

April 1935

Are Physicians Exempt From Testifying?

William S. John

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Civil Procedure Commons](#), [Medical Jurisprudence Commons](#), and the [Medical Specialties Commons](#)

Recommended Citation

William S. John, *Are Physicians Exempt From Testifying?*, 41 W. Va. L. Rev. (1935).

Available at: <https://researchrepository.wvu.edu/wvlr/vol41/iss3/18>

This Bench and Bar is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.

ARE PHYSICIANS EXEMPT FROM TESTIFYING?

Is a physician or surgeon, under the common law, or under the statutes of West Virginia, exempt from testifying as to professional communications of patients?

The scope of this question makes it unnecessary to hark back to the origin of the doctrine of "privileged communications". The inadmissibility of certain kinds of evidence denominated "privileged", rests on grounds of public policy. Greater mischief may result from admission than from rejection of such evidence.¹ As illustrations, the interest of government in state secrets, and in the detection and prevention of crime, imposes secrecy as to communications whose revelation may tend to work injury to the public. "The proper administration of the law ordinarily forbids requiring an officer to disclose his source of information regarding a crime."² Just respect for the family relation bars disclosure of communications between husband and wife. The professional relation between attorney and client seals the lips of the attorney, out of regard for the interest of justice and to facilitate its dispatch. The church affords another immunity; for even in the Middle Ages, the Roman and the French laws permitted the guilty conscience to seek consolation in confession, without fear of revelation of guilt in the courts. Under the milder British rule, the common law merely excused the clergy from presenting the offender. But in all other respects, says Greenleaf, the clergyman, "is left to the full operation of the rules of the common law, by which he is bound to testify in such cases as any other person when duly summoned."

"Neither is this protection extended to *medical persons*, in regard to information which they have acquired confidentially, by attending in their professional characters."³

Throughout West Virginia it is not unusual to hear physicians and surgeons assert immunity from testifying as to professional communications received by them in the treatment of patients. A doctor often declines to become a witness, on the ground that the facts revealed to him by a patient are "privileged communications" which he cannot reveal except by his patient's consent. From the vantage point of such exemption, expert witnesses bargain for fees. Suits for damages under insurance policies,

¹ 1 GREENLEAF ON EVIDENCE (16th ed. 1899) § 236.

² State v. Paun, 109 W. Va. 606, 155 S. E. 656 (1930).

³ GREENLEAF ON EVIDENCE § 247a.

and actions for automobile accidents and for injuries received by employees in industry make special examination and consultation by experts desirable as protection against collusion. And this precautionary measure has been pursued under the assumption that the secrets of professional disclosures are protected by rules governing the admission of evidence.

Long before the Legislature of West Virginia passed any statute relating to the exemption of medical men, New York adopted a provision in these words:

“No person duly authorized to practice physic or surgery, shall be allowed to disclose any information which he may have acquired in attending a patient in a confidential character”.⁴

In construing this statute, the Supreme Court of New York said, “The privilege is undoubtedly that of the party (patient), and not that of the witness (doctor)”.⁵

The Virginia Codes of 1849 and 1860 allow no exemption to physicians and surgeons. Mayo, after speaking of the strict rule against disclosures by attorneys, says:

“This privilege does not extend to other professional persons. All other professional men, whether clergymen, physicians or surgeons, are bound to disclose the matters confided to them”.⁶

The West Virginia Code of 1868 forbade the examination of one spouse against the other, except in actions or suits between them; but it enumerated no exemptions to or inhibitions against either attorneys or doctors testifying as to professional secrets.

But in 1863, for the first time, the Legislature of West Virginia embodied in the justices' code⁷ (since designated as Chapter 50 of the General Code), the following classes of persons as incompetent to testify: (1) persons of unsound mind and children; (2) husband and wife as to communications between them; (3) attorney and client as to professional secrets; and (4) ministers, clergymen and priests concerning confessions.

Again the Legislature of 1872-3 recodified the laws relating to justices and constables, but omitted the four above-mentioned classes incompetent to testify.⁸ The Legislature of 1881 again revised the justices' code and restored the provision of 1863, with

⁴ N. Y. REV. STAT. v. 2, p. 406.

⁵ Johnson v. *Id.*, 14 Wend. 636 (N. Y. 1835).

⁶ MAYO'S GUIDE (1860) 252.

⁷ W. Va. Acts 1863, p. 206, § 157.

⁸ W. Va. Acts 1872-3, c. 226.

the qualification that an attorney may testify with his client's consent; and to these it added a fifth incompetent class, namely:

"A physician or surgeon, without his patient's consent, concerning any communication made to him by his patient, which was necessary to enable him to prescribe and treat the case."⁹

These acts, neither in title nor body, express the object or purpose of making them applicable in any cases except those before justices of the peace. The Constitution, Article VI, Section 30, requires that the object of every act "shall be expressed in the title". The title of the Act of 1872-3 reads: "An act to reduce into one the laws defining the jurisdiction, powers and duties of justices of the peace and constables." And the Act of 1881 is equally limited in purpose to the powers and procedure before justices.

In similar language the exemption accorded to the medical profession has been carried into later codes, now appearing as Section 10, Article 6, of Chapter 50 of the Official Code.

In the statute excluding testimony as to personal transactions with a decedent, there is a proviso allowing a physician who is a defendant in a wrongful death action to testify as to medicine or treatment given, but not as to conversation with the deceased.¹⁰ Another statute of minor importance makes a practitioner of chiropractic incompetent as a medical witness in personal injury cases.¹¹ Except for these enactments, which plainly have small bearing upon the subject of privileged communications, the Code is silent with respect to extending the privilege to communications with physicians for purposes of litigation in tribunals other than magistrates' courts. Since communications with other classes of persons are privileged, the class under consideration must be taken to be denied that treatment by implication. No authority has been discovered, which would shake this conclusion.

Thus it appears that, in cases originating before a justice or on appeal, a medical man may invoke the rule exonerating him from testifying, only upon proof of his patient's consent; but no common law rule or statute of the state may be invoked in any other case, whether with or without his patient's consent. Unless the evidence sought to be adduced is inadmissible on recognized grounds touching public policy or public morals or the adminis-

⁹ W. Va. Acts 1881, c. 8, § 107.

¹⁰ W. VA. REV. CODE (1931) c. 57, art. 3, § 1. For a detailed criticism of this statute with a suggested revision see *supra* p. — *et. seq.*

¹¹ W. VA. REV. CODE (1931) c. 57, art. 3, § 8.

tration of justice, a physician or surgeon may be called to testify in response to the same sort of process, and in the same manner and extent as to facts, as ordinary witnesses. But in the capacity of an expert, he may bargain and dictate his own terms before engaging in consultation, diagnosis or treatment.

WILLIAM S. JOHN.

SHOULD THE EVIDENCE IN A CRIMINAL CASE BE
GIVEN TO THE PUBLIC IN ADVANCE OF
THE TRIAL BEFORE A JURY?

The slogan carried on the first page of one of the country's leading newspapers, *viz*: "All the News That's Fit to Print", suggests some comments upon the growing practice among newspapers all over the country when a major crime has been committed, of sensational proportions, printing, for the general public to read, every clue and every item of evidence in detail, with the names and addresses of the witnesses, as rapidly as gathered by investigating officers, in advance of the trial of the case by a jury—a practice, in my humble opinion, highly detrimental to the public interest.

There are some reasons supporting this view. In the first place, let us suppose that no one has been arrested and charged with the crime. The result is to acquaint the guilty party, whoever he may be, with all the clues and evidence gathered by detectives and law enforcement officers, with the names and addresses of the witnesses who are expected to testify in court for the State.

It must be assumed that the guilty party will see and read the newspapers and so become fully informed of the progress made towards his detection and arrest. He is thus fully prepared, either to disappear, entailing great expense and delay in his ultimate arrest, and seriously jeopardizing the chances of his ultimate conviction, by the delay, or he may conclude to stand his ground and set about the business of destroying the State's case, by threatening or bribing material witnesses and so causing them to disappear, or develop at the trial such lapses of memory as to destroy the value of their testimony; or, if all other means fail, a very material witness may be "taken for a ride." All that has been said above, applies with equal force to one who has been arrested and indicted and who has been able to procure bail.