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THE PHYSICIAN-PATIENT PRIVILEGE: SOME REFLECTIONS

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Although no testimonial privilege existed at common law concerning confidences entrusted by a patient to his physicians, section 622.10 of the IOWA CODE provides that no physician may testify with respect to "any confidential communications properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office . . . ."[1] Similar statutes can be found in thirty-four other states.[2]

At the beginning of this discussion, it should be recognized that the privilege, if it exists at all, belongs to the patient and those claiming through him, and not to the doctor.[3] The doctor may indeed have an ethical duty to keep his patient's confidences to himself,[4] and when he does not, he may be liable to his patient;[5] but he has no legal privilege so to do.[6] If the patient does not object to the testimony of the doctor, the doctor is in the same position as any other witness.[7] Because of this understanding of the privilege,

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1 IOWA CODE § 622.10 (1962): "No practicing . . . physician, surgeon, or the stenographer or confidential clerk of any such person, who obtains information by reason of his employment . . . shall be allowed, in giving testimony, to disclose any confidential communication properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual practice or discipline. Such prohibition shall not apply to cases where the party in whose favor the same is made waives the rights conferred."

The statute has existed in Iowa in substantially the same form since 1851.

2 The statutes are collected in DEWITT, PRIVILEDGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT (1958) at pp. 447-471. The privilege has not been recognized in the absence of statute.

3 See 8 WIGMORE, EVIDENCE § 2386 (McNaughton Rev. 1961). See also Burgess v. Sims Drug Co., 114 Iowa 275, 86 N.W. 307 (1901).

4 The Hippocratic Oath prescribes: "Whatsoever things I see or hear concerning the life of men, in my attendance on the sick or even apart therefrom which ought not be noised abroad, I will keep silence thereon, counting such things to be as sacred secrets.

See Flannagan, *The Spirit of the Oath*, 57 Va. Med. Mo. 538 (1930). For a good discussion of the extent of the oath see Morrison v. Malmquist, 62 So. 2d 415 (Fla. 1953).

5 See, *e.g.*, Hammonds v. Aetna Cas. & Sur. Co., 237 F. Supp. 96 (N.D. Ohio 1965); Berry v. Meench, 8 Utah 2d 191, 331 P.2d 814, 73 A.L.R.2d 315 (1958); but *cf.*, Jacobs v. Cedar Rapids, 181 Iowa 407, 164 N.W. 891 (1917) ("There is no punishment provided for the physician who reveals what has been confided in him.").

6 See 8 WIGMORE, EVIDENCE § 2368 (McNaughton Rev. 1961) (hereinafter cited as WIGMORE); see also State v. Knight, 204 Iowa 819, 216 N.W. 104 (1927). The most interesting discussion of this rule is found in Mutual Life Ins. Co. v. Lamarche, 59 Que. Q.B. 510 (1935).

7 Wigmore puts it thusly: "Although . . . it is commonly the physician who as witness declines to answer, still the claim of privilege must formally be made,

and the rules with respect to waiver of the privilege, some consideration must be given to it in almost every personal injury lawsuit.

Although the privilege is also important in actions involving life, accident and health insurance policies,[8] in workmen's compensation proceedings,[9] in divorce actions,[10] in testamentary proceedings,[11] in malpractice cases,[12] and in some criminal prosecutions,[13] it is with respect to personal injury actions that the privilege has its every day application, and where the impact of the privilege upon the trial practice is most strongly felt. I therefore propose to limit these remarks to the privilege and its relationship to later class of lawsuits. I do so not only because of the fact that personal injury litigation is constantly increasing, but also because in dealing with other types of claims or proceedings one is presented with a variety of other considerations not for my purposes relevant. Thus, the existence of the privilege in an action under a life insurance policy may involve interpretation of waiver provisions contained in the policy itself;[14] in a malpractice action against a physician, the very confidence which is privileged is what is in issue,[15] and in criminal actions the sanctity of the protected confidence falls prey to the urge to solve the crime and punish the wrongdoer.[16] Such problems are beyond the extent of the presentation here; to the extent to which the remarks here apply, however, the author will gratefully accept the credit.

A. The Assigned Policy of the Privilege and its Application

The very nature of the privilege gives a patient, who also is a party to a personal injury action (a "claimant" as he is popularly called) an opportunity to shield from the court and jury, and, to a lesser extent, his adver-

in analogy to the other privileges, by the patient, if he is before the court, or by his attorney; if he is not, then technically he should be given an opportunity to claim before the examination is proceeded with." 8 WIGMORE, § 2386.

[8] See DEWITT, PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT, §§ 109-10 (1958) (hereinafter cited as DEWITT).

[9] DEWITT, § 76.

[10] *Cf.*, DEWITT, § 16.

[11] See DEWITT, § 71. In this connection the problem of waiver of the privilege after death is usually important. The consideration of this issue I leave to those who can understand why a person who is dead should be able to haunt us from the grave.

[12] The rule in malpractice cases is ordinarily that the patient waives the privilege by commencing the action; if the rule were otherwise, the physician would have very little way of defending himself. See DEWITT, § 73.

Ponder, if you will, how a physician can possibly sue his former patient for the value of his services, if the patient invokes the privilege. See DEWITT, § 74.

[13] Compare DEWITT, §§ 37 and 50 with State v. Tornquist, 254 Iowa 1135, 120 N.W.2d 483 (1963).

[14] An anticipatory waiver of the privilege is usually found either in the application blank of the policy itself; they are almost uniformly effective as a waiver of the privilege. The cases are collected in 86 A.L.R. 138, (1933). An illustration of the provision is as follows:

"I further waive for myself and beneficiaries the privileges and benefits of any and all laws which are now in force or may hereafter be enacted in regard to disqualifing any physician from testifying concerning any information obtained by him in a professional capacity."

It is difficult to understand how such provisions have stood up to an attack as being contrary to public policy. But see George v. Guarantee Mut. Life Ins. Co., 144 Neb. 285, 13 N.W.2d 176 (1944).

[15] See DEWITT § 73. For a case which WIGMORE terms a "mockery of justice", see Linscott v. Hughbanks, 140 Kan. 353, 37 P.2d 26 (1934), where the patient, in a malpractice suit, successfully prevented his defendant doctor from testifying that he did not treat the plaintiff at all.

[16] See State v. Tornquist, 254 Iowa 1135, 120 N.W. 2d 483 (1963).

sary, the facts, whether they be good or bad, concerning his physical or mental condition; the issue which is probably the most important one in the litigation. A claimant is able, however, to disclose those facts concerning his condition which are helpful to his cause, without losing the privilege entirely. Consequently, by careful manipulation of his medical evidence and his own testimony, a claimant is able to hide the bad and disclose only the good. When his adversary attempts to introduce the testimony of one the claimant's own doctors, or produce his medical records, the assertion of the privilege will effectively deny the trier of fact from hearing or seeing such evidence. Obviously, then, the privilege may, and certainly does in the great majority of cases where it is asserted, prevent the court and jury from the consideration of all the facts relevant to the matter in issue.[17] To this extent, the privilege frustrates the "search for truth" which is considered to be the primary function of a lawsuit's role in the settlement of disputes.[18]

The reason usually assigned for the sacrifice to the principle of a search for truth which the privilege involves, is that the existence of the privilege promotes public health by assuring the patient that his confidences will not be violated, even in a court of law, without his consent, thereby assuring that the patient will disclose all relevant matter concerning his condition to his physician.[19] In the words of the Iowa court:

> [the] manifest purpose . . . [of the privilege] . . . is to make consultation by a patient with his physician entirely confidential and free from anticipation or fear that this confidence will be broken by the examination of the physician . . . directly or indirectly as a witness in some legal proceedings . . . .[20]

A basic disagreement with this policy has led more able commentators than I to suggest that the privilege be abolished.[21] The battle has usually been fought on the issue whether or not the assigned policy, which is dubious at best, justifies suppression of relevant facts in a law suit, the most important issue of which is the condition of the patient to which the privilege relates. That suppression is permitted, if not downright encouraged, admits of little doubt. That it ought to be permitted is naive. However, this does not argue for complete abolition of the privilege. But, first, a discussion of how suppression results.

B. Extent of Privilege

Although the language of the statute refers only to communications to physicians, the privilege nonetheless extends to all information gained by the physician during the patient-privilege relationship.[22] Thus, a doctor's observations, his conclusions and opinions,[23] and even his statements to the

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[17] See Chaffee, *Privileged Communications: Is Justice Served or Obstructed By Closing the Doctor's Mouth on the Witness Stand,* 52 Yale L.J. 607 (1943); 8 Wigmore § 2291.

[18] *Id.*: see also Hickman v. Taylor, 329 U.S. 495 (1947).

[19] See 8 Wigmore § 2380a; DeWitt §§ 8-11.

[20] Howard v. Porter, 240 Iowa 153, 155, 35 N.W.2d 837, 838 (1949).

[21] The most outspoken critic is Wigmore. See 8 Wigmore § 2380a. See also DeWitt § 11; Chaffee, *Privileged Communications: Is Justice Served or Obstructed By Closing the Doctor's Mouth on the Witness Stand,* 52 Yale L.J. 607 (1943).

[22] DeWitt Chapter X. See also Cross v. Equitable Life Assur. Soc., 228 Iowa 800, 293 N.W. 464 (1940); Nelson v. Nederland Life Ins. Co., 110 Iowa 600, 81 N.W. 807 (1900).

[23] The cases are collected in Krislov, *Physician-Patient Privilege as Affected by Mode of Gaining Information,* 1 W. Res. L. Rev. 142 (1949); cf. Howard v. Porter,

patient are privileged.[24] The statute requires that the communication be related to "the office" of the physician; this no doubt means that the communications, to be privileged, must be germane or somehow related to treatment or examination.[25] As a practical matter, however, all that occurs between the doctor and his patient is subject to the claim of privilege, except perhaps the fact that the doctor did see the patient and the dates of such visit.

If a physician cannot be required to testify as to communications from or to his patient, the patient cannot be so required either.[26] The privilege would otherwise be nullified. Logically, if the physician and patient cannot be compelled to testify, third persons who are present for the purpose of assisting the doctor ought to be and are barred to the same extent as the doctor.[27] Similiarly, the privilege extends to the writings of the doctors, and his aides,[28] and also to hospital records,[29] charts, x-rays, and similar records,[30] all of which are likely to reveal the protected communications if introduced into evidence.

It also perhaps should be noted that the privilege is only a testimonial prohibition. If the doctor wishes to speak to all outside of a courtroom only his ethical duty pervents him from so doing; in any event the statute gives the patient no protection from extra-judicial utterances.[31]

C. Assertion of the Privilege

The fact that evidence, when offered, may be subject to exclusion on the grounds of privilege does not generally deprive a party of the right to offer it, and therefore the adverse party to a claimant in a personal injury action may call the claimant's doctors or offer his medical records if he so desires.[32] The question of whether or not the doctor will be permitted to testify as to matters which are privileged or whether the records will be admitted is for the claimant to decide, since he is the holder of the privilege.[33] Obviously, the doctor's testimony or such records may be relevant and the mere fact that such evidence is subject to a claim of privilege does not prevent the adversary from hoping that the privilege will be waived. If, however, the claimant is required to assert his privilege in the hearing of the jury it may seriously prejudice his cause, since it is only natural for a jury to wonder

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240 Iowa 153, 35 N.W.2d 837 (1949); Battis v. Chicago, R. I. & Pac. Ry., 124 Iowa 623, 100 N.W. 543 (1904).

24 See DeWitt § 47.

25 The specific language of the particular statute often controls. See, *e.g.*, Iowa Code § 622.10 (1962), the text of which is set forth at note 1, *supra*. See also, State v. Tornquist, 254 Iowa 1135, 120 N.W.2d 483 (1963); 8 Wigmore § 2382.

26 See Wigmore § 2386 and cases there collected; DeWitt § 17.

27 Iowa Code § 622.10 (1962) specifically bars stenographers and clerks. The bar probably extends to all persons whose presence is necessary. See DeWitt § 19.

28 DeWitt §§ 63 and 64; Newman v. Blom, 249 Iowa 836, 89 N.W.2d 349 (1958).

29 *Ibid.*

30 8 Wigmore § 2382. In this connection, there has been some dispute as to whether or not the privilege extends to medical records which are required to be kept by statute, as for instance death certificates, records at a state hospital, and birth certificates. There has been no general agreement in this area. Wigmore has collected the cases. *Id.*, at 2386, note 1.

31 See note 6, *supra*. The patient, however, may have a cause of action for the unauthorized release of such records or information.

32 DeWitt § 86.

33 See note 3, *supra;* DeWitt § 86.

why the very person with the most knowledge of the claimant's condition is being prevented by the claimant from relating what he knows. May then a defendant call the plaintiff's doctors and require the claimant to assert the privilege in the hearing of the jury? In *Johnson v. Kinney*,[34] the Iowa court settled the question by the rather broad holding that it was improper under any circumstances to require the holder of the privilege to claim it in the hearing of the jury. In the language of the court, "a party should not be prejudiced by claiming a right which the law gives him."[35] Despite the fact that ordinarily a party has no right to have his general objections to hearsay evidence, or other inadmissible evidence heard without the jury,[36] the *Kinney* rule is followed with regard to the medical privilege, and other privileges, by a large number of courts.[37]

In light of this rule, it is better practice to determine prior to trial whether or not the claimant intends to claim privilege with respect to a particular doctor or other privileged evidence, rather than requiring the doctor, the medical librarian or other witness to be present in the courtroom. The same suggestion can be made in connection with pre-trial depositions, since the Rules of Civil Procedure prevent inquiry into privileged matter.[38] Contrary practice is not only likely to result in an unhappy doctor or other witness who, when the privilege is asserted and sustained, has wasted his time, but also in a strong suggestion from the claimant that the sole reason for requiring the doctor to be present was to prejudice the jury.[39]

Obviously, not all of the testimony of a claimant's doctor is privileged, and consequently the doctor may be called and examined concerning non-privileged matter. Even the claimant's doctor ought to be permitted to testify as to the fact of treatment and the dates thereof;[40] he also perhaps can be qualified as an expert witness and opine in response to hypothetical questions.[41] Since the claimant may assert his claim to privilege outside the hearing of the jury, and will probably insist that the jury be excused before making his claim of privilege, better practice would seem to be to require the parties to take the matter up in chambers with the court prior to examination of a physician and to caution counsel to refrain from inquiry into priviliged area. Conduct or questioning intended to elicit a claim of privilege in the presence of the jury is probably improper and certainly risky,[42] and con-

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[34] 232 Iowa 1016, 7 N.W.2d 188 (1942).

[35] *Id.* at 1024, 7 N.W.2d at 191.

[36] DEWITT § 86.

[37] The cases are collected in 8 WIGMORE § 2386, note 5.

[38] Rule 143 of the IOWA R. CIV. P. (1962) provides in part as follows: "Subject to the provisions of Rule 141, the deponent may be examined regrading any matter not privileged . . . ." See also Rule 26 of the FED. R. CIV. P. which is substantially the same.

[39] *Cf.* Howard v. Porter, 240 Iowa 153, 35 N.W.2d 837 (1949); DEWITT § 100.

[40] Such matter is ordinarily not considered privileged. DEWITT § 47. These matters are not confidential, although the mere fact of dates of treatment, unaccompanied by testimony of what treatment, is likely to hurt the claimant's cause. The jury can only wonder, and probably will, what the treatment was.

[41] In Nelson v. Johnson, 41 Idaho 697, 243 Pac. 647 (1925) the plaintiff called his examining doctor and did not inquire as to treatment. Rather he propounded a hypothetical question setting forth certain injuries, and asked for the doctor's opinion on the basis of these facts. The court held that the privilege had not been waived. Why the defendant could not do the same is not clear—he should be able to do so.

[42] See Johnson v. Kinney, 232 Iowa 1016, 7 N.W.2d 188 (1942).

sequently when the examination approaches the privileged area, the jury ought to be excused and the matter gone into before the court.

In the event an objection to the doctor's testimony is sustained on the grounds of privilege, a problem arises with respect to preservation of record. If the privilege is for the purpose of keeping secret the proffered testimony, how indeed can an appropriate offer of proof be made and the substance of the offered matter disclosed to enable proper review of the question.[43] Despite the fact that the offer of proof, itself, reveals the very secrets that the privilege is designed to protect, such an offer is ordinarily required.[44] A statement of counsel as to what he intends to prove by the proffered evidence is probably sufficient; such statement, however, ought to be made outside the hearing of the jury.[45]

The doctor, himself, has no privilege, and consequently he is in no position to assert it.[46] Neither does the court, particularly if the claimant is in court or represented by counsel.[47] Generally, the objection to the introduction of evidence subject to a claim of privilege must be made at the time such evidence is offered.[48] The objection ought to be made upon the grounds of privilege; objections on the basis of relevancy, or materiality are not sufficient,[49] since the evidence is probably highly relevant and material. As we shall see, failure to assert the privilege at this time results in waiver of the privilege, at least with regard to the particular witness, if not to the entire privilege.[50]

D. Waiver of the Privilege

The Iowa privilege statute provides for waiver in the following language: "[the testimonial] prohibition shall not apply to cases where the party in whose favor the same is made waives the rights conferred."[51] Similar language is found in other states which have the privilege, and if the particular statute contains no express language with regard to waiver, the courts have engrafted waiver rules themselves.[52]

The policy of the statute, at least the one assigned to it by the decisions, is to protect the patient from disclosure of his secrets entrusted to his doctors. And since only the patient, himself, can waive the privilege, it seems to follow that once the patient reveals the secrets protected by the privilege, the reason for the privilege disappears. Likewise, if the patient either by presenting privileged testimony, or by failing to assert his privilege when he is

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43 See generally, DeWitt § 87.

44 *Ibid.*

45 This is an assumption made by the author in light of Johnson v. Kinney, *supra*, note 42. The cases do not arise often, probably because the defendant cannot find out because of the privilege the very evidence that he wishes to offer. This has given rise to a rule in Minnesota, that unless the claimant is willing to waive the privilege prior to the time of trial, his opponent may argue that an inference arises that the testimony or evidence which is privileged is adverse. See Nelson v. Ackerman, 246 Minn. 751, 83 N.W.2d 500 (1957).

46 See note 3, *supra*.

47 See 8 Wigmore § 2386.

48 See DeWitt § 130.

49 *Ibid.* The doctor is only incompetent to testify because of the privilege, not because the evidence has nothing to do with the issues of the lawsuit. Unfortunately, it is because of this that Wigmore and others feel that the statute should be abolished. See 8 Wigmore § 2380a.

50 See note 74, *infra*.

51 Iowa Code § 622.10 (1962), the text of which appears at note 1, *supra*.

52 See DeWitt § 106.

given the opportunity, lets his secrets be made public, the privilege no longer makes sense. It is common sense that once the patient publishes the confidences protected by the statute, he should not thereafter be permitted to insist upon the silence which the privilege affords him.[53] The subject of waiver has not been resolved by this approach, and indeed the patient is permitted to speak or to keep silence, about as he wishes. Thus, there exists the variancies illustrated in the following discussion.

1. Express Waiver

If the claimant expressly authorizes or permits his adversary to examine his physicians or his medical records at the time of trial, the privilege is, of course, waived.[54] But when the claimant authorizes either his doctor or the hospital to release information concerning his condition, such release is not treated as a waiver.[55] Such a rule can be justified on the basis that a waiver, to be effective, must be a voluntary relinquishment of a known right. The claimant is probably unaware of his privilege, and consequently there has been no relinquishment of a *known* right.[56] Ordinarily, however, the problem has been resolved by a close reading of the particular statute involved, with the consequent holding that the privilege only extends to testimony, to which there has been no waiver. Thus, a pre-trial waiver is ordinarily treated as merely releasing the doctor or the hospital from the ethical duty to keep silent. Placed on these grounds, the position illustrated by these holdings is hard to justify; if the patient is willing that his confidences be violated before trial, there seems little reason to protect such public confidences at the time of trial. Some courts so hold.

2. Waiver by Conduct

Although the logic presently escapes me, it is clear that the bringing of a personal injury action in which the condition, mental or physical, of the claimant is in issue does not amount to a waiver of the privilege.[57] This

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[53] It must be clear enough that in most cases, the claimant has no real thought that his ailments are secret. He discusses them with all who will listen, he shows his scars and he even joins clubs that are organized for the purpose of comparing notes and discussing common problems of the members, all of whom have similar maladys; witness the Rosebud clubs, as they are called, the members of which all have had colestomys. Indeed, group therapy is a medically recognized method of treating certain types of disease.

Agreed, that in cases of veneral disease, abortion and perhaps a few other matters, the patient is indeed worried about secrecy of his condition. If, however, the patient is later charged with a crime in which such a condition is an issue, which he is likely to be because of the nature of the condition, the law is likely to force disclosure. In this connection, see DEWITT §§ 9, 50.

To permit secrecy in cases in which even the patient does not care must indeed seem a surprise to those not familiar with the system. Indeed, it seems strange to some who are so familiar.

[54] See DEWITT § 108.

[55] See DEWITT § 138; Ost v. Ulring, 207 Minn. 500, 292 N.W. 297 (1940). The Minnesota statute expressly provides that "no oral or written waiver of the privilege hereinbefore created shall have any binding force or effect except that the same be made upon the trial or examination where the evidence is offered or received." MINN. STAT. § 595.02 (1963).

[56] See Donovan v. Donovan, 231 Iowa 14, 300 N.W. 656 (1941). A review of the United States Supreme Court decisions in the last twenty years with respect to waiver of the right to counsel is sufficient to convince anyone that this is the definition of waiver as applied to at least this right. *Cf.*, BEANY, THE RIGHT TO COUNSEL IN AMERICAN COURTS, C. 7 (1955).

[57] See 8 WIGMORE § 2389. Rule 27(4) of the Uniform Rules of Evidence (1953)

rule seems particularly repugnant when the defendant's position is that there has been no injury at all, and he has one of the plaintiff's own doctors to prove it. Nonetheless, it is the law (with perhaps the exception of malpractice actions against the doctor)[58] and perhaps the best way of treating the privilege, short of abolishing it altogether.

3. Calling Physicians

It seems only logical that if the claimant calls a doctor who has treated or examined him as a witness concerning the condition for which the claimant has formerly been examined or treated, he waives his privilege.[59] In the words of Wigmore, "no other reasoning could maintain to the contrary."[60] The waiver, in such case, ought to and does extend[61] to all admissible facts learned by the doctor in the course of the treatment of the claimant; it is not restricted to the particular injury for which claim is being made, and extends to other ailments and injuries even though there has been no testimony by the witness in this regard.[62] The waiver ought and probably does extend to such records as the doctor has chosen to base his testimony upon.[63] But to call one doctor is not a waiver as to testimony by other doctors who have treated the claimant for the same injury, unless such doctors have consulted with and were engaged in a unified course of treatment with the doctor who has testified.[64]

Wigmore was wrong; there is reasoning to the contrary.[65] The justification offered for this position is that the claimant has a privilege with respect to communications to his physicians. The waiver with regard to the communications to one doctor cannot be a waiver with respect to an entirely separate communication to another doctor. Doctor shopping, or the practice of a claimant going from one specialist to another until a willing and imaginative doctor is found,[66] is thus encouraged, and is sufficient reason alone for abolition of this rule. Moreover, once the secret of the claimant's condition is made public, there is no reason to protect the patient's disclosures, unless the real policy of the statute is to protect from publication only the evidence concerning the claimants' condition harmful to his claim or contradictory of it.

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and Rule 223(3) of the Model Code of Evidence deny the application of the privilege in such case.

58 See note 13, *supra*.

59 That this does not constitute a waiver even amazes the doctors. See SHARTEL AND PLANT, THE LAW OF MEDICAL PRACTICE §§ 7-16 (1959).

60 8 WIGMORE § 2390.

61 See DEWITT § 131.

62 *Cf.* Nugent v. Cudahy Packing Co., 126 Iowa 517, 102 N.W. 442 (1905) (cross examination held no waiver on the facts); See also 8 WIGMORE § 2390.

63 See DEWITT § 64.

64 See, *e.g.*, Baxter v. Cedar Rapids, 103 Iowa 599, 72 N.W. 790 (1897); Person v. Butts, 224 Iowa 376, 276 N.W. 64 (1937); Johnson v. Kinney, 232 Iowa 1016, 1023, 7 N.W.2d 188, 192 (1942) ("[A]ppellee did not waive his privilege as to Dr. Jones' evidence by offering testimony of the two other doctors who had treated him on different occasions.") The latest case applying the rule is Brown v. Guiter, 128 N.W. 2d 896 (Iowa 1964).

65 See cases collected in 8 WIGMORE § 2390, note 3.

66 A description of the practice can be found in SHARTEL AND PLANT, THE LAW OF MEDICAL PRACTICE, §§ 7-13, 7-15 (1959). I suppose that the privilege can also be blamed for giving rise to the so-called "plaintiff's doctors," who always testify on behalf of the claimant, and their corresponding brethren, the "defendant's doctors," who always testify on behalf of insurers.

4. Waiver by Discovery

The privilege, of course, extends to pre-trial discovery proceedings, and may be waived during depositions[67] or in answers to interrogatories,[68] in the same manner as at the time of trial. In this connection, it should be noted that Rule 133 of the Iowa Rules of Civil Procedure,[69] which is similar to the federal rule[70] from whence it came,[71] and which relates to adverse mental and physical examination, expressly provides for waiver as to "the testimony of any physician . . . ." concerning a condition for which the claimant has been examined pursuant to the rule and a report of such examination requested by and furnished to the claimant or his counsel. The waiver, under this Rule, extends to all physicians,[72] and is therefore contrary, at least in theory to the rule that there is no waiver by calling one doctor as to other physicians unless such physicians are engaged in a unified course of treatment of the claimant with the doctor called as a witness.

5. Failing to Object

As has been indicated before, the claim of privilege must be asserted to claim the protection of the statute. If the claimant fails to object, he is said to have waived the privilege.[73] At best, this is not a waiver. The most the patient does by failure to object is to consent to the evidence or testimony offered, and consequently it has been rather consistently held that the waiver involved does not extend beyond the particular condition, or doctor, or records, to which the privilege is not asserted.[74]

The same rule is not applied to cross examination—at least in Iowa. It is clear that privileged matter elicited upon cross examination does not result in a waiver of the privilege.[75] Since such cross examination is clearly objectionable,[76] and probably highly improper,[77] and thus excludable by proper objection by the claimant, the failure to object ought to result in the same waiver which would obtain if the failure came during direct examination. It should make little difference how the confidence is exposed, as long

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[67] See, *e.g.,* Vermillion v. Prudential Ins. Co., 230 Mo. App. 993, 93 S.W.2d 45 (1936); DeWitt § 129.

[68] *Cf.* DEWITT §§ 129 and 142.

[69] The rule provides as follows:

"(a) The party thus examined shall be furnished on his request, with a copy of the examiner's findings and conclusions, stated in detail. He shall thereafter, deliver to the examining party a like report of the prior or subsequent findings of any other physician who examines him on the same subject.

(b) If the party examined thus requests and obtains the examiner's report or takes the examiner's deposition, he waives any privilege in that action or any other involving the same controversey, regarding the testimony of any physician or other person as to the condition for which the examination was ordered. . . ."

[70] See FED. R. CIV. P. 35 (1962).

[71] Compare the two.

[72] See Lindsay v. Prince, 8 F.R.D. 233 (N.D. Ohio 1948).

[73] See, *e.g.* State v. Koenig, 240 Iowa 592, 36 N.W.2d 765 (1949); Burgess v. Sims Drug Co., 114 Iowa 275, 86 N.W. 307 (1901).

[74] See Johnson v. Kinney, 232 Iowa 1016, 7 N.W.2d 188 (1942); *cf.* DEWITT § 130, and cases therein collected.

[75] See, *e.g.,* Johnson v. Kinney, *supra,* note 74; see also Donovan v. Donovan, 321 Iowa 14, 300 N.W. 656 (1941) and cases therein cited.

[76] See, *e.g.,* Burgess v. Sims Drug Co. 114 Iowa 275, 86 N.W. 307 (1901); DEWITT § 139.

[77] If such cross examination is done expressly for the purpose of eliciting a claim of privilege in front of the jury, the rule of Johnson v. Kinney, which was discussed at page 87 herein, applies. The practice, however, probably is permitted. See Burgess v. Sims Drug Co., *supra,* note 76.

as the claimant can prevent disclosure, and if the real basis for the rule is the claimant's tacit consent, the distinction is illusory. The contrary position is illustrated as follows:

> No doubt, under this privilege, the . . . patient may refuse to answer on cross examination when asked with reference to the privileged communications. But we are not willing to hold that the failure to insist on this privilege makes the testimony which he may give on cross examination voluntary, in such sense as to constitute a waiver of his privilege with reference to the communications to his . . . physician. In the case before us it is evident that any objection of the witness . . . with reference [to the privilege] cannot be treated as a waiver of the privilege for it is essentially not voluntary. If counsel saw fit, on cross examination to inquire into this matter, he must be bound by the answer, and cannot afterwards claim that the witness, by answering without objection, voluntarily waived the privilege.[78]

This position defies analysis. If the claimant is worried that his claim of privilege may subject him to prejudice, he may assert the privilege outside of the hearing of the jury.[79] And if the court here is suggesting that there can be no impeachment with respect to privileged matter, elicited upon cross examination, the very purpose of cross examination disappears.[80]

6. Challenging the Claimant to Waive

It is improper to ask a claimant on cross examination whether or not he will waive his privilege.[81] Even if the demand is not objected to and the claimant agrees to do so, there probably is no waiver if he subsequently changes his mind.[82]

7. Testimony of the Claimant

Once the claimant himself takes the stand and testifies in regard to his condition, the policy of the statute assigned to it by the decisions disappears. Nonetheless the question of whether a claimant waives the privilege by so doing depends upon how much he says. If the claimant merely relates that fact that he was injured and the general nature of his condition, there is no waiver.[83] If he goes into too much detail, however, the privilege is waived.[84] Thus, if the testimony of the claimant relates to the treatment received from his physician, his stay in the hospital or his relationship with the doctors, the privilege is waived.[85]

If the claimant testifies that he was in good health prior to the injury or ailment for which he is now seeking compensation, there is no real reason to afford him the protection of the statute. He certainly cannot be embarrassed

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[78] 114 Iowa at 280, 86 N.W. 307 at 310.

[79] Johnson v. Kinney, 232 Iowa 1016, 7 N.W.2d 188 (1942).

[80] *Cf.*, 8 WIGMORE § 2380a.

[81] See McConnell v. Osage, 80 Iowa 293, 303, 45 N.W. 550, 553 (1890). While the plaintiff was being cross examined she was asked: "Are you willing that the physicians who have treated you for the past ten or fifteen years may disclose to this jury any conversation you made to them, at the times they treated you, in reference to your condition?" The Court held that such examination was improper.

[82] See Donovan v. Donovan, 231 Iowa 14, 300 N.W. 656 (1941).

[83] See, *e.g.*, Pearson v. Butts, 224 Iowa 376, 276 N.W. 65 (1938); Walmer-Roberts v. Hennessey, 191 Iowa 86, 181 N.W. 898 (1921); McConnell v. Osage, 80 Iowa 293, 45 N.W. 550 (1890); DEWITT § 133.

[84] See Woods v. Lisbon, 150 Iowa 433, 130 N.W. 372. See also DEWITT § 134.

[85] See, *e.g.*, Reed v. Rex Fuel Co., 160 Iowa 510, 141 N.W. 1056 (1911); State v. Bennett, 137 Iowa 427, 110 N.W. 150 (1908); See also 8 WIGMORE § 2389 and cases collected at note 7.

by the disclosure of his physician that he was in good health, and if the facts are contrary, it should be held that he waived the protection of the statute by testifying as to his condition. The claimant's testimony as to his condition prior to the accident is extremely important; it goes to the very issue of causation. The cases are in conflict;[86] Iowa adheres to the rule that there is no waiver under such circumstances.[87] The rule cannot be defended on any grounds other than undue solicitude for the claimant's privacy which no longer exists. But again, the court has protected the communication to the physician; the assigned policy of the statute is forgotten.

8. Waiver and Bradshaw v. Iowa Methodist Hospital

A startling decision concerning waiver which is fairly bound to cause continuing difficulty is the 1962 decision of the Court in *Bradshaw v. Iowa Methodist Hospital*.[88] Mr. Bradshaw was claiming that he had injured his back when he fell off a chair in the defendant's hospital. Bradshaw apparently testified on direct examination after the accident that he left the City of Des Moines and went to Chicago, and while there was uncomfortable and suffered pain, spent four days in a hospital there, and then returned to Des Moines. Upon cross examination, defendant inquired as to the plaintiff's hospitalization in Chicago. Plaintiff promptly asserted his privilege, and cross examination concerning the matter was not allowed. Subsequently, defendant offered the hospital records of plaintiff's Chicago hospital stay, and the claim of privilege made to these was also sustained. The hospital records (which the defendant had somehow obtained) contained evidence that plaintiff's injury had been sustained in a manner inconsistent with his present claim, and were therefore extremely damaging to his cause.

On appeal, the court, in reversing, referred to prior case law which had established the rule "that where the testimony of a witness on direct examination makes a prima facie case, or creates a presumption or inference as to the existence of a fact not directly testified to, the witness may be cross examined to rebut such prima facie proof, presumption or inference."[89] This rule was then applied to Bradshaw thus:

> We think the correct rule as applied to a waiver . . . is that where the patient on direct examination, as his own witness, testified as to certain facts such as would bring into effect the [foregoing] rule, such testimony creates a waiver of the [privilege] so as to permit competent evidence by his adversary, either by cross examination or by his own witness, to rebut or refute the presumption or inference left by the patient's direct testimony.[90]

Since the "inference" created by the plaintiff's testimony was that his Chicago hospital stay was due to his injury which occured in defendant's hospital, under the rule just announced, cross examination was permissible to rebut such inference, as were the introductions of the hospital records.

The application of the *Bradshaw* rule is unclear. The basis of the rule is simply the basic Iowa rule with respect to the extent of cross examination;

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[86] The cases are collected in DEWITT § 136.

[87] See, *e.g.*, Walmer-Roberts v. Hennessey, 191 Iowa 86, 181 N.W. 798 (1921); McConnell v. Osage, 80 Iowa 293, 45 N.W. 550 (1890) (disclosure on cross examination).

[88] 253 Iowa 1360, 115 N.W.2d 816 (1962).

[89] *Id.* at 1363, 115 N.W.2d at 817-18, quoting from Eno v. Adair County Mutual Ins. Assn., 229 Iowa 249, 257, 294 N.W. 323, 327 (1940).

[90] *Id.* at 1363-64, 115 N.W.2d at 818.

it had never previously been applied to privilege cases.[91] In addition, the general force of most of the prior decisions of the court was the protection of communications. The rule here applied opens the door to all communications, as long as such communications are somewise related to the patients direct testimony.

Under the *Bradshaw* holding, if the claimant testifies as to his good health prior to the occurrence which gives rise to his present injuries, it certainly is part of his prima facie case, and there is waiver. If, indeed, the claimant testifies with respect to his condition at all, there is waiver, since this raises the inference that such a condition exists. *Bradshaw* gives no indication of the extent to the waiver involved. Does such waiver extend to all of the claimant's doctors? There is no reason why it should not, except that fact that the Court has held that a waiver as to one physician does not amount to waiver as to other physicians not engaged in a unified course of treatment with respect to the doctor who is called and examined.[92]

If the *Bradshaw* rule is applied broadly, it certainly is a step in the right direction. It is difficult to imagine what testimony presented by the claimant himself relating to his condition will not amount to a waiver of the privilege. Therefore, the claimant will no longer be able to hide the harmful facts about his condition by asserting the privilege. Once he takes the stand, his secrets are out, the bad with the good.

E. Failure to Produce

Because of the natural expectation that every litigant will present the strongest and best evidence available in support of his claim, it has become a well established rule of evidence that, without satisfactory explanation, the failure of a party to produce relevant evidence which is peculiarly within his control or possession, and which he would naturally be expected to produce if favorable to him, gives rise to an inference that its production would have resulted unfavorably to him.[93]

In personal injury cases, which probably form the vast majority of the cases in which the medical privilege is asserted, it is the treating and examining physicians and the hospital records that are the strongest evidence of the existence of the injury and are the very evidence which the claimant ought naturally be expected to produce. However, and as strange as it seems, it is commonplace in many personal injury actions that the doctors who treated or examined the claimant do not testify and that the hospital records are not produced. Rather, the claimant relies upon his own testimony, or that of lay witnesses to establish the existence of the injury. Usually, a

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[91] The rule is stated in Eno v. Adair County Mutual Assn., 229 Iowa 249, 294 N.W. 323 (1940).

The opinion also indicated that the plaintiff had waived his privilege with respect to the hospital records by calling a physician who testified as to the treatment received while at the hospital. Bradshaw v. Iowa Methodist Hospital, 253 Iowa 1360, at 1365, 115 N.W.2d. 816, at 818 (1962). It is clear from the opinion that the Court did not rely upon this as a basis for their holding.

[92] See note 64, *supra*.

[93] See, *e.g.*, 10 R.C.L., *Evidence* § 32 (1915); 2 WIGMORE § 285; DEWITT § 92.

[94] See DEWITT § 93. There is even one case in which the plaintiff's treating physician was called and was examined hypothetically; cross examination as to treatment was not permitted since the physician had not testified with respect to treatment. See Nelson v. Johnson, 41 Idaho 697, 243 Pac. 647 (1925).

physician, who has never professionally treated the claimant is called and in response to hypothetical questions testifies as to the extent and seriousness of the claimed injury, and to the fact that it was caused by the accident or occurrence for which the defendant is sought to be held accountable.[94] Common sense dictates that the inference is strong that the testimony or evidence of the claimant's own doctors is adverse to the claimants' position when he fails to produce them. It is only natural that the claimant would use the testimony which is strongest, and it is not unreasonable to assume that a claimant is willing that the true facts concerning his condition be revealed. Although the decisions in the several states are in conflict,[95] it is clear that in Iowa that no such adverse inference may be drawn, and consequently counsel may not argue to the jury that they draw the inference,[96] nor is the defendant entitled to an instruction from the court permitting the jury to draw such inference.[97] In fact, Iowa has approved an instruction directing the jury not to speculate as to the testimony that would have been given by a witness had he been called and testified.[98]

Such rule pertains, however, solely to those cases in which the failure to call the witness is protected by the medical privilege.[99] Although no decision has so held, it appears to be the practice, and the Court has at least inferentially approved such an inference when doctors or records with respect to which privilege has been waived are not produced.[100]

Summary

The decisional law concerning the privilege has given the privilege a broad interpretation to "effectuate its purpose."[101] This approach explains in part the Court's holding that no adverse inference may be drawn from assertion of the privilege, since the language of the statute itself says nothing with respect to the subject of inference. But whatever the reason for this holding, and for the rules as to express or implied waiver, the results

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[95] The cases are collected in DEWITT, §§ 92-99.

[96] See Howard v. Porter, 240 Iowa 153, 35 N.W.2d 837 (1949).

[97] See, *e.g.*, Laur v. Banning, 152 Iowa 99, 131 N.W. 783 (1911).

[98] *Ibid.*

[99] *Cf.* Brown v. Guiter, 128 N.W.2d 896 (Iowa 1964).

[100] *Id.* at 902. But, queare, if the privilege is waived, is not the defendant in position to call the witness. In this connection see Hemminghaus v. Ferguson, 359 Mo. 476, 215 S.W.2d 481 (1948), where the court held that a defendant is not in a position to call plaintiff's physician when the privilege is waived at the time of trial. The holding seems correct, since the right to call a witness certainly also should include the right to discuss what he is likely to say before trial.

[101] See DEWITT § 10. The statute is in derogation of the common law and ordinarily one would think that its construction would therefore be strict. But see IOWA CODE § 4.2. (1962) ("The rule of common law that statutes in derogation thereof shall be strictly construed has no application to this code. Its provisions . . . shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice.") Undue emphasis has been given to the first phrase of this section; that last one seems to have been forgotten, at least with respect to the medical privilege. Compare Howard v. Porter, 240 Iowa 153, 35 N.W.2d 837 (1949) (improper to argue failure to call doctors raises an adverse inference) with State v. Ferguson, 226 Iowa 361, 283 N.W. 917 (1939) (prosecutor may argue the that the failure of the defendant to take the stand in a criminal action is evidence of his guilt). But see Griffin v. California, 33 U.S.L. WEEK 4382 (U.S. Apr. 28, 1965), holding that comment upon the failure of a defendant to take the stand in his own behalf, in a criminal prosecution, is a violation of his Fifth Amendment right against self-incrimination, which right is guaranteed to him in state court prosecutions by the Fourteenth Amendment. State v. Ferguson has been, in effect, overruled by this decision.

are consistent, and a claimant is permitted to hide the bad, in line with the policy of the statute to encourage patients to tell all to their physicians.

I seriously doubt that this is or ought to be the policy of the statute. There is no evidence, other than conjecture, that patients in England[102] or in those states which do not have the privilege are any less free with their confidences or receive any worse treatment because of it. Besides, a physician's ethical duty, incorporated in his oath,[103] is just as certain to convince those who would otherwise be hesitant of disclosing their inner most confidences to a doctor. More consistent with common sense, if not logic, is the notion that the privilege reflects the outrage all of us generate when a doctor acts against the interest of his own patient with regard to confidences which he has been entrusted with. It is against this notion that the suppression of the truth which will follow if the privilege is sustained, ought to be measured, rather than against the illusory impetus to recalcitrant patients to disclose their all.

But enough of this; the statute exists and I am not about to suggest that at least the latter reason is not sufficient to justify its existence. Moreover, the doctor himself, in light of today's medical-legal relationships, is entitled to some protection from the prying eyes of lawyers and others interested in the physical condition of one of his patients. As a practical matter the privilege gives him this protection, at least until the patient is willing that others know of his condition. At this time, however, there is ordinarily enough information concerning the patient's condition, consisting of written reports and what have you, to satisfy the attorney's or insurer's natural curiosity. When the available information is coupled with the legal profession's general regard for the attitude of the doctor, prompted by a healthy respect of how important his services can be at some later time, the doctor enjoys the collateral benefits of the privilege, even though it is not his to assert or to claim.[104]

Conclusion

What has disturbed both the critics and the courts concerning the privilege is that it is most certainly used to suppress facts concerning the condition of the claimant which, if revealed, would not violate either the supposed or any other purposes assigned to the privilege. The privilege, in practice, is used to hide in secrecy the facts concerning the claimant's condition which he believes to be harmful to his cause, although he is more than willing that the most minute details of his condition be related if they are likely to produce a higher award. It is true, of course, and the supporters of the privilege are quick to point out, that some matters concerning a patient's condition have little relevance or importance to the issues of the law suit at hand. With respect to these matters, no one really cares that the privilege be invoked; no harm is done to the merits of the controversy, and the patient, himself, may indeed be saved a little untoward embarrassment. But in reality, the reason for assertion of the privilege is not to save the patient from embarrassment because of his condition; the privilege is asserted to suppress relevant evidence which is harmful to his claim.

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102 See DEWITT § 4.
103 See note 4, *supra*.
104 See note 3, *supra*.

The *Bradshaw* decision goes far, at least in principle, in destroying this situation. But what is needed is some method by which it is possible to determine when the privilege is being asserted to defeat the interest of truth; and yet give to the claimant the protection for which the statute is enacted. *Bradshaw,* in theory, may force a claimant to keep off the stand entirely, or at least not to testify with regard to his condition at all, in order to claim the protection of the statute.. Alhough, as a practical matter, claimants will be unwilling to do this, they are thus faced with a waiver of the privilege. In any event, the Court has finally come to grips with the problem; by forcing the claimant either to waive the privilege, or to not disclose anything, the patient has his choice of telling all or hiding all.

The same result can be accomplished by merely permitting an inference that the evidence which the claimant fails to present concerning his condition is adverse to his cause. Such an inference is not only strong under the proper circumstances, it is likely to require the claimant to waive his privilege to prevent such inference.

Even in those cases in which the inference may be indulged, there are obvious limitations. Thus, if the evidence which was not produced was merely cumulative, or corroborative, or was equally available to both parties, no such inference should arise.[105] Also, the claimant ought to be permitted to explain his failure to produce the matter with regard to which he has a privilege before his is subjected to an adverse inference of its content.[106]

By imposing the burden of showing the proper foundation on the defendant, before the inference can be argued, or the jury instructed concerning it, solicitude can be shown to the claimant's interests of privacy; but once such showing is made, the inference is there and the defendant ought to be permitted to argue it.

The details of this procedure can be best left to case by case development; other states have adopted similar practices for guide.[107] The proposal is therefore one of concept only, but the concept is one of fairness to the litigants, with all due regard to a claimant's confidences, at least to the extent to which such confidences deserve protection.

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[105] See DeWitt §§ 94-96.

[106] *Ibid.*

[107] The Minnesota procedure is represented by Dubois v. Clark, 253 Minn. 556, 560, 93 N.W.2d 533, 536, note 1 (1958) ("This does not mean that a party examined by a physician and a number of medical specialists, as consultants, who has waived his privilege as to the examining physician should be required to call all such consulting specialists and waive his privilege as to the testimony of each in order to avoid the risk of comment by opposing counsel as to the adverse inference to be drawn from their failure to be called. Nor should opposing counsel be compelled to subpoena them to ascertain if the privilege as to their respective findings is to be exercised before being entitled to comment on the adverse inference arising from the failure to present their testimony. To avoid such difficulties and the expense involved in subpoenaing such witnesses, the party examined should take timely measures outside the jury's presence to advise the court and opposing counsel as to their names; the reason for not calling them; and that any privilege with respect to their findings was to be waived. Thereafter no comment as to the adverse inferences to be drawn because of their absence should be permitted. Should the court and opposing party be not thus advised and such witnesses be not called, it would then be proper for opposing counsel to make such comment without the necessity of first placing such witnessess on the stand to ascertain whether the privilege as to their testimony was to be exercised.")

DES MOINES PRE-TRIAL RELEASE PROJECT 1964-1965

Martin R. Dunn*
Thomas W. George**

Judges, lawyers and laymen have long been dissatisfied with the inequities of traditional bail bond procedures. Several years ago a New York industrialist became interested in the problem and established the Vera Foundation. The Vera Foundation working with the New York University School of Law initiated a project designed "to gather data on the operation of the bail system and to explore the use of release on one's own recognizance . . . ."[1] The hypothesis the experiment hoped to prove was ". . . that more persons can successfully be released on parole if verified information concerning their (the defendants') character and roots in the community is available to the court at the time of bail determination."[2] The experiment was an astounding success and interested parties in Des Moines decided to test the hypothesis here.

The Des Moines Pre-Trial Release Project concluded its first year in operation on February 3, 1965. The Project acted as an investigator and reporter for the Des Moines District and Municipal Courts and some Justice of the Peace Courts by interviewing the criminally accused and putting information so acquired at the disposal of the judge so that he could determine whether or not an accused should be released by signing his own bond or be released on his own recognizance.

Once a person was charged, a Drake University law student interviewed him in the jail or courtroom. Persons accused of non-bailable offenses, sex crimes against minors, narcotics charges (other than illegal possession of prescription drugs), robbery with aggravation and intoxication (with some exceptions) were excluded. No one was required to submit to an interview; it was completely voluntary.

The interviewer, by use of a special questionnaire,[3] discovered relevant facts in relation to the defendant's residence, job record, family ties, and prior criminal record. The information acquired was transposed into points. The number of points obtained by the defendant is a relatively accurate reflection of this individual's degree of stability and community ties. This in turn reflects the likelihood of the accused appearing in court on the set date. If the accused received sufficient points then a formal recommendation was made to the presiding judge.[4] The judge then made the final decision as to whether or not the defendant would be released on his own recognizance.

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1 Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U.L. Rev. 67 (1963).

2 *Id.* at 68.

3 *Id.* at 93 has an appendix containing an example of a questionnaire used for such purposes.

4 The Project is allowed to release individuals from 4:00 p.m. to 8:00 a.m. without approval of a judge, where the person is charged with a misdemeanor and otherwise qualifies for release.