Ohio's Physician-Patient Privilege in Personal Injury Cases--Time for Reform

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INTRODUCTION

In the literature of the physician-patient privilege the traditional contributors have been the great law teachers. It is time that the practitioners revealed how the privilege works in real life.

The public may not know it, and specialized sections of the bar may not yet realize it, but there is a crisis in the administration of justice in civil jury cases. The physician-patient privilege lies close to the heart of that crisis, for it is woof and warp of 90 percent of those cases.

No longer can continued existence of the privilege be justified by familiar clichés. It causes concealment of evidence, encourages dissembling, promotes litigation, obstructs settlement and contributes to court delay. Fair analysis of its workings demonstrates the need for its abrogation.

INCIDENCE OF THE PRIVILEGE
IN THE UNITED STATES

Ohio's privilege is established by Ohio Revised Code section 2317.02. It provides:

The following persons shall not testify in certain respects: a physician, concerning a communication made to him by his patient in that relation, or his advice to his patient. 2

There was no such privilege at common law; it is a statutory creature. 3 The first enactment in this country occurred in New York in

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1. 8 Wigmore, Evidence §§ 2380-91 (McNaughton rev. 1961); De Witt, Privileged Communications Between Physician and Patient (1958); Chafee, Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand, 52 Yale L.J. 607 (1943); DeWitt, Privileged Communications Between Physician and Patient, 10 W. Res. L. Rev. 488 (1959); DeWitt, Medical Ethics and the Law: The Conflict Between Dual Allegiances, 5 W. Res. L. Rev. 5 (1953); Morgan, Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence, 10 U. Chi. L. Rev. 285 (1943).

2. Ohio Rev. Code § 2317.02(A).

3. 8 Wigmore, op. cit. supra note 1, at § 2380.
At present, sixteen states continue to observe the common law rule, as do England, Scotland, and most of the jurisdictions in the Commonwealth nations. Thirty-four states have a physician-patient privilege of one kind or another. Of these states, however, seven make it expressly inapplicable in personal injury cases. In one state, it is modified by a rule of procedure comparable to federal rule 35, in effect making the privilege unavailable in personal injury situations. In another the court has discretion to declare the privilege inapplicable in the interests of justice. In still another, the privilege is not available in cases which are tried in courts of record. In Louisiana it is available only in criminal cases.

Accordingly, of the fifty states in the Union the physician-patient privilege is applicable in full force in only twenty-three states in personal injury cases which are tried in courts of record. Ohio presently belongs to this minority.

Involvement of the Privilege in the Trial of Civil Cases

The records of the Court of Common Pleas of Cuyahoga County, Ohio are probably illustrative of the experience of trial courts in metro-
politlan areas. In the January 1964 term of that court 2071 civil cases were filed. Of these, 1137 were jury cases. Of these, fully 1045 or 92 percent were tort cases, and the overwhelming percentage of these were suits for personal injuries.

The court's records for the April, 1964 term establish the same pattern. During this term 3879 civil cases were filed, of which 2241 were jury cases. Of the jury cases, 2031, or 91 percent were tort cases. The number of these which were not for personal injuries was negligible.

These figures are astonishing. They establish that in Cuyahoga County the principal business on the civil side of the common pleas court is personal injury litigation. This is not only in terms of sheer volume of cases filed, but also in terms of the exhausting demands which this type of litigation makes upon judicial time and manpower resources.

If the principal business of the modern metropolitan trial court is personal injury litigation, its principal business is the type of practice in which the physician-patent privilege plays an inevitable and major role. If the privilege were involved only rarely — as in will contests or suits for life insurance proceeds — there would be no particular need to consider its practical impact. But when it is woof and warp of 90 percent of the jury cases in our backlogged civil courts, it merits examination if only to see whether its modification could have an ameliorating effect on the serious social problem of jury case delay.

A TYPICAL BODILY INJURY CLAIM. ITS GENESIS, DEVELOPMENT AND FINAL DISPOSAL

The influence of the privilege is felt long before a potentially litigable matter ever gets near a courthouse. For purposes of illustration, assume

14. Records of John J. LaVelle, Court Administrator, Cuyahoga County, Ohio. The term "civil cases" does not include divorce cases. It encompasses the following categories: automobile torts, other torts, contracts, appropriations, appeals from Industrial Commission, will contests, partitions, foreclosures, Uniform Dependency Act cases and other equity cases.

15. The jury case segment of the civil cases filed encompasses the following categories: automobile tort cases, other tort cases, appropriation cases, appeals from The Industrial Commission, and will contests. The non-jury grouping consists of the following categories: partitions, foreclosures, Uniform Dependency Act cases, other equity cases, and contract cases. Most contract cases are actions on cognovit notes; the remainder generally involve questions of contractual interpretation only, and if questions of fact are involved they are normally left to the determination of the court as the trier of fact without the intervention of a jury.

16. Of the 1,045 tort cases, 662 were automobile tort actions and 383 were other tort actions.

17. Records of John J. LaVelle, Court Administrator.

18. In comparison to the 2,031 tort actions, the remainder of the jury cases consisted of 132 appropriation cases, 56 appeals from the Industrial Commission and 22 will contests.

19. The simplest personal injury case commonly takes 3 days to try, starting from the time counsel are first summoned to chambers and ending with the rendition of the verdict. A great many cases take 4, 5 or 6 days to try, and it is not uncommon for trials to last about 2 weeks. Probably the longest personal injury trial in the Cleveland area occurred several years ago; almost 3 months of trial were consumed in putting on the plaintiff's evidence alone.
a hypothetical but typical situation — one which the writer has observed in all its essentials on hundreds of occasions.

An automobile is struck from the rear as it stands in a line of traffic. Police officers arrive at the scene and make a routine investigation. They ask if anyone wishes to go to a hospital. The gentleman who later becomes a claimant is mildly dazed and the back of his neck feels tight. He tells the officers he would like to be checked at the hospital. They take him there in their cruiser. At the hospital's emergency room he is given an examination by a young intern, X-rayed and advised to consult his family physician. On the following day he sees his family doctor. The doctor takes a history, conducts a careful examination and notes his findings in his office record. He prescribes medication and suggests that heat be applied to the neck, which is now quite tender and stiff. He reassures his patient and tells him that he will be feeling better with the passage of time.

Within a few days the tortfeasor's insurance adjuster is out to the claimant's house. All insurance companies try to contact potential bodily injury claimants as soon as possible after receiving notice of the accident. Some companies are geared to making contact within three to four hours; others may take a day or two. Companies served by independent adjusters instead of staff adjusters tend to take a little longer, since there is more delay in the handling and forwarding of correspondence.

The purpose of the speedy contact is to enable the company to get to the claimant before a lawyer does. Doing so does not guarantee that counsel will not ultimately represent the claimant. But it does give the company a chance to demonstrate its readiness to help, and if the adjuster impresses the claimant as a man who will do right by him, the claimant will be less inclined to employ the services of counsel.

The insurer's desire to avoid the involvement of counsel is a matter of simple economics. Matters in which lawyers are involved cost more to process and conclude than matters which are settled directly with claimants.

The extent to which counsel are involved in the representation of accident victims is substantially greater than is commonly assumed. Ten to fifteen years ago counsel were involved in a relatively small percentage of bodily injury claims. This percentage, in the experience of insurance claims personnel in the Cleveland area, has been increasing steadily. A representative sampling of claims superintendents in Cleveland establishes that during the past year bodily injury claimants have been represented by counsel in roughly 50 percent of all bodily injury files disposed of prior to suit. This figure varies from company to company, ranging from a low of about 30 percent to a high of about 70 percent. The companies enjoying a good "direct settlement" experience are those
whose procedures enable them to get to claimants quickly. The ones which are not geared for making prompt contact are the ones which find that counsel are most frequently in the picture.

The means by which counsel become involved are diverse. Sometimes the injured party has a personal attorney. Sometimes there is a lawyer in the family. Sometimes counsel will be urged by a business associate or social friend. The organized bar has conducted an effective public relations program which has impressed the public with the benefit of legal representation in a wide variety of situations. The public is also inclined to associate the idea of counsel with personal injury problems. Thus many lawyers become involved as representatives of bodily injury claimants through no affirmative acts of their own. Some representation, however, is due to affirmative action by counsel or their friends in the field. Policemen, emergency room personnel, nurses, doctors, body shop repairmen, and others whose work brings them into contact with accident victims are often instrumental in transmitting news of an accident to members of the bar. Accident victims are often solicited by such persons, who suggest the engagement of their favorite personal injury practitioner. Solicitation by or in behalf of counsel is, of course, unethical; if proven it guarantees disbarment. Nevertheless, it is a risk which is run by some and is the cause, to an indeterminable degree, of the representation of some portion of the claimant population.

If the claimant is one of the minority who is not represented by counsel, the adjuster will obtain a signed statement from him which describes the accident and the injuries which he sustained. The adjuster will also obtain authorization from the claimant to get a copy of his hospital record, and he will leave forms for the claimant's doctor to fill out describing the injuries. In this way the adjuster informs himself of the medical aspects of the claim.

If counsel represents the claimant, however, the situation is quite different. The adjuster must now deal with counsel, and all of his requests for medical information must be directed to counsel. At this point the physician-patient privilege begins to take effect.

If counsel desires, he can keep the hospital records secret. They are privileged. He can keep his own medical reports secret. They are privileged. He can forestall the claimant's doctors from making any report to the adjuster. The doctors' findings are privileged. And he has the right to make the claimant totally unavailable for defense medical examination.

During the period in which counsel and the adjuster are in contact with each other the claimant's medical treatment continues. Our typical accident victim makes periodic office visits to his family doctor for a month or two. He may be hospitalized for traction. He may be ordered
to take physiotherapy treatments as an outpatient at one of the hospitals or in a physiotherapist's office. All of the reports to counsel and the business records of treatment rendered are privileged against disclosure. The adjuster is given none of this material unless it suits claimant's counsel.

The entrance of counsel into the picture frequently has an effect on the course of medical treatment. Counsel may be content to have his client continue with the family doctor. Frequently, however, he decides that it would be advisable for a consultant or a new treating physician to enter the picture. Typically this doctor enjoys a favorable relationship with counsel. From past experience in similar situations he has become appreciative of counsel's problems, and he likes to be of help.

The doctor to whom the patient has been referred by counsel is usually a man of outstanding qualifications. Commonly, he has been certified by a specialty board. If he should ever testify in court, he will look impressive, he will sound impressive, he will be impressive. In the great majority of instances he adheres strictly to his personal standards of professionalism. But by dint of his background, experience and personal predilection he has an underlying attitude. This fundamental attitude is hardly ever out of phase with the objectives of the attorney who referred the claimant to him.

The consultant typically makes one or two examinations of the claimant. His first examination is some months after the accident occurred. He submits a careful report to counsel, describing in detail the history, the complaints, the physical findings, and the prognosis. The description of the accident is frequently vivid. Commonly there are objective findings of present disability. Prognosis is hardly ever cheerful. Normally it is "guarded." Sometimes the consultant will submit a report which is tacitly understood to be for settlement purposes only. There is an understanding that if the doctor were under oath and his testimony were being transcribed, it probably would not climb to the favorable heights indicated in the report. The lily is gilded somewhat as an aid to favorable negotiation.

The adjuster in the meantime has been asking counsel how the claimant is getting along. Counsel usually replies that he does not yet have all of his special damages and doctors' reports together. Frequently this is true. Counsel has asked the family doctor for a report, but his requests have been ignored. The family doctor wants to avoid medicolegal situations. He considers report-writing for lawyers a nuisance and a bore, and he justifies his diffidence on the ground that it is more important for him to be saving people's lives.

After months go by and the adjuster is still without any medical information, he asks if the claimant could be examined by a doctor of his
designation. Claimant's counsel find it convenient to withhold permission for such an examination right away, pleading inconvenience, the press of business, his temporary inability to accompany the client to the doctor's office, and so on. Throughout this period, however, the adjuster and counsel attempt to discuss settlement. In many cases it is the objective of counsel to keep the adjuster in the dark about those aspects of the medical picture which are not advantageous to the claim. Negotiation is undertaken in an atmosphere of sales puffing, exaggeration, non-disclosure of selected items, and bluffing. Nevertheless, if the parties can strike a rough practical balance on a figure which can be justified to their principals, the matter will be settled. This occurs about 75 per cent of the time. All too frequently, however, settlements are not the result of informed discussion; the claim is simply sold by counsel and bought by the adjuster. If the latter does not operate in total darkness, at least he has been forced to perform in areas of heavy shade.

As noted, only about 75 per cent of the claims in which counsel are involved are settled without suit. The remaining 25 per cent advance to the litigation stage. There are many reasons why bodily injury claims get into litigation. Not the least of these is the existence of reasonable differences of opinion about value even after all facts are known to both sides. However, a fundamental institutional cause is the cloak of secrecy which the law encourages counsel to draw around the very core of his case: its medical features. So long as counsel are encouraged by the existence of the medical privilege to conceal from the insurer available medical opinion, the insurer will be leery of parting with its money. Without objective data in his file, an adjuster is generally unable to justify to his superiors the payment of anything more than very modest and therefore very safe sums in which claimant's counsel is not likely to display much interest. Where medical data is not disclosed, settlement negotiations become form without substance. Discussions cannot be conducted sensibly; there is apparent puffing on the one hand and fearful intransigence on the other.

Once the claim advances to the suit stage — but not until then — the defendant has the right to a medical examination of the plaintiff.20 By the time this examination is actually conducted, however, a couple of years have usually elapsed since the accident occurred. By this time many plaintiffs have no objective signs of injury. All that the defense doctor can report is that notwithstanding subjective complaints, there was no objective evidence of disability at the time of his clinical examination.

20. The defendant's right to an examination stems from the right of the court in which an action is pending to make equitable orders in the interests of justice without statutory authority. See S.S. Kresge Co. v. Trester, 123 Ohio St. 383, 175 N.E. 611 (1931); Miami & Montgomery Turnpike Co. v. Bailey, 37 Ohio St. 104 (1881); Nomina v. Eggeman, 188 N.E.2d 440 (Ohio C.P. 1963)
When the essence of his report is communicated to plaintiff's counsel, the latter's rejoinder is likely to be one or both of the following:

"Aw, that defense-minded doctor never finds anything anyway." Or —

"He didn't see my man until two years after the accident. I've got reports from the treating physicians and they all report plenty of objective signs."

Under the present practice the report which defense counsel receives from the defense doctor is privileged. Plaintiff's counsel has no right to see it. Nor can plaintiff's counsel depose the defendant's doctor. Similarly, the defendant cannot obtain the reports of plaintiff's doctors to plaintiff's counsel. They are privileged. Plaintiff's doctors cannot be deposed by defense counsel; they are incompetent to testify by virtue of the privilege. And defense counsel have no right to see the portion of the plaintiff's hospital record which reflects privileged communications between the plaintiff and his doctors. Thus, since each side has the right to keep all its medical data secret, settlement discussions can and often do occur in an atmosphere of mutual ignorance and unreality.

Since lawyers are generally practical people who are interested in a practical disposal of their cases, they are usually driven by force of circumstances toward a partial disclosure of the medical data in their hands if settlement negotiations are to be productive. As a practical matter, accordingly, the privilege of secrecy which the law confers is, to varying degrees, disregarded. When it is to their advantage counsel will disclose a portion of the medical cards which the law encourages them to hold so closely to their vests. If the privilege were rigidly observed in practice, parties could hardly ever settle their cases. They would have to try almost every case to learn enough about the medical evidence to reach a judgment about its settlement value. No one can try every case, and no one wants to try every case. What occurs therefore is a degree of voluntary communication which gives counsel some understanding of the available medical evidence.

The disregard of the privilege for practical purposes is hardly ever complete. The exchange of medical information is usually on a piece-meal basis, each side displaying its strongest cards only. As a result, while there is some degree of voluntary disclosure, it proceeds on an ad hoc basis from case to case. The objective is generally the maximization of personal advantage.

If the matter cannot be settled, it must of course proceed to trial. At this stage the plaintiff invariably testifies about his injuries and his medical treatment, thus waiving the privilege. His doctors testify about what

22. Ibid.
they found, and defense counsel thus learn of their opinions. Similarly, the defendant’s doctor testifies as to his findings and opinions, and this is commonly the first time that plaintiff’s counsel has learned of them. Complete disclosure is thus ultimately effected.

After all is said and done and after the passage of many years, the secrecy privileges enjoyed by the parties vanish through the process of express waiver. And it is ironic that waiver must be made in every personal injury case, for if it were not the very core of the case, the injury component, could not be proved. Since the secrecy rights conferred by the privilege are always relinquished in the last analysis, the question naturally arises: Was it necessary that they should exist in the first place?

**AN EVALUATION OF THE THEORETICAL JUSTIFICATION OF THE PRIVILEGE**

The primary theoretical function of the privilege is to encourage patients to make that complete disclosure to their doctors which they would not make unless their doctors’ lips were sealed in court. The theory is that if doctors were not restrained from testifying about what they learn in the privacy of their offices, patients would not make full disclosure to them out of fear of being embarrassed in court, and this in turn would make it difficult for doctors to treat medical problems effectively. It is questionable whether this notion has any validity. Lawyers of the greatest eminence have challenged both its logic and the social benefit claimed for it.

The theory assumes, of course, that patients know about the testimonial privilege before they consult their doctors and that because they know of it they speak more freely. Yet not one patient in a thousand knows of it. If patients are ignorant of it, it obviously has no effect on the degree to which they confide.

A patient who seeks medical treatment wants the best for himself and will do everything he can to help his doctor provide it. He will answer every question his doctor asks, whether or not he knows of the privilege. The possibility that some day his doctor may have to make disclosure in court is so remote that it is never considered, except perhaps where the patient has a court proceeding pending in which his condition is in issue. In that event he will probably offer his doctor’s testimony anyway.

Generally speaking, it cannot be contended with reason that patients

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24. 8 Wigmore, *op. cit. supra* note 1, at § 2380a; 56 Ohio Jur. 2d Witnesses § 240; see DeWitt, *supra* note 6, at 493.

25. 8 Wigmore, *op. cit. supra* note 1, at § 2380a; Chafee, *supra* note 1; DeWitt, *supra* note 6, at 494-500.
would fear the consequences of court disclosure if the testimonial privilege were removed. If there is any fear about disclosure of an embarrassing condition, it is that the doctor might make indiscreet comment on a purely private level to a person within the patient's circle of acquaintances, and this is a risk which the testimonial privilege neither reaches nor guards against.

Moreover, it must be acknowledged that of the many ailments which affect the human constitution only a few give cause for embarrassment. People openly recount to their friends all manner of details about their operations, skiing injuries, coronaries, and the like. That people talk about such things routinely and voluntarily strongly suggests that they would feel no embarrassment if a court were informed of them by the person best qualified to describe the condition — the treating doctor.

The claim that the testimonial privilege enhances medical management simply cannot be supported. The privilege does not exist in such centers of medical science as Boston, Baltimore, Chicago, Dallas, San Francisco and Los Angeles. But no one has yet suggested, or much less demonstrated, that the practice of the medical art has suffered there in comparison to places like Cleveland, Columbus, Toledo, and Cincinnati, where the privilege does exist.

Whatever validity there may be to the theoretical justification of the privilege, and this is to be doubted, it has absolutely no validity in the personal injury action. Such an action comes into being when the patient has his lawyer prepare a petition for filing with a court which broadcasts in public record all of the physical, mental, and emotional conditions which the patient has related to his doctor. Once these complaints and conditions are voluntarily made a matter of public record, there is no longer any rational basis for the testimonial privilege. Logically it should be deemed waived when the petition is filed. In this situation enforcement of the privilege makes no sense. Its lack of logic is bad enough; worse, however, is the mischief to which it can be put as an affirmative instrument of injustice. As Professor DeWitt has observed:

When a party voluntarily puts in issue his state of health or his bodily injury and discloses the details thereof to serve his own pecuniary ends, any good and sufficient reason for maintaining the silence of the physician no longer obtains. A patient may keep the door of the sickroom closed, but he should not be permitted to open it so as to give an imperfect or false view of what took place there, and promptly shut the door the minute the truth is about to be revealed. It is a monstrous thing to permit a party to fabricate evidence for himself in this class of cases, and then deny his adversary the right to resort to the only reliable means to elicit the truth.26

AN EVALUATION OF THE PRIVILEGE IN LIGHT OF PRE-TRIAL DISCOVERY PROCEDURES

Pre-trial discovery of relevant evidence is afforded by a wide range of statutes and judicially declared rules. Deposition procedure is authorized by Ohio Revised Code sections 2319.06 through 2319.19,27 under which parties may take each other's depositions and the depositions of all those having knowledge of matters relating to the issues.

Under sections 2309.43 and 2317.0728 parties may propound written interrogatories to each other. Under the latter statute a complete cross examination may be conducted in writing, and it may go even to the point of determining the names of witnesses who were with a party at the time of his accident.29

Production of books, records and written instruments is authorized under sections 2317.32, 2317.33 and 2317.35.30 These sections compel the production of "books and writings which contain evidence pertinent to the issue," "books and documents which contain evidence relating to the merits of the action," and "written instruments" on which one's claim or defense is founded. Under these provisions, for example, a party can be ordered to produce copies of his income tax records to shed light on the question of whether his accident actually caused an income loss.31

Under section 2317.4832 chattels are subject to inspection and testing.33

Substantial discovery of medical matters is authorized under the federal practice. Under federal rule 353 the defendant has a right to a medical examination of the plaintiff. The plaintiff has the right to a copy of the defendant's doctor's report. He may also depose the defendant's doctor. Defense counsel have the right to copies of reports prepared by plaintiff's doctors, and they may depose the plaintiff's doctors.

Only in the state practice, by virtue of the physician-patient privilege, does discovery skid to a screeching halt when it approaches the medical core of a personal injury case.

The sound social policies underlying the expansion of discovery in non-medical areas are surely applicable with equal force to the discovery

27 OHIO REV. CODE §§ 2319.06-.19.
28 OHIO REV. CODE §§ 2309.43, 2317.07
29 Furman v. Central Park Plaza Corp., 102 N.E.2d 622 (Ohio C.P. 1951)
30 OHIO REV. CODE §§ 2317.32, 33, 35.
31 Mandell v. Yellow Cab Co., 170 N.E.2d 296 (Ohio C.P. 1958)
32 OHIO REV. CODE § 2317.48.
34 FED. R. CIV. P. 35.
of medical facts in personal injury actions. As one court recently observed:

The trial of a lawsuit is not a game to be conducted by two adversaries, but it is a matter in which the general public has an interest, for such suit concerns the settlement of controversies, which leads to peace and tranquility in the state. To that end any reasonable order for the inspection of property alleged to be involved in a claim of bodily harm can lead but to revealing the truth of the conflicting claims, which is what an action at law seeks to determine.  

The Cuyahoga County Court of Common Pleas has held:

It would seem that the courts have moved away from the old theory that a lawsuit is a game of wits and that secrecy must surround a party's case until the day of trial. In the federal courts the federal rules of civil procedure have recognized the need of getting at the truth of controversies at an early stage with a view to clearing the issues and eliminating surprise. It is logical that state courts should arrive at the same result. After all, a lawsuit is a quest for truth.

Surely the healthy policies underlying the expansion of pre-trial discovery are applicable to the medical factor in personal injury cases. In so many of these cases the very heart of the matter is medical. Unless the medical core of the case is as open to discovery as all other factors, counsel will continue playing games with each other.

The bar has a duty to itself and to the public to make it clear that in this area of the law we are not playing games. A personal injury lawsuit can no longer be regarded as a contest for lawyers in which the most agile man wins. The objective of a lawsuit is the attainment of a just result. In the personal injury field it is time that the bar put justice ahead of winning.

**Consequences of Abolition of the Physician-Patient Privilege in Personal Injury Cases**

The fundamental consequence of an abolition of the privilege in personal injury cases would be to bring to that practice a quality of openness and candor which is now so sadly lacking. The existing system encourages concealment. What results is sleight of hand, misrepresenta-

tion, bluffing, and other forms of questionable conduct. If the smoke screen were swept away, however, and all cards were dealt face up on the table, settlement discussions could proceed with a degree of rationality and objectivity which is only rarely attained now.

It cannot be proven in advance, but it seems fair to assume that abolition of the privilege would enhance the possibilities of settlement at every stage in the life of a bodily injury claim. With respect to those claims which are still in the pre-litigation stage, abolition of the privilege plus the enactment of supplementary discovery statutes would have a "filter down" effect which would greatly increase the extent of voluntary disclosure. If the parties understand that they will be forced to make complete disclosure to each other once the claim goes to suit, they will be inclined to make a voluntary disclosure of those matters prior to suit which they would be compelled to disclose following suit. The "filter down" effect would unquestionably increase the opportunities for sensible settlement discussions in the pre-litigation stage and would tend to reduce the volume of suit filings.

Of those claims that go to suit, it could reasonably be expected that full disclosure by both sides of all available medical data would increase both the volume and the rate of disposals prior to trial. Of those claims which do proceed to suit, of course, only a tiny fraction go all the way to verdicts. On the average, about 90 of every 100 personal injury suits are settled during the pre-trial stage. The burden of disposal is thus actually carried not by the courts but by counsel and insurance claims representatives. Anything that might reasonably be done to amplify the opportunities for settlement should be encouraged. While abolition of the medical privilege in personal injury cases is certainly no cure-all, its fundamental momentum would be in the direction of promoting sensible discussions and settlement agreements. And to that extent it would ameliorate congestion on the civil jury docket to some undetermined degree.

Would the vital routines of physicians be disrupted if they were subject to discovery depositions? This is most doubtful. Most doctors would probably finish out their lives without once having to testify on a deposition. The expense factor alone would mitigate against medical depositions. The fair fee of the doctor should reasonably be assumed by the party taking his deposition. This could be expected to

38. Lloyd Lustig, Assignment Commissioner of the Court of Common Pleas of Cuyahoga County, advised that this is the experience of that court. The author knows of no national studies or statistics, but his discussions of the subject with lawyers from different parts of the country indicate that the 90 percent figure is generally true nationwide. Statistical studies compiled by the author's firm with respect to its own experience establish that of more than 3000 suits disposed of in a ten year period through 1963 inclusive, 90 percent were disposed of prior to verdict, and 84 percent were disposed of prior to impaneling of the jury.
run about $100 plus. Counsel's time would have to be paid for, and the not inconsequential charges of the court reporter would have to be incurred. Thus, the ultimate cost to an insurer who wants to depose a plaintiff's doctor would be on the order of $200 or more. This kind of expense is not lightly incurred. And it certainly would not be incurred routinely. Doctors' depositions would probably be taken only in unusual situations.

In the estimation of counsel for the American Medical Association, doctors should not resist the abrogation of physician-patient privilege statutes if adequate safeguards are provided against the potentials of abuse.\textsuperscript{39}

Abolition of the privilege in personal injury situations would have two specific technical consequences: (1) it would enable the defendant to depose the plaintiff's treating physicians; and (2) it would enable the defendant to obtain those portions of hospital records which contain matters now privileged under the statute. If the ends of justice were truly to be served, abolition of the privilege should be accompanied by the enactment of supplementary discovery statutes which would open up to both sides all areas of the medical field. Such statutes should provide specifically for the following objectives.

1. The \textit{reports} which plaintiff's counsel receive from \textit{treating} physicians should be subject to discovery by defense counsel.\textsuperscript{40}

2. The \textit{consulting} physicians to whom counsel send plaintiffs for the purposes of trial preparation should likewise be subject to discovery depositions, and their \textit{reports} to plaintiff's counsel should be discoverable by defendants.\textsuperscript{41}

3. The \textit{defendant's doctor} should be subject to deposition by plaintiff's counsel, and the \textit{reports} which he submits to defense counsel should be discoverable by plaintiffs.\textsuperscript{42}


\textsuperscript{40} As a matter of strict logic the patient's waiver of the physician-patient privilege would not operate as a waiver of his attorney's work-product privilege, and the latter privilege might well be regarded as the one which shields from defense counsel's eyes the reports which plaintiff's counsel receives from the examining physicians. Special provision for discovery of such reports should be made. Additionally, it would be advisable to provide for the discovery of these reports to minimize the incidence of depositions of treating physicians. In most cases defense counsel and their clients would probably desire to forego deposing treating physicians if they had a copy of his report which sets out his findings, diagnosis, prognosis, and description of treatment.

\textsuperscript{41} Insofar as the attorney's work-product privilege is concerned, there may be a recognizable distinction between treating physicians who treat the patient prior to the involvement of counsel and consulting physicians to whom the patient is sent by counsel for the purpose of preparing the case for trial. As to the consultants, it could be contended that their reports fall within the attorney's work-product privilege and are therefore not affected by the patient's waiver of the statutory privilege relating to communications between patient and treating physician. This is a matter which should be covered by express reference in supplementary discovery rules if the statutory privilege were abrogated in personal injury situations.

\textsuperscript{42} Under Ohio law, the defendant's doctor may not be deposed by plaintiff's counsel and his report to defense counsel is privileged against disclosure. \textit{In re Bates}, 167 Ohio St. 46, 146 N.E.2d 306 (1957). While the supreme court has not defined the exact nature of that
Plaintiffs' counsel may react adversely to the idea that their consultant's reports should be discoverable by the defense; and defense representatives may bristle at the thought of losing the secrecy privilege which presently surrounds defense medical reports under state but not federal practice. Discovery, however, is not a one-way street; traffic should move both ways. And every vestige of the shrouds of secrecy which veil the existing practice should be swept away in the interests of justice and rational settlement discussion. Accordingly, we commend to the good graces of all those concerned with the effective administration of justice in the personal injury field the following draft of a bill to amend the physician-patient privilege statute in Ohio and to provide for supplementary rules of discovery.

A BILL TO ABROGATE THE PHYSICIAN-PATIENT PRIVILEGE IN PERSONAL INJURY CASES AND TO PROVIDE FOR SUPPLEMENTARY DISCOVERY PROCEDURES THEREIN

(A) The commencement of an action to recover damages for personal injuries or wrongful death shall constitute consent by the person bringing the action that any physician who has examined, treated, consulted or prescribed with respect to the injured person or decedent is free to testify in the trial of the action and in any deposition instituted by any of the parties thereto respecting his knowledge of matters and his treatment of conditions which are relevant to the physical, mental and emotional conditions for which damages are sought.

(B) In any such action, no portion of a hospital record otherwise admissible into evidence shall be deemed inadmissible or privileged against discovery by virtue of Revised Code section 2317.02 (A)

(C) In any action contemplated by this section the court in which the action is pending shall, upon the motion of any party, order such mental or physical examinations by physicians as the court deems just. The court shall determine the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.

(D) In any action contemplated by this section, counsel in possession of reports from physicians concerning their examination, consultation, treatment or prescription regarding the person whose physical or mental condition is in issue shall deliver copies of such reports to counsel for all other parties to the action within a reasonable time after request is made therefore. If delivery of such reports is not made pursuant to

privilege, it would appear to be generally of the attorney's work-product type. Logically, statutory abrogation of the physician-patient privilege would not reach the work-product privileges now enjoyed by defense counsel. In order to insure that defense counsel would be obligated to reveal all of their medical data, just as plaintiff's counsel would be obligated to do there would have to be supplementary legislation which would bring this result about.
such request, the court in which the action is pending shall order delivery
to be made, and it shall, in its discretion, make such further orders as are
reasonable and appropriate.

(E) In any action contemplated by this section, each party shall
have the right to depose physicians who have examined, treated, consulted
or prescribed with respect to the party whose mental or physical condition
is in issue. The reasonable fee of the medical witness shall be paid by
the party instituting the deposition. The court in which the action is
pending shall have jurisdiction to determine the reasonableness of the fee
charged by the medical witness. In so doing the court may inform itself
of the fees customarily charged in the community by other physicians of
comparable learning, taking into account the time involved in preparing
for and giving testimony.

(F) Effect shall not be denied to any of the provisions of this
section on the ground that the person whose mental or physical condition
is in issue is a minor.

(G) In all proceedings pursuant to the provisions of this section,
the court in which the action is pending shall have jurisdiction to make
all such orders as in its discretion may be required, upon the motion of
any party or witness, to safeguard parties and witnesses from oppression,
embarrassment, harassment or other injustice.