney-client conference is another attorney also representing the client.<sup>11</sup> Although authority is very meagre on this point, in view of the underlying principles of the privilege it would seem most reasonable to extend the privilege to the second attorney in this type of case.

A second general qualification of the rule, that where a communication between attorney and client takes place in the presence of a third party such communication is not privileged, presents itself in those cases where two or more parties consult an attorney on a matter in which they are mutually interested. In such a case, the privilege sometimes exists and sometimes fails, depending upon the identity of the parties to the action in which the privilege is invoked.<sup>12</sup> That is to say, the privilege is clearly binding upon the attorney, in an action between his clients who have mutually consulted him and a third party;<sup>13</sup> while it is equally clear that the privilege disappears when a controversy arises between his clients.<sup>14</sup> The reasoning behind the disappearance of the privilege in an action between the clients is predicated upon the clear rule that the presence of an adverse party at the attorney-client conference invariably destroys the privilege.<sup>15</sup>

Thus, although it is clear that the rule which destroys the privilege as regards communications made in the presence of third parties is universally accepted and quoted by the courts, it is equally clear, by

<sup>11</sup> *Dickerson v. Dickerson*, 322 Ill. 492, 153 N. E. 740 (1926).

<sup>12</sup> See generally: 5 WIGMORE, EVIDENCE, 2d ed., 55 (1923); 5 JONES, EVIDENCE, 2d ed., 4098, 4143 (1926); 1 TAYLOR, EVIDENCE, 11th ed., 629 (1920); 28 R. C. L. 553 (1921); Ann. Cas. 1913A 18; 23 AM. & ENG. ENCYC. LAW 65 (1903); 6 L. R. A. 481 (1890).

<sup>13</sup> *In re Seip's Estate*, 163 Pa. St. 423, 30 A. 226 (1894); *Gruber v. Baker*, 20 Nev. 453, 23 P. 858 (1890); *Hurlburt v. Hurlburt*, 128 N. Y. 420, 28 N. E. 651 (1891); *Root v. Wright*, 84 N. Y. 72 (1881). *Contra*: *Hull v. Lyon*, 27 Mo. 570 (1858). See also *Minard v. Stillman*, 31 Ore. 164, 49 P. 976 (1897), in which it was held that there was no privilege in an action by one of the clients against the attorney.

<sup>14</sup> *Lawless v. Schoenaker*, 147 Misc. 626, 264 N. Y. S. 280 (1933); *Crawford v. Raible*, 206 Iowa 732, 221 N. W. 474 (1928); *Stewart v. Todd*, 190 Iowa 283, 173 N. W. 619 (1919); *Koogle v. Cline*, 110 Md. 587, 73 A. 672 (1909); *Parish v. Gates*, 29 Ala. 254 (1856).

<sup>15</sup> *Howsley v. Clark*, 167 Okla. 371, 29 P. (2d) 947 (1934); *Griffin v. Williams*, 179 Ga. 175, 175 S. E. 449 (1934); *Kissack v. Bourke*, 132 Ill. App. 360 (1907); *Thompson v. Cashman*, 181 Mass. 36, 62 N. E. 976 (1902); *Cocroft v. Cocroft*, 158 Ga. 714 at 719, 124 S. E. 346 (1924), where the rule is clearly explained as follows: "When a client makes to his attorney a communication or statement in the presence of the opposite party as to the transaction in hand, it is not confidential or privileged and the attorney is a competent witness to testify respecting the same on the trial of a case arising out of such transaction."

reason of the various well-founded qualifications of the rule, that it is not literally applied to all cases. Stating this in another way, the rule is literally applied if understood as qualified by the additional statement that there are parties other than the attorney and client who are excluded from the classification of "third parties" as employed in the statement of the rule. It is entirely reasonable that the question should arise as to whether there is any definite basis for these qualifications, in order that the rule may be more definitely defined with a view to reasonably accurate forecasts of future decisions. It is submitted that there is a definite basis for these qualifications, and that the full scope of the client's privilege regarding communications made to his attorney in the presence of other parties may be clearly determined.

The general policy of fostering the client's privilege over communications made to his attorney is one of enabling the client to consult his attorney freely, without fear of disclosure by the attorney of information communicated at the attorney-client conference.<sup>16</sup> It necessarily follows from this general policy that the privilege is extended only to confidential communications to the attorney.<sup>17</sup> Furthermore, it is the assumption that the presence of a third party at the attorney-client conference necessarily prevents the communications of such conference from being confidential which results in the stating of the rule that the presence of a third party destroys the privilege. Statements such as the following exemplify this view in the decisions upon this point:

"A third person even though a mere stranger or bystander in whose hearing communications are made by a client to an attorney may testify to such communications. . . . The communication not being confidential the attorney is not privileged from disclosing it. Where there is no confidence reposed, no privilege can be asserted. In such cases the attorney is permitted to testify not because the privilege has been waived, but because the communication, not having been made in confidence, was not privileged.

<sup>16</sup> As expressed by Professor Wigmore: "In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; and hence the law must prohibit such disclosure except on client's consent. Such is the modern theory." 5 WIGMORE, EVIDENCE, 2d ed., 14 (1923). See also, 5 JONES, EVIDENCE, 2d ed., 4088 (1926); 1 TAYLOR, EVIDENCE, 11th ed., 621 (1920).

<sup>17</sup> 5 WIGMORE, EVIDENCE, 2d ed., 53 (1923): "The privilege assumes, of course, that the communications are made with the intention of confidentiality. The reason for prohibiting disclosure ceases when the client does not appear to have been desirous of secrecy." See also, *In re Arnolt's Estate*, 127 Misc. 579, 217 N. Y. S. 323 (1926), where it was held that communications between a client and his attorney were not confidential, when made in a room with the door ajar at the time of the conference.

The privilege . . . cannot be extended to cover cases not within the reason upon which the privilege rests."<sup>18</sup>

Following through this line of reasoning, it would then seem that whenever the presumption that communications made in the presence of third parties are not confidential fails, the privilege then attaches itself to the communications. This would seem to be the basic reason for the qualifications of the rule which states that the presence of third parties destroys the privilege.

Thus, in those cases where the third party is an employee of either the client or the attorney (that is, where the third party is a clerk or stenographer of the client<sup>19</sup> or of the attorney, an interpreter, or another attorney), in the very nature of things, the client would reasonably suppose that the presence of such a party would not impair the confidential nature of the conference. The modern attorney's necessity for an assistant in the nature of a law clerk or stenographer is such that the ordinary client would consider him no more a receiver of his confidential communications to the attorney than would be a fixture of the attorney's office.<sup>20</sup> Similarly, the same situation is apparent where a necessary interpreter<sup>21</sup> or another attorney is the third party.<sup>22</sup> The theory remains the same in those cases where two or more clients consult an attorney for mutual advice, the rule being that the privilege attaches in an action between the clients and a third party<sup>23</sup> and is

<sup>18</sup> *Baumann v. Steingester*, 213 N. Y. 328 at 333, 107 N. E. 578 (1915).

<sup>19</sup> Although no case has been found where the client's personal secretary was present at the attorney-client conference, by analogy to the case where the attorney's personal secretary is present and is privileged it seems reasonable to suppose that the client's secretary would also be privileged.

<sup>20</sup> *Taylor v. Taylor*, 179 Ga. 691 at 693, 177 S. E. 582 (1934), "Under modern practice of law the business of an attorney in most offices cannot be conducted without such an assistant [referring to a confidential clerk or stenographer]. This clerk or secretary, by reason of his or her position, must frequently have almost as much information as to the confidential business of the client as the attorney himself." Ga. Code (1935), § 38-419 (Code 1914, § 5786) expressly extends the privilege to the attorney and his clerk, although the cited case goes beyond the express provisions of the statute and extends the privilege to a confidential secretary as distinguished from a clerk.

<sup>21</sup> *State v. Loponio*, 85 N. J. L. 357 at 362, 88 A. 1045 (1913), "The question probably comes down after all to one of whether or not the method [of communication] employed was intended and understood to be confidential. . . ."

<sup>22</sup> *Dickerson v. Dickerson*, 322 Ill. 492, 153 N. E. 740 (1926).

<sup>23</sup> *In re Seip's Estate*, 163 Pa. St. 423, 30 A. 226 (1894); *Gruber v. Baker*, 20 Nev. 453, 23 P. 858 (1890); *Hurlburt v. Hurlburt*, 128 N. Y. 420, 28 N. E. 651 (1891); *Root v. Wright*, 84 N. Y. 72 (1881). *Contra*: *Hull v. Lyon*, 27 Mo. 570 (1858)..

destroyed in an action between the clients.<sup>24</sup> The application of the theory, in this connection, is aptly stated as follows:

“And where two persons are present at a conference with an attorney, both being interested in the advice they sought, [the privilege] does not apply . . . in an action between those two persons. . . . This is on the theory that nothing either said to the attorney could be deemed to be confidential so far as the other was concerned.”<sup>25</sup>

A final example of the overthrowing of the presumption that the presence of a third party at an attorney-client conference makes communications at such conference non-confidential, thus destroying the privilege, is offered by the case of *Bowers v. State*.<sup>26</sup> In that case a girl under eighteen years of age, who was prosecutrix of a seduction action, had consulted her attorney on a bastardy proceeding commenced against the defendant. The mother of the prosecutrix was present at such conference. At the seduction trial, the defendant then claimed that the communications made to the attorney by the prosecutrix were admissible in evidence, since the mother was present at the consultation. The court held that the communications were privileged, notwithstanding the presence of the mother at the conference. The court justified its decision as follows: “We think it is only a dictate of decency and propriety to regard the mother in such a case as being present and acting in the character of confidential agent of her daughter. The daughter’s youth and supposed modesty would render the participation of her mother appropriate and necessary.” The decision serves to illustrate the proposition that the presence of a third party at an attorney-client conference does not destroy the client’s privilege over his communications to the attorney, if the circumstances of the conference are such that the client reasonably understood that the third party was included in the client’s confidence; that is, if the client reasonably intended that his communications should be confidential, notwithstanding the presence of the third party. Putting it another way, we can say that the presence of a third party raises a strong presumption that the client’s communications were not intended to be confidential, but that this presumption may be rebutted by evidence of

<sup>24</sup> *Lawless v. Schoenaker*, 147 Misc. 626, 264 N. Y. S. 280 (1933); *Crawford v. Raible*, 206 Iowa 732, 221 N. W. 474 (1928); *Stewart v. Todd*, 190 Iowa 283, 173 N. W. 619 (1919); *Koogle v. Cline*, 110 Md. 587, 73 A. 672 (1909); *Parish v. Gates*, 29 Ala. 254 (1856).

<sup>25</sup> *Lawless v. Schoenaker*, 147 Misc. 626 at 628, 264 N. Y. S. 280 (1933).

<sup>26</sup> 29 Ohio St. 542 (1876) (quotation at p. 546).



a contrary intention, such intention being inferred from the surrounding circumstances at the conference.<sup>27</sup>

It should be finally noted, that although the client's privilege over confidential communications to his attorney is a common-law privilege and thus exists independently of statutes, a number of states have set forth the privilege in statutory form, and that some of these statutes extend the privilege beyond the attorney. There are twenty-nine states which have statutes expressly dealing with the privilege. These twenty-nine statutes fall into four general types as follows: (1) the statute merely states the attorney-client privilege;<sup>28</sup> (2) the statute provides, in addition to the ordinary prohibition against examination of the attorney that the attorney's secretary, stenographer, or clerk cannot be examined without the consent of his employer, concerning any fact, the knowledge of which was acquired in such capacity as secretary, stenographer, or clerk;<sup>29</sup> (3) the statute merely imposes the privilege on communications to the attorney, or an employee of the attorney;<sup>30</sup> and (4) the statute imposes a privilege on communications to an attorney's clerk by the client, or by the attorney.<sup>31</sup> Although these last three types of statute extend the privilege beyond communications to the attorney alone, it cannot be said that they go a great deal further than the more liberal courts' interpretation of the common-law privilege. These statutes are helpful, however, in that they definitely define the

<sup>27</sup> It should be noted that this proposition is not applied in those cases where the third party is not at the conference in person, but inadvertently or intentionally overhears the communications. In those cases, the rule is strictly applied that there is no privilege in regard to a third person who by accident or design overhears the communications. See *Vanhorn v. Commonwealth*, 239 Ky. 833, 40 S. W. (2d) 372 (1931); *United States v. Olmstead*, (D. C. Wash. 1925) 7 F. (2d) 760; *Morton v. Smith*, (Tex. Civ. App. 1898) 44 S. W. 683; *Perry v. State*, 4 Idaho 224, 38 P. 655 (1894); *Hoy v. Morris*, 79 Mass. 519 (1859). But see, *King v. Choney*, 13 Can. Crim. Cas. 289 (1908), where it was held that detectives, who were concealed for the purpose of overhearing defendant's statements to a person, falsely representing himself to the defendant as an interpreter sent by defendant's attorney, could not testify as to what they heard. One of the grounds of the decision was that if the attorney had actually been present, he would have taken steps to guard against third persons overhearing the conversation. The decision is interesting in that it shows a slight tendency away from the literal doctrine that third persons who overhear the communications are not privileged.

<sup>28</sup> The following 19 states possess this type of statute: Arkansas, Idaho, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Washington, West Virginia, Wisconsin, Wyoming, and Alaska.

<sup>29</sup> The following five states possess this type of statute: Arizona, California, Colorado, Nevada, Utah, and also the Philippine Islands and Porto Rico.

<sup>30</sup> The following four states possess this type of statute: Georgia, Iowa, Minnesota, and New York.

<sup>31</sup> Alabama alone has enacted this statute.

privilege, and in that they indicate to the courts the legislatures' cognizance of the fact that it is necessary under modern conditions to include confidential employees of an attorney within the privilege.

## 2.

In considering the effect of the presence of third parties upon the privilege which is generally extended to communications from patient to physician,<sup>32</sup> it is well to observe two preliminary facts. The first of these is that the physician-patient privilege, unlike the attorney-client privilege, exists by statutory enactment alone.<sup>33</sup> This privilege was not known to the common law.<sup>34</sup> Thus, before determining in what way the privilege is affected by the presence of third parties, it will be illuminating to examine the various statutes which create the privilege. There are twenty-nine states which have enacted statutes creating this privilege. An overwhelming majority of these statutes provide that physicians and surgeons may not, without the consent of the patient, be examined as to any information acquired in attending the patient which was necessary to prescribing or acting as a physician or surgeon.<sup>35</sup> Two of the statutes are unique in that the privilege is extended to physicians, surgeons, and nurses.<sup>36</sup> These, however, are the only ones which extend the privilege beyond the physician and surgeon. It would thus appear that, if the statutes were construed literally, there would be little room for the extension of the privilege to persons other than physicians and surgeons.<sup>37</sup> It should also be observed that the reasons

<sup>32</sup> On the general subject of privileged communications between physician and patient, see 5 JONES, EVIDENCE, 2d ed., 4155 (1926); 5 WIGMORE, EVIDENCE, 2d ed., 201 (1923); 70 C. J. 439 (1935); 28 R. C. L. 532 (1921); 23 AM. & ENG. ENCYC. LAW 83 (1903); 17 Am. St. Rep. 565 (1891).

<sup>33</sup> 5 JONES, EVIDENCE, 2d ed., 4155 (1926); 5 WIGMORE, EVIDENCE, 2d ed., 201 (1923).

<sup>34</sup> In England at the present time, there is no statute making communications between physician and patient privileged. See 1 TAYLOR, EVIDENCE, 11th ed., 622 (1920).

<sup>35</sup> The statutes of the following twenty-seven states, and three territories, conform generally, for our purposes, to the general provisions stated: Arizona, California, Colorado, Idaho, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Washington, West Virginia, Wisconsin, Wyoming, and Alaska, Hawaii, Philippine Islands.

<sup>36</sup> New York extends the privilege to "professional or registered nurses," while in Arkansas, communications to "trained nurses" are privileged. It is interesting to note that the statute enacted in Porto Rico is most extreme in extending the privilege to physicians, surgeons, and their assistants.

<sup>37</sup> As concerns the construing of these statutes generally, the following cases have held that since the statutes are in derogation of the common law, they should be strictly construed: *General Accident Fire & Life Assur. Co. v. Tibbs*, (Ind. 1936)

and policy supporting the physician-patient privilege have been at times severely criticized,<sup>38</sup> which might indicate a tendency by the courts to look with considerably less favor upon this privilege than upon the attorney-client privilege.

It can be broadly stated that third persons who are present at a physician's examination, oral or physical, are generally not included in the statutory privilege which is extended to the physician.<sup>39</sup> Furthermore, the exceptions and qualifications of this rule are very few and very closely defined. These exceptions and qualifications are entirely concerned with cases where the third person is in the nature of an assistant to the physician.<sup>40</sup> Thus it is very clear that an assisting physician is privileged along with the original physician.<sup>41</sup> On the other hand, it would appear that there is a clear split of authority on the precise question of whether the privilege should be extended to nurses who are acting in the capacity of assistants to physicians,<sup>42</sup> despite a

2 N. E. (2d) 229; *Goodman v. Lang*, 158 Miss. 204, 130 So. 50 (1930); *Wm. Laurie Co. v. McCullough*, 174 Ind. 477, 90 N. E. 1014 (1910); *Buffalo Loan, etc. Co. v. Knights Templar, etc., Mut. Aid Assn.*, 126 N. Y. 450, 27 N. E. 942 (1891). On the other hand the following cases have held that since the statutes are remedial in nature, they should be liberally construed. *Kramer v. Policy Holders' Life Ins. Assn.*, 5 Cal. App. (2d) 380, 42 P. (2d) 665 (1935); *In re Williams' Will*, 186 Wis. 160, 202 N. W. 314 (1925); *McRae v. Erickson*, 1 Cal. App. 326, 82 P. 209 (1905).

<sup>38</sup> 5 WIGMORE, EVIDENCE, 2d ed., 205 (1923); *Purrington*, "An Abused Privilege," 6 COL. L. REV. 388 (1906); *Maine v. Maryland Casualty Co.*, 172 Wis. 350, 178 N. W. 749 (1920).

<sup>39</sup> See generally, 5 JONES, EVIDENCE, 2d ed., 4156 (1926); 70 C. J. 449 (1935); 96 A. L. R. 1419 (1935).

<sup>40</sup> In regard to the classes of persons included within the term "physician," see 68 A. L. R. 176 (1930).

<sup>41</sup> Cases are collected in 16 L. R. A. (N. S.) 887 (1908); 22 A. L. R. 1217 (1923). Recent cases include: *Mississippi Power & Light Co. v. Jordan*, 164 Miss. 174, 143 So. 483 (1932); *Provident L. & A. Ins. Co. v. Chapman*, 152 Miss. 747, 118 So. 437 (1928); *Mutual Life Ins. Co. v. Owen*, 111 Ark. 554, 164 S. W. 720 (1914); *Green v. Nebagamain*, 113 Wis. 508, 89 N. W. 520 (1902). *Contra*: *In re Loewenstine's Will*, 2 Misc. 323, 21 N. Y. S. 931 (1893), where a physician who acquired his knowledge, not by actual professional attendance upon the patient, but by visiting another physician, was permitted to testify.

<sup>42</sup> Only five cases were found expressly deciding this question. Of these, three favored the extension of the privilege: *Mississippi Power & Light Co. v. Jordan*, 164 Miss. 174, 143 So. 483 (1932); *Culver v. Union Pac. R. Co.*, 112 Neb. 441, 199 N. W. 794 (1924); *Humble v. John Hancock Life Ins. Co.*, 28 Ohio N. P. (N. S.) 481 (1931). The remaining two cases rejected the extension of the privilege. *Southwest Metals Co. v. Gomez*, (C. C. A. 9th, 1925) 4 F. (2d) 215; *Hobbs v. Hullman*, 183 App. Div. 743, 171 N. Y. S. 390 (1918). It should be noted that the statutes of Arkansas and New York cover a portion of this problem, by specifically extending the privilege to "trained" and "professional or registered" nurses, respectively. In *Hobbs v. Hullman*, 183 App. Div. 743, 171 N. Y. S. 390 (1918), it was held that the

weight of dicta in support of such an extension of the privilege.<sup>43</sup> The view of those courts which extend the privilege to a nurse engaged in assisting a physician is best expressed by a quotation from the decision of *Culver v. Union Pacific Ry.*<sup>44</sup> as follows:

“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 doctors 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 witnesses.”

To support the opposing view, those courts which refuse to extend the privilege do so by strictly construing the particular statute of their jurisdiction which relates to the privilege. The general attitude of these courts seems to be that even if public policy does demand an extension of the privilege, such extension should be made by legislative enactment and not by judicial construction.<sup>45</sup>

As stated above, there is clear authority for the proposition that the patient's privilege as to communications made to his physician is extended to third parties who are present at the physician's examination of the patient, when such third parties are nurses or physicians assisting the original physician. However, there is scant direct authority for any extension of the privilege to third parties beyond this point. It is true that numerous cases are cited in which dicta support the contention that a third person cannot testify to the communications, if he is present to aid the physician, or if his presence is necessary as a means of communication between the physician and patient.<sup>46</sup> Never-

statute had no application, inasmuch as the nurse in the case was not a professional or registered nurse.

<sup>43</sup> *Mullin-Johnson Co. v. Penn Mut. Life Ins. Co.*, (D. C. Cal. 1933) 2 F. Supp. 203; *Meyer v. Russell*, 55 N. D. 546, 214 N. W. 857 (1927); *Indiana Union Traction Co. v. Thomas*, 44 Ind. App. 468, 88 N. E. 356 (1909); *Springer v. Bryam*, 137 Ind. 15, 36 N. E. 361 (1894).

<sup>44</sup> 112 Neb. 441 at 450, 199 N. W. 794 (1924).

<sup>45</sup> *Southwest Metals Co. v. Gomez*, (C. C. A. 9th, 1925) 4 F. (2d) 215.

<sup>46</sup> *Kramer v. Policy Holder's Life Ins. Assn.*, 5 Cal. App. (2d) 380, 42 P. (2d) 665 (1935); *Mullin-Johnson Co. v. Penn Mut. Life Ins. Co.*, (D. C. Cal. 1933) 2 F. Supp. 203; *Meyer v. Russell*, 55 N. D. 546, 214 N. W. 857 (1927); *In re Swartz's Will*, 79 Okla. 191, 192 P. 203 (1920); *Indiana Union Traction Co. v. Thomas*, 44 Ind. App. 468, 88 N. E. 356 (1909); *North American Union v. Oleske*, 64 Ind. App. 435, 116 N. E. 68 (1917); *Springer v. Bryam*, 137 Ind. 15, 36 N. E. 361 (1894).

theless, no case has been found which squarely holds that a third party, who is not a nurse or another physician, is prevented from testifying as to the details of a physician-patient examination observed by such third party while present at the examination.<sup>47</sup> On the other hand there are several decisions which squarely hold that the testimony of third parties is not privileged although such third parties seem to bear the closest possible relation to the patient, and seem to be necessarily present at the examination.<sup>48</sup> Thus the conclusion to be deduced from the cases would seem to be that under no circumstances will the testimony of a third party who is present at a physician-patient examination be privileged,<sup>49</sup> unless such third party is a nurse or a second physician who is assisting the original physician; and this is true irregardless of the close relationship which such third party may bear to the patient.

Unlike the client's privilege over communications to his attorney, it is not generally held that permitting a third person to testify as to facts concerning the physician-patient examination removes the seal of secrecy from the physician's lips. On the contrary, in so far as the physician's testimony is concerned, the courts have generally preserved the patient's privilege over communications to his physician, even though a third party (and it is not necessary that such third party be an assisting nurse or physician) is present at the physician-patient

<sup>47</sup> See *Hogan v. Bateman*, 184 Ark. 842 at 845, 43 S. W. (2d) 721 (1931), where the physician took down his patient's statement in longhand, and then had a notary public type out the statement, read it to the patient, and witness the patient's signature to the statement. Held, that both the physician and the notary were incompetent to testify as to the contents of the statement. The court justified the decision as follows: "If a physician could call any third person and disclose to such person his information and thereby enable her to testify, the statute would be of no effect." The following statement by the court, however, weakens the decision: "In the case at bar, however . . . the undisputed evidence shows that the appellant [patient] was suffering so much pain that he did not know what they [physician and notary] were doing," for if that were the case there was no communication from the patient as to which either the physician or the notary could testify.

<sup>48</sup> *Mullin-Johnson Co. v. Penn Mut. Life Ins. Co.*, (D. C. Cal. 1933) 2 F. Supp. 203; *Horowitz v. Sacks*, 89 Cal. App. 336, 265 P. 281 (1928); *Denaro v. Prudential Ins. Co.*, 154 App. Div. 840, 139 N. Y. S. 758 (1913). In these cases, intimate members of the patient's family were present, and it was held that these third parties were not privileged.

<sup>49</sup> *Leeds v. Prudential Ins. Co.*, 128 Neb. 395, 258 N. W. 672 (1935); *Mullin-Johnson Co. v. Penn Mut. Life Ins. Co.*, (D. C. Cal. 1933) 2 F. Supp. 203; *State v. Knight*, 204 Iowa 819, 216 N. W. 104 (1927); *Denaro v. Prudential Ins. Co.*, 154 App. Div. 840, 139 N. Y. S. 758 (1913); *Indiana Union Traction Co. v. Thomas*, 44 Ind. App. 468, 88 N. E. 356 (1909); *Springer v. Bryam*, 137 Ind. 15, 36 N. E. 361 (1894).

examination,<sup>50</sup> and even though such third party is permitted to testify.<sup>51</sup> It would appear that the presence of a third party frees the physician's testimony from the privilege only when such presence clearly indicates the patient's intention that the examination should not be confidential.<sup>52</sup> It should be noted that although the underlying principles are clear as stated above, there is some disagreement as to the application of these principles to the facts of each case. That is to say, the cases are in some confusion as to when the presence of a third party destroys the inherent confidential nature of the examination,<sup>53</sup> thus permitting the physician to testify.

Thus, a general summary of the physician-patient privilege, in respect to the presence of third parties at the physician-patient examination, might be couched in the following language: Testimony of the physician is generally privileged, notwithstanding the presence of third parties at the physician-patient examination, unless the presence of such third parties clearly indicates the patient's intention that the examination should not be confidential; unlike the attorney-client privilege, the class of third parties to whom the physician-patient privilege is extended is strictly limited to assisting physicians and nurses; although the competent testimony of a third party who was present at the physician-patient examination does not, in itself, necessarily make the physician a competent witness as to details of the same examination.

In conclusion, we may say that a comparison of the two professional privileges as regards the effects of the presence of a third party yields the following results: Where the presence of the third party clearly indicates that the communications were not intended to be confidential, each privilege is completely destroyed, both as to the professional con-

<sup>50</sup> *Bassil v. Ford Motor Co.*, 278 Mich. 173, 270 N. W. 258 (1936); *Kramer v. Policy Holders' Life Ins. Assn.*, 5 Cal. App. (2d) 380, 42 P. (2d) 665 (1935); *Walmer-Roberts v. Hennessey*, 191 Iowa 86, 181 N. W. 798 (1921); *Cincinnati, H. & D. R. R. v. Gross*, 186 Ind. 471, 114 N. E. 962 (1917); *North American Union v. Oleske*, 64 Ind. App. 435, 116 N. E. 68 (1917).

<sup>51</sup> *Leeds v. Prudential Ins. Co.*, 128 Neb. 395, 258 N. W. 672 (1935); *Denaro v. Prudential Ins. Co.*, 154 App. Div. 840, 139 N. Y. S. 758 (1913); *Indiana Union Traction Co. v. Thomas*, 44 Ind. App. 468, 88 N. E. 356 (1909).

<sup>52</sup> *State v. Knight*, 204 Iowa 819, 216 N. W. 104 (1927); *In re Swartz's Will*, 79 Okla. 191, 192 P. 203 (1920); *Horowitz v. Sacks*, 89 Cal. App. 336, 265 P. 281 (1928); *Masons' Union Life Ins. Assn. v. Brockman*, 26 Ind. App. 182, 59 N. E. 401 (1901).

<sup>53</sup> Compare: *Denaro v. Prudential Ins. Co.*, 154 App. Div. 840, 139 N. Y. S. 758 (1913); *Horowitz v. Sacks*, 89 Cal. App. 336, 265 P. 281 (1928); *Cincinnati, H. & D. R. R. v. Gross*, 186 Ind. 471, 114 N. E. 962 (1917); *In re Swartz's Will*, 79 Okla. 191, 192 P. 203 (1920).

fidant and as to the third party.<sup>54</sup> However, there is a stronger presumption that the presence of a third party destroys the confidentiality of the communications in the case of the attorney-client privilege than in the case of the physician-patient privilege.<sup>55</sup> The attorney-client privilege is extended equally to, or withdrawn just as equally from, both attorneys and third parties.<sup>56</sup> By decided contrast (due to the obvious disinclination of the courts to extend the privilege to persons other than assisting nurses and physicians), the physician-patient privilege is extended in all but the unusual type of case, to all physicians, surgeons, and assisting nurses,<sup>57</sup> while at the same time it is as carefully withdrawn from all other persons.<sup>58</sup>

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<sup>54</sup> In re Quick's Estate, 161 Wash. 537, 297 P. 198 (1931); *Machnofsky v. Smith*, 101 Pa. Super. 578 (1931); *People v. White*, 102 Cal. App. 647, 283 P. 368 (1929); *Horowitz v. Sacks*, 89 Cal. App. 336, 265 P. 281 (1928); *Crawford v. Raible*, 206 Iowa 732, 221 N. W. 474 (1928); *State v. Knight*, 204 Iowa 819, 216 N. W. 104 (1927); *Whigham v. Bannon*, 21 Ohio App. 496 (1926); *Livezey v. United States*, (C. C. A. 5th, 1922) 279 F. 496, cert. den. 260 U. S. 721, 43 S. Ct. 12 (1922); *In re Swartz's Will*, 79 Okla. 191, 192 P. 203 (1920); *Masons' Union Life Ins. Assn. v. Brockman*, 26 Ind. App. 182, 59 N. E. 401 (1901).

<sup>55</sup> Compare *People v. White*, 102 Cal. App. 647, 283 P. 368 (1929); *In re Quick's Estate*, 161 Wash. 537, 297 P. 198 (1931); *Crawford v. Raible*, 206 Iowa 732, 221 N. W. 474 (1928); *Carleton v. Bonham*, 60 Cal. App. 725, 214 P. 503 (1923); *Livezey v. United States*, (C. C. A. 5th, 1922) 279 F. 496, cert. den. 260 U. S. 721, 43 S. Ct. 12 (1922); *Whigham v. Bannon*, 21 Ohio App. 496 (1926); *Machnofsky v. Smith*, 101 Pa. Super. 578 (1931), which deal with the attorney-client privilege, with the following cases which are concerned with the physician-patient privilege: *Leeds v. Prudential Ins. Co.*, 128 Neb. 395, 258 N. W. 672 (1935); *Cincinnati, H. & D. R. R. v. Gross*, 186 Ind. 471, 114 N. E. 962 (1917); *Walmer-Roberts v. Hennessey*, 191 Iowa 86, 181 N. W. 798 (1921); *Kramer v. Policy Holders' Life Ins. Assn.*, 5 Cal. App. (2d) 380, 42 P. (2d) 665 (1935); *North American Union v. Oleske*, 64 Ind. App. 435, 116 N. E. 68 (1917); *Bassil v. Ford Motor Co.*, 278 Mich. 173, 270 N. W. 258 (1936); *Indiana Union Traction Co. v. Thomas*, 44 Ind. App. 468, 88 N. E. 356 (1909); *Denaro v. Prudential Ins. Co.*, 154 App. Div. 840, 139 N. Y. S. 758 (1913).

<sup>56</sup> It is true that there is some authority which permits the third party to testify, while excluding the attorney's testimony. See *Blount v. Kimpton*, 155 Mass. 378, 29 N. E. 590 (1892); *Hartness v. Brown*, 21 Wash. 655, 59 P. 491 (1899). However, this splitting of the attorney-client privilege has been subjected to such an amount of adverse criticism that no cases which are more recent than the above cited have been found to support this view.

<sup>57</sup> *Bassil v. Ford Motor Co.*, 278 Mich. 173, 270 N. W. 258 (1936); *Kramer v. Policy Holders' Life Ins. Assn.*, 5 Cal. App. (2d) 380, 42 P. (2d) 665 (1935); *Walmer-Roberts v. Hennessey*, 191 Iowa 86, 181 N. W. 798 (1921); *Cincinnati, H. & D. R. R. v. Gross*, 186 Ind. 471, 114 N. E. 962 (1917); *North American Union v. Oleske*, 64 Ind. App. 435, 116 N. E. 68 (1917).

<sup>58</sup> *Leeds v. Prudential Ins. Co.*, 128 Neb. 395, 258 N. W. 672 (1935); *Denaro v. Prudential Ins. Co.*, 154 App. Div. 840, 139 N. Y. S. 758 (1913); *Indiana Union Traction Co. v. Thomas*, 44 Ind. App. 468, 88 N. E. 356 (1909).