Doctor, Doctor, Mr. M.D.: Dr./Patient Privilege in MT

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Evidence Corner | Doctor-Patient Privilege

Doctor, Doctor, Mr. M.D.: Dr./Patient privilege in MT

"I was feeling so bad
I asked my family doctor just what I had,
I said 'Doctor, Doctor, Mr. M.D.,
Can you tell me what's ailing me?'"

— "Good Lovin’" by the Young Rascals

Any doctor worth her salt would need to know a bit more before providing an answer to the question (diagnosis) and a solution (prescription). The necessary additional information comes, at least in part, from the patient’s own description of the symptoms and their inception. The “history” component of the patient’s visit reflects the doctor’s notes about what the patient told her, and often contains extremely sensitive information that may help the physician discern and/or fix the medical problem.

Doctors and patients generally assume that the patient’s disclosures are confidential and intend to keep them that way. The law has a different understanding of the situation, and in many cases can compel both production of the written medical record and oral testimony about what was said in the “privacy” of the doctor’s office. Thus, the doctor-patient privilege differs significantly from the attorney-client and spousal privileges.

As I have discussed in earlier columns, every assertion of privilege necessarily deprives the fact-finder of valuable information. The Legislature’s extension of privilege to communications between parties to certain relationships reflects the judgment that society will benefit more from candid discussions in those relationships than it will lose from disclosure of those discussions. A doctor-patient privilege encourages patients to provide doctors with full information, and thus allows the doctors to make accurate diagnoses and optimal treatment.

However, as I develop below, the doctor-patient privilege is not a sure bet, and the many limitations on it should cause a patient to be wary of full disclosure of unfavorable information to his treating physician. In turn, that rational wariness on the part of the patient may prevent the ultimate aim of the privilege in the first place: getting the patient better.

A. Medical Ethics Favor Confidentiality

Can the doctor voluntarily disclose what the patient told her? The American Medical Association says no, as a matter of medical ethics:

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The information disclosed to a physician by a patient should be held in confidence. The patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services. The patient should be able to make this disclosure with the knowledge that the physician will respect the confidential nature of the communication. The physician should not reveal confidential information without the express consent of the patient, subject to certain exceptions which are ethically justified because of overriding considerations.¹

The AMA acknowledges the possibility that the law may have a different view of the confidentiality of patient communications, and instructs a doctor in this situation to first inform the patient, presumably to allow the patient’s lawyer to analyze the legal situation and try to prevent the disclosure if possible:

When the disclosure of confidential information is required by law or court order, physicians generally should notify the patient. Physicians should disclose the minimal information required by law, advocate for the protection of confidential information and, if appropriate, seek a change in the law. (III, IV, VII, VIII).²

B. The Legal Landscape

The question now becomes whether and when the law will require, and a court order, a physician to testify or provide records reflecting communications made by a patient. The answer depends on what court system is involved, and within that court system, on what kind of case. Federal courts do not recognize any doctor-patient privilege in federal criminal and federal question civil cases, although one may occur in diversity cases.

On the other hand, Montana state law recognizes a doctor-patient privilege in civil cases but not in criminal cases, and even in those civil cases, provides for ready waiver of the privilege.

² Id.
Montana's Statutory Doctor-Patient Privilege
Montana state law provides an evidentiary privilege for communications from a patient to his doctor. M.C.A. 26-1-805, first enacted in 1867, provides:

Except as provided in Rule 35, Montana Rules of Civil Procedure, a licensed physician, surgeon, or dentist may not, without the consent of the patient, be examined in a civil action as to any information acquired in attending the patient that was necessary to enable the physician, surgeon, or dentist to prescribe or act for the patient.
A communication described in 45-9-104(7) is not a privileged communication. (Emphasis added)

A. There is no doctor-patient privilege in Montana criminal actions
First and foremost, this privilege applies only in civil cases: "in a civil action" means "not in a criminal action." Thus, there is no doctor-patient privilege in criminal cases in Montana state courts. The Montana Supreme Court so held, basing its opinion on the express language (bolded above) in the statute, in its single case on the subject, State v. Campbell, 146 Mont. 251, 405 P.2d 978 (1965).
Campbell was convicted of murdering his fiancée as she ended her waitressing shift early one morning in Twin Bridges. The admitted evidence against him included a bullet taken from the defendant’s own body (he apparently shot himself a couple of times after he shot the victim, to make it look like a third person had assaulted both). The doctor who treated Campbell removed and kept the bullet at Campbell’s request, "in a civil action as to any information acquired in attending the patient that was necessary to enable him to prescribe or act for the patient." After rejecting Campbell’s argument that the removal of the bullet amounted to unconstitutional search and seizure, the Court went on to deny his doctor-patient privilege argument:

Also in connection with the admission of the bullet and X-rays, appellant urges that the physician-patient privilege was violated. We hold with the great weight of authority that this privilege is not available to appellant in a criminal prosecution. See Anno.: 45 A.L.R. 1357, superseded in 2 A.L.R.2d 647. The applicable statute in Montana is R.C.M.1947, § 93–701–4, which provides in part:

"There are particular relations in which it is the policy of the law to encourage confidence and 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."

R.C.M.1947, § 94–7209, provides:

"The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this code." Section 94–7209, by its language, incorporates into criminal procedure all that is applicable of Title 93, the Code of Civil Procedure. The one qualification is 'except as otherwise provided by this code.' Section 93–701–4 sets forth five privileged relationships in addition to that of physician-patient. Only in the case of the physician-patient (sub-section 4) and one other relationship (sub-section 6) is the qualifying language 'in a civil action' used. This would seem to be the kind of language limiting a rule to civil procedure alone as was contemplated in the Provision in Section 94–7209, 'except as otherwise provided in this code.' Such a construction is consistent with that given to essentially the same statutes by the State of California. See People v. West, 106 Cal. 89, 39 P. 207; People v. Dutton, 62 Cal. App.2d 862, 145 P.2d 676. (Emphasis added)


B. There especially is no doctor-patient privilege in criminal cases for fraudulently obtaining prescriptions for dangerous drugs.

The last sentence of Montana's doctor-patient privilege states: "A communication described in 45-9-104(7) is not a privileged communication." M.C.A. 45-9-104 is part of Title 45, entitled "Crimes." The subject of the title's Chapter 9 is "Dangerous Drugs." The specific statute, 45-9-104, deals with "the offense of fraudulently obtaining dangerous drugs;” subsection (7) says:

(7) knowingly or purposefully communicating false or incomplete information to a practitioner with the intent to procure the administration of or a prescription for a dangerous drug. A communication of this information for the purpose provided in this subsection is not a privileged communication.

Because no doctor-patient privilege exists in criminal cases, the two corollary sentences in the privilege and dangerous drug statutes are technically unnecessary. Anything the patient said to the doctor is admissible in any criminal prosecution (if relevant, etc.), regardless of the patient’s innocent or criminal purpose in providing the information. Both of these sentences were added to the Code by 2011 Montana Laws Ch. 194 (S.B. 210), perhaps with the simple idea of making it clear that there really, really, really is no privilege in these cases, really.

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C. In civil cases, Rule 35 waives doctor-patient privilege when the patient's condition is in controversy, either as a claim or a defense, and when the patient requests a copy of the other party's Rule 35 examination report.

The first phrase of the doctor-patient privilege is “Except as provided in Rule 35, Montana Rules of Civil Procedure.” M.R.Civ.P. 35 (oh, how I love this intersection of Civil Procedure and Evidence), part of the discovery section of the rules, covers physical and mental examinations. As you recall, a party may obtain (by agreement or court order, not automatically) a physical or mental examination of a person whose condition is “in controversy.”

The opponent and the person examined are entitled, upon request, to a copy of the examiner’s report. Rule 35 appears to impose, as a cost to such a request, the loss of the person’s doctor-patient privilege:

(b) (4) Waiver of Privilege.

By requesting and obtaining the examiner's report, by deposing the examiner, or by commencing an action or presenting a defense which puts a party's condition at issue, the party examined waives any privilege it may have — in that action or any other action involving the same controversy — concerning testimony about all treatments, prescriptions, consultations, or examinations for the same condition. The waiver of any privilege does not apply to any treatment, consultation, prescription, or examination for any condition not related to the pending action. On a timely motion for good cause and on notice to all parties and the person to be examined, the court in which the action is pending may issue an order to prohibit the introduction of evidence of any such portion of any person’s medical record not related to the pending action. (Emphasis added).

The examined party—usually, but not always, the plaintiff—who exercises his or her right to a report from or deposition of the Rule 35 examining physician has no “privileged” objection to a discovery request for information from the plaintiff's treating or litigation physicians about the same condition(s). In fact, this “price” of is illusory, because the Rule then adds (out of chronologic order) that waiver is also triggered by “commencing an action or presenting a defense which puts the party's condition at issue.”

Under M.R.Civ.P. 35, a plaintiff who sues for damages, alleging a physical or mental injury, waives any doctor-patient privilege with regard to that injury when he files the complaint, and thereafter must upon request provide the defense with all medical records relating to the condition. The defendant may also depose a treating doctor, and may require the doctor to recount exactly what the patient told her about the condition, including its origin. The legal effect is twofold: first, there really is no doctor-patient privilege in personal injury cases (or other civil cases where a physical or mental condition is grounds for either a claim or defense); second, a plaintiff should always request the report and/or depose the Rule 35 examiner, because she has already “paid” for the right.

Callahan v. Burton, a 1971 case, was the first case to apply the Rule 35 waiver to a plaintiff who put her own medical condition into controversy when she filed a personal injury action. The case involved a claim of medical malpractice against an ophthalmologist for alleged failure to diagnose malignant melanoma in the plaintiff’s eye. The defense took the deposition of one of the plaintiff’s treating physicians, and then sought private interviews with him and another of the plaintiff’s doctors. The trial judge applied the then-new Rule 35, and granted the motion for the interviews, reasoning that the plaintiff had waived all privilege when she sued. The Montana Supreme Court affirmed, and in so doing explained the genesis of the waiver-by-filing component of Rule 35:

The so-called physician-patient privilege is not a creature of the common law but is solely a creature of statute. Only approximately two-thirds of the states of the United States have adopted a privilege-communication statute. Hague v. Williams, 37 N.J. 328, 181 A.2d 345, 348; 8 Wigmore, Evidence, s 2380 (McNaughton rev. 1961).

Montana did so in 1867 by enacting Section 93-701-4, R.C.M.1947...

The physician-patient privilege is an anachronism which has come under considerable criticism and attack as the great volume of personal injury suits increased. 8 Wigmore, Evidence, s 2380a (McNaughton rev. 1961); McCormick on Evidence, s 108.

The Montana Supreme Court notified all licensed attorneys in the state of Montana that an amendment had been proposed to Rule 35, M.R.Civ.P., which would abolish the privilege whenever a plaintiff commenced an action which places in issue the mental or physical condition of the party bringing the action *** regarding the testimony of every person who has treated, prescribed, consulted or examined or may thereafter treat, consult, prescribe or examine such party in respect to the same mental or physical condition ***.

After notice of the proposed amendment was sent to all counsel, attorneys were given to and including May 25, 1967, within which to prepare, serve and file memoranda in opposition or in support of the proposed rule change. In addition, 16 lawyers were given permission to appear in oral argument at a hearing to be held on the proposed change June 9, 1967. Certain modifications of the proposed amendment were submitted. One proposed that the testimony of any treating and attending physician be reduced to writing at pretrial deposition. Another suggested amendment proposed that treating and attending physicians' testimony should not include diagnosis, prognosis or expert opinion or expert testimony but should be limited solely to the facts
within the personal knowledge of the person. Neither of these amendments was adopted when the Supreme Court ordered the rule to be amended Sept. 29, 1967, and proclaimed its effective date as Jan. 1, 1968.

Judge McClernan's order of April 28, 1970, [allowing defense counsel to interview plaintiff's doctors alone and in addition to the deposition] accorded with the new rules and with these concepts.


Ten years later, in Jaap, the Court reversed Callahan's result, although it continued to find that the plaintiff had waived her doctor-patient privilege when she filed her personal injury complaint. The difference between the two cases lies solely in the effect of that waiver. The Jaap court reasoned that the defendant was conducting discovery and thus was governed by, and limited to, the discovery provisions of the Rules of Civil Procedure, which allow for interrogatories depositions but contain no provision for court-compelled private interviews of treating physicians:

There is no question but that under Rule 35(b)(2) M.R.Civ.P., as the same is promulgated in Montana, Julie Jaap. by commencing an action for damages for her personal injuries which placed in issue the mental and physical condition arising from the accident, waived any physician-patient privilege as to her mental or physical condition in controversy. Accepting as a premise that the physician-patient privilege has been waived, may the District Court, by way of discovery, order that defense counsel may engage in informal, private interviews with the physicians treating Julie Jaap for her alleged injuries?

Put another way, granting that plaintiff has waived any physician-patient privilege relating to her mental and physical condition in controversy, what limits, if any, circumscribe the power of the District Court in authorizing and enforcing discovery under the Montana Rules of Civil Procedure?

Although we agree with that portion of the District Court order which stated that once the physician-patient privilege has been waived, the physician is to be considered as any other witness, we conclude that the District Court does not have power, under the rules of discovery, to order private interviews between counsel for one party and possible adversary witnesses, expert or not, on the other. We derive this conclusion from an examination of the Rules of Civil Procedure relating to discovery.

The methods by which discovery may be obtained, under the Montana Rules of Civil Procedure, are set out in Rule 26(a)...

Obviously a private interview of an adversary witness is not one of the "methods" of discovery for which the Rules of Civil Procedure provide....

It is obvious, that if a method of discovery such as a private interview is ordered by the court, the sanctions and protections which are available under the Montana Rules of Civil Procedure for ordinary methods of discovery become unavailable for private interviews....

We conclude therefore, that a District Court, in allowing and enforcing discovery in litigation before it, must relate the discovery to one of the methods provided in Rule 26(a), M.R.Civ.P. Any attempt to enforce a method of discovery not provided by the Montana Rules of Civil Procedure is outside the power of the District Court. We hold that the Court is without power to order a private interview. To do so would defeat open disclosure, a prime objective of the Rules of Discovery.


Because doctors are forbidden by their own duty of confidentiality from disclosing patient information without permission of the patient or legal process, they generally will refer any requests for private interviews to the patient, and thus to the patient's attorney. Thus, as a practical matter, defense counsel can certainly invoke the waiver provisions of Rule 35, but can only get access to the desired information through formal discovery or by agreement with opposing counsel, on stipulated conditions.

The Court again affirmed its allegiance to the Rule 35 waiver-by-filing provision in a case where a mother sued for injuries to her minor child, asserting that the mother also suffered mental injuries as a result of the accident. The defense sought discovery of the mother's prior medical records to test her claim as to inception and causation of her mental condition. The mother refused to provide full copies of the records, instead allowing her own doctors access to them and having them testify that there was no causal relationship. The trial judge denied the defendants' motion to compel discovery. The Supreme Court found this to be an abuse of discretion:

§ 36 Medical records are private and "deserve the utmost constitutional protection." State v. Nelson (1997), 283 Mont. 231, 242, 941 P.2d 441, 448. Article II, Section 10, of the Montana Constitution guarantees informational privacy in the sanctity of one's medical records. Nelson, 283 Mont. at 242, 941 P.2d at 448. However, "[w]hen a party claims damages for physical or mental injury, he or she places the extent of that physical or mental

4 In Ostermiller v. Alvord, 222 Mont. 208, 720 P.2d 1199 (1986), the Court distinguished its holding in Jaap that a trial court cannot compel private interviews between a plaintiff's doctor and defense counsel from the situation in that case, where during trial plaintiff's counsel indicated he was not going to call plaintiff's treating dentist and the court then denied plaintiff's objection to a defense interview, with plaintiff's counsel present, of the dentist to prepare him for testimony in the defense case.

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injury at issue and waives his or her statutory right to confidentiality to the extent that it is necessary for a defendant to discover whether plaintiff’s current medical or physical condition is the result of some other cause.” State ex rel. Mapes v. District Court (1991), 250 Mont. 524, 530, 822 P.2d 91, 94. …

§ 39 In the present case, Kristin commenced an action for damages for her personal injuries which placed in issue her mental and physical condition arising from the accident. … In doing this, she waived any physician-patient privilege as to a mental or physical condition in controversy. Jaap, 191 Mont. at 322, 623 P.2d at 1391; Rule 35(b)(2), M.R.Civ.P. This includes testimony her physicians may have provided concerning her prior mental condition. Kristin did not produce records from before Hunter’s accident because the records were “sensitive and personal.” She did produce redacted medical records for the period after Hunter’s accident which she determined were relevant. The State did view the redacted portion of Kristin’s medical records. However, the State sought all Kristin’s mental and medical health records from ten years before Hunter’s accident (1985) through time of trial.

§ 40 Kristin claims that because she provided her doctors with complete copies of the disputed medical records, and her doctors stated the records showed no causal correlation between any previous injury or condition and her current injuries, this ends the inquiry into the medical records. Kristin argues that the State should be denied access to the records because it did not present any expert medical opinion that her alleged injuries were more probably than not caused by some factor other than witnessing Hunter’s fall. The fallacy in this argument is that there was no way that the State could have provided this opinion because it was denied access to the very records which would have enabled it to make this determination. The court’s denial of these records only allowed for one-sided review of the medical records by Kristin’s physicians.

§ 41 The State was prejudiced when it was denied the right to defend itself in an informed manner. It had the right to discover evidence related to prior physical or mental conditions possibly connected to Kristin’s current damages. State ex rel. Mapes, 250 Mont. at 530, 822 P.2d at 94. The State is not entitled to unnecessarily invade Kristin’s privacy by exploring totally unrelated or irrelevant matters. State ex rel. Mapes, 250 Mont. at 530, 822 P.2d at 95. However, because Kristin presented her entire medical records file to her treating physicians and asked for their expert medical opinions, which were at least in part based on the records which were denied to the defense, she waived her statutory right to confidentiality but only to the extent that it is necessary for the State to discover for itself whether Kristin’s current medical or physical condition is the result of some other cause. State ex rel. Mapes, 250 Mont. at 530, 822 P.2d at 94. The State thus has a right to review Kristin’s medical records to determine whether her present condition is attributable to some preexisting cause.

§ 42 The similarity between Kristin’s present claims and those for which she was previously treated shows the possible correlation between her pre-accident records and her present claims. Kristin’s claims involve emotional distress, loss of consortium and post-traumatic stress disorder (PTSD). The record indicates that prior to Hunter’s accident, she was taking medications which can be used to treat depression, headaches, sleep disorders and anxiety. The connection between Kristin’s present claims and her past conditions is not attenuated as it was in Mix where access to records was denied. Mix, 239 Mont. at 360, 781 P.2d at 756.

Accordingly, we reverse the District Court’s denial of the State’s motion to compel production of the medical records.


Thus, although Montana’s statute does provide a first-line doctor-patient privilege in civil cases, even that privilege is not absolute and may be waived despite the doctor’s and patient’s intent to maintain confidentiality. A person who has sought medical treatment necessarily must choose between confidentiality and later legal redress for that injury or condition. Further, if the patient does become a plaintiff, she must realize that all of her prior medical records pertaining to her claimed injury will be discoverable and admissible, and might involve having her doctor recount (unwillingly) to a jury everything she told him. The patient does control the waiver, but preserving the privilege may require her to walk away from a legal claim or defense.

D. When doctor-patient privilege does apply in civil cases in Montana state courts, it covers only ‘information necessary to enable physician, surgeon or dentist to prescribe or act for the patient.’

Even before Montana was a state, the territorial court invoked the doctrine of strict construction of the privilege between doctor and patient. In Territory v. Corbett, 3 Mont. 50 (1877), the male defendant was indicted for his marriage to his half-sister, Sarah Parker, who was called to testify, unwillingly, against him. Two doctors also testified, on the fact of sexual intercourse and the knowledge of the partners of the biological link between them. The Territorial Supreme Court refused to apply any privilege to their testimony:

The evidence of Doctors Yager and Smith was properly admitted. The statutes of this Territory provide that a physician shall not testify without the consent of the patient as to any information he may have acquired while attending the same. Codified Statutes, p. 125, §
450. Sarah Parker and not John Corbett was the patient, and she gave her consent, and that was sufficient to make them competent witnesses.

Physicians were not exempted at common law from disclosing confidential communications, confided to them in their professional character. Greenl. on Ev., § 247; Phill. on Ev., marg. p. 136. We are therefore confined strictly to the words of the statute in considering this point, and that, we have seen, limits the confidential communications to those made by the patient to the physician in his professional character, and were necessary to enable him to prescribe for the same. The communications made to Doctors Yager and Smith by the defendant do not come within the exemption specified in the statutes. (Emphasis added)

Territory v. Corbett, 3 Mont. 50, 59 (1877).5

Conversely, when the privilege does exist, its waiver via Rule 35 extends only to the condition in controversy:

Nonetheless, the waiver is not unlimited; the defendant may only discover records related to prior physical or mental conditions if they relate to currently claimed damages. The plaintiff’s right to confidentiality is balanced against the defendant’s right to defend itself in an informed manner. State ex rel. Mapes, 250 Mont. at 530, 822 P.2d at 94. A defendant “is not entitled to unnecessarily invade plaintiff’s privacy by exploring totally unrelated or irrelevant matters.” State ex rel. Mapes, 250 Mont. at 530, 822 P.2d at 95....

§ 38 A defendant is not allowed unfettered access to all medical records he believes may help his defense. In State v. Mix, the trial court refused access to records because the subject matter was irrelevant and too remote to the case. State v. Mix (1989), 239 Mont. 351, 360, 781 P.2d 751, 756. In that case, a defendant charged with deliberate homicide sought medical records regarding the victim’s asthma condition. Mix, 239 Mont. at 360, 781 P.2d at 756.


E. The privilege belongs to patient, not doctor

In Hier v. Farmers Mutual Insurance, the deceased patient’s estate sued for payment on the fire insurance policy. The insurer defended on the ground that the decedent himself set the fire; the estate claimed that he had been insane at the time, robberying him of the requisite intent to viti ate the policy. The estate called the insured’s treating physician at trial, and the insurance company objected. The judge’s decision to allow the testimony anyway was affirmed by the Supreme Court:

Dr. Cloud was called as a witness for the administrator and was allowed to detail the facts as to his examinations and treatment of Temmel at times previous to the fire. He was also allowed to state his opinion as to his insanity. Strenuous objection was made to the admission of his testimony on the ground of statutory privilege as contained in section 10536, subdivision 4, Revised Codes, which has to do with the disability of a physician or surgeon to testify without the consent of his patient in any civil action as to information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient. In considering this matter we must have in mind the fact that the object of the statute, and of 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. 28 R.C.L. p. 542. The same authority states: “The patient may therefore waive objection and permit the physician to testify. In other words, the privilege is the privilege of the patient and not of the physician; and by the great weight of authority, if the patient assents the court will compel the physician to answer.”

*** The physician cannot waive the statutory privilege and testify against the wishes of his patient.” In this case it must be understood that the statute could only apply on behalf of the patient, Temmel. It could not be asserted by the physician, and we fail to see wherein the Insurance Company had any right to assert the privilege as 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.

We may assume all of the other facts of this case without the death of the insured and then assume that the insured lived to recover his sanity and thereafter brought suit upon the insurance policy. Unquestionably, he could have waived the privilege proposition and could have called upon the doctor to testify in the matter. In 5 Jones Commentaries on Evidence, p. 4194, it is said: “By the weight of authority, however, it is held that since the patient may waive the privilege for the purpose of protecting his right, the same waiver may be made by those who represent him after his death, for the purpose of protecting rights acquired by him.” (Emphasis added)

Hier v. Farmers Mut. Fire Ins. Co., 104 Mont. 471, 67 P.2d 831, 836-37 (1937). (The insurance company also argued that there was no “formal waiver” in the record, but the Court held that the tender of the doctor’s evidence sufficed.)

Federal Treatment of the Doctor-Patient Privilege

The federal doctor-patient privilege is very different; there

5 The territorial version of the privilege statute apparently covered criminal as well as civil cases, but I have not gone the extra step to actually research this.

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is none in federal criminal cases or in federal civil cases where state law does not provide the rule of decision. The Federal Rules of Evidence approach privilege on a common-law basis. When the Advisory Committee first promulgated the FRE and the Supreme Court sent its draft to Congress, Article V on Privileges contained nine specified evidentiary privileges. (None, however, covered communications between a physician and a patient). Congress rejected this approach and instead whittled Article V down to a single rule, 501. The current version of FRE 501, virtually unchanged since the inception of the FRE in 1975, states:

RULE 501. PRIVILEGE IN GENERAL

The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:

the United States Constitution;
a federal statute; or
rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Setting aside the last sentence of FRE 501 for now, the question becomes whether the federal courts, in “light of reason and experience,” hold that the communications between a doctor and her patient are privileged in non-diversity cases tried in federal court. The answer is a resounding “No.” The Supreme Court, in a case which established a psychotherapist-patient privilege for federal court, differentiated psychotherapy from treatment by a physician:

Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is “rooted in the imperative need for confidence and proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

Jaffee v. Redmond, 518 U.S. 1, 10, 116 S. Ct. 1923, 1928, 135 L. Ed. 2d 337 (1996). The Court recognized the psychotherapist-patient privilege there, but has never gone on to protect communications between physicians (who are not psychiatrists) and patients. See also, Wei v. Bodner, 127 F.R.D. 91, 97 (D.N.J. 1989) (“there is no physician-patient privilege as a matter of federal common or statutory law.”); Hutton v. City of Martinez, 219 F.R.D. 164 (N.D.CA., 2003) (“The physician-patient privilege is not recognized by federal common law, federal statute, or the U.S. Constitution.”)

As the last sentence of FRE 501 states, however, a federal court applies state law as to the doctor-patient privilege, in federal cases where state law is used to determine liability. This provision is used largely but not exclusively in diversity of citizenship cases in federal court under 28 U.S.C. 1332. It also governs privilege under federal statutes which explicitly refer to state law, such as the Federal Tort Claims Act, 28 U.S.C. 2671, 2674.

Federal Rule 35 Waiver of Doctor-Patient Privilege is Different

The current Montana version of Rule 35 was meant to mirror the federal version. The Montana Commission Comment to the 2011 version of M.R.Civ.P. 35 states:

The language of Rule 35 has been amended as part of the general restyling of the Civil Rules to make them more easily understood. The changes also have been made to make style and terminology consistent throughout these rules and to conform to the recent changes in the Federal Rules.

The Committee has adopted Federal Rule 35 in its entirety with one addition in Rule 35(b)(4) adapted from previous Rule 35(b)(2), limiting the waiver of doctor-patient privilege in instances where treatment, consultation, prescription, or examination relates to a mental or physical condition “not related to the pending action.”

Notwithstanding the stated intent of the Montana Commission to mirror F.R.Civ.P. 35, the federal version of Rule 35 relating to privilege currently is, in fact, quite different from M.R.Civ.P. 35. F.R.Civ.P. 35(b)(4) provides for a waiver of the privilege if the examinee requests a copy of the examination report or deposes the defense examiner, but does not further provide for waiver simply by filing a complaint or answer putting the condition into controversy:

(4) Waiver of Privilege. By requesting and obtaining the examiner’s report, or by deposing the examiner, the party examined waives any privilege it may have— in that action or any other action involving the same controversy— concerning testimony about all examinations of the same condition.

The 1970 federal Advisory Committee Note to Rule 35(b)(3) states:

The subdivision also makes clear that reports of examining physicians are discoverable not only under Rule 35(b) but under other rules as well. To be sure, if the report is privileged, then discovery is not permissible under any rule other than Rule 35(b) and it is permissible under Rule 35(b) only if the party requests a copy of the report of examination made by the other
party's doctor. Sher v. De Haven, 199 F.2d 777 (D.C. Cir. 1952), cert. denied 345 U.S. 936 (1953). But if the report is unprivileged and is subject to discovery under the provisions of rules other than Rule 35(b)—such as Rules 34 or 26(b)(3) or (4)—discovery should not depend upon whether the person examined demands a copy of the report.

The key to understanding this apparent discrepancy between the Montana and federal Rules 35 regarding waiver of the privilege is in the privilege itself. Because there generally is no doctor-patient privilege in federal court, there generally is nothing to waive. In federal criminal cases and in most federal civil cases (except where state law provides the rule of decision), the opponent is entitled to discovery and admission of the patient's medical information, including the substance of his communications with his doctor, even over the objection of both the doctor and the patient. No action by the patient can establish a privilege, nor can any inaction (e.g., deciding not to sue) save the privilege.

The language in the 1970 Note "if the report is privileged" applies only to federal civil cases (primarily diversity or Federal Tort Claims cases) where state law governs the substantive issues. Thus, in these cases, the plaintiff may be able to sue and still maintain privilege over her communications with her doctor unless and until she asks for a copy of the defense physical examination report. THERE IS A HUGE CAVEAT HERE!!! Remember Erie v. Tompkins Ry.? Holding generally that in diversity cases, under the Rules of Decision Act,8 federal courts are supposed to apply state substantive law and federal procedural law? The very reason Congress inserted the last sentence into Rule 501 was to resolve any substance/procedural debate with regard to privilege. It did not, however, specify, whether the state's discovery and other procedural rules regarding a privilege would also trump the F.R.C.P. provisions.

In Benally v. United States, 216 F.R.D. 478, 479-81 (D. Ariz. 2003), see also, Hampton v. Schimpff, 188 F.R.D. 589 (D. Mont. 1999), where Judge Donald Molloy applied the Montana Supreme Court's Jaap holding in a federal diversity case, without as much analysis of F.R.E. 501 as occurred in Benally. Of course, these are both federal trial court orders, which merely reflects one of two possible approaches to this issue. The U.S. Supreme Court has not yet taken a case that would resolve this wrinkle in privilege law, and such a case could develop from the difference between the Montana and federal Rules 35 regarding waiver of the doctor-patient privilege.

Under the circumstances presented here, where the state law provides the rule of decision, and Arizona law of physician-patient privilege expressly prohibits ex parte interviews of treating physicians as a matter of public policy and to preserve the integrity of the privilege, this Court declines to allow the ex parte interview by counsel for the United States of Plaintiff's treating physicians.

Bottom Line: Much Uncertainty

Montana recognizes a privilege for doctor-patient communications in civil cases only, but not in criminal cases. In Montana civil cases, the privilege is easily waived if litigation involves the condition for which the communication was made. The federal courts do not recognize any doctor-patient privilege, but will apply a state privilege if the case is ultimately to be decided through state substantive law. When the federal courts do recognize the privilege, it is not clear whether the state or the federal version of Rule 35, with its waiver language, will apply. Of course, each tribal court also has its own law about doctor-patient privilege (which I simply do not have room to lay out here). Could you pass a pop quiz on the status of the doctor-patient privilege? Or even a true/false test question: "There is a doctor-patient privilege in Montana"? And you are a lawyer, with three years of law study and some actual legal practice. What is a non-lawyer to do?

The purpose of every privilege is to encourage full and frank communication between the parties to the specified relationship, to achieve some societally desirable end. That end, where the doctor-patient privilege is recognized, is full information to the physician so that the patient's medical health can be optimized. Unfortunately, when the patient avails herself of medical advice, she usually can't predict if there will be litigation involving the condition and if so, in which court system and which type of case. Without this information, it is impossible to predict whether or not her statements to her doctor can be discovered and used against her.

In ruling that the federal courts should recognize a psychotherapist-patient privilege, the U.S. Supreme Court observed that a large majority of states had such a privilege and that fact was relevant to the Court's decision:

In addition, given the importance of the patient's understanding that her communications with her therapist will not be publicly disclosed, any State's promise of confidentiality would have little value if the patient were aware that the privilege would not
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be honored in a federal court. Denial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications.


The Court also stressed the need for certainty as to the existence and extent of any privilege, at the time the communication is made:

As we explained in Upjohn, if the purpose of the privilege is to be served, the participants in the confidential conversation “must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.” (Citation omitted).

518 U.S. at 18, 116 S.Ct. at 1932. The current situation with

9 Justice Scalia's dissent on this point is characteristically caustic: “This is a novel argument indeed. A sort of inverse pre-emption: The truth-seeking functions of federal courts must be adjusted so as not to conflict with the policies of the States. This reasoning cannot be squared with Gillock, which declined to recognize an evidentiary privilege for Tennessee legislators in federal prosecutions, even though the Tennessee Constitution guaranteed it in state criminal proceedings. Gillock, 445 U.S., at 368, 100 S.Ct., at 1191. Moreover, since, as I shall discuss, state policies regarding the psychotherapist privilege vary considerably from State to State, no uniform federal policy can possibly honor most of them. If the policy is the name of the game, rules of privilege in federal courts should vary from State to State, & la Erle R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).” Jaffee v. Redmond, 518 U.S. 1, 24-25, 116 S. Ct. 1923, 1935, 135 L. Ed. 2d 337 (1996)

regard to the doctor-patient privilege in Montana, despite a nominally simple privilege statute, is exactly what the Supreme Court prophesied: functionally uncertain, even though it may purport to be certain. It is “little better than no privilege at all” because it does not provide any clear guidance to the beneficiary of the privilege at the time she must decide what to communicate.

Lessons for the patient

The doctor-patient privilege is much more limited than most patients, and perhaps doctors, realize. Although the doctor intends to keep confidential what her patient tells her, she cannot do so:

• where the patient is involved in a criminal proceeding in Montana state court;
• where the patient later bases a legal claim or defense on the condition in a civil proceeding in Montana state court;
• where the patient is the subject of a Rule 35 examination in Montana or federal court, and requests a copy of the report of, or deposes, the examiner;
• where the patient is involved in any proceeding, civil or criminal, in federal court, except the relatively few cases where state law provides the rule of decision.

Neither the doctor nor the patient is likely to know at the time of the appointment which type of court proceedings, and thus whether in fact any privilege will protect the communications made in the appointment. Given this situation, the patient should assume there is no doctor-patient privilege at all, and thus that anything she says to her doctor may be used against her by her adversary in some future court proceeding.

Cynthia Ford is a professor at the University of Montana School of Law where she teaches Civil Procedure, Evidence, Family Law, and Remedies.

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a shock to Pat, his brothers say no one is more deserving.

“He's devoted his life to representing people who might not have a voice in our courts,” Thomas said. “He certainly is not afraid to pick up the argument for people who might not have a voice. That is in the finest tradition of our profession.

“When he told me about the award, I said, ‘Well deserved. And maybe a little bit overdue.’”

When asked what he has been most proud of over the course of his career, Pat McKittrick said it is being able to be of service to the working men and women of Montana.

“I'm very proud of representing the working person throughout my entire career and being able to help quite a few of the working people throughout the years,” Pat said. “It's been a wonderful career. That feeling of accomplishment of helping people in their time of conflict and need has been very rewarding.”

**BE A STAR WITH THE BAR**

The Bozeman rock band The Buzztones will be performing at the Wednesday, Sept. 24, opening reception for the 40th Annual Meeting in Big Sky.

The opening reception will be at Buck's T-4 Lodge (about a mile past the Big Sky turn off) from 5 to 7 p.m.

Some of the members of The Buzztones are also local attorneys. The band would welcome any cameo performers to sing or play an instrument on a song or two. If you are interested in joining the band onstage, contact Buzz Tartow at 406-588-9714 before Aug. 30 to discuss your possibilities of stardom.

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