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## Medical Discovery in Negligence Actions: Rule 35(b)(2) of Montana Rules of Civil Procedure

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**MEDICAL DISCOVERY IN NEGLIGENCE ACTIONS:****RULE 35 (b) (2) OF MONTANA RULES OF CIVIL PROCEDURE**

Rule 35 (b) (2) was adopted by the Montana Supreme Court and became effective January 1, 1968. The impact of this rule will extend beyond the courtroom and the practice of law because it affects two unrelated professions, law and medicine. In each of these professions there is the feeling of independence. Each profession wants to establish its own rules and standards of conduct. Among physicians, any infringement on their independence is viewed with jaundiced eye and a raised scalpel.

From the earliest moment of his professional training, the physician is taught the requirement of absolute confidence of the physician-patient relationship. The medical office personnel are carefully instructed concerning this confidence. The physician feels that his patients personal medical records are a closed file. The physician is aware of the sacredness of this relationship. As he begins to record any of the information given to him, there is a breakdown of free communication. The confidence of the patient is only restored by reassurance that whatever enters the medical record will be revealed to no one. The patient is sometimes told that his record will remain secret unless he consents to reveal it. Both the patient and the physician feel that this confidential relationship should be maintained.

The waiver of this privilege by the commencement of an action may be an unjust forfeiture placed upon the individual who asks for redress of a legal wrong. In the eyes of both the patient and physician, it is the attorney who has betrayed their mutual confidence.

Both professions have been moderately successful in their repeated attempts to establish a better inter-professional relationship. The professional gap has narrowed greatly during the past few years. There has been the formation of a soft callus; however, the necessary calcium will never be deposited if a new source of irritation develops between the two professions. Therefore, the medical profession must know the reasons behind Rule 35 (b) (1) & (2), and the legal profession must not attempt to extend the rule beyond its boundaries.

**PHYSICIAN—PATIENT PRIVILEGE**

To understand the underlying issues involved it is necessary to discuss the historical basis of the physician and patient privilege. This privilege was unknown at the common law.<sup>1</sup> The physician could be called as a witness and compelled to disclose any facts, regardless of how personal, that had been communicated to him by his patient. The patient likewise could not object to any disclosure made by the physician although the testimony given may have adverse effect upon his claim,

<sup>1</sup>58 AM. JUR. *Witnesses* § 401 (1948).

his social well being, and his personal pride.<sup>2</sup> The patient himself could be required to disclose the details of any confidential discussion he had with his personal physician.<sup>3</sup> There was no protection of the patient's privacy for the physician was required to give the information to a court of justice even though it was contrary to his principles and the Hippocratic Oath.<sup>4</sup>

In some states this situation still exists because their legislatures have failed to see the need for statutory protection of the personal confidence necessary for accurate diagnosis and proper treatment.<sup>5</sup>

In 1828, the New York legislature became the first in the United States to enact a statutory physician-patient privilege.<sup>6</sup> The moral depth and personal wisdom of the Commissioners of Revisions of the Statutes of New York can be seen in the following statement from their report.

The ground on which communications to counsel are privileged, is the supposed necessity of a full knowledge of the facts, to advise correctly, and to prepare for the proper defense or prosecution of a suit. But surely the necessity of consulting a medical adviser, when life itself may be in jeopardy, is still stronger. And unless such consultations are privileged, men will be incidentally punished by being obliged to suffer the consequences of injuries without relief from the medical art, and without conviction of any offense. Besides, in such cases, during the struggle between legal duty on the one hand, and professional honor on the other, the latter, aided by a strong sense of the injustice and inhumanity of the rule, will, in most cases, furnish a temptation to the perversion or concealment of truth, too strong for human resistance.<sup>7</sup>

Since then the efforts of distinguished judges, leading jurists, and responsible citizens have resulted in statutes in thirty states which protect these confidential communications from compulsory disclosure.<sup>8</sup>

Montana Section 93-701-4 of the Revised Code of Montana 1947 states:

Persons in certain relations cannot be examined. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

"4. A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient."

The purpose of the statute is to allow that free communication which gives the physician every opportunity to be of maximum service to his

<sup>2</sup>*Travelers' Ins. Co. v. Bergeron*, 25 F.2d 680, 58 A.L.R. 1127, *cert. denied*, 278 U.S. 638 (1928).

<sup>3</sup>*Winters v. Winters*, 102 Iowa 53, 71 N.W. 184 (1897).

<sup>4</sup>*Morrison v. Malnquist*, 62 Fla. 415, 62 So.2d 415 (1953). To "keep secret knowledge in the exercise of my profession or outside of my profession or in daily commerce with men, which ought not to be spread abroad."

<sup>5</sup>*Birmingham v. Leven*, 241 Ala. 47, 200 So. 888 (1941).

<sup>6</sup>8 WIGMORE, EVIDENCE (McNaughton rev. 1961) § 2380.

<sup>7</sup>Commissioners on Revision of the Statutes of New York, 3 N. Y. Rev. Stat. 737 (1836).

<sup>8</sup>*Biss & Co. v. Callaway*, 108 Cal. 93, 114 P.2d 550, 135 A.L.R. 878 (1941).

patient.<sup>9</sup> It covers the communications between the physician and patient with a cloak of confidence<sup>10</sup> and thus allows a greater freedom in their communications with respect to matters touching the disease of the patient.<sup>11</sup> This privilege is designed for the benefit of the patient to the end that he will be encouraged to disclose his ailments to a physician so that they receive the proper treatment.<sup>12</sup> The law protects the patient's secrets so that their disclosure does not bring the patient, reproach, criticism, unfriendly comment, embarrassment, humiliation, or disgrace.<sup>13</sup> Other reasons for the statutory protection are the right to privacy,<sup>14</sup> public policy and the general interest of the community.<sup>15</sup> A duty is placed on the physician to keep the communications secret and this is a duty which he cannot waive.<sup>16</sup>

### SCOPE OF THE PRIVILEGE

The scope of the privilege varies greatly among the different states. Some statutes include everything communicated between the physician and the patient under his care or by one seeking medical advice.<sup>17</sup> Other statutes cover only that area of the information which is necessary for the diagnosis or treatment of his condition.<sup>18</sup> The privilege is not absolute in some jurisdictions and may be refused in the discretion of the presiding judge, who will direct an answer when in his opinion it is necessary to a proper administration of justice.<sup>19</sup> It covers all physicians and surgeons and in some instances dentists, nurses, psychologists and stenographers.<sup>20</sup> Not only does the privilege protect communications but also other records made by the physician, including hospital records and any observations made in connection with the patient's care.<sup>21</sup>

<sup>9</sup>Yow v. Pittman, 241 N.C. 69, 84 S.E.2d 297 (1954).

<sup>10</sup>Wimberly v. State, 217 Ark. 130, 228 S.W.2d 991 (1950).

<sup>11</sup>Supra note 2.

<sup>12</sup>State v. Fackrell, 44 Wash.2d 874, 271 P.2d 679 (1954); Re Bruendl, 102 Wis. 45, 78 N.W. 196 (1899); Jacobs v. Cedar Rapids, 181 Iowa 407, 164 N.W. 891 (1917); State v. Dean, 69 Utah 268, 254 P.142 (1927).

<sup>13</sup>Hier v. Farmers Mut. Fire Ins. Co. v. Bergerson, 104 Mont. 471, 486, 67 P.2d 831, 110 A.L.R. 1051 (1937); In re Albert Lindley Lee Memorial Hospital, 115 F. Supp. 643 (1953); City & County of San Francisco v. Superior Court In and For City & County of San Francisco et. al., 37 C.2d 227, 231 P.2d 26 (1951).

<sup>14</sup>Williams v. State, 65 Okla. Cr. 336, 86 P.2d 1015 (1939).

<sup>15</sup>Sumpter v. National Grocery Co., 194 Wash. 598, 78 P.2d 1087 (1938).

<sup>16</sup>Supra note 9.

<sup>17</sup>United States Fidelity & G. Co. v. Hood, 124 Miss. 548, 87 So. 115 (1921).

<sup>18</sup>Colo. R.S. § 154-1-7 (1963), for example, provides "a physician or surgeon . . . shall not be examined without the consent of his patient, as to any information acquired in attending a patient in a professional capacity and that was necessary to enable him to act in that capacity;" Bozicevich v. Kenilworth Mercantile Co., 58 Utah 458, 199 P.406, 17 A.L.R. 346 (1921); Myers v. State, 192 Ind. 592, 137 N.E. 547, 24 A.L.R. 1196 (1922).

<sup>19</sup>Fuller v. Knights of Pythias, 129 N.C. 318, 40 S.E. 65 (1901).

<sup>20</sup>New York C.P.L.R. § 4504 (1962) Iowa Code Ann. § 204.18 (1962).

<sup>21</sup>Randa v. Bear, 50 Wash.2d 415, 312 P.2d 640 (1957); Colo. R.S. § 154-1-7 (1963).

In *Hier v. Farmers Mutual Fire Ins. Co.*<sup>22</sup> there was an unusual attempt by the adverse party to enforce the physician-patient privilege. The Montana Supreme Court stated:

"In considering this matter we must have in mind the fact that the object of the statute and all such statutes, is not to absolutely disqualify a physician from testifying, but to enable a patient to secure medical aid without betrayal of confidence." . . . "In this case it must be understood that the statute could only apply on behalf of the patient. It could not be asserted by the physician, and we fail to see wherein the Insurance Company had any right to assert the privilege against the plaintiff in this case.

"It was never intended that such a claim of privilege could be asserted by an adverse party to defeat the proof of an alleged ailment which was a necessary element to the plaintiff's cause of action."

### WAIVER OF THE PRIVILEGE

The privilege may be waived by the patient himself, if he is competent to do so, or by his guardian if he is incompetent,<sup>23</sup> or by those who represent him after his death.<sup>24</sup> The patient or his representative may waive the privilege by an oral or written communication, or he may waive it as a matter of law by his own actions.

If the adverse party desires a complete medical discovery he must depend on the exceptions or waivers as established by law. Of the thirty-two states which have statutory physician-patient privilege, twenty-one statutorily define the doctrine of waiver.<sup>25</sup>

There are four occasions when this statutory waiver may take place.<sup>26</sup>

1. At the time of the filing of the action for personal injuries.
2. At the time of the injured person's requesting a copy of a report of the physician examining the injured person at the request of the adverse party or the taking of such physician's deposition.
3. At the time of the injured person's offering himself as a witness or offering testimony of a physician relating the mental or physical condition in issue.
4. At the time of the injured person's offering his body to the jury for its examination.

The time waiver occurs is very important, because in states under the first two categories above, the waiver is such that it allows pre-trial discovery. However in category three and four the waiver may take place at the time of trial and only then when certain conditions are met.

The Supreme Court of Montana put Montana in category one by

<sup>22</sup>*Hier v. Farmers Mut. Fire Ins. Co. v. Bergerson*, 104 Mont. 471, 486, 67 P.2d 831 (1937).

<sup>23</sup> 5 JONES COMMENTARY ON EVIDENCE 4194; *supra* note 22.

<sup>24</sup>*Basil v. Ford Motor Co.*, 278 Mich. 173, 270 N.W. 258, 107 A.L.R. 1491 (1936).

<sup>25</sup>Arkansas, Arizona, California, Colorado, Hawaii, Illinois, Iowa, Kansas, Michigan, Minnesota, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Virginia & Wyoming.

<sup>26</sup>33 INSURANCE COUNSEL JOURNAL 376 (1966).

adopting the change in Rule 32 (b) (2) which became effective January 1, 1968.<sup>27</sup> This amendment is given below.

Rule 35 (b) (2) Montana Rules of Civil Procedure:

(2) Waiver of Privilege. Either by (1) requesting and obtaining a report of the examination ordered as provided herein, or by taking the deposition of the examiner, or by (2) commencing an action which places in issue the mental or physical condition of the party bringing the action, the party examined, or the party bringing the action, waives any privilege he may have in that action or any other action involving the same controversy, regarding the testimony of every person who has treated, prescribed, consulted or examined, such party in respect to the same mental or physical condition; but such waiver shall not apply to any treatment, consultation, prescription or examination for any mental or physical condition not related to the pending action. Upon motion reasonably made, and upon notice and for good causes shown, the court in which the action is pending, may make an order prohibiting the introduction in evidence of any such portion of the medical record of any person as may not be relevant to the issues in the pending action.

Advisory Committee's Note to 35 (b) (2)

This amendment extends the existing modification by Rule 35 of subparagraph 4 of R.C.M. 1947, sec. 93-701-4. The purpose is to facilitate the obtaining of competent medical testimony and the use of testimony of the original attending physician, especially in personal injury cases. The proposal coincides with the view recommended in Wigmore on Evidence (McNaughton rev. 1961), Vol. VIII, secs. 2380 and 2380a.

BACKGROUND OF CHANGES TO RULE 35

This amendment was developed to prevent the plaintiff from refusing defendant access to any report from the physician who gave the initial care following the accident. The plaintiff would go to another physician for further care and then rely on this report as a basis of recovery. The reason behind this procedure was that the initial care was often given by a company doctor who would tend to minimize the extent of the injury.

Because many members of the Montana Trial Lawyer's Association were strongly opposed to this amendment, a hearing was held by the Advisory Committee on Rules of Civil Procedure. The objection was raised that the plaintiff should have the opportunity to exclude a possible biased company doctor's report.

The proponents on the other hand stressed the need for full disclosures. They argued that a company doctor's biased testimony could be devastated by effective cross-examination. However, those opposed to the amendment feared that this vigorous cross-examination would create additional discord between attorneys and the physicians. In any event, the final advisory committee's report to the Montana Supreme Court was favorable and the Supreme Court accepted the amendment.

<sup>27</sup>There are eight other states in category one: California, Hawaii, Illinois, Kansas, Nebraska, Nevada, Pennsylvania & Virginia.

Prior to the adoption of this new Rule, Montana, like the federal courts and other states with rules patterned after the federal rules, was in the second category mentioned above.

Federal Rule 35 states:

**"PHYSICAL AND MENTAL EXAMINATION OF PERSONS."**

- (a) **ORDER FOR EXAMINATION.** In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.
- (b) **REPORT OF FINDING.** (1) If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. If the party examined refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial. (2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect to the same mental or physical condition."

Under the federal rule it is the plaintiff's own initiative in seeking a copy of the defendant's examination which activates the reciprocal provisions.<sup>28</sup>

In explaining the waiver under Federal Rule 35 the following statement may be helpful:

"In express terms subdivision (b) (1) of Rule 35 provides that after request by and delivery to the examined party of a copy of the examining physician's report, the party causing the examination to be made shall be entitled to receive from the examined party a like report of any examination, previously or thereafter made, of the same physical or mental condition, and subdivision (b) (2) provides that by requesting and obtaining a report of the ordered examination the examined party waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may examine him in respect of the same mental or physical condition."<sup>29</sup>

The federal courts have held that the rule itself implies recognition that an examination made by a physician is privileged unless the privilege

<sup>28</sup>Benning v. Phelps, 249 F.2d 47 (1957).

<sup>29</sup>Wier v. H.A. Simmons, 233 F. Supp. 657 (1964); 36 A.L.R.2d 946, 948 (1952).

is waived by pursuing the course referred to in the Rule.<sup>30</sup> The Rule is in derogation to the physician-patient statutory privilege and therefore the Rule should be strictly constructed.<sup>31</sup> The person examined waives the privilege only when the examination of the patient is the result of a court order and the examined person requests and is delivered a copy of the report of that examination.<sup>32</sup> There is no waiver of the privilege by the requesting of a report of an examination paid for by the adverse party.<sup>33</sup>

Under the amendment adopted in Montana there is an automatic waiver when the plaintiff commences his action. There is no doubt that the statutory privilege may be modified, limited or even abolished in whole or in part by the legislature.<sup>34</sup> However there may be a question relating to the court's power to make a rule whereby a party to an action must forfeit a statutory protection before he has a right to ask the court for relief of a grievance.<sup>35</sup>

The Supreme Court of New Mexico stated:

"Where the statute specifically grants the privilege it is beyond the power of the courts to direct the petitioner to waive the same."<sup>36</sup>

The Montana change in Rule 35 (b) (2) and similar changes by other states have been made so there may be an advancement toward full disclosures in actions involving the physical or mental condition of a party.<sup>37</sup> The stated purpose:<sup>38</sup>

"is to facilitate the obtaining of the competent medical testimony and the use of testimony of the original attending physician, especially in personal injury cases. The proposal coincides with the view recommended in Wigmore on Evidence (McNaughton rev. 1961), Vol. VIII, secs. 2380 and 2380a.

The view taken in Wigmore on Evidence is that legal values from full disclosure far outweighs any objections that can be raised to the contrary. This view is that there is very little, if any, rational support for a physician-patient privilege. In support of this conclusion, the authors argue: "In only a few instances, out of the thousands daily occurring, is the fact communicated to a physician confidential in any real sense."<sup>39</sup>

This statement could be made only by someone with no medical experience or no true understanding of the desire, by the vast majority of

<sup>30</sup>Lewis v. United Air Lines Transport Co., 32 F. Supp. 21 (1940).

<sup>31</sup>Sher v. DeHaven, 91 App. D.C. 257, 199 F.2d 777, cert. denied, 354 U.S. 936 (1952).

<sup>32</sup>Supra note 28.

<sup>33</sup>State ex rel. Miller v. Tackett, 68 N.M. 318, 361 P.2d 724 (1961).

<sup>34</sup>McGrath v. State, 104 N.Y.S.2d 882, 200 Misc. 165 (1950).

<sup>35</sup>Supra note 28.

<sup>36</sup>Supra note 28.

<sup>37</sup>Supra note 26.

<sup>38</sup>Supra note 6.

<sup>39</sup>8 WIGMORE, EVIDENCE (McNaughton rev. 1961) § 2380a, 829.

humanity, for privacy in their personal affairs. Any attorney who has ever drafted a will would surely be aware of an individual's intense desire for secrecy. If a physician were to make a statement that "in only a few instances out of the thousands daily occurring, are the facts communicated to an attorney confidential in any real sense" he would most certainly confront violent disagreement.

The view also is taken in Wigmore on Evidence that an injury to civil justice has a far more detrimental effect than an injury to a privilege that promoted physical or mental well being.<sup>40</sup> Opinions like this on the part of the legal profession and viewpoints as dogmatic to the contrary on the part of the medical profession have contributed to the antagonism and coolness between the two professions.

### CONCLUSION

This article was written to present a physician's viewpoint of the physician-patient privilege and the rules which effect its use. The privilege's historical background was given along with various applications in different jurisdictions. The rules of waiver are discussed in relationship to pre-trial discovery. Montana's new amendment to Rule 35 of Civil Procedure is challenged perhaps more from a medical than a legal standpoint. The viewpoints are not given in criticism of either profession but to stimulate thoughtful reaction and to promote understanding.

The statutory physician-patient privilege was established in the words of the Washington Supreme Court for the following purpose:<sup>41</sup>

"The privilege is for the benefit of the patient to the end that he will be encouraged to disclose his ailments to a physician so that they may be properly treated."

It must be remembered by the legal profession that the rule they are establishing here may not only affect them but may also affect the medical profession. However the effect goes further; it may cause the mismanagement of a patient's condition resulting in the loss of health or life itself.

However, as stated by a law professor at the University of Montana: "The privilege belongs to the patient or litigant, not to either the physician or the lawyer. The only legitimate inquiry is whether the public interest in full disclosure of all the facts in all trials outweighs the public interest in preserving the confidentiality of communication between the physician and his patient."

If our society has moved to the point that we are no longer concerned

<sup>40</sup>Supra note 39 at 830.

<sup>41</sup>Supra note 12.

with those principles which compelled the legislature to pass statutory protection it is for that same body to modify or withdraw it.<sup>42</sup>

The new Montana Rule of Civil Procedure 35 (b) (2) is like a new thoroughbred prancing in the starting gate. Upon its back is the defense attorney eager to make a successful run to the final fall of the gavel. In the judge's stand, is the Montana Supreme Court, ready to make a final determination of any photo finish. The cheers of the spectators, the general public, the medical profession and the plaintiff's attorneys, will be determined by the direction the horse will run.

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<sup>42</sup>Bozienich v. Kenilworth Mercantile Co., 58 Utah 458, 199 P.406 17 A.L.R. 346 (1921).

