



Personal Injury and Workers' Compensation Court Litigation: Privilege Considerations

JEDIDIAH I. BRESSMAN

BRESSMAN LAW

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Patient-Physician Privilege

What is Attorney-Client Privilege?

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Practical Considerations

Who is Jedidiah Bressman?



- Married to Michelle Bressman
- Father to a 7-month-old daughter, Zipporah.
- OHSAA Wrestling Referee
- Former Radio DJ for 97.3 WMEE in Fort Wayne, Indiana.
- Graduate of The Ohio State University Moritz College of Law.
- Former AAG at the Ohio Attorney General's Office
- Former Judicial Staff Attorney on the 10th District Court of Appeals
- Attorney at Bressman Law specializing in Personal Injury and BWC court appeals.

Attorney-Client Privilege



WHAT IS ATTORNEY-
CLIENT PRIVILEGE?



WHEN DOES IT
APPLY?



EXAMPLES



POTENTIAL PITFALLS



OBJECTIONS

What is Attorney-Client Privilege?

R.C. 2317.02(A)

A communication made to the attorney by a client in that relation or concerning the attorney's advice to a client.

EXCEPTION: The attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client.

EXCEPTION: If the client voluntarily reveals the substance of attorney-client communications in a nonprivileged context or is to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject.



Attorney-Client Privilege in Bad Faith, Fraud, or Criminal Misconduct situations

A communication made to the attorney by a client in that relationship or the attorney's advice to a client.

EXCEPTION: If the client is an insurance company, the attorney may be compelled to testify, subject to an in-camera inspection by a court, about communications made by the client to the attorney or by the attorney to the client that are related to,

EXCEPTION: The attorney's aiding or furthering an ongoing or future commission of bad faith by the client, if the party seeking disclosure of the communications has made a prima-facie showing of bad faith, fraud, or criminal misconduct by the client.



What is the Purpose of Attorney-Client Privilege?

MA Equip. Leasing I, LLC v. Tilton, 980 N.E.2d 1072, P19 (10th Dist.)

(1991). The purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Leslie at ¶ 20, quoting Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981).



When Does Attorney-Client Privilege apply?

MA Equip. Leasing I, LLC v. Tilton, 980 N.E.2d 1072, P19 (10th Dist.)

[Dist. LEXIS 121830 \(Aug. 28, 2012\)](#). Under the privilege, ""(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived."" [Leslie at ¶ 21](#), quoting [Reed v. Baxter, 134 F.3d 351, 355-56 \(6th Cir.1998\)](#). Because a client's

Examples



- A client is seeking advice from a lawyer for a business transaction and discloses confidential information about their business operations to the attorney.
- A client disclosing information to his or her attorney about a past crime that he or she committed, and the communication was done in private.
- A client disclosing to the attorney that he or she hid assets in a divorce.
- A communication between privileged persons (attorney, client), made in confidence for the purpose of obtaining or providing legal assistance for the client.

Potential Pitfalls

- Meeting your client in public.
- Client speaks to a third-party about the privileged communications.
- Advice-of-Counsel Defense
 - Waiver of Attorney-Client Privilege
 - Full Disclosure to the attorney of all material facts
 - Good-faith reliance on the attorney's advice.
- Selective Waiver vs. Complete Waiver





Objections

Typically, scenarios that involve attorney-client privilege are during the discovery process. Proper objections are key to your client not waiving attorney-client privilege.

Here is an example from a deposition:

Q. Okay. Did your attorney ever communicate to you -- without telling me, did they ever communicate to you why it was denied?

MR. BRESSMAN: Objection. Attorney-client privilege. You've literally just asked did your attorney ever communicate with you. That is attorney-client privilege. So I'm going to object and instruct her not to answer.

Case Studies

- **MA Equip. Leasing I, LLC v. Tilton, 980 N.E.2d 1072 (10th Dist.)**
 - The trial court did not abuse its discretion by finding that no attorney-client relationship existed between the corporate affiliates and the principals and the lessee's counsel.

- **Clapp v. Mueller Elec. Co., 835 N.E.2d 757, (8th Dist.)**
 - It is the contents of the communications between a company's attorneys and the company's employees that are privileged under the attorney-client privilege; not the mere fact that a communication took place.

Patient-Physician Privilege



WHAT IS PATIENT-
CLIENT PRIVILEGE?



WHEN DOES IT
APPLY?



EXAMPLES



POTENTIAL
PITFALLS



OBJECTIONS

What is Patient-Physician Privilege?

R.C. 2317.02(B)

A patient's communication made to the medical provider by a patient in that relation or the advice of a medical provider given to a patient.



When is Patient-Physician Privilege Waived in the context of Personal Injury and BWC?

A medical provider may be compelled to testify or to submit to discovery under the Rules of Civil Procedure only as to a communication made to the medical provider by the patient in question in that relation, or the advice of the medical provider given to the patient in question, **that related causally or historically** to physical or mental injuries that are relevant to issues in the claim.

Most of the arguments appear when a defendant submits a medical authorization and during discovery.



What is the Purpose of the “Causally and Historically Related” portion of R.C. 2317.02(B)?

Gentile v. Duncan, 2013-Ohio-5540 (10th District)

[*P23] [HN4](#)^[↑] While appellee is entitled to discovery of matters causally or historically related to the injuries at issue, a plaintiff ^[**107] filing a personal injury claim does not open “herself up to exposure, without limitation, of *all* her medical records.” (Emphasis sic.)

[*P24] As noted above, this court has previously found that [HN5](#)^[↑] a trial court errs in ordering a plaintiff to execute “general medical records release authorizations” that are not tailored to physical or mental injuries relevant to the issues in the case. [Ward](#). Here,

Dineen v. Pelfrey, 2022-Ohio-2035 (10th District)

actions filed by the patient.”). When the physician-patient privilege described in [R.C. 2317.02\(B\)\(1\)](#) does not apply, the communication must be “related causally or historically ^[**15] to physical or mental injuries that are relevant to issues” in the civil action. [R.C.](#)

[*P30] [HN7](#)^[↑] Similar to [Wooten](#), this court has determined that a trial court errs in ordering broad access to a plaintiff’s medical information without considering, upon request, whether the requested records are causally and historically related to the injuries at issue and without determining whether confidential and privileged information may need protected. See e.g., [Mason at ¶ 22](#) (“We acknowledge

Examples

- A patient goes to her doctor to be examined for pain in her abdomen.
- A patient discusses her mental health with a psychologist.
- A patient has surgery.
- Medical records including treatment of a patient.



Potential Pitfalls

- Your client speaks about the condition with someone outside the privilege.
- Your client includes a condition in their lawsuit that is not related to the lawsuit.
- Not redacting unrelated medical information from relevant medical documents.
- Selective Waiver vs. Complete Waiver





Objections

Typically, scenarios that involve patient-physician privilege are during the discovery process. Proper objections are key to your client not waiving patient-physician privilege.

Here is an example from a deposition:

MR. BRESSMAN: No. We're not -- She's not going to talk about any injuries that are not causally or historically related to this incident. If it was not knee instability, then she's not going to discuss it.

██████████ Is that an objection?

MR. BRESSMAN: Yes, it is an objection.

BY ██████████

Q. You can still answer, ██████████ It's not privileged.

MR. BRESSMAN: Yes, it is privileged. Anything that is not causally or historically related to the injuries claimed in this incident is privileged. She's not answering the question.

Case Studies

- **Gentile v. Duncan, 2013-Ohio-5540 (10th District)**

- The trial court erred in granting a broad discovery order with respect to the car accident victim's medical records, and in refusing to conduct an in-camera review in order to ascertain what was causally or historically related, because the medical authorizations submitted by the driver were essentially unlimited as to scope, as well as the time period for which the medical records were sought.

- **Dineen v. Pelfrey, 2022-Ohio-2035 (10th District)**

- The motions to compel ordering plaintiff to sign authorizations for release of medical and billing records was reversed because trial court erred under R.C. 2317.02(B) in ordering broad access to plaintiff's medical information without considering, upon request, whether requested records were causally and historically related to injuries at issue and without determining whether confidential and privileged information may need to be protected.

- **Randall v. Cantwell Mach. Co., 2013-Ohio-2744 (10th District)**

- Thus, the trial court did not err by granting defendant's motion to compel the unaltered medical release, but it did err by not granting plaintiff a protective order under Civ.R. 26(C) or implementing some other measure, such as an in-camera review, to determine whether certain records were protected under the physician-patient privilege of R.C. 2317.02(B).

Thank you

QUESTIONS?

EMAIL: JEDIDIAH@BRESSMANLAW.COM