



When Does a Plaintiff Waive Physician-Patient Privilege?

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his article briefly describes the Oregon physician-patient privilege and the circumstances in which a plaintiff might be considered to waive the privilege.

The Physician-Patient Privilege

Oregon's physician-patient privilege was first codified in 1862. Originally, and for the next 120 years or so, it prohibited a physician from disclosing any information without the consent of the patient. A patient was deemed to consent to disclosure in civil litigation only when he or she offered himself or herself as a witness at trial. Former ORS 40.040(2).

Over time the emphasis shifted from a prohibition on the physician's disclosure of any information, to a privilege held by the patient. OEC 504-1. This change is traceable to Oregon's adoption of the evidence code and rules patterned after proposed Federal Rule of Evidence 504. Although that Rule was never adopted after it was approved by the United States Supreme Court, it became the model for Oregon's Rules of Evidence 504 and 504-1. Legislative Commentary to OEC 504-1, reprinted in Kirkpatrick, Oregon Evidence (3rd ed 1996) at 245-46.

Today OEC 504-1 provides that any confidential communication between a physician and a patient made for the purposes of diagnosis or treatment is privileged from disclosure in any civil action. This includes not only direct communication, but notes, observations, laboratory and other medical records intended to convey information. Legislative Commentary to OEC 504-1 at 245-46.

The physician-patient privilege is

a creature of statute. Indeed, while at common law the revelation of a plaintiff's confidence by a physician may be "breach of honor and great indiscretion," a physician was bound to provide otherwise confidential information if asked in court. *State ex rel. Grimm v. Ashmanskas*, 298 Or 206, 209, 690 P2d 1063 (1984), quoting *Duchess of Kingston's Trial*, 20 How.St.Trials 573 (1776). The privilege is recognized as contrary to the "favored policy" of pretrial discovery of all relevant evidence. *E.g. Nielson v. Bryson*, 257 Or 179, 185, 477 P2d 714 (1970).

Waiver of the Privilege

In most American jurisdictions, legislatures recognized the unfairness of permitting a patient to sue for damages for injuries, while limiting a defendant's right to discovery through the physician-patient privilege. In most states, a patient waives physician-patient privilege by filing a lawsuit arising from his or her injuries. See *e.g.* McCormick, Evidence (5th ed 2003) Section 103 ("Happily today the once prevalent rule that no waiver results from raising a claim or defense has been widely reversed by statute.")

Not so in Oregon. Here, in a typical personal injury case, defendant may not depose plaintiff's treating physician because filing a lawsuit does not waive privilege. Today, waiver of the physician-patient and other statutory privileges is governed by OEC 511. That Rule expands the circumstances in which a patient may waive privilege, but specifically does not go as far as the majority of American jurisdictions. A patient waives privilege when he or she:

[v]oluntarily discloses or consents to disclosure of any significant part of the matter or communication. . . . Voluntary disclosure does not occur with the mere commencement of litigation, or, in the case of a deposition taken for the purpose of perpetuating testimony, until the offering of the deposition as evidence.

OEC 511 (emphasis added).

Unless the plaintiff voluntarily takes a deposition of his or her own physician, no waiver results from plaintiff himself or herself being deposed. *State ex rel. Grimm*, 298 Or at 213, n3. See also *State ex rel. Calley v. Olsen*, 271 Or 369, 532 P2d 230 (1975).

Still, there is one area where defendants have broad access to physician-patient communications. Beginning in 1974, as part of the statute authorizing independent medical exams, Oregon law required personal injury plaintiffs to give defendants access to pertinent medical records that were previously held to be privileged. *Nielson*, 257 Or at 184-85. Originally codified at ORS 44.620, this provision became part of the Rules of Civil Procedure in 1978. ORCP 44C.

Unfortunately, the Supreme Court decided that the document production requirements of ORS 44.620 did not signal a retreat from the physician-patient privilege and did not give defendants the right to depose a treating physician. In *Woosley v. Dunning*, 268 Or 233, 242-43, 520 P2d 340 (1974), even though the court concluded that the new law did not apply to the underlying facts, it held:

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Thus, after considering our decision in *Nielson*, the Oregon legislature chose to continue the prohibition against the taking of depositions of a plaintiff's physician without the consent of the plaintiff . . . except in the event that the physician failed or refused to make a detailed report.

Woosley, 268 Or at 243.

Options For Defense Counsel

So what is a defense lawyer who wants to depose a treating physician to do? Look for waiver wherever you can find it.

The Oregon Supreme Court has been clear that the lawyer-client privilege is waived during a perpetuation deposition unless proper objection is made to a question inquiring into a privileged area. *State ex rel. OHSU v. Haas*, 325 Or 492, 513, 942 P2d 261 (1997). And the Court of Appeals has held that the voluntary production of a privileged communication during a deposition, in response to a discovery request, waives privilege. *Goldsborough v. Eagle Crest Partners, Ltd.*, 105 Or App 499, 502, 805 P2d 723 (1991).

In fact, the Legislative Commentary to OEC 511 points out that while the mere commencement of litigation is not waiver, "[t]hereafter . . . waiver can occur during discovery or at trial, either on direct or cross examination." Legislative Commentary to OEC 511, citing McCormick, Evidence § 93 (2d ed 1972). Kirkpatrick also concludes that if a patient voluntarily discloses privileged communications during a deposition, "a stronger argument exists for finding waiver of the privilege." Kirkpatrick, Oregon Evidence (3rd ed 1996) at 281. Absent at least an objection by plaintiff's counsel, plaintiff may waive the privilege if he or she gives deposition testimony concerning confidential communications with a physician.

Although it is a much tougher argument, the *Woosley* decision may also be open to challenge. The court's discussion of ORS 44.620 appears to be *dicta*, coming after it had already determined that the statute did not apply to defendant's request to depose a treating physician in a wrongful death action.

Beyond that, *Woosley* interprets the privilege set out in former ORS 40.040, which in 1981 was superseded by OEC 504-1 and OEC 511. Under the evidence code, only *confidential* information is privileged and a patient can waive privilege through *voluntary disclosure or consent* to disclosure. OEC 504-1 and OEC 511. Thus, the legislature both restricted the scope of the privilege and broadened the circumstances in which it might be waived.

Perhaps most importantly, there is no exception to OEC 511's waiver for the production of medical records required by ORCP 44C. It may not be too much of a stretch to conclude that every patient who sues for personal injury knows, or ought to know, that the defendant is entitled to review the relevant medical records. And it is not too far beyond that to conclude that under those circumstances, the patient who voluntarily sues a defendant could be deemed to voluntarily disclose or consent to disclosure of confidential information, thereby waiving the physician-patient privilege.

Conclusion

As with expert discovery and interrogatories, Oregon is a jurisdiction of contradiction when it comes to discovery of a plaintiff's medical condition. Yet there may be some chinks in plaintiffs' armor. Perhaps the interplay of OEC 504-1, OEC 511, ORCP 44 and Supreme Court precedent offers an opportunity to test Oregon's traditional restriction on the discovery of relevant evidence. ☺

1 The privilege does not attach in workers' compensation or criminal matters. See *Booth v. Tektronix, Inc.*, 312 Or 463, 823 P2d 402 (1991).