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Michael W. Hogan, Waiver of the Physician-Patient Privilege in Personal Injury Litigation, 52 Marq. L. Rev. 75 (1968). Available at: http://scholarship.law.marquette.edu/mulr/vol52/iss1/3

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WAIVER OF THE PHYSICIAN-PATIENT PRIVILEGE IN PERSONAL INJURY LITIGATION

MICHAEL W. HOGAN*

"that thou mightest know the certainty concerning the things wherein thou was instructed"

1 Luke 4

INTRODUCTION

The purpose of this article is to discuss the statutory and case law applicable to waiver of the evidentiary privilege attached to physician-patient communications, and to determine if grounds exist for a more liberal interpretation of this privilege in personal injury actions. In order to do this, we should redefine the boundaries of the physician-patient privilege, discuss how the privilege constitutes a problem in personal injury litigation, and how, if at all, the courts might so construe the law as to afford the defendant a right to pre-trial discovery and pre-trial admissibility of medical evidence. In other words, is the doctrine of evidentiary waiver subject to re-interpretation?

OUTLINE OF THE PHYSICIAN-PATIENT PRIVILEGE

Although no physician-patient privilege existed at common law, at least 32 states have enacted statutory privileges relating to confidential communications between a patient and his treating physician. These statutes vary widely as to wording and scope, but fall into three general categories: (1) the strict statute providing few exceptions; (2) the modified statute which has engrafted some common exceptions; and

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** Teachers write articles to explain and synthesize court opinions for two reasons. (1) The average judicial opinion is based on a novel historical situation in which certain errors have been raised on appeal. Not only does this limit the opinion, but it limits the sufficiency with which the court can treat the legal problem involved. This means that most opinions must from their inherent common law nature be insufficient. (2) Most appellate court opinions are not adequate, that is, the courts fail to come to grips with the central issue of the legal controversy and to positively and completely dispose of all the peripheral problems. Although this to can be blamed upon the common law methodology, it must in some degree be the fault of poor briefs, shortage of time, and lack of adequate scholarship on the courts themselves. No doubt these two criticisms arise from a teacher's exasperation with the legal materials he must present to the student. This article is meant to raise these two specific points as regards the doctrine of waiver of evidentiary privilege.


4 Wis. Stat. §885.21 (1965).
(3) the modern, liberal statute providing for waiver of the privilege in personal injury actions.\(^6\)

The necessity and purpose of the physician-patient privilege is usually justified on the grounds that it encourages the patient to make a full and frank disclosure of all information necessary for diagnosis and treatment, and by reason of the confidential nature, to spare him humiliation, embarrassment or disgrace.\(^6\)

The information gained by reason of the professional treatment may be acquired not only from oral or written statements, but by observation or examination.\(^7\) At least in civil cases the courts have not adopted the testimonial-communicative dichotomy of Wigmore as done in \textit{Schmerber v. California}.\(^8\) Although not usually an issue, the privilege covers communications by the physician to the patient, as well as disclosures by the patient to the physician.\(^9\) Form of the privilege communications, whether oral, by deposition, affidavit, certificate, hospital records or charts is not generally material. Wisconsin has made a distinction in the records protected, as only those records made by the physician as a part of the course of treatment are protected.\(^10\)

The cases seem to indicate that the person claiming the privilege has the burden of proving the physician-patient relationship\(^11\) and that the communication was necessary for the physician to act, treat and prescribe for the patient.\(^12\) While the courts generally state that the privilege extends to all information acquired by the physician while attending the patient,\(^13\) this acquisition means information coming to the attention of the physician while acting in his professional capacity and information acquired from personal acquaintance before and after the rendition of professional services is not privileged.\(^14\) Moreover, information acquired by the physician which was not necessary for treat-

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\(^{8}\) \textit{Bryant v. Modern Woodmen of America}, 86 Neb. 373, 125 N.W. 621 (1910).

\(^{9}\) \textit{Prudential Ins. Co. v. Kozlowski}, 226 Wis. 641, 276 N.W. 300 (1937); \textit{see Annot.}, 38 A.L.R.2d 778 (1954); \textit{Annot.}, 120 A.L.R. 1124 (1939); \textit{Annot.}, 75 A.L.R. 378 (1931).

\(^{10}\) \textit{Bowles v. Kansas City, 51 Mo. App.} 416 (K.C. App. 1892); \textit{Griffiths v. Railway Co.}, 171 N.Y. 106, 63 N.E. 808 (1902).

\(^{11}\) \textit{Pride v. Interstate Business Men's Assn.}, 207 Iowa 167, 216 N.W. 62 (1927); \textit{Note}, 37 \textit{Yale L. J.} 528 (1928).

\(^{12}\) \textit{In re Bruendl's Will}, 102 Wis. 45, 78 N.W. 169 (1899); \textit{Boyle v. Northwestern Mut. Relief Assn.}, 95 Wis. 312, 70 N.W. 351 (1897); \textit{Shafter v. Eau Claire}, 105 Wis. 239, 81 N.W. 409 (1900).

\(^{13}\) \textit{Traveler's Ins. Co. v. Bergeson}, 25 F.2d 680 (8th Cir. 1928); \textit{Annot.}, 58 A.L.R. 1134 (1929).
or the fact that the patient has visited the doctor, the number of times the patient has been treated, or the number of visits may be disclosed without penalty. A difference of opinion exists as to information which is contained in records filed as public documents, such as autopsies, but the Wisconsin Court has held post-mortem examinations to be outside the definition of confidential communications and hence not privileged.

Any court faced with a dispute over a physician-patient privilege has at least three determinations to make: (1) is the fact situation one within the statutory privilege, (2) is the information sought to be suppressed protected by the statute and (3) has a waiver occurred. The privilege may be waived by several methods: (1) express consent, (2) introduction of testimony at trial, (3) disclosures to third parties, or (4) commencement of a personal injury action in which the issue of damages is material. The term “waiver” has been indiscriminately applied to all these acts or non-acts by the plaintiff, and a more sophisticated articulation and selection of precise standards seems indicated.

The privilege is basically personal to the patient and cannot be waived by others while the patient is alive and competent. The suggested changes in the Preliminary Draft of Proposed Amendments to Federal Rule 35 uses the terminology “person in his custody or legal control” to attempt to solve the problem of the minor or mental incompetent who is not an actual party to the action, but who is the patient or holder of the privilege. The Defense Research Institute Sample Statute uses the term “holder of the privilege” and defines this as “the patient when he has no legal representative, or the legal representative of the patient when the patient is dead, or when another person has custody or legal control over the patient.” The present provisions of Federal Rule 35 and Section 885.21 Wisconsin Statutes 1965 allow a court ordered examination only of a “party”, and a somewhat analogous situation was faced by the Wisconsin Court in State v. Miller.

15 Terry v. Hannagan, 257 Mich. 120, 241 N.W. 232 (1932); Note, 18 Iowa L. Rev. 103 (1933).
17 Jones, Evidence, § 845 at 1516 (Supp. 1968).
18 Borosich v. Metropolitan Life Ins. Co., 191 Wis. 239, 210 N.W. 829 (1926); Note, 12 Iowa L. Rev. 313 (1927).
19 Olson v. Court of Honor, 100 Minn. 117, 110 N.W. 374 (1907).
20 Epstein v. Pennsylvania R. Co., 250 Mo. 1, 156 S.W. 699 (1913).
23 Monograph, supra note 2 at 30.
24 Monograph, supra note 2, Sample Statute I, § B (1) (d), 30.
25 35 Wis. 2d 454, 151 N.W.2d 157 (1966).
The *Miller* case did not involve the physician-patient privilege but the secrecy provisions of section 48.78\(^2\) applicable to juvenile records. Miller was accused of having sexual intercourse with a 17 year old female, and voluntarily disclosed to the police while in the police car going to the station that he had had intercourse with the complaining witness a number of times, but only a fraction of what she had stated. This confession was later repeated at the station. Miller was not afforded the *Miranda* warning\(^27\) but the Wisconsin Supreme Court found the statements to be voluntary. The application of the *Miranda* case was deferred because the hearing on the admissibility of the confession was held on June 1, 1966, some 12 days before the rendition of the *Miranda* opinion. The Court had to stretch its imagination to find that the trial had commenced at the time of the *Goodchild* hearing as jeopardy had not attached; the first witness in the case had not been called, sworn and commenced testimony before the Jury on June 1st.\(^28\) However, it belabor the point to recognize the specious reasoning of the Court on retroactivity as comparison of the cases reflects a decided inconsistency with common law principles of finality,\(^29\) civil applications of the retroactivity doctrine,\(^30\) and generous use of the waiver doctrine in criminal cases to block application of United States Supreme Court mandates.\(^31\)

The complaining witness in the *Miller* case was in the custody of the Catholic Apostolate, and defendant sought to recover from the District Attorney copies of her statements, the history of prior mental illness, and all other records relating to the minor, and for examination by a psychiatrist. This request was made pursuant to an affidavit of the de-

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28 State v. Witte, 243 Wis. 423, 428, 10 N.W.2d 117 (1943).
29 The concept of retroactivity is beyond the scope of this paper, but the idea of a limited retrospective application remains a state problem, as the concept is not a constitutional guarantee. Linkletter v. Walker, 381 U.S. 618 (1965) set forth the idea of a cut-off date of applicability as when the case was "finalized.". The later case of Johnson v. New Jersey, 384 U.S. 719 (1966) adopted the date of rendition of the United States Supreme Court opinion and the date of the trial of the state's case. If the defendant was placed on trial before the United States Supreme Court decision, then the rule was not to be applied. The Wisconsin Supreme Court has chosen to follow the federal dichotomy of the *Johnson* case as to the application of Escobedo v. Illinois and Miranda v. Arizona. See Reimer v. State, 31 Wis. 2d 457, 143 N.W.2d 525 (1966); But Cf. State v. Shoffner, 31 Wis. 2d 412, 143 N.W.2d 458, 475 (1966), Beilfuss, J., dissenting, asserting that a trial is considered one proceeding until the judgment is final. See Loewy, *The Old Order Changeth—But For Whom?*, 1 Suffolk U. L. Rev. 1 (1967); Fairchild, *Limitation of New Judge-Made Law to Prospective Effect Only: Prospective Overruling or Sunbursting*, 51 Marq. L. Rev. 254 (1968).
30 Compare Fitzgerald v. Meissner & Hick, Inc., 38 Wis. 2d 571, 157 N.W.2d 595 (1967) (applying wife's action for loss of consortium retroactively) with Dupuis v. General Casualty Co. of Wisconsin, 36 Wis. 2d 42, 152 N.W.2d 884 (1967) (the parent-child immunity doctrine abolished prospectively only).
fendant claiming that the minor female had previously accused others falsely of having intercourse with her, and that the District Attorney had noted on a statement he took of the complaining witness the words "slightly retarded." The trial court denied the motion to inspect medical and other records of the guardian, finding them privileged under section 48.78, and finding that section 48.78 extended to psychiatric records as well as other social history. The examination by the psychiatrist was likewise denied, and justified on the observation of the trial judge that the complaining witness seemed to be competent.

To the final objection that such records and medical history should be available to defendant as products of criminal discovery, the Court found no discovery mechanism present in Wisconsin criminal law and set the problem aside for future court rule or legislation. Hence, under either Brady v. Maryland or Giles v. Maryland, the Giles case being somewhat similar on the facts, the Court found that the Brady-Giles situations dealt with suppression of evidence by the District Attorney and not to post-trial objections, and hence the area of pre-trial discovery motions, the Brady-Giles opinions were inapplicable.

The Wisconsin Court did not seem to feel that testimony of the complaining witness on the stand that she had falsely accused others of having intercourse with her, when she later retracted the statements, were error, but only affected the credibility of her testimony.

One can only speculate as to the outcome of a court order to disclose the medical information when the complaining witness was not a "party" to the action and hence could not be compelled to submit to an examination by defendant's physician under section 269.57, and not under the "custody or legal control" of the District Attorney. Section 885.21 (a) relating to homicide and (b) relating to civil or criminal malpractice actions would not provide an exception. Therefore, if the Court could not order an examination by the defendant's physician, although this is possibly an inherent right of the Court to present its own expert witness. If the testimony of the complaining witness is not construed as a waiver on the medical issue, and no exception is provided in section 885.21, it would seem the complaining witness could block presentation of her physician's testimony by exercise of her physician-patient privilege.

There were some problems in the early cases under the then existing Wisconsin statute as to waiver by the personal representative or beneficiaries of personal injury actions and insurance policies, but waiver by the survivors of the holder of the privilege was provided by amend-

33 386 U.S. 66 (1967).
34 Wis. Stat. § 269.57 (1965).
ment in 1927.36 The nature of an express waiver seems to be judicially construed as a written or judicially acknowledged act.37 However, contractual waivers which are given to procure insurance are not adequately considered by most courts.38 As most of these insurance waivers are raised to support proof of fraud as to the patient's medical condition at the time of issuance of the policy, it would seem the Courts could handle the issue by the doctrine of failure of condition or estoppel.

Disclosures which occur by reason of communication to third persons or the public in general have consistently been construed as waivers, as the confidential nature of the information has been lost.39 Judicial disclosure by failure to object to the testimony of the physician,40 or detailed testimony of one of several physicians41 or of the plaintiff42 operates to waive the privilege.

Minnesota and California have recently enacted statutes which provide that a personal injury plaintiff waives the privilege by commencing an action for damages, in which the medical condition is a material issue.43 Alaska has held that filing suit for personal injuries waives the privilege at least as to pre-trial discovery depositions.44 As a practical matter, such a discovery-waiver occurs under Federal Rule 35(b) (2) if the plaintiff requests a copy of the defendant physician's report. Wisconsin has apparently not reached the issue of waiver by filing suit, and due to the language of section 885.21 (d) which requires the "express consent" of the holder of the privilege, we should re-examine the reasons for the privilege, look to the Wisconsin statutes for analogy, and perhaps to contract law for a clearer definition of waiver in its multiple meanings: (1) failure to act by design or ignorance, (2) election, as an intelligent, voluntary, knowledgeable choice, (3) estoppel as something akin to promissory estoppel and detrimental reliance by the opposing party.

Problems of the Physician-Patient Privilege in Personal Injury Litigation

One of the vexing problems of pre-trial discovery of medical information stems from the fact that disclosure on deposition is not generally considered to be "voluntary" and hence not a waiver so as to make the information admissible at trial. Moreover, in many states medical information in the form of a physician's deposition is not available, and

36 Cretney v. Woodmen Accident Co., 196 Wis. 29, 219 N.W. 448 (1928).
38 3 JONES, EVIDENCE, § 850 at 1592 (Supp. 1968).
40 Epstein v. Penn. R. Co., 250 Mo. 1, 156 S.W. 699 (1913).
41 Ibid.
42 Ibid.
43 CALIF. EVID. CODE § 990-995 (Supp. 1967); MINN. STAT. ANN. § 595.02 (Supp. 1967).
PHYSICIAN-PATIENT PRIVILEGE

if the physician aids the investigator by an oral discussion of medical records, he may well be subject to suit for wrongful disclosure. The Court-ordered medical examination and disclosure of medical records under section 269.57 is a good example of a limited means of pre-trial discovery which fails to adequately inform the defendant about earlier medical examinations not in the specified doctor's files, nor can it aid in a proper diagnosis of injuries which have partially healed or which have developed additional symptoms, as the delay in procuring an examination of the plaintiff limits the defendant's physician in ascertaining the causes and immediate post-injury damage.

Even under those statutes which provide for a waiver as to medical examinations concerning the "condition in controversy", the inability to properly depose the plaintiff's physician severely limits the defense in its attempt to define and defend against the alleged injury. If the defendant had the right to depose both the plaintiff and the plaintiff's doctor or doctors, and such evidence be admissible at trial, the fairness of a trial which involves a medical issue would be greatly enhanced.

The case for a judicial finding of waiver arising from testimony at trial is even stronger than justification for a pre-trial waiver. The problem which arises by allowing the plaintiff to delay the issue of his medical condition is similar to discovery of government agents under the Jencks rule. The specious belief that the defendant is adequately protected by a recess examination of records and vigorous cross-examination belies the complications of medical testimony and the crucial undiscovered facts which come out for the first time during the direct examination. Certainly, the grounds for the privilege, confidentiality and adequate disclosure for treatment are no longer issues. Under our modern rules for discovery to help frame issues, provide the defense with the ability to adequately prepare its case, and to simplify and eliminate time consuming proof at trial, it seems highly inconsistent to allow the plaintiff to maintain a physician-patient privilege over a medical condition which has been discussed with family, friends and counsel under the guise of non-disclosure.

DISCUSSION OF THE THEORIES OF WAIVER

Any further discussion of the concept of waiver must be directed towards support of a theory of waiver which would occur by something less than an express consent or judicially acknowledged consent or judicially ordered examination. The concern with waiver in the context of personal injury actions stems from the reasons already stated, and because it represents one of the real inequitable extensions of statutory privilege to defeat the ends of fair and expeditious litigation.

47 See Wis. Stat. § 269.57 (1965) (judicially ordered examination of records or party); Wis. Stat. § 885.21 (1965) (physician-patient privilege) esp. par. (d).
The search of judicial decisions on waiver of the physician patient privilege has been both educational and disappointing. One of the early opinions which sought to define and limit the operation of the privilege was Epstein v. Pennsylvania R. Co., a 1913 decision of the Missouri Supreme Court, written as only Judges Lamm and Paris could do. These two giants of the bench remind me of Justices Eschweiler and the elder Fairchild, in that their opinions dissect and reconstitute the legal problems with a perception that marks their greatness as legal scholars. The Epstein opinion sets forth an excellent discussion of the factual situations in which waiver occurs.

The plaintiff, Epstein, had been injured in a train wreck and was suing the owner-company for personal injuries. Epstein had been treated by three physicians, Drs. Elston, Christie and Phelps. The plaintiff testified extensively as to his injuries and conversations with all three physicians, and the testimony of Dr. Elston was introduced by the defendant without objection by the plaintiff. The question before the Missouri Court was whether the testimony of the plaintiff or the testimony of one of three treating physicians was a waiver under the Missouri statute which contained no provision for waiver.

The Missouri court was quick to assert that waivers had been found judicially, either by express statements or by implication, and said as follows:

We have, as has every civilized court where the statute exists, already ingrafted by construction waivers upon it, which are now so well settled as not to admit of question or quibble; e.g., the patient may waive the privilege by calling his physician as a witness; the insured may waive the privilege in any subsequent action, by contract in the policy of insurance. Other waivers, not so well settled, but well decided and resting on the soundest logic and reasoning are: (a) That if a physician to a patient-party in an action be called in the first trial by the adverse side and be allowed to testify without objection, then such act is a waiver of objection in any subsequent trial . . . (b) if the adverse side examine the physician of plaintiff as to the fact of treatment, cross-examination by patient’s attorney as to the patient’s condition operates as a waiver . . . (c) by failing to object to the question, the answer to which would involve disclosures of privileged communications between the physician and himself, the patient waives the privilege . . . (d) by himself giving in evidence voluntarily the facts and nature of his ills and the communications had with and acts done by his physician treating him, the patient waives his privilege to object.48

Wisconsin had indicated that waiver as to medical reports of one treating physician is a waiver as to all such treating physician reports, and this might be used to imply that testimony by one of several physicians

47 250 Mo. 1, 156 S.W. 699 (1913).
48 Id. at 705.
PHYSICIAN-PATIENT PRIVILEGE

waives as to all. However, Wisconsin has not held that testimony by the plaintiff is a waiver.40

The Court in the Epstein case also quoted liberally from Wigmore concerning waivers as follows:

... a waiver is to be predicated, not only when the conduct indicates a plain intention to abandon the privilege, but also when the conduct (though not evincing that intention) places the claimant in such a position, with reference to the evidence, that it would be unfair and inconsistent to permit the retention of the privilege. It is not to be both a sword and a shield. ... That which was intended by the Legislature to hide, as with a veil, the secret and sacred confidences of the sickroom, should not be used as a snare for the judge and jury. There was a want of candor and fairness in such a course that at once challenges the sense of justice. It is a game of hide and seek, to be played by one side alone, to the utter helplessness and confusion of the other side. A sense of judicial responsibility forbids us giving our consent to a rule of law that, on its face, is so unfair and so unjust.50

Needless to say, the Missouri Court found that both the introduction of the medical issue by the plaintiff's testimony and the failure to object to defendant's use of one treating physician was a waiver of the privilege. These early concepts of waiver of the physician-patient privilege have changed little with the passage of time.51

Some of the doctrines of contracts applied to the various factual situations of waiver illustrate a method by which the concept of physician-patient privilege could become a workable mechanism in personal injury litigation. Waiver is discussed by Williston as being a very broad concept often referred to as the "intentional relinquishment of a known right." The use of the term "right" makes the definition inaccurate as some rights are not waivable, such as jurisdiction of the subject-matter, presumption of innocence and burden of proof in criminal matters. Williston's classifications of waiver include (1) the idea of substituted performance of an existing duty, which he places outside contractual waiver and into a concept of rescission; (2) election by a party who has a choice of several remedies or rights and adopts one, thereby destroying all others; (3) surrender of a legal right by or acting upon an express or implied promise; (4) promissory estoppel as a bar to a duty not yet due; (5) prevention or hindrance by another party and (6) laches. We can use the several categories (eliminating express surrender of a legal right) into a three-fold definition of waiver: (1) failure to act, (2) election and (3) estoppel. Probably the first category, failure to act, is the most difficult to define, as it includes

50 156 S.W. 707 (Mo. 1913).
51 Emory, Waiver of Patient's Privileges, 6 Wash. L. Rev. 71, 73 (1934).
52 5 Williston, Contracts, § 678, 238 (1961).
omissions by design or ignorance and also laches. Omissions by ignorance do not call for intent and knowledge, whereas omissions by design would. Election is certainly involved with intent and knowledge, and although outside the constitutional problem of coercion or voluntariness found in self-incrimination, it may well become incumbered with the special circumstances test applied to confessions such as age, intelligence, previous experience and volitional circumstances. Estoppel, on the other hand, does not require intent, as the party may not conceive of the detrimental reliance by his adversary, nor is knowledge of the right necessary, as it is the act creating the reliance which is judged and not the party’s understanding of a possible relinquishment of the privilege.

Our problem of finding a definitive judicial expression of waiver, in either contract or evidentiary law, stems from the language of the courts in using the one term “waiver” to express all these different acts or omissions, based on different necessary elements. Williston chose to restrict the meaning of waiver to the promissory estoppel situations in Restatement 90 and 297. However, evidentiary waiver can easily encompass failure to act, even though Williston’s choice is fully justified in contracts.54

Failure to act is most easily illustrated by the facts in the Epstein opinion. The defendant chose to place Epstein’s physician on the stand, and Epstein chose not to object to this testimony. The facts of the opinion do not, and could not state why this was done. In any event, a party has not exercised a right to claim a privilege, and this omission is deemed a waiver. This principle of failure to act or object to disclosure of the information can easily be extended to third parties present at the time of the confidential communications. This is consistent because the doctrine of failure to act does not contemplate proof of intention or knowledge, but arises from the negative circumstances.

Election55 applied to personal injury actions seems to justify holding that the plaintiff by commencing suit has “elected” to waive the benefit


54 5 WILLISTON, note 52 supra, §§ 680-681 at 266-268.

55 5 WILLISTON, note 52 supra, §§ 683-688 at 269-305.
of his physician-patient privilege by placing his injuries in issue. De-
stuction of the purpose of the statute, confidentiality, has either oc-
curred by the allegations of the complaint, or is imminent in the trial
to occur. The Supreme Court of Alaska found that institution of an
action for personal injuries waived the physician-patient privilege as
to pre-trial discovery depositions of plaintiff’s physicians but failed
to articulate what this theory of waiver was based upon. The Court im-
plied the justification to be fairness in pre-trial discovery procedures and
compared personal injury litigation to testamentary proceedings and
actions for life insurance benefits. The first liberalization of the Wiscon-
sin statute occurred with an amendment in 1927 which allows for con-
sensual waiver in actions by a personal representative or beneficiary of
an insurance policy in a cause of action which would have belonged to
the deceased holder of the privilege. The other exceptions to section
885.21 are absolute and concern homicide, lunacy, malpractice, voluntary
inmates of mental institutions seeking insurance and child abuse cases.
However, paragraph (d) which would apply to personal injury actions
uses the words “with the express consent of the patient” and this has
allowed a plaintiff to testify as to her injuries without waiving the
privilege.

It is suggested that the Wisconsin Supreme Court might weigh the
value of interpreting “express consent” to occur by the filing of suit
on two rationales: (1) That filing suit was an election done voluntarily
by plaintiff with intent and knowledge that his medical condition was
being placed in issue and discovery of his medical condition and history
was thereby assented to, both as to pre-trial disclosure and admissibility
at trial, or (2) that such conduct, if not express, was implied in fact
by the nature of the transaction, that is, it was an innate or inherent part
of the cause and prevention or hindrance as to disclosure simply frus-
trates the purpose of the litigation.

This same logic would be applied to life insurance application
waivers when the language used was not as extensive as found in Wilhelm v. Columbian Knights. Wilhelm had executed a waiver in the
following terms:

And for myself and for any person or persons accepting or ac-
quiring any interest in any benefit certificate issue on this applic-
ation, I hereby expressly waive any and all provisions of law now
existing or that may hereafter exist, preventing any physician
from disclosing any information acquired in attending me in a
professional capacity, or otherwise, or rendering him incompetent
as a witness in any way whatever, and I hereby consent and

56 See note 44 supra.
57 Cohodes v. Menominee & Marinette L. & T. Co., 149 Wis. 308, 135 N.W. 879
(1912).
58 149 Wis. 585, 588, 136 N.W. 160 (1912).
request that any such physician testify concerning my health and physical condition, past, present or future.\textsuperscript{59}

The Court was faced with an obvious case of fraudulent misrepresentations, as deceased-insured had been urged to make false statements in his application by his wife and the insurance agent. Although the court passed over the admissibility problem and the waiver by citing authority outside Wisconsin, the language seems to be grounded on an unwillingness of the Court to be a fourth member to the scheme to defraud. Waiver is not any more specifically attacked in \textit{Cretney v. Woodmen Accident Co.},\textsuperscript{60} which involved determination of coverage under an accidental death benefits provision since the deceased insured after the accident had been operated upon and the cause of death fixed as cancer of the stomach unconnected with the accident. The deceased had employed two treating physicians, and the report of one was admitted into evidence, and the issue was whether admission of one doctor's testimony was a waiver as to all others. The Court found the plaintiff had waived as to all treating physicians, but did not explain the legal theory upon which this was based, but relied largely upon a doctrine of fairness in the exercise of the physician-patient privilege.

One of the more recent cases involving waiver, its form and scope is \textit{Alexander v. Farmers Mut. Auto Ins. Co.}\textsuperscript{61} This case involved a personal injury plaintiff who had been injured in a car-truck collision, and had consulted more than one physician for treatment of her ailments. The second physician that she consulted submitted a report of his findings to the first doctor, and after suit was instituted, plaintiff executed a consent to inspection of medical records pursuant to section 269.46 (2). The Court did not say it was imposing the formalities of section 269.46 (2) upon section 885.21 (d) to satisfy the "Express consent of the patient", but it might be implied. The second issue was the priority of section 269.57 (1) over section 855.21 (d). Plaintiff, after execution of the written consent had steadfastly refused to allow the defendant to inspect the second doctor's report, and the trial court then issued two orders to compel execution of a written waiver or suffer dismissal of the action, and to both of which the plaintiff appealed. The Wisconsin Supreme Court was consistent in following the earlier cases of \textit{Thompson v. Roberts}\textsuperscript{62} and \textit{Leusink v. O'Donnell},\textsuperscript{63} and these prior interpretations of section 269.57 had opened the entire medical history of the patient to inspection. In these cases Wisconsin is struggling with the same problem found in \textit{FEDERAL RULE 35(b) (2)} which reads:

\textsuperscript{59} Id. at 588.
\textsuperscript{60} 196 Wis. 29, 219 N.W. 488 (1928).
\textsuperscript{61} 25 Wis. 2d 623, 131 N.W.2d 373 (1964).
\textsuperscript{62} 269 Wis. 472, 69 N.W.2d 482 (1955).
\textsuperscript{63} 257 Wis. 571, 44 N.W.2d 525 (1950).
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 of the same mental or physical condition.

Under the Preliminary Draft of the Proposed Amendments to the Federal Rules of Civil Procedure, Professor Rosenberg has not changed the language of Federal Rule 35(b)(2) but sought to alleviate the problem of copies to the examined party of earlier medical examinations and reports that were in the possession of the defendant by amending subparagraph (b)(1) to require the defendant for whom the court order is directed to furnish the plaintiff, or examined party, a copy of all earlier examinations which it has gained access to. However, the Alexander Case seems to imply that an express waiver by plaintiff was the ground upon which inspection was possible, but went to great lengths to justify a priority of 269.57 over the privilege of 885.21. The court orders are only supplementary to the express waiver already given, and were not specifically issued under the authority of section 269.57.

The problem of copies of earlier reports being furnished to the examined party does not seem to be covered under section 269.57, nor is there any implementation of deposition discovery against the plaintiff's physician. A third situation exists if we alter the facts of the Alexander case to make the report of Dr. Suckle one prepared by an expert in furtherance of instructions of plaintiff's attorney. Nothing apparently relates to the right of the defendant to conduct an adverse of physicians or other experts consulted, who may be protected under the work-product rule. Professor Conway in section 29.11 of his treatise on Civil Procedure indicates his belief that Wisconsin attorneys may be compelled to disclose opinions of medical experts under Tomek v. Farmers Mut. Automobile Ins. Co.64

This last illustration might be the expert opinion obtained by the plaintiff under circumstances which would not protect the information under the physician-patient privilege, but under which the attorney may claim such opinions as work-product. Here, an additional problem arises, which is really outside the area of evidentiary privilege, that is, the judicial administration value placed on the adversary process to insure the protection of attorney work-product from lazy lawyers. Certainly, the Wisconsin Court has attempted to articulate the attorney-client privilege in the Dudek case,65 and has defended the privilege on historical grounds. However, the un-articulated premise remains, which is so forcefully put in Justice Jackson's concurring opinion in the Hick-

64 268 Wis. 556, 68 N.W.2d 573 (1954).
65 State ex rel Dudek v. Circuit Court, 34 Wis. 2d 559, 603, 150 N.W.2d 387, 411 (1967).
man case, that no attorney should be forced to disclose information which, upon trial, he will be forced to testify upon directly, or by way of impeachment, adversely to his client.

Almost all of the other usual historical grounds for enforcement of the attorney-client privilege fall prey to some exception, and the Wisconsin Court fails to come to full grips with whether the attorney-client privilege is upheld on confidentiality of the attorney-client relationship, the principle of adversary litigation, or the fidelity of lawyer to his client. Although the first two grounds are often raised, it is probably only the latter which can survive the attacks for disclosure predicated upon hostility of adverse witnesses, unavailability, expense of obtaining the information or other grounds usually raised to defeat the attorney-client privilege.

As an aside, some of the same problems of failure to fully articulate the reasoning of the Court are found in criminal procedure cases dealing with constitutional rights and their waiver in pre-trial or trial stages of litigation. For example, the Wisconsin Court has taken great pains to set forth the steps to be taken by a trial judge in order to accept a plea of guilty and waiver of the right to counsel, and stated there in State ex rel Burnett v. Burke as follows:

We recognize that before accepting a plea of guilty the trial court must be careful not to require an accused to make admissions or to acknowledge previous crimes. However, by appropriate questions and simply phrased comments, it is feasible for the trial court to do the following:

1. To determine the extent of the defendant's education and general comprehension.
2. To establish the accused's understanding of the nature of the crime with which he is charged and the range of punishments which it carries.
3. To ascertain whether any promises or threats have been made to him in connection with his appearance, his refusal of counsel, and his proposed plea of guilty.
4. To alert the accused to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to a layman such as the accused.
5. To make sure that the defendant understands that if a pauper, counsel will be provided at no expense to him.
6. Finally, the trial judge should be certain that the record itself reflects the fact that careful consideration was given to the foregoing propositions.

By way of comparison, the Wisconsin Court has taken a very conservative view and limiting construction of Escobedo v. Illinois and judici-

67 22 Wis. 2d 486, 126 N.W.2d 91 (1963).
68 Id. at 494.
ally construed it applicable only to its exact fact situation. Moreover, no definitive case has explained at what stage the Miranda v. Arizona warning is due, although a liberal construction of Huebner v. State would seem to make it applicable to field investigations when an arrest in fact has occurred. Nor has any Court decided how such warnings are to be proven to avoid the swearing match situation which always arises in disputed confessions. If a voluntary, knowledgeable, intelligent waiver is necessary to waive counsel and plead guilty, then it would seem that "waiver" of the right to silence and the right to counsel in the Escobedo situation contemplates our definition of election and the Court's definition of "waiver" in the Burnett case. If "election" is the proper term which can be deduced from Burnett and Miranda, this means that a waiver of constitutional dimensions is a fully informed, voluntary and conscious choice by the person having the right. Choice implies knowledge on the part of the party having the right, and only the most limited standards have been adopted to guarantee that knowledge in fact existed in the mind of the defendant. The Holloway interpretation of Escobedo is more in the nature of failure to act as constituting a waiver. The amicus curie brief of the American Civil Liberties Union suggested that the defendant in an Escobedo situation should have a lawyer to consult with before exercising a waiver of any constitutional privileges. This concept is much more in line with judicial interpretations requiring full and adequate professional advice in implied consent dealing with medical malpractice.

The doctrine of fault or assumption of risk is raised in Perry v. John Hancock Mut. Life Ins. Co., in which the insured had represented herself to be a housewife, and under the terms of the policy such representations were made warranties. However, the district manager had visited the insured shortly before her death, and other testimony in the case made it apparent that the insured was a known prostitute running an establishment in the community. The Court refused to allow the insurance company to use these representations to defeat recovery, claiming the insurance company had waived the requirements. This is hardly an intentional act on part of the insurance company. Nor can it be found in the case that the insurance company had actual knowledge of the situation. A more accurate term would have been fault, in the neglect or refusal of the company to investigate, or the concept of assumption of risk which occurred after a reasonable period of coverage.

70 Holloway v. State, 32 Wis. 2d 559, 564, 146 N.W.2d 441 (1966).
72 33 Wis. 2d 505, 147 N.W.2d 646 (1966).
73 HALL & KAMISAR, MODERN CRIMINAL PROCEDURE 376 (2d ed. 1966).
If there is any comparison of loss of a right to claim rescission for material misrepresentation and waiver of a medical privilege, it would have to come in a comparison of the fact situations, and whether the failure of a party to claim a medical privilege was an election or choice made with knowledge that such a privilege exists. Williston characterizes the waiver by an insurer after knowledge of a condition breached as an election evidenced by acceptance of a subsequent premium. The Epstein case previously discussed represents an analogous situation in which the plaintiff with knowledge of her communications with the witness-physician, chose not to object to introduction of his testimony for defendant. Of course, insurance policies have been enforced on estoppel principles when the plaintiff-insured relied upon representations of the insurance company and did not seek other insurance.

Although the principle of election resulting from acts or conduct construed as a waiver of the physician-patient can be justified in order to expand pre-trial discovery and the doctrine of waiver by testifying at trial, yet a third concept exists to find a privilege waiver: the concept of estoppel.

Promissory estoppel as defined in Restatement 90 has the following elements: a promise by the party to be bound; that the promisor should reasonably anticipate the promise will induce action; that the injured party does in fact rely upon the promise to his substantial detriment; and that only enforcement of the promise will provide justice. Of course, for the purpose of defining a waiver of evidentiary privilege, we include acts or conduct within the term promise, and we must conclude that to do substantial justice means to afford discovery and/or admissibility of evidence.

Insurance application cases present a classic concept of estoppel since fraud or wilful misrepresentation is an element which induced the insurance company to issue to policy. Although many cases involving disputes over the physician-patient privilege in actions to collect insurance benefits are defeated on grounds of a right to recission, the real nature of the right exercised is based upon failure of a material condition of health. It might as easily be said that the insured is estopped from exercising a right to collect benefits by nondisclosure of medical information by reason of the fraud perpetrated on the insurance company.

The filing of a complaint in which personal injuries are alleged would be capable of construction within the contractual idea of inducing action on the part of the defendant, who must at his detriment, either pay the

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76 See Williston, note 52 supra § 753.
claimed damages or forego the expense of litigation. Modern expenses of investigation and the decision process to file an answer are no longer minimal items of cost. Even the most naive plaintiff must reasonably anticipate the defendant's necessary reaction to suit. Finally, casting upon the equitable principle of justice, as requiring enforcement of a promise, it becomes the usual problem of denying the wrongdoer a defense to enforcement of the injured party's rights. Institution of suit can thus be a justification for an estoppel theory to find a waiver of the physician-patient privilege in personal injury actions. To the criticism that an estoppel theory of pleading is a novel and unsupported idea, I would but call attention to the doctrines of failure to assert affirmative defenses, the election of remedies, requests of admissions of fact, failure to raise constitutional issues in the trial court, and the appellate rule on the necessity of a motion for new trial to preserve an objection to the sufficiency of the evidence. In all of these situations a party is deemed to have "waived" a procedural right, but in actuality is estopped from exercising a right at a later stage of the litigation.

No less important, any testimony at trial should afford the same logical conclusion, that the plaintiff's acts have caused a reliance by defendant, court and jury, and hence an estoppel to a claim or privilege to suppress disclosure as to the injury in issue and related medical information.

Of course, this idea of reliance overlaps into the failure to act concept of waiver. The same proposition is found in element (3) Wigmore, section 2380, allowing waiver of the privilege if injury to the relationship of the parties (that is, physician-patient) is not greater than the hindrance to the litigation. As our concept of estoppel is a narrow definition of promissory estoppel, the Wisconsin courts could construe the "express consent" provision of 885.21(d) to include situations in which an act of the plaintiff in commencing a personal injury action had caused defendant to change position in reliance on such allegations in the complaint. In other words, the literal interpretation of 885.21(d) would not control in those situations in which (1) the personal injury is put in issue by suit; (2) the nature of the plaintiff's asserted right inherently implies waiver in fact or waiver implied in law. Hence, we find the broad concept of "waiver" in need of a more explicit definition, and the tools for construction in analogous use of contractual concepts and the equitable principle of justice announced in both contract and evidence cases.

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78 See Restatement of Contracts, § 88, which indicates that in theory the promise is not enforced, but rather the law simply refuses to allow interposition of a defense by the wrongdoer.
81 Wigmore, Evidence, § 2196, 2380 (McNaughton ed. 1961).
The closest analogy of the principle of failure to act is the defective acceptance which Williston puts outside the doctrine of waiver as really constituting a counter-offer, as the waiver doctrine would give to the original offerer the ability to alternatively be bound to the contractual agreement at his option, and hence destroy the mutuality of obligation. There is a strong comparison to parties in litigation, as both have become bound under the existing system of rules of practice and procedure, and discovery by one side shouldn't be subject to arbitrary unilateral action. The real problem emerges quickly: The priority of the physician-patient privilege over broad rights to discovery and efficient judicial administration.

It must be conceded that the Wisconsin Court may have some problems in defining the boundaries of waiver of an evidentiary privilege if the Court adheres to a Justice Black literal interpretation, finding that "express consent" must always be a written waiver or judicial order. Nothing clearly emerges from the Alexander case, other than the Court has indicated that section 269.57 does not need historical interpretation, and that the waiver in the Alexander case was within the strict form required under section 269.46(2).

The failure to act, estoppel theory and election theories offer a suggested rationale to limit the physician-patient privilege to nonlitigated situations. A third problem remains to be decided on a case-by-case basis; that is, whether the waiver is to be found contained in the facts, and hence implied-in-fact from the nature of the transaction or the words and conduct of the parties, or implied-in-law as a necessary adjunct to discovery and judicial administration. These justifications remain the perogative of the appellate opinion writer seeking to rationalize his findings. They are not always clearly separated in contract cases, and they probably cannot be completely independent in evidentiary situations.

82 The most notable example of the literal construction imposed by Justice Black, at least on constitutional interpretation is found in Adamson v. California, 332 U.S. 46 (1947), but his general pattern of conservative analytical positivism has been demonstrated in other areas. See Hogan, The Philosphic Conflict In Criminal Due Process, Wis. Cont. Legal Ed. 103 (1967); Reich, Mr. Justice Black and the Living Constitution, 76 Harv. L. Rev. 673 (1963).