CRIMINAL LAW: Testimony of a physician is not privileged
WITNESSES: communication as to his patient where the facts testified to were not necessary for him to prescribe for such patient as a physician or do any act as a surgeon.

January 31, 1941

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FILED
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Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We are in receipt of your request for an opinion dated January 29, 1941, which reads as follows:

> "Please send me an opinion on this question as soon as possible.
>
> "A father is charged with incest on his sixteen year old daughter, who is in a family way and will have a child in about a month. The father took his daughter to an osteopathic physician for examination. The doctor examined the girl and pronounced her condition as pregnancy. Then he asked the girl who was the father and the girl said that she had no boy friends, but that she had always slept with her father and he got her in a family way. Is this testimony of the girl and the father before this doctor admissible in evidence, or is it a privileged communication?
>
> "The doctor did not treat the father, but examined the daughter at the request of the father. She is his minor daughter, and the examination was to determine the true nature of her condition. The father and daughter made an admission before the doctor proving the crime."

Section 1731, R. S. Missouri 1929, reads in part 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."

It will be noticed under the above request that the doctor first examined the girl and ascertained her condition. He then later asked the girl who was the father of the child. It was then that the father and girl made admissions which you desire to use as evidence by the testimony of the physician.

It will be noticed under Section 1731, R. S. Missouri 1929, that it specifically states, "* * * to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon." In this case the physician had already ascertained and diagnosed the case and it would not have been necessary to have any statements either from the father or the daughter to prescribe for such patient. The question as to who is the father of the child was not necessary information for the physician to use in the treatment of the daughter.

In the case of State v. Lassieur, 242 S. W. 900, paragraph 5, the court said:

> "Appellant makes numerous assignments of error with respect to the admission of testimony. One complaint is to the effect that the court permitted Dr. Drace to testify as to communications made to him by witness Janie Lassieur. State's counsel elicited from his witness that she became the mother of an illegitimate child shortly after the homicide, and upon inquiry by appellant's counsel she said that the

> deceased was the father. The prosecuting attorney sought to impeach this testimony by showing that the witness had told Dr. Drace, the physician who attended her at the birth of the child that another was the father, and that such information had been given him, not to enable him to prescribe for her and to treat her, but for the purpose of gathering data for the state department of vital statistics. This communication was not privileged. State v. Carryer (Mo. Sup.) 180 S. W. 850; section 5418, R. S. 1919."

Also, in the case of State v. Carryer, 180 S. W. 850, paragraph 2, the court said:

> "If, however, the objection had been properly made, and so preserved as to entitle it to review, the admission of the testimony in question would be held not to have been error. The limitation of the statute (section 6362, R. S. 1909) in regard to the competency of a witness who is an attending physician extends no further than to exclude information acquired by him from a patient while attending the latter professionally, and which information was necessary to enable him to prescribe for such patient as a physician, or to do some act for him as a surgeon. The inquiry here went no further than to ascertain whether the prosecutrix had given the physician, who was testifying, the required information. Not being in violation of any rule, it was in no sense prejudicial, and appellant will not be heard to complain. * * * * "

CONCLUSION

In view of the above authorities it is the opinion of this department that the evidence of the physician who pronounced the condition of the daughter before any admissions were made by the father or daughter is not privileged communication. The reason that the evidence of this physician is not privileged communication is the fact that the statements which he heard after he had examined the daughter and pronounced her condition was not necessary to enable him to prescribe for such patient as a physician, or do any act for her as a surgeon.

Respectfully submitted

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Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

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