CRIMINAL LAW: **Physician is incompetent to testify as to sobriety of a patient whom he is treating for injuries, but a physician is competent to testify as a layman when he is not treating an intoxicated person.**

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FILED 57

Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We are in receipt of your request for an opinion, which reads as follows:

> "This state of facts concerns privileged communications between doctor and patient as set out in section 1731.
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> "The facts are these; The sheriff of Morgan County, Mo was called to the scene of a wreck of a motor car on the highway. The driver of the car had the odor of alcohol on his breath, and was injured and bleeding. The sheriff was of the opinion that the driver ran off of the road while the driver was operating a car while intoxicated. The sheriff then brought the driver to town under arrest, and took the driver to a physician for examination as to the extent of injury and for treatment of the wounds. The sheriff did not want to jail the driver until the medical attention was given. The physician made an examination of the injuries and dressed the wounds. While the physician was making the examination and dressing the wounds, the physician

> discovered that the driver was intoxicated. The physician will testify that the driver of the car was sloppy drunk. The driver of the car was too helpless to seek the aid of a physician. He may have been suffering from the shock of the wreck, the injuries or by being partially paralyzed from intoxication.
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> "Now on preliminary examination the driver in an examination as to whether the driver drove a motor vehicle while intoxicated, the physician was not allowed to testify because the communication of what the doctor learned while treating the driver professionally was priviledged. Is this the rule of evidence. Of course while treating the driver professionally for the wounds, the physician learned that the driver was drunk.
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> "My question is, suppose I, as prosecuting attorney suggests to the sheriff, that he call a physician to give a drunken driver an examination to determine if the driver is intoxicated, is that a priviledged communication so that I cannot use the testimoney of the physician that the driver is intoxicated? "

From your request it can readily be seen that the intoxicated driver of an automobile became a patient of the physician when he was taken to the office of the physician for treatment of his wounds, and in that case the fact that he was drunk and the observations made by the physician were privileged, and the physician could not testify according to his opinion that the driver of the automobile was intoxicated. It was so held in the case of Owens v. Kansas City, C. C. & S. J. Ry. Co., 225 S. W. 234, l.c. 236, pars. 7,8. where the court said:

> "The record does not disclose that the excluded evidence of the doctors as to statements of plaintiff's husband while in the hospital, which were obtained by them as ' a part of the history of the case,' comes within the ruling in the case of Green v. Terminal R. Ass'n, 211 Mo. 18, 35-44, 109 S. W. 715, and hence error cannot be predicated thereon. The fact that they smelled liquor on his breath and he appeared to be intoxicated was clearly privileged (Kling v. City of Kansas, 27 Mo. App. 231, 244), unless waived, and the record does not show such waiver. In this connection it is not clear to us how the fact of the smell of liquor on his breath was relevant in a case, depending wholly, as this one does, on the humanitarian doctrine."

It was also held in the case of Kling v. The City of Kansas, 27 Mo. App. 231, l.c. 244, 247, where the court said:

> "If a patient suffering from a broken leg, in explaining to his physician the manner in which he received the injury, in order to give needed information concerning the injury, communicate to the physician information that he was under the influence of intoxicating drink at the time of the accident, such information would be excluded. Our conclusion is, that any information necessarily acquired by the physician from the patient, in order to treat him while attending him in a professional capacity is excluded by the statute."

> "The test is, how was the information acquired; it matters not that it could have been acquired in a different way. In our opinion the distinction is supported by neither the spirit nor the letter of the statute, and is not real. The physician called upon the plaintiff as his physician; any information as to the plaintiff's condition as to sobriety, acquired by the physician by seeing him, was necessarily acquired in order to treat him, and is excluded by the statute. The indications that the plaintiff had been drinking, and was under the influence of liquor, were, in part, the appearance of the plaintiff, as stated by the physician. The court properly struck the questions and answers from the deposition."

According to the above cases the court properly ruled that the physician could not state that the driver of the car was intoxicated while being treated, for the reason that the physician was incompetent to so testify on account of said information, so acquired from the patient while attending him in a professional character, was necessary to enable him to prescribe for such patient as a physician. Both cases as set out above, follow the statute as set out in section 1731 R. S. Mo. 1929, which partially reads as follows:

> "The following persons shall be incompetent to testify: * * * * * * * * * * *; fifth, a physician or surgeon, concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable

> him to prescribe for such patient as a physician, or do any act for him as a surgeon."

In your request you also asked whether or not a physician is competent to testify as to the condition of intoxication of a driver of an automobile when the driver has been taken to the office of the physician solely for the purpose of determining if the driver was intoxicated. In that event their status is not that of physician and patient but only for the purpose of using the opinion of the doctor as to the intoxication of the driver of the car. If the driver of the car is taken to the office of the physician for any treatment whatsoever, the physician would not be a competent witness to testify as to the driver being intoxicated. The physician is only acting as an ordinary layman, who, according to the law, may give an opinion from his observation as to whether a man is sober or intoxicated. The physician under such a statement of facts is only a witness, and the status of patient and doctor does not apply. It was so held in the case of State v. Revard, 106 S. W. (2d) 906, l. c. 909, pars. 7,8, where the court said:

> "Complaint is made that the court erred in permitting witnesses for the state to testify that at the scene of the collision and immediately after it had occurred defendant was or appeared to be intoxicated. No objection was made to any of this testimony except in one instance, viz: While Knapp was on the witness stand, he was asked to state what defendant's condition was as the latter got out of his car, and without objection, answered, 'He was very much intoxicated.' He then described defendant's actions and conduct. Following such description he was asked,'And in your opinion he was intoxicated there at the time when he got out of the car?' to which he answered, 'Yes, sir.' Not only do we think he was qualified to give the opinion expressed, having described the actions

> and conduct of defendant, but there was no objection until after the question had been answered (when objection was offered on the ground that the question called for a conclusion) and there was no motion to strike the answer. The objection came too late. Moreover, Knapp had previously testified without objection that defendant was intoxicated when he got out of his car. This contention is ruled against appellant."

It was also held in the case of Griffith v. Continental Casualty Co. 253 S. W. 1043, l. c. 1047, where the court said:

> "(1) The only fact appearing in the testimony of Dr. Chiles with respect to which he was incompetent to testify was the fact that Griffith had had tuberculosis for a considerable length of time before his death. That fact, however, was established by the plaintiff's evidence in chief before Chiles was called to the witness stand by defendant. It is not perceived how she could have been prejudiced by further evidence of such fact, even though it came from a prohibited source. Chiles was not incompetent to testify to Griffith's statement, that he did not think life worth living and that he had as well jump in the river, for the simple reason that it was not information necessary to enable him to prescribe for Griffith as his patient."

Where the physician is not acting as a doctor for the driver and the driver is not a patient of the doctor, his evidence is competent and the courts have

even held that where there are doctors examining a patient and another doctor is present, but who is merely a by-stander, the bystander is not placed in the position of a physician for the patient and his evidence is competent, although he is a physician. It was so held in the case of Plater v. W. C. Mullins Const. Co., 17 S. W. (2d) 659, l.c. 669, where the court said:

> "The courts permit men to be sent to the penitentiary upon the evidence of trespassers who go upon defendants' land and there discover evidence of the illegal manufacture of whisky. Men are convicted of crime upon evidence procured by tapping telephone and telegraph wires. Eavesdroppers are held to be competent witnesses. Therefore, this court must hold that a plaintiff in a personal injury suit who permits a bystander to assist in an examination of her physical condition runs the risk that that bystander, when called as a witness, will be permitted to state his opinions because of his special skill and training. We hold that the trial court committed error in refusing to permit Dr. Horigan to testify."

CONCLUSION

In view of the above authorities it is the opinion of this department that the evidence of a physician is not competent either in a civil or criminal case where the status of physician and patient exists, and the information to which he will testify was acquired from the patient while attending him in a professional character. It is further the opinion of this department

that where the physician is not treating the driver of the car and the status of physician and patient does not exist his testimony would be competent as to the condition of the sobriety of the driver, the same as an opinion of an ordinary layman based upon the facts of the case.

Respectfully submitted,

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APPROVED:

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