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Accelerated Waiver of the Physician-Patient Privilege

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RECENT DEVELOPMENTS

ACCELERATED WAIVER OF THE PHYSICIAN-PATIENT PRIVILEGE

Plaintiff, a clerk-typist, sitting at her desk, was injured in the arm by a falling windowpane. She commenced a personal injury action against her employer and the owners and managers of the building in which she was injured. During pre-trial deposition, the plaintiff's attorney objected to the questioning of the plaintiff's physician on grounds of the physician-patient privilege. Deposition was adjourned. On defendant's application to the court on the motion calendar the judge ordered the doctor to answer questions about plaintiff's medical history in regard to suspected similar arm injuries.[1] Commencement of the personal injury action waived her physician-patient privilege. On writ of certiorari to review the order, a majority of five of the nine justices of the Washington Supreme Court reversed. *Held:* The filing of a complaint in a personal injury action is not a waiver of the plaintiff's physician-patient privilege, such that plaintiff's doctor can be examined by the defendant on deposition. *Bond v. Independent Order of Foresters*, 69 Wash. Dec. 2d 885, 421 P.2d 351 (1967).

The physician-patient privilege did not exist at common law.[2] In 1828 it was introduced into the United States by a New York statute.[3] Today approximately three-fifths of the states have statutes creating the privilege.[4] In Washington:[5]

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[1] A host of injuries relating to the arm injury in the principal case were revealed in the initial questioning of the plaintifl on deposition. There were two claims by plaintiff against the Seattle Transit System each arising out of the closing of a transit door on plaintiff's arm. The second injury occurred after the accident in the principal case and had been paid. It also appeared that plaintiff had had an automobile accident and suffered a broken wrist, sometime after the accident in the principal case. Defendant sought to inquire of the doctors treating these injuries how they might have affected the extent and nature of the arm injury alleged in the principal case. Brief for Respondents at 3-4, Bond v. Independent Order of Foresters, 69 Wash. Dec. 2d 885, 421 P.2d 351 (1967).

[2] Duchess of Kingston Trial, 20 How. St. Tr. 355, 573 (1776).

[3] The statute is found in the following 1828 edition of the Revised Statutes: 2 N.Y. Rev. Stat. 1828, 406 (pt. 3, c.7, tit. 3, art. 8, § 73).

[4] *See* Brief for Respondents at 75, Bond v. Independent Order of Foresters, 69 Wash. Dec. 2d 885, 421 P.2d 351 (1967).

The following states have no privilege statutes whatsoever: Alabama, Connecticut, Delaware, Florida, Georgia, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, South Carolina, Tennessee, Texas and Vermont.

[5] WASH. REV. CODE § 5.60.060(4) (1965). The privilege also extends to criminal prosecutions. WASH. REV. CODE § 10.52.020 (1965).

There are several statutory exceptions to the privilege. It does not apply in judi-

> a regular physician or surgeon[6] shall not, without the consent of his patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him to prescribe or act for the patient, . . .

The privilege can be waived expressly,[7] by contract[8] or by conduct.[9] Until the decision in the principal case, it was felt under *Randa v. Bear*[10] that the filing of a personal injury complaint was a waiver of the privilege.[11] A poll of King County superior court judges revealed that fourteen out of fifteen judges sitting on the motion calendar ruled the privilege waived when the complaint was filed.[12] The court in the principal case repudiated that view.[13] It is now uncertain when, or whether, plaintiff waives the privilege during the pre-trial process.

According to the court in the principal case the sole question presented was whether the physician-patient privilege is waived by the filing of a personal injury complaint.[14] Citing the statutory language, the court pointed out that the literal wording provided waiver of the privilege could only arise from plaintiff's "consent." The filing of a complaint was not designated in the statute as "consent." The court then distinguished three cases relied upon by the defendant, *Randa v. Bear*,[15] *Kime v. Niemann*,[16] and *McUne v. Fuqua*.[17] The court con-

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cial proceedings concerned with child abuse. WASH. REV. CODE. § 26.44.060 (1965). It does not apply in cases concerning Workmen's Compensation. WASH. REV. CODE § 51.04.050 (1961). It does not apply in cases involving fraudulent procurement of narcotics. WASH. REV. CODE § 69.33.380(2) (1959). Venereal diseases and other highly contagious diseases are reportable to the health authorities, although the identity of the party so reported is released only to official agents and doctors charged with enforcing the health regulations. WASH. AD. CODE 248-100-070, -075 (1966).

[6] Psychiatrists are considered physicians, psychologists are not. But WASH. REV. CODE § 18.83.110 (1965) provides:

> Confidential communications between a client and a psychologist shall be privileged against compulsory disclosure to the same extent and subject to the same conditions as confidential communications between attorney and client.

The confidential relationship between a psychoanalyst and a patient is not covered by statute.

[7] McUne v. Fuqua, 42 Wn. 2d 65, 74, 253 P.2d 632, 637 (1953) (dictum).

[8] Randa v. Bear, 50 Wn. 2d 415, 421, 312 P.2d 640, 644 (1957) (dictum citing 58 AM. JUR. *Witnesses* § 444 (1948)).

[9] McUne v. Fuqua, 42 Wn. 2d 65, 74, 253 P.2d 632, 637 (1953) (dictum).

[10] 50 Wn. 2d 415, 312 P.2d 640 (1957).

[11] *See* R. MEISENHOLDER, EVIDENCE LAW AND PRACTICE, 5 WASH. PRAC., § 223, at 205 (1965) and Henry, *Uniform Rules of Evidence—Should They be Adopted? Their Effect on Local Practice*, 39 WASH. L. REV. 380, 386 (1964).

[12] *See* Henry, *supra* note 11, at 386 n.23.

[13] This result was anticipated by Professor Meisenholder interpreting Kime v. Niemann, 64 Wn. 2d 394, 391 P.2d 955 (1964) and State v. Miller, 105 Wash. 475, 178 Pac. 459 (1919). MEISENHOLDER, *supra* note 11 at 205.

[14] 69 Wash. Dec. 2d at 886, 421 P.2d at 353.

[15] Randa v. Bear, 50 Wn. 2d 415, 312 P.2d 640 (1957).

[16] Kime v. Niemann, 64 Wn. 2d 394, 391 P.2d 955 (1964).

[17] McUne v. Fuqua, 42 Wn. 2d 65, 253 P.2d 632 (1953).

cluded that *Randa* applied only to waivers of an insured's privilege under an express medical service contract. The court declared that *Kime*, by pointing out that the question of waiver upon bringing suit was still open in Washington, had indicated that the authorities favoring waiver were supported by explicit state statutes. No such statute exists in Washington. It is implicit in *Kime* that waiver on filing does not exist in Washington. The court cited *McUne* as an example of waiver by plaintiff's voluntary testimony on the witness stand. The court went on to hold that plaintiff in the principal case had not waived her privilege by testifying as an adverse party on deposition. Further, the court emphasized that under CR 35[18] the defendant could obtain a medical examination of plaintiff. The court concluded that to imply waiver in the principal case beyond the limits outlined in CR 35 would require legislative action. The four dissenting justices argued that the primary policy at issue in the principal case was the prevention of surprise at trial due to tactical postponement of an inevitable waiver. They concluded that the Washington statute provided no definition of "consent" and that it should be implied in the principal case.

The interests protected by the physician-patient privilege and those protected by the discovery rules often appear to be in sharp conflict. The privilege is designed to encourage confidence between doctor and patient by obviating any fear of future exposure. The privilege promotes effective medical treatment.[19] Discovery is designed to facilitate complete gathering of facts by both parties[20] and correspondingly to eliminate "surprise" courtroom tactics,[21] encourage early settlement and speed-up the trial by elimination of unnecessary issues.[22] The policy conflict between the physician-patient privilege and disclosure of relevant facts at trial has been judicially reconciled by application of the waiver doctrine. In most personal injury actions and especially

[18] WASH. SUPER. CT. (CIV.) R. 35 (Hereinafter cites will be to CR accompanied by the appropriate rule number; *e.g.*, CR 35.)

[19] State v. Miller, 105 Wash. 475, 178 Pac. 459 (1919).

[20] Under the Washington Rules of Superior Court, the defendant in a personal injury action has five ways to acquire information about plaintiff's physical condition: CR 26 (deposition); CR 33 (interrogatories); CR 34 (discovery of documents); CR 16 (pre-trial procedure); and CR 35 (physical and mental examination of persons).

The defendant in the principal case chose to employ CR 26 and CR 33, which are restricted in their scope to nonprivileged matters. Defendant claimed, however, that plaintiff's filing of the personal injury complaint waived her physician-patient privilege.

[21] Walker v. West Coast Fast Freight, Inc., 233 F.2d 939 (9th Cir. 1956).

[22] For list of discovery rule aims see Note, 34 NEB. L. REV. 507, 509-10 (1955) and, for Washington, Order Adopting Civil Rules for Superior Court, 71 Wash. Dec. 2d i, ix (May 5, 1967).

in the principal case, waiver at trial is inevitable.[23] The problem which confronted the court was whether the information which plaintiff must disclose at the trial to prevail should be made available during discovery. Courts and commentators have confused these two distinct problems, sometimes advocating as the answer to the abuse of waiver problem, a solution conceptually designed to eliminate the privilege altogether.[24]

Three different approaches are available to solve the abuse of waiver problem and force plaintiff to waive the privilege during discovery. First, the doctrine of waiver itself, with its various forms,[25] could be defined more broadly to force disclosure at discovery *if* waiver would be inevitable. Pre-trial waiver has been found in limited circumstances.[26] Implied waiver which determines that given actions and words of the plaintiff are consent to disclosure occurs usually during trial, too late to prevent "surprise." Implied waiver, however, could be defined to include as "consent" any indication[27] by plaintiff during

[23] Under recent Washington decisions it appears that plaintiff's own testimony as to treatment and diagnosis of his physical condition waives his patient-physician privilege. Randa v. Bear, 50 Wn. 2d 415, 312 P.2d 640 (1957), McUne v. Fuqua, 42 Wn. 2d 65, 253 P.2d 632 (1953). In an early Washington decision, Noelle v. Hoquiam Lumber & Shingle Co., 47 Wash. 519, 92 Pac. 372 (1907), a plaintiff's testimony as to his physical condition without reference to medical consultation was not a waiver of the privilege. The *Randa* decision, however, rejects the *Noelle* case and the line drawn between testimony including statements about medical consultation and testimony excluding it. Professor Mesienholder also suggests such a line has been eliminated, citing *McUne*. MEISENHOLDER, *supra* note 11, at 204.

[24] An example of the confusion can be found in Mathis v. Hilderbrand, 416 P.2d 8 (Alaska 1966). First, the court noted with approval the commentators' arguments against the existence of the physician-patient privilege. Then the court upheld blanket waiver as the solution to the abuse of waiver problem, implying the arguments cited supported their conclusion. For a criticism of the opinion, see Note, 51 MINN. L. REV. 575 (1967).

[25] To waive the physician-patient privilege, there must be consent by the party waiving the privilege. Consent may be express, by contract or implied. Express waiver is a voluntary, intentional relinquishment of the privilege. Waiver by contract usually occurs when a party signs a policy of insurance or medical service, in which there is a clause relinquishing the privilege. An implied waiver is consent by conduct of the party, conduct which indicates that the party means to allow disclosure of the privileged material.

[26] The typical instances of pre-trial waiver are as follows:

1. Signing of contract, insurance policy, etc.
2. Failure to assert the privilege when physician is depositioned.
3. Waiver at former trial.
4. Submission to physical examination in presence of third party not bound by privilege.

See Note, 6 WASH. L. REV. 71 (1931).

Practically, these instances do not occur in most personal injury actions. Also, when they do occur, adjudication of the existence of the waiver may still be moved forward into the trial so that discovery is hampered nonetheless.

[27] Indications that waiver will occur during trial can be found mainly by examination of the issues to be tried in the case. Especially under CR 16, where sharp issues must be presented and drawn for the judge as a prerequisite to the use of the rule,

discovery that waiver would be inevitable.[28] The courts have not chosen to broaden implied waiver[29] but have sought new approaches to the abuse problem.[30] Some courts have sought to cure surprise during trial by allowing trial to recess following waiver at trial, in order for defendant to re-evaluate the evidence.[31] However, the delay and cost involved in this approach do not commend its usefulness.[32]

The second solution, proposed by defendant in the principal case, is blanket waiver of the privilege upon filing of a personal injury complaint. This approach is really designed to prevent abuse of the waiver only as an incident to eliminating the privilege in personal injury actions. The commentators[33] argue that the privilege is of dubious worth and therefore blanket waiver should be mandatory in personal injury actions.[34] There is no doubt that the privilege is of little value

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the need to waive the privilege in order to present evidence can be made clear. Also the judge can ask if waiver is forthcoming. The taking of depositions may also provide clues as to the need to waive the privilege.

[28] Wigmore finds that implied waiver should be derived both from considerations of actual conduct and the fairness of the situation created by that conduct. In short, if it is unfair and inconsistent to permit retention of the privilege in situations which are of plaintiff's own making, a waiver may be implied. 8 J. WIGMORE, EVIDENCE § 2388, at 855 (J. McNaughton rev. 1961).

[29] The courts may have chosen not to use a broadened view of implied waiver in order to keep it conceptually clear. A broad use of the doctrine of implied waiver becomes what we have labeled blanket waiver. If it is always unfair to allow plaintiff to sue for personal injury and still assert the privilege then all personal injury actions would produce implied waivers of the privilege. Such an extension of the implied waiver doctrine reaches beyond the case by case inquiry of plaintiff's conduct and takes on the nature of a rule of law. When this occurs the extended implied waiver acquires a new set of qualities. Consequently it is better to give the conceptually extended implied waiver a new name, blanket waiver, than to have to reconcile the traditional concepts of implied waiver to the extended waiver.

[30] Several states, unsatisfied with the traditional solutions of waiver, have statutes creating blanket waiver in personal injury actions. See Brief for Respondents at 77, Bond v. Independent Order of Foresters, 69 Wash. Dec. 2d 885, 421 P.2d 351 (1967). Other states have reached the same results through case law construction. See Mathis v. Hilderbrand, 416 P.2d 8 (Alaska 1966).

[31] Awtry v. United States, 27 F.R.D. 399 (1961); Kriger v. Holland Furnace Co., 12 App. Div. 2d 44, 208 N.Y.S. 2d 285 (1960).

[32] As stated in Awtry v. United States, 27 F.R.D. 399, 402 (1961):

> If such matters were deferred to the trial the almost inevitable result would be an interruption of the trial when the privilege had been waived by the plaintiff so as to permit the defendant to prepare its defense. In all likelihood a suspension of the trial would be impractical and it would be necessary to declare a mistrial.

[33] 8 J. WIGMORE, EVIDENCE § 2380a, at 828 (J. McNaughton rev. 1961); C. MCCORMICK, EVIDENCE ch. 11 (1954); Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?*, 52 YALE L.J. 607 (1943); C. DEWITT, PRIVILEGED COMMUNICATIONS 50 (1958).

[34] The commentators suggest that there is real doubt that the privilege secures the confidential relationship between physician and patient. Wigmore maintains that truly confidential information, such as the existence of a criminal abortion or venereal disease is excepted from the privilege. See note 5 *supra*. Meanwhile information which remains privileged is usually divulged to friends without embarassment. (This generalization is not meant to deride exceptionally embarassing situations which may be served by the existence of the privilege. It is meant only to suggest

in most personal injury actions and that the legislature should make a careful re-evaluation of the problem. However, the arguments against the privilege itself are not helpful when attempting to prevent abuse of waiver. They cloud the issue and tend to overweight the arguments in favor of any solution to the abuse problem which cuts into the use of the privilege. *Elimination* of the privilege is ultimately a legislative function,[35] and not the subject of this note.

Although blanket waiver may be a useful way to eliminate the privilege from personal injury actions, it is too rigid a solution for the simple abuse of waiver problem. If blanket waiver occurs on filing the complaint, plaintiff's medical history becomes open to defendant's inspection at that time. If plaintiff changes his mind and decides not to continue suit, he cannot return his medical history to secrecy. Likewise, once open to public view, medical history will continue open to view even in later actions, related or not.[36] In addition, the scope of

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that once plaintiff chooses to sue, the choice between exposure and embarassment has been made by the individual.) Especially in light of the number of states which have no privilege whatsoever, it seems doubtful that patients are in any way influenced by the existence or non-existence of the privilege when confiding in their doctor for medical treatment.

On the other side of the argument, advocates of the privilege staunchly maintain that the privilege is essential to the maintenance of a confidential relationship between doctor and patient. Secondly, they argue that, given the privilege in Washington, the creation of a blanket waiver upon filing the personal injury complaint would negate the privilege statute in personal injury actions and obviate the purposes of CR 35. Brief for Appellants at 26, Bond v. Independent Order of Foresters, 69 Wash. Dec. 2d 885, 421 P.2d 351 (1967). Lastly, it would unfairly force the plaintiff to choose between bringing suit and revealing personal information. The argument is similar to the one used to support the tort rule that each party to an action must pay his own legal fees. It is "undesirable to discourage the 'submission of rights to judicial determination' by subjecting [any party] to heavy damage by reason of submission." C. MCCORMICK, DAMAGES 71 (1935). The plaintiff who is forced to give up a privilege in order to sue is discouraged from entering court on equal terms with his opposing party.

It is also argued that the doctor-patient privilege is analogous to the attorney-client privilege. To the extent that there is a public stigma attached to "squealers" and an ethical dilemma for both doctors and lawyers in choices between a client's and the public interest, the analogy has substance. To the extent that a *confidential* relationship is required to effectuate both a fair trial and a cure, the analogy fails. A cure is not necessarily dependent on confidence, as the nonprivilege states can testify. Confidence is essential, however, to (1) enable counsel to meet all the evidence introduced by the other side and (2) know whether his case should be compromised. The Washington attorney-client statute is WASH. REV. CODE 5.60.060(2) (1965).

[35] The major effort at codifying a solution to this problem is found in the UNIFORM RULES OF EVIDENCE 27(4) (1953).

> There is no privilege under this rule in an action in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a part.

[36] This point is undecided in Washington, but the rule in many jurisdictions is that a waiver by a patient is general and permanent and prevents subsequent reassertion of it at subsequent trials of the same or different actions. Annot., 79 A.L.R. 173, 176 (1932).

pre-trial discovery is much broader than the scope of admissible evidence.[37] Waiver during trial opens plaintiff's medical history less than would blanket waiver on filing. In an atypical case plaintiff could be intimidated by the release of non-germane medical history and forced to settle prior to trial.[38] If litigation of the issues at trial will not require disclosure of medical history, the blanket waiver on filing has resulted in the unnecessary disclosure of plaintiff's medical history.[39] In short, blanket waiver as a solution to the abuse of waiver problem is over-inclusive.[40] It releases plaintiff's medical history too soon in the pre-trial process and in instances where there might be no need for its release.[41]

The third solution courts have used to prevent the abuse of waiver problem is actually a group of solutions. They are not aimed at elimination of the privilege from personal injury actions, but only to prevent the abuse problem.

The first alternative solution, employed in federal courts, is accelerated waiver. These courts have held that when it is clear plaintiff will waive his privilege later during trial, the waiver is accelerated into the discovery period to prevent surprise and unfairness to the defendants.[42] In *Mariner v. Great Lakes Dredge & Dock Co.*[43] the defendant sought pre-trial information about plaintiff's medical history in a personal injury action. The court allowed an accelerated waiver of plaintiff's physician-patient privilege saying:[44]

> [A]lthough medical information may be privileged under the law, this

[37] CR 26(b) provides: "It is not ground for objection to deposition that the testimony will be inadmissible at the trial...."

[38] *Harassment* of any party by another is punishable under two rules: CR 30(d) and CR 33. For a discussion of the tort actions also available, see Note, 41 WASH. L. REV. 370 (1966).

[39] An example of this sort of occurrence is as follows. Plaintiff has his arm cut off in defendant's machine. Liability and damages are not at issue; the only question at issue is a point of law as to whether defendant is ever liable under the circumstances. Such a narrowing of issues is achieved by use of CR 42 (b) providing for split trials.

[40] *See* Note, 51 MINN. L. REV. 575 (1967).

[41] A final comment might be made in regards to the consequences of accepting blanket waiver as the abuse solution. If plaintiffs in general must face disclosure on filing, then logically plaintiffs will be forced to choose *before* filing whether to forego embarassment, and not afterwards as presently. This seems reasonable except when it is realized that if the plaintiff is facing a statute of limitations he can not take time to deliberate. He must file immediately or lose his cause of action altogether. In such instances, plaintiff is unduly accepting the penalty of disclosure solely in order to sue. He has not really chosen to take his embarassment.

[42] Awtry v. United States, 27 F.R.D. 399 (1961); Mariner v. Great Lakes Dredge & Dock Co., 202 F. Supp. 430 (N.D. Ohio 1962); Kriger v. Holland Furnace Co., 12 App. Div. 2d 44, 208 N.Y.S.2d 285 (1960).

[43] 202 F. Supp. 430 (N.D. Ohio 1962).

[44] 202 F. Supp. at 434.

> privilege can, and in all probability will, be waived by the plaintiff at the time of the trial. If it is going to be waived at that time, then there is no reason why the defendant should not have this information prior to trial.

In Washington, *Randa v. Bear* uses similar language to support waiver of the privilege. The court in the principal case rejected this language as support for blanket waiver. It creates, however, a strong inference that the inevitable waiver at trial is good grounds to prevent assertion of the privilege before trial:[45]

> In bringing her cross-complaint based on the medical service contract, respondent placed herself in a position which would have required her, in the normal course of events, to reveal to the world the nature of her illness and the treatment she received for it. . . .Under these circumstances, she should not have been allowed to take an unfair advantage of appellant's stipulation. . .by interposing the claim of privilege to completely bar appellant from presenting its defense.

Defendant can achieve acceleration in two ways. Utilizing CR 37, defendant can employ the motion calendar's sanctions. Under CR 37(a)[46] defendant can ask the court to compel plaintiff to waive the privilege *if* it is clear waiver is being postponed as a tactical measure.[47] Under CR 37(b)(2)(A)[48] the court can order that the issues involving privileged subject matter be decided against plaintiff unless he waives the privilege prior to trial.[49] The court also can order that the medical information, if not disclosed during discovery will be inadmissible at trial when the privilege is waived.[50] This would force both plaintiff and defendant to be without essential expert testimony. A last order under CR 37(b)(2) (C)[51] is for the court to withhold the entire case from the trial calendar until plaintiff waives his privilege.[52] In all events CR 37(b)(2)[53] provides that the judge may issue any order necessary to the furtherance of a just result.

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[45] 50 Wn. 2d at 424, 312 P.2d at 646.
[46] CR 37(a).
[47] The obvious indication of the issues to be tried is the complaint. If CR 16 on pre-trial procedure is used clarification of the issues is a prerequisite to use of the rule and the inevitability of the waiver becomes obvious.
[48] CR 37 (b) (2) (A).
[49] Since in most personal injury actions the plaintiff's medical condition is central to the determination of both proximate cause and damages, this sanction cuts at the core of plaintiff's case.
[50] CR 37(2)(B).
[51] CR 37(2)(C).
[52] This sanction was employed in Awtry v. United States, 27 F.R.D. 399, 402 (1961) and Kriger v. Holland Furnace Co., 12 App. Div. 2d 44, 208 N.Y.S.2d 285, 290 (1960).
[53] CR 37(b)(2).

Using the motion calendar to effectuate accelerated waiver is preferable to blanket waiver. First, it is more flexible and subject to the case by case discretion which the Washington Court seems desirous to maintain. Second, it is the commonly used method in Washington superior courts to approach the bench on pre-trial matters.[54] Finally, the use of the motion calendar will prevent the unnecessary disclosures of plaintiff's medical history which occurs under blanket waiver due to its automatic effect upon filing.

Defendant can also accelerate waiver under the pre-trial procedure of CR 16.[55] In a recent federal decision, *Buffington v. Wood*,[56] the court held that under pre-trial procedures the judge had full discretion to compel exchange of medical documents. (The documents were not privileged.) In dictum, the court emphasized that under CR 16, the judge is given full power to innovate and create any procedures for assuring the just and economical movement of the judicial process.[57] Combining this view with the other federal cases which demand acceleration of waiver,[58] it is clear acceleration could be achieved under CR 16. CR 16 is a more time consuming procedure than the motion calendar. It has not been as frequently used in Washington state courts as in the federal courts.[59] Nevertheless it is an acceptable way to accelerate waiver on a case by case approach in Washington.

The court in the principal case implied that CR 35 is an alternative to blanket waiver.[60] It provides that defendant can request that plaintiff be given a physical examination on showing of good cause. Plaintiff can, without showing any cause, request a copy of the written examination report. If requested and given plaintiff then waives all further privilege of medical history related to the physical condition

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[54] *See* note 59 *infra*.

[55] CR 16.

[56] Buffington v. Wood, 351 F.2d 292 (3rd Cir. 1965).

[57] The following appears *id.* at 298:

> Necessarily, pretrial procedure envisages the invocation of initiative on the part of the judge. It transforms him from his traditional role of moderator passing on questions presented by counsel, to that of an active director of litigation. One of its principal functions is to ascertain the real points in dispute, to strip the controversy of nonessentials, and to mold it into such form as will make it possible to dispose of the contest properly with the least possible waste of time and expense.

[58] Awtry v. United States, 27 F.R.D. 399, 402(1961); Kriger v. Holland Furnace Co., 12 App. Div. 2d 44, 208 N.Y.S. 2d 285, 290 (1960); Mariner v. Great Lakes Dredge & Dock Co., 202 F. Supp. 430 (N.D. Ohio 1962).

[59] Only seven cases in Washington on CR 16 have been digested up to the present. *See* L. ORLAND, RULES PRACTICE, 3 WASH. PRAC. 572 (1965).

[60] This had also been suggested by the brief for the plaintiff. Brief for Appellant at 27, Bond v. Independent Order of Foresters, 69 Wash. Dec. 2d 885, 421 P.2d 351 (1967); CR 35 (b).

examined. Sometimes plaintiff will voluntarily undergo a physical examination but not request to see the results. Thus the plaintiff's past medical history is still undisclosed.[61] The aim of the rule is not to disclose plaintiff's past medical history. The rule is an effective "barrier to much malingering and fraudulent testimony as to the real physical or mental condition"[62] of the plaintiff after the injury. It also assures that defendant as well as plaintiff will be able to present informed expert testimony at trial. Since *past* medical history is essential to evaluating the causal connection between the alleged injury and the resulting physical condition, CR 35 is not an effective alternative to blanket or accelerated waiver.

A final alternative exists for those defendants who are within the jurisdiction of a federal court. The federal courts are currently split as to the extent they are bound by state privilege statutes.[63] Because there is no federal privilege statute, those arguing for uniformity in the federal system have succeeded in some cases in persuading the court to consider state privilege laws as not binding on the federal courts in a diversity case. But, even if plaintiff is unable to obtain a federal forum, the federal cases requiring acceleration[64] of waiver are persuasive authority for pre-trial waiver.

Ultimately the court in the principal case used foresight in rejecting the blanket waiver doctrine. The blanket waiver doctrine would have eliminated the physician-patient privilege in personal injury actions. Such elimination is ultimately a legislative task. The doctrine of accelerated waiver is a more workable approach because it reconciles both the discovery rules and the privilege statute. CR 16 could be used more fully in Washington, but because the motion calendar approach under CR 37 is equally effective, it is probably the best alternative for Washington.

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[61] Sher v. DeHaven, 91 U.S. App. D.C. 257, 199 F.2d 777, *cert. denied*, 345 U.S. 936 (1952). *See* Annot., 36 A.L.R.2d 937 (1954).

[62] Note, *The Federal Rules of Civil Procedure*, 25 VA. L.R. 261, 280 (1938).

[63] For list of federal circuits discussing state privilege statutes, see Mariner v. Great Lakes Dredge & Dock Co., 202 F. Supp. 430 (N.D. Ohio 1962).
See also, 4 J. MOORE, FEDERAL PRACTICE § 26.23[9] (2d ed. 1966).

[64] *See* note 41 *supra*.