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ATTORNEYS WILL AGREE that an injustice occurs whenever one party prevails in a court of law and another's rights are defeated but for knowledge of the relevant facts. Further, most will agree that some such injustice is inevitable in any judicial system, all such systems being subject to some degree of error. No one can deny the professional responsibility of all attorneys to work actively toward the reduction of such error. As numerous commentators have pointed out, injustice may also result from delay. It is equally the responsibility of the Bar to work toward the alleviation of that source of injustice.

Pre-trial or in-trial procedures which help to separate the meritorious case from the non-meritorious case, which advance early evaluation of liability and/or damages, or assist both sides in arriving at a realistic appraisal of any cause, benefit the speedy and true administration of justice. While a courtroom trial is the formalized procedure for the production of facts necessary to arrive at necessary judicial conclusions, most litigation is, of course, concluded by settlement or compromise without trial. This is only possible after both sides have sufficient facts to realistically evaluate their positions. Frequently, many such facts have been in the exclusive possession of one party for a great time before trial, yet they are often not produced until a trial is underway.

This discussion is to suggest two possible reforms in Ohio discovery procedure which, it is believed, would contribute to an alleviation of both sources of possible injustice. One suggestion refers primarily to the issue of liability; the other primarily to the issue of damages.

A. Proposed that the Names and Addresses of Fact Witnesses Be Subject to Discovery

The present law in Ohio denies either side of a lawsuit the right to discover the names and locations of fact-witnesses known

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to the opposite party.[1] The idea here seems to be that each side of a lawsuit is on its own, to make its own investigation, and to develop its own case; that each side's case is inviolate from discovery by the other. In logic and in justice, however, fact-witnesses should *belong* to *neither* party. We can all agree that a game-of-wits theory of a lawsuit belongs to a different era. The rule of nondisclosure of the names and addresses of fact-witnesses is a hold-over from a prior era; it follows from the old chancery rule which protected a party's own case from discovery by the other side.[2] The rule itself may have merit, but non-disclosure of the names and locations of *fact*-witnesses does not follow from the rule as witnesses are not part of anyone's case. They are neutral and non-partisan historians of events.

Any rule of nondisclosure must sustain the burden of proving that it fosters the better administration of justice. No other argument has merit.

The Federal Rules of Civil Procedure (Rule 26) expressly provide for discovery of the identity and location of "persons having knowledge of relevant facts."[3] Rule 30 (d) grants the court discretion to limit abuses of this discovery procedure.[4] Thus, the Federal Courts have abandoned the hide-and-seek practice of law in this respect. It is submitted that Ohio, in justice, ought to follow that lead. Justice does not thrive on surprise and, in fact, surprise is frequently a serious abuse of the judicial quest for truth.

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[1] Ex parte Schoepf, 74 Ohio St. 1 (1906); In re Beger, 13 O. App. 206; In re Shoup, 154 Ohio St. 221 (1956), two cases cited.

[2] Ex parte Schoepf, 74 Ohio St. 1 (1906); 6 Wigmore, § 1856c.

[3] Rule 26(b) Scope of Examination. Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claims or defense of the examining party or to the claim or defense of any party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

[4] Rule 30(d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of any party, or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b) . . .

But, for what valid purpose can the names of fact-witnesses be withheld by either side? That is the question to be answered by those who support the rule.

This is not a proposal to share the full products of a party's investigation, such as statements taken from witnesses, or photographs of the scene of an accident, etc., that in practice might allow one party to let the other do all the work and thereby sustain the expense. This proposal is limited to the names and addresses of witnesses to the facts relevant to the cause.

Let me cite some hypothetical examples. Automobile intersection cases often turn on the fact of which automobile has the green light. Attorneys, before trial, frequently claim to have an eye witness that the light was green for their client. Not at all infrequently an insurance company will instruct defense counsel to settle the matter if that witness is produced and can so testify. Yet, the witness will frequently *not* be produced until trial. If the witness exists, and if the witness can in fact so testify, what proper purpose is served by a refusal to divulge the witness' name and address?[5]

Another example arises from the rule stated in *Furman v. Central Park Plaza*,[6] decided in the Common Pleas Court of Cuyahoga County. That decision required disclosure by the plaintiff of the names and addresses of those persons who were accompanying plaintiff at the time of the accident. Disclosure was compelled on the theory that the data were part of the *res gestae*. Regardless of the rationale given by the court, the rule is a salutory one which cannot work any improper burden on either party—assuming that party has a meritorious cause. Yet, in a recent case still pending, the same court refused to require disclosure of the names of two friends who were crossing the street with plaintiff at the time he was struck by defendant's automobile. These persons exist and are known to plaintiff; they were necessarily witnesses to the facts of the accident. What possible rationale can be used to support nondisclosure of their testimony? The court gave no reason, it merely applied the rule.

In the Federal Court system, this withholding of the names and addresses of fact-witnesses does not happen.[7] Can it truly be said that justice is less well served in the federal system? The

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[5] See Judge Taft in Shaw v. Ohio Edison, 9 Ohio Dec. Rep. 809, 812 (1887) for Ohio authority that this rule is not based on reason.

[6] 46 O. Ops. 106, 65 O. L. A. 172 (1951).

[7] See 4 Moore, Fed. Rules 26.19.

Ohio cases give no substantial reason for denying disclosure of the names and addresses of persons known to know relevant facts of a case. The courts merely state the rule. The rule without the reason, we believe, is meaningless and its bald application does not contribute to the stature of those courts which apply it.

It seems to us that attorneys for either side have a right to demand a reason for this rule and it seems, further, that the courts have a fundamental responsibility to justify application of the rule if they are going to continue to apply it. If there are good reasons for preventing disclosure of the facts known to fact-witnesses, then it is the clear responsibility of those persons advocating retention of the present rule to step forward and present their position. To date there is nothing in the case law or in the treatise law which adequately supports application of the rule of nondisclosure and, as mentioned above, any rule of nondisclosure carries the burden of proving that it fosters better administration of justice. This rule not only has failed to carry that burden of proof; it is a burden to justice itself. It should be discarded.

B. Proposed that the Patient-Physician Privilege Obstructs the Administration of Justice

Today a plaintiff in Ohio can file a suit for personal injury arising out of accident or illness and allege perfect health prior to the accident or illness. The plaintiff may have been under a doctor's care for the very same difficulty or illness for years prior to the accident, but the fact that he was under a doctor's care can be withheld from the defendant and can be withheld from the trier of facts entirely at the plaintiff's will.[8] Plaintiff can use his medical testimony if it supports his case; he can exclude it from the eyes of the court and the other party at will. Such a rule enables a party to prevail in a court of law, and to defeat another's right in that court, by the intentional withholding of relevant facts.

Of the wealth of modern comment and discussion directed toward this privilege, no example has been found which supports its existence.

The privilege seems to have the aura of Blackstone about it, that it is inviolate for its age, that it is in the long tradition of the

[8] For a general review of the State of Ohio law on the subject, see Stewart, Physician-Patient Privilege in Ohio, 8 Clev.-Mar. L. R. 444 (1959), 8 Wigmore, Evid. § 2380 (3rd Ed., 1940).

courts. But no such reverence is warranted. Even today, 17 of the states have no such privilege.[9] England has never had the privilege.[10] There was no such common law privilege.[11] The privilege has existed in Ohio only since 1921. Certainly, if the matter is to be reexamined, it need not be approached as one of the pillars of Anglo-Saxon jurisprudence.

Wigmore sets up four canons which a communication privilege must satisfy.[12]

1. That the communication actually originates in a confidence.

2. That the inviolatability of that confidence is vital to the attainment of the purposes of a particular relation (here of physician and patient).

3. That the relation is one that should be fostered.

4. That the expected injury to the relation through disclosure is greater than the expected benefits of disclosure to justice.

The physician-patient privilege violates *all* of these canons excepting only No. 3. As Wigmore points out, a negative response to any *one* leaves the privilege without support.

The most common argument in support of this privilege is that the injured and the ill will be deterred from medical help if their doctor can be compelled to disclose their confidences. Certain it is that this argument has no foundation in fact; the argument violates common sense and common experience. We know that generations of patients and physicians had no such privilege and we know, for example, that there is no such privilege in any of the New England states today.[13] Can it truly be said that medical practice in New England is affected thereby, or that a different relationship exists between a Boston physician and patient and a Cleveland physician and his patient? Do patients tell doctors more in Ohio than in Massachusetts? Do patients in Ohio feel free to express confidences today which they

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[9] See Chaffee, Is Justice Served by Closing the Doctor's Mouth, 52 Yale L. J. 607 (1943) wherein (note, page 610) Harpman v. Devine, 133 Ohio St. 1 (1937) is used as an illustration of the "absurdity of the solicitude for the patient's privilege."

[10] *Ibid.*

[11] State v. Martin, 182 N. C. 846 (1921).

[12] 8 Wigmore, § 2380a, page 811.

[13] See Chaffee, *supra,* note 9.

would not have expressed before 1921, and does this freedom foster better medical care? Clearly this argument falls.

A second argument is that a physician's testimony might be embarrassing to the plaintiff-patient. Here again we meet the obstacle of common sense. The patient's shyness did not prevent a public allegation of injury, illness, or physical condition when suit was filed. It is common sense that only rare medical conditions today are subject to any public disapproval. The average plaintiff has told his entire neighborhood and his fellow employees of his difficulty and in great detail—but he claims privileges in court. Thus, the patient-plaintiff can withhold this information from that body most clearly entitled to know it.

There is another argument based upon the physician's honor and the physician's duty to the patient. First of all, the privilege belongs to the *patient* and not to the physician.[14] Can it be said that a physician's honor is violated or a physician's duty less well fulfilled in those states that do not grant this privilege? Again, can it be said that there is an indiscretion on the part of the physician when he is compelled involuntarily to disclose data in court or on deposition. This is neither a matter of idle gossip nor a voluntary act on his part. Further, one might seriously question whether or not a doctor has a professional obligation to protect the medical history of a patient who instigates a public investigation of his physical condition by filing a lawsuit.

A final argument is sometimes put forward that a claim for one disease should not open the plaintiff's doctor to examination on a variety of physical conditions.[15] But we have adequate procedural rules of relevancy and materiality.

It is submitted that no positive purpose is served, and more importantly that injustice is created when the facts necessary to an appraisal of damages suffered by a plaintiff are put in that plaintiff's own pocket to produce at his discretion or to withhold at will.

It may be argued that medical testimony is frequently produced in court eventually and that the plaintiff frequently waives his privilege at the time of trial. This is true, but it is not by any means always true. Much medical testimony at trial is expert testimony.[16] Physicians are retained for that sole purpose and

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[14] State v. Osborne, 25 O. L. A. 543 (1937), stating a helpful rule.

[15] Baker v. Industrial Commission, 135 Ohio St. 491 (1939).

[16] McMillen v. Industrial Commission, 34 O. L. A. 435 (1941).

while such testimony is not protected by privilege, that testimony in no way waives the privilege a plaintiff has to bar his personal physician from the stand.

Conclusion

While there are abuses and will continue to be abuses, cases will be settled when the liability picture comes into focus and when the true nature of plaintiff's injury is honestly disclosed. No party can be expected to purchase a pig in a poke. It is essential that both sides have a realistic appraisal of the facts before entering into serious negotiation.

While neither side can, for obvious reasons, be expected to disclose witnesses names unilaterally today, both sides should be compelled to do so, and a court rule would do the trick. There is no statute forbidding it. As to the privilege, statutory change is obviously required.

Where rules of procedure exist which have nothing to commend them and which clearly operate against even-handed justice, those rules require review. The professional obligation of attorneys is to support their demise and the judicial obligation of courts is to foster the quest of truth by summarily disposing of such rules.