# NY CLS CPLR § 4504

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***New York***

***Consolidated Laws Service*** ***>***

***Civil Practice Law And Rules (Arts. 1 — 100)*** ***>***

***Article 45 Evidence (§§ 4501 — 4551)***

## § 4504. Physician, dentist, podiatrist, chiropractor and nurse.

**(a) Confidential information privileged.** Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry, podiatry or chiropractic shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity. The relationship of a physician and patient shall exist between a medical corporation, as defined in article forty-four of the public health law, a professional service corporation organized under article fifteen of the business corporation law to practice medicine, a university faculty practice corporation organized under section fourteen hundred twelve of the not-for-profit corporation law to practice medicine or dentistry, and the patients to whom they respectively render professional medical services.

A patient who, for the purpose of obtaining insurance benefits, authorizes the disclosure of any such privileged communication to any person shall not be deemed to have waived the privilege created by this subdivision. For purposes of this subdivision:

**1.** “person” shall mean any individual, insurer or agent thereof, peer review committee, public or private corporation, political subdivision, government agency,

department or bureau of the state, municipality, industry, co-partnership, association, firm, trust, estate or any other legal entity whatsoever; and

**2.** “insurance benefits” shall include payments under a self-insured plan.

**(b) Identification by dentist; crime committed against patient under sixteen.** A dentist shall be required to disclose information necessary for identification of a patient. A physician, dentist, podiatrist, chiropractor or nurse shall be required to disclose information indicating that a patient who is under the age of sixteen years has been the victim of a crime.

**(c) Mental or physical condition of deceased patient.** A physician or nurse shall be required to disclose any information as to the mental or physical condition of a deceased patient privileged under subdivision (a), except information which would tend to disgrace the memory of the decedent, either in the absence of an objection by a party to the litigation or when the privilege has been waived:

**1.** by the personal representative, or the surviving spouse, or the next of kin of the decedent; or

**2.** in any litigation where the interests of the personal representative are deemed by the trial judge to be adverse to those of the estate of the decedent, by any party in interest; or

**3.** if the validity of the will of the decedent is in question, by the executor named in the will, or the surviving spouse or any heir-at-law or any of the next kin or any other party in interest.

**(d) Proof of negligence; unauthorized practice of medicine.** In any action for damages for personal injuries or death against a person not authorized to practice medicine under article 131 of the education law for any act or acts constituting the practice of medicine, when such act or acts were a competent producing proximate or

contributing cause of such injuries or death, the fact that such person practiced medicine without being so authorized shall be deemed prima facie evidence of negligence.

## History

Add, L 1962, ch 308; amd, L 1966, ch 252, eff Sept 1, 1966; L 1971, ch 987, § 3, eff Sept 1, 1971; L 1971, ch 1139, § 15; L 1984, ch 913, § 1, eff Oct 5, 1984; L 1990, ch 800, § 1; L 1991, ch 457, § 1, eff July 19, 1991; L 1993, ch 555, § 3, eff July 28, 1993.

Annotations

## Notes

### Prior Law

Earlier statutes: CPA §§ 352, 354; CCP §§ 834, 836; 2 RS 406, § 73.

### Editor's Notes

**Laws 1971, ch 1139, § 1,** provides as follows:

Section 1. The legislature hereby finds and declares that:

Improving the present method of delivering health care services is a matter of vital state concern. Without improving the present system, increased health insurance and other benefits will continue to drive up the cost of medical care and overload the delivery system.

Prepaid comprehensive health care plans, wherein the consumer receives comprehensive health services for a periodic charge and the providers are paid on a fixed per capita basis, represent a promising system for delivering a full-range of health care services at a reasonable cost.

Accordingly, it shall be the policy of this state to:

(a) expand the health care options available to the consumer and ensure that each New Yorker will have true freedom of choice in choosing that plan which is most compatible with his needs;.

(b) encourage the formation by physicians of non-profit medical corporations and the operation of such groups in connection with prepaid comprehensive health care plans by.

—granting preferred tax status to medical corporations participating in such plans;.

—making medical and hospital corporations eligible for seed money loans to cover expenses incurred in organizing such a plan;.

—making the capital facilities and equipment of medical corporations eligible for financing by the state housing finance agency under the hospital and nursing home loan program;.

—empowering health service corporations, governed by article nine-C of the insurance law, to organize and manage prepaid comprehensive health care plans;.

—directing the superintendent of insurance to modify insurance requirements applicable to health service corporations to enable them to use their assets to organize and manage prepaid comprehensive health care plans.

**Advisory Committee Notes**

**Subd (a)** of this section is exactly the same as former § 352, except for the addition of the phrase, “Unless the patient waives the privilege,” and substitution of “medicine” for “physic or surgery.” The single word is clearer and has the same meaning. Cf. Educ Law § 6501(4). The requirement in former § 354 of express waiver at the trial or examination or by stipulation is omitted. As in the case of the attorney-client privilege, waiver may, under the cases, be implied. See, e.g., Apter v Home Life Ins. Co. 266 NY 333, 336, 194 NE 846, 847 (1935). The reason for these limitations on waiver in former § 354 has been aptly stated as follows: “This statutory requirement nullifies waivers made by contract by the patient prior to trial or examination. Its principal purpose was to correct the practice and resultant abuse of waivers inserted in contracts of life insurance.” Richardson, Evidence 441 (8th ed, Prince 1955). However, the New York

policy on this point has changed. Since these restrictions on waiver were first adopted, this state has enacted a statute compelling waiver of the insured's privilege in an action on a life insurance policy. Subdivision 4 of section 149 of the Insurance Law provides that "[i]f in any action to rescind any such contract or to recover thereon . . . the insured or any other person having or claiming a right under such contract shall prevent full disclosure and proof of the nature of such medical impairment, such misrepresentation shall be presumed to have been material." See also Note, 1 Syracuse L Rev 101 (1949). Obtaining of a waiver by fraud or duress can, of course, be met by the court's refusal to recognize it.

**Subd (b) and (c)** of this section consist of those portions of former sections 352 and 354, except for the waiver clause, which limit the physician-patient privilege. There are a number of minor language changes. The word "physician" is as broad as the former phrase "physician or surgeon." Cf. Educ Law § 6501(4).

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## I. Under CPLR

### A. In General

#### 1. Generally

The purpose of CPLR 4504 and the reason motivating the legislature to establish the physician-patient privilege is to protect those who are required to consult with physician from the disclosure of secrets imparted to physician, to protect the relationship of patient and physician, and to prevent physicians from disclosing information which might result in humiliation, embarrassment, or disgrace to patients. People v Abdul Karim Al-Kanani, 33 N.Y.2d 260, 351 N.Y.S.2d 969, 307 N.E.2d 43, 1973 N.Y. LEXIS 838 (N.Y. 1973), cert. denied, 417 U.S. 916, 94 S. Ct. 2619, 41 L. Ed. 2d 220, 1974 U.S. LEXIS 1804 (U.S. 1974).

The requirement of CPLR § 4504(b) that a physician disclose information indicating that a patient under the age of 16 has been the victim of a crime, and the legitimate public interest in the prosecution of crime, do not support the release to the Grand Jury of all records held by the Bureau of Sexually Transmissible Diseases concerning a 16-year-old girl who had several months earlier been interviewed by the Bureau regarding certain sexual contacts; CPLR § 4504(b) is directed to the physician-patient privilege, which was not invoked in this case, and such a contention would not even find factual support in the record; further, respondent people made an inadequate showing that the identity of the girl's contacts could not have been procured by less intrusive means. Grattan v People, 65 N.Y.2d 243, 491 N.Y.S.2d 125, 480 N.E.2d 714, 1985 N.Y. LEXIS 14678 (N.Y. 1985).

Treating physician owes patient duty to speak truth about her medical condition when authorized to supply otherwise confidential information to others, either as result of patient's express consent or waiver by condition having been placed in issue. Treating physician was not entitled to summary judgment in patient's action for breach of physician's duty to supply truthful information regarding her condition in her underlying action against insurance company seeking continuous skilled nursing care under health policy where physician executed affidavit prepared by insurer's attorneys in which he affirmed that only limited skilled nursing was required, he later signed affidavit prepared by patient's counsel in which he affirmed that continuous nursing services were required, and there was settlement of underlying action unfavorable to patient, allegedly due to court's "blunt assessment" of patient's poor chances of success based on existence of contradictory affidavits. Aufrichtig v Lowell, 85 N.Y.2d 540, 626 N.Y.S.2d 743, 650 N.E.2d 401, 1995 N.Y. LEXIS 1036 (N.Y. 1995).

Even if a hospital administrator violated the physician-patient privilege in N.Y. C.P.L.R. 4504 by giving defendant's name to an investigating police officer, suppression of the evidence found as a result was not required. People v Greene, 9 N.Y.3d 277, 849 N.Y.S.2d 461, 879 N.E.2d 1280, 2007 N.Y. LEXIS 3276 (N.Y. 2007).

Action of Department of Mental Hygiene in maintaining computerized records concerning psychiatric outpatients did not violate patients' right of privacy, patient-physician privilege or right of hospital staff personnel to practice their profession. Volkman v Miller, 52 A.D.2d 146, 383 N.Y.S.2d 95, 1976 N.Y. App. Div. LEXIS 11970 (N.Y. App. Div. 3d Dep't 1976), aff'd, 41 N.Y.2d 946, 394 N.Y.S.2d 631, 363 N.E.2d 355, 1977 N.Y. LEXIS 2011 (N.Y. 1977).

The statutorily created privileges which attach to communications between a physician and his patient, a psychologist and his client, and a certified social worker and his client (CPLR 4504, 4507, 4508) all share the common purpose of encouraging the patient or client fully to disclose the nature and details of his illness or emotions without fear of later revelation by one in whom he placed his trust and confidence. Perry v Fiumano, 61 A.D.2d 512, 403 N.Y.S.2d 382, 1978 N.Y. App. Div. LEXIS 9768 (N.Y. App. Div. 4th Dep't 1978).

The disclosure by a psychiatrist of personal information learned during the course of treatment without justification or excuse is a breach of the fiduciary duty of confidentiality and gives rise to a cause of action sounding in tort; however, the disclosure of confidential information to the spouse of a patient was justified and not actionable where the circumstances and competing interests showed there was a danger to the patient, the spouse or another person if the information was not disclosed. MacDonald v Clinger, 84 A.D.2d 482, 446 N.Y.S.2d 801, 1982 N.Y. App. Div. LEXIS 14945 (N.Y. App. Div. 4th Dep't 1982).

Physician-patient privilege prohibits, in absence of waiver by patient, disclosure by physician of information acquired in attending patient in professional capacity which was necessary to enable physician to act in that capacity. Riccardi v Tampax, Inc., 113 A.D.2d 880, 493 N.Y.S.2d 798, 1985 N.Y. App. Div. LEXIS 52508 (N.Y. App. Div. 2d Dep't 1985).

Hospital and doctor did not breach physician-patient privilege of confidentiality by permitting news media to be present in waiting room of infectious disease unit since (1) persons present in medical waiting room need not be patients but may include friends and relatives of patients, persons selling medical supplies, and persons interviewing for employment, and (2) there was no claim that plaintiff was identified as patient while in waiting room. Anderson v Strong

Memorial Hospital, 151 A.D.2d 1033, 542 N.Y.S.2d 96, 1989 N.Y. App. Div. LEXIS 8388 (N.Y. App. Div. 4th Dep't 1989).

When legislature enacted CLS Pub Health § 3373, it abrogated physician-patient privilege contained in CLS CPLR § 4504 as to controlled substances. When illicit drugs are recovered during surgery performed on defendant who has swallowed condoms containing drugs in order to smuggle them into jurisdiction, physician-patient privilege of CLS CPLR § 4504 does not apply by virtue of CLS Pub Health § 3373. People v Figueroa, 173 A.D.2d 156, 568 N.Y.S.2d 957, 1991 N.Y. App. Div. LEXIS 5315 (N.Y. App. Div. 1st Dep't), app. denied, 78 N.Y.2d 1075, 577 N.Y.S.2d 239, 583 N.E.2d 951, 1991 N.Y. LEXIS 5256 (N.Y. 1991).

In civil damage action brought by molested child, admitted child molester should be compelled to respond to deposition questions regarding fact of psychiatric treatment, as distinguished from content of such treatment, since privilege of CLS CPLR §§ 4504 and 4507 does not extend to mere fact that treatment was sought. Child C. v Fleming School, 179 A.D.2d 460, 578 N.Y.S.2d 185, 1992 N.Y. App. Div. LEXIS 238 (N.Y. App. Div. 1st Dep't 1992).

Patient records to be produced by plaintiff doctor would be required to be produced in redacted form by deleting patients’ names and addresses and any other identifying information, in order to comport with doctor-patient privilege afforded by CLS CPLR § 4504 Calabrese v PHF Life Ins. Co., 190 A.D.2d 1069, 594 N.Y.S.2d 1016, 1993 N.Y. App. Div. LEXIS 1309 (N.Y. App. Div. 4th Dep't 1993).

Confidentiality of information acquired during treatment of patient under CLS CPLR § 4504 applies to designated health care professional, and it does not create private right of action. Waldron v Ball Corp., 210 A.D.2d 611, 619 N.Y.S.2d 841, 1994 N.Y. App. Div. LEXIS 12410 (N.Y. App. Div. 3d Dep't 1994), app. denied, 85 N.Y.2d 803, 624 N.Y.S.2d 373, 648 N.E.2d 793, 1995 N.Y. LEXIS 312 (N.Y. 1995).

In action against decedent’s estate arising out of decedent’s alleged wrongful transmission of AIDS virus to plaintiff, plaintiff had compelling need for decedent’s confidential HIV-related

information, and thus was entitled to disclosure under CLS Pub Health § 2785; statute overcame physician-patient privilege, and purpose of preserving confidentiality of HIV-related information (to encourage voluntary HIV testing) was not implicated because medical records were those of deceased person. Plaza v Estate of Wisser, 211 A.D.2d 111, 626 N.Y.S.2d 446, 1995 N.Y. App. Div. LEXIS 4569 (N.Y. App. Div. 1st Dep't 1995).

Plaintiffs should be precluded from introducing evidence at medical malpractice trial concerning matters as to which physician-patient privilege had been properly asserted during disclosure. Murphy v LoPresti, 232 A.D.2d 461, 648 N.Y.S.2d 169, 1996 N.Y. App. Div. LEXIS 10215 (N.Y. App. Div. 2d Dep't 1996).

Physician-patient privilege cannot be raised for first time on appeal. Hall v Hall, 238 A.D.2d 257, 656 N.Y.S.2d 866, 1997 N.Y. App. Div. LEXIS 4051 (N.Y. App. Div. 1st Dep't 1997).

The state, having submitted itself to the jurisdiction of the courts like everyone else, is no more immune to the mandate of CPLR 4504 than is or would be any other person or corporation in a like position. Application of Hofberg, 50 Misc. 2d 147, 269 N.Y.S.2d 919, 1966 N.Y. Misc. LEXIS 1894 (N.Y. Ct. Cl. 1966).

The question of privilege can be raised by any party to the action although the patient is not a party, and the party asserting privilege bears the burden of showing its application. Mayer v Albany Medical Center Hospital, 56 Misc. 2d 239, 288 N.Y.S.2d 771, 1968 N.Y. Misc. LEXIS 1704 (N.Y. Sup. Ct. 1968), modified, 37 A.D.2d 1011, 325 N.Y.S.2d 517, 1971 N.Y. App. Div. LEXIS 3091 (N.Y. App. Div. 3d Dep't 1971).

A physician, who enters into an agreement with a patient to provide medical attention, impliedly covenants to keep in confidence all disclosures made by the patient concerning the patient’s physical or mental condition as well as all matters discovered by the physician in the course of examination or treatment. This is particularly and necessarily true of the psychiatric relationship, for in the dynamics of psychotherapy the patient is called upon to discuss in a candid and frank manner personal matter of the most intimate and disturbing nature. The Legislature, in excluding

from CPLR 4504 (subd [a]) the opening words of section 354 of the Civil Practice Act, intended to reinforce the public policy of this State expressed in numerous statutes and regulations (CPLR 4504, subd [a]; 4508; Education Law, §§ 6509-6511; Mental Hygiene Law, § 15.13, subds [c], [d]; § 35.11; Public Health Law, § 2803-c, subd 3, par f; § 2805-e, subd 3; § 3371; 8 NYCRR 60.1 [d] [3]) prohibiting physicians, persons in allied fields and medical institutions from disclosing, without authorization of the patient, information discovered in attending the patient. A complaint alleging unauthorized publication, verbatim, by a psychiatrist of a patient's disclosures during the course of a lengthy psychoanalysis does not state a cause of action for breach of privacy under sections 50 or 51 of the Civil Rights Law, since the patient's "name, portrait or picture" has not been used, or under a common-law right of privacy, since to date there has not been recognized in this State such a right. It does, however, state a cause of action arising from two other sources: the public policy of the State of New York proclaimed by statute and regulation, which bars a physician from disclosing a patient's confidences, and the implied promise of confidentiality which every physician makes his patient. Doe v Roe, 93 Misc. 2d 201, 400 N.Y.S.2d 668, 1977 N.Y. Misc. LEXIS 2650 (N.Y. Sup. Ct. 1977).

The State's policy interest in protecting the confidentiality of the physician-patient relationship must yield to the mandate of constitutional due process considerations when the need for disclosure is present. People v Lowe, 96 Misc. 2d 33, 408 N.Y.S.2d 873, 1978 N.Y. Misc. LEXIS 2544 (N.Y. City Crim. Ct. 1978).

Action by nonresident patient against resident physician for breach of physician-patient fiduciary duty of confidentiality under CLS CPLR § 4504(a), and breach of duties under CLS Pub Health Art 27-F, based on physician's allegedly improper disclosure of patient's HIV-positive status to Pennsylvania Workers' Compensation Board pursuant to subpoena, was governed by New York rather than Pennsylvania law, since (1) physician-patient relationship was entered into and alleged improper disclosure was made in New York, (2) New York thus had greater interest in litigation regarding issues raised and law to be applied, and (3) under CLS Pub Health § 2780(6), protection against improper disclosure of HIV-related information applies to nonresident

such as patient, as “protected individual.” Doe v Roe, 155 Misc. 2d 392, 588 N.Y.S.2d 236, 1992 N.Y. Misc. LEXIS 407 (N.Y. Sup. Ct. 1992), modified, aff'd, 190 A.D.2d 463, 599 N.Y.S.2d 350, 1993 N.Y. App. Div. LEXIS 5673 (N.Y. App. Div. 4th Dep't 1993).

Psychiatrists fall within ambit of CLS CPLR § 4504, which includes physicians and various medical personnel; CLS CPLR § 4507 is limited to psychologists. Fact that doctor in question did not actually treat defendant but merely diagnosed his condition based on other physicians’ findings did not preclude finding that doctor-patient privilege had been established. People v Sanders, 169 Misc. 2d 813, 646 N.Y.S.2d 955, 1996 N.Y. Misc. LEXIS 264 (N.Y. Sup. Ct. 1996).

Patient confidentiality obligations to which a physician was subject did not make the medical services rendered for a corporate employer any less subject to the terms of the employment-at-will relationship; therefore, the trial court properly dismissed for failure to state a claim the employee’s wrongful dismissal action against the employer, which had been premised on the claim that the termination occurred because the physician had refused to disclose employee health records without their consent. Horn v New York Times, 100 N.Y.2d 85, 760 N.Y.S.2d 378, 790 N.E.2d 753, 2003 N.Y. LEXIS 221 (N.Y. 2003).

Social worker is outside the privilege provided by rules. Fitzgerald v A. L. Burbank & Co., 451 F.2d 670, 1971 U.S. App. LEXIS 7132 (2d Cir. N.Y. 1971).

When patient becomes danger to himself or others, doctor-patient privilege must give way; protective privilege between doctor and patient ends where public peril begins. Altman v New York City Health & Hosps. Corp., 100 F.3d 1054, 1996 U.S. App. LEXIS 30112 (2d Cir. N.Y. 1996).

**2. Who may assert privilege**

The trial court properly denied a hospital’s motion to suppress a Grand Jury subpoena calling for the hospital’s records, issued as part of an investigation into whether the hospital had a procedure under which various lifesaving and support measures were selectively denied to

certain seriously ill patients, since a hospital being investigated by a Grand Jury in connection with possible crimes committed against its patients by the staff may not successfully assert the physician-patient privilege contained in CPLR § 4504 or the social worker-client privilege contained in CPLR § 4508, in that the purpose of those privileges is to protect the patient while encouraging uninhibited disclosure between patients and their physicians or social workers and not to shield the criminal. In a proceeding before a Grand Jury, a subpoena, although limited to "names and addresses of those treated for stab wounds or other wounds caused by a knife from June 15, 1982 through June 17, 1982," was properly quashed on the basis that it would have required the hospital to which it was addressed to divulge information concerning diagnosis and treatment, which was protected by the physician-patient privilege CPLR § 4504(a), since, although the privilege belonged to the patient and could not be asserted by the physician, hospital or anyone else to protect himself with respect to the crime committed against the patient, it could be asserted by the hospital or physician for the protection of the patient who had not waived his or her privilege, even though the patient was suspected of or charged with the crime, and the statutory privilege did not yield to the public interest in the investigation of a homicide since exceptions to the privilege were for the Legislature to declare. In re Grand Jury Investigation, 59 N.Y.2d 130, 463 N.Y.S.2d 758, 450 N.E.2d 678, 1983 N.Y. LEXIS 3109 (N.Y. 1983).

In an action by a prisoner against the state for injuries resulting from an assault by another prisoner, wherein the plaintiff sought disclosure of state prisoner, wherein the plaintiff sought disclosure of state records, the state may invoke the privilege afforded by CPLR 4504 to avoid disclosure concerning confidential communications between one of its inmates and staff physicians or psychiatrists, as well as records relating to an inmate's prognosis and the diagnosis of his propensities and condition by prison physicians and psychiatrists. Wilson v State, 36 A.D.2d 559, 317 N.Y.S.2d 546, 1971 N.Y. App. Div. LEXIS 4892 (N.Y. App. Div. 3d Dep't 1971).

Dental assistant was not entitled to invoke dentist-patient privilege in litigation commenced by dentist against health insurance company to recover amounts which had been recouped by company on ground that dentist had breached his contract with company by allowing dental assistants to perform treatments that only dentist was permitted to perform, since (1) CLS CPLR § 4504(a) was enacted for benefit of patients and was not to be wielded as sword by practitioners, and (2) company had assured court that no questions would be asked which would require giving names of patients. Desai v Blue Shield of Northeastern New York, Inc., 146 A.D.2d 264, 540 N.Y.S.2d 569, 1989 N.Y. App. Div. LEXIS 5013 (N.Y. App. Div. 3d Dep't 1989).

In a drunk driving prosecution, the court construed the privilege liberally and held that when an injured driver disclosed to an emergency medical technician, who was gathering information in order to aid in proper treatment of the driver, the information was protected as a privileged communication to a health care professional. People v Mirque, 195 Misc. 2d 375, 758 N.Y.S.2d 471, 2003 N.Y. Misc. LEXIS 191 (N.Y. City Crim. Ct. 2003).

**3. Burden of proof**

In pretrial discovery proceedings one who asserts the doctor-patient privilege has the burden to show the existence of circumstances justifying its recognition. Koump v Smith, 25 N.Y.2d 287, 303 N.Y.S.2d 858, 250 N.E.2d 857, 1969 N.Y. LEXIS 1112 (N.Y. 1969).

In an action for medical malpractice, the trial court properly denied plaintiff’s request to charge that the house physician at defendant hospital who treated the infant plaintiff after her birth was not authorized to practice medicine, which would be deemed prima facie evidence of negligence under CPLR § 4504(d), where although the physician was not authorized to practice medicine in New York at the time of the infant’s birth, the authorization question was never raised before the jury, which merely heard that the doctor was unlicensed, and where the burden of establishing nonauthorization was plaintiff’s. Ellenberger v Pena, 88 A.D.2d 373, 453 N.Y.S.2d 436, 1982 N.Y. App. Div. LEXIS 17084 (N.Y. App. Div. 2d Dep't 1982).

In addition to establishing that the person whose testimony is sought to be excluded was a physician, dentist or nurse, that the information was acquired by such person while attending patient in a professional capacity, and that the information was necessary to enable such person to act in that capacity, the party asserting the privilege must also establish that in the light of all surrounding circumstances the communication was intended to be confidential, and the court must determine whether the injury to the patient which might result from disclosure would be so great as to outweigh the benefit that disclosure would afford in placing before it such information as is necessary for an informed judgment on the merits on the matter before it. Milano v State, 44 Misc. 2d 290, 253 N.Y.S.2d 662, 1964 N.Y. Misc. LEXIS 1372 (N.Y. Ct. Cl. 1964).

The question of privilege can be raised by any party to the action although the patient is not a party, and the party asserting privilege bears the burden of showing its application. To meet the burden of establishing the application of the physician-patient privilege, it must be established that the person whose testimony petitioner seeks to exclude was authorized to practice medicine or dentistry or was a registered professional or licensed practical nurse; that the information to be excluded was acquired by such person while attending the patient in a professional capacity; that the information was necessary to enable that person to act in a professional capacity; and that the information was intended to be confidential. Mayer v Albany Medical Center Hospital, 56 Misc. 2d 239, 288 N.Y.S.2d 771, 1968 N.Y. Misc. LEXIS 1704 (N.Y. Sup. Ct. 1968), modified, 37 A.D.2d 1011, 325 N.Y.S.2d 517, 1971 N.Y. App. Div. LEXIS 3091 (N.Y. App. Div. 3d Dep't 1971).

**B. Scope Of Privilege**

**4. Generally**

The physician-patient privilege (CPLR 4504), which belongs to the patient, is not terminated by death alone, and applies unless waived in some manner. In a wrongful death action wherein it was alleged that plaintiff’s deceased husband was killed when he fell from a 36th floor window,

statements made by the deceased's psychiatrist to a medical examiner and to plaintiff after her husband's death do not constitute a waiver of the spousal or physician-patient privilege, making otherwise privileged statements admissible, since a recipient of confidential information may not destroy the privilege; however, such statements are admissible since a wrongful death action is authorized only if it could have been maintained by the decedent had he survived (EPTL 5-4.1) and if decedent had survived and brought the action he could not have successfully resisted defendants' demand, in their effort to establish that his injuries resulted from attempted suicide rather than defendants' negligence because the privilege against self incrimination does not permit a plaintiff to claim affirmative relief and at the same time refuse to disclose information bearing upon his right to maintain his action and for essentially the same reason, the decedent as plaintiff could assert neither the physician-patient privilege nor the conjugal privilege to foreclose inquiry concerning whether his injury was the result of an attempt at suicide. By bringing a personal injury action in which mental or physical condition is affirmatively put in issue, privilege is waived, and it is judicially noticed that many apparently accidental deaths are in fact suicides and that a wrongful death complaint predicated upon an alleged accidental fall from a 36th story window is sufficiently equivocal in that respect to put in issue, by plaintiff's affirmative act in bringing the action, decedent's mental condition. Prink v Rockefeller Center, Inc., 48 N.Y.2d 309, 422 N.Y.S.2d 911, 398 N.E.2d 517, 1979 N.Y. LEXIS 2401 (N.Y. 1979).

Physician-patient privilege applies not only to information communicated orally by patient, but also to information obtained from observation of patient's appearance and symptoms, unless facts observed would be obvious to laymen; moreover, privilege operates whether information is contained in patient's medical files or is sought to be introduced at trial in form of expert testimony. Information obtained by physician in administering blood alcohol test is protected communication under CLS CPLR § 4504 since information is product of professional skill and knowledge and would not be apparent to layman uninitiated in medical arts. Dillenbeck v Hess, 73 N.Y.2d 278, 539 N.Y.S.2d 707, 536 N.E.2d 1126, 1989 N.Y. LEXIS 265 (N.Y. 1989).

Whether the confidentiality inherent in the fiduciary physician-patient relationship is breached does not depend on the nature of the medical treatment or diagnosis about which information is revealed; this section protects all types of medical information and provides consistency, avoiding case-by-case determinations of what is considered embarrassing to any particular patient. Chanko v American Broadcasting Cos. Inc., 27 N.Y.3d 46, 49 N.E.3d 1171, 29 N.Y.S.3d 879, 2016 N.Y. LEXIS 702 (N.Y. 2016).

In order for the physician-patient privilege to attach, a communication must have been confidential in nature and the patient must have contemplated that it would be kept so. Plaintiff's Blue Shield applications for reimbursement of professional and surgical fees were not protected from disclosure by the physician-patient privilege, since the type of information set forth in a Blue Shield application is clearly not of a confidential nature intended to be communicated only to the attending physician nor is it such as to result in humiliation, embarrassment or disgrace to patients; however, it was unnecessary to reveal the names of the patients and, therefore, the disclosure order would be modified accordingly. Bernstein v Lore, 59 A.D.2d 650, 398 N.Y.S.2d 388, 1977 N.Y. App. Div. LEXIS 13525 (N.Y. App. Div. 4th Dep't 1977).

In a medical malpractice action, the court improperly denied plaintiff's request for the names and addresses of nonparty patient witnesses, where disclosure of such witnesses, who may have seen the alleged acts of malpractice, did not violate the privilege of confidentiality of treatment provided for by CPLR § 4504. Hirsch v Catholic Medical Center, Inc., 91 A.D.2d 1033, 458 N.Y.S.2d 625, 1983 N.Y. App. Div. LEXIS 16356 (N.Y. App. Div. 2d Dep't 1983).

In a divorce action, an order directing defendant husband, a physician, to make his financial books and records available to plaintiff wife would not be interpreted as requiring him to provide access to his patient files and patient ledger cards, disclosure of which would be in clear violation of the physician-patient privilege in CPLR § 4504. Lehman v Lehman, 94 A.D.2d 761, 462 N.Y.S.2d 703, 1983 N.Y. App. Div. LEXIS 18216 (N.Y. App. Div. 2d Dep't 1983).

A subpoena directing a psychiatrist to produce medical records of 15 persons who may have falsely claimed group health policy benefits for services allegedly rendered by the psychiatrist

would be quashed except in relation to the dates and times of treatments contained in the records, since the individuals' records fell within the physician-patient privilege in CPLR § 4504 and the medical information release contained in insurance claim forms did not constitute a waiver of that privilege, and since the dates and times of treatments are not privileged information. Henry v Lewis, 102 A.D.2d 430, 478 N.Y.S.2d 263, 1984 N.Y. App. Div. LEXIS 18804 (N.Y. App. Div. 1st Dep't 1984).

Privilege extends both to production of medical records and testimony. Yetman v St. Charles Hospital, 112 A.D.2d 297, 491 N.Y.S.2d 742, 1985 N.Y. App. Div. LEXIS 56085 (N.Y. App. Div. 2d Dep't 1985).

In professional misconduct hearing, negative inferences could properly be drawn from patient's assertion of marital and doctor-patient privileges, despite patient's status as both patient and spouse of psychiatrist charged with misconduct, where material that was sought dealt with matters prior to marriage and generally did not deal with information obtained through confidential communications within privileged relationships; since privileges were improperly invoked, negative inferences could properly be drawn. Damino v Board of Regents, 124 A.D.2d 271, 508 N.Y.S.2d 618, 1986 N.Y. App. Div. LEXIS 61318 (N.Y. App. Div. 3d Dep't 1986), app. denied, 70 N.Y.2d 613, 524 N.Y.S.2d 431, 519 N.E.2d 342, 1987 N.Y. LEXIS 19897 (N.Y. 1987).

Although legislature did not intend to create dental assistant-patient privilege with CLS CPLR § 4504(a), such privilege does apply under certain circumstances—such as where dental assistant acts in concert with dentist—since contrary conclusion would effectively undercut whole purpose of dentist-patient privilege, particularly in case of dentists who seldom perform any treatment without attendance and services of dental assistant or hygienist. Desai v Blue Shield of Northeastern New York, Inc., 146 A.D.2d 264, 540 N.Y.S.2d 569, 1989 N.Y. App. Div. LEXIS 5013 (N.Y. App. Div. 3d Dep't 1989).

Physician-patient privilege did not apply in prosecution for possession of controlled substance where physician during surgery recovered cocaine-filled condoms that patient had swallowed;

privilege is abrogated by CLS Pub Health Art 33, which imposes duty on physician to report illegal possession by patient, and abrogation applies to prosecutions under Penal Law given its adoption of controlled substances definitions contained in Public Health Law. People v Figueroa, 173 A.D.2d 156, 568 N.Y.S.2d 957, 1991 N.Y. App. Div. LEXIS 5315 (N.Y. App. Div. 1st Dep't), app. denied, 78 N.Y.2d 1075, 577 N.Y.S.2d 239, 583 N.E.2d 951, 1991 N.Y. LEXIS 5256 (N.Y. 1991).

Doctor, who had received letter from patient's insurance carrier indicating that prior prescriptions might have been altered to provide for unauthorized refills, was acting solely in medical management capacity when she demanded that patient return prescription; thus, patient's statement to doctor that she would tear up prescription and return it next day was not protected by physician-patient privilege. People v Porpiglia, 215 A.D.2d 784, 627 N.Y.S.2d 720, 1995 N.Y. App. Div. LEXIS 5726 (N.Y. App. Div. 2d Dep't), app. denied, 86 N.Y.2d 800, 632 N.Y.S.2d 514, 656 N.E.2d 613, 1995 N.Y. LEXIS 4066 (N.Y. 1995).

Defendant in prosecution for driving while intoxicated could not use nurse-patient privilege as bar to admission of his blood test result, because CLS Veh & Tr § 1194(4)(a)(1)(i) expressly provides that registered nurse may withdraw blood for purpose of determining its alcoholic content, and withdrawal of defendant's blood for that purpose was by no means necessary for his treatment. People v Hagin, 238 A.D.2d 714, 657 N.Y.S.2d 105, 1997 N.Y. App. Div. LEXIS 3925 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 894, 662 N.Y.S.2d 436, 685 N.E.2d 217, 1997 N.Y. LEXIS 2788 (N.Y. 1997).

In medical malpractice action alleging that, at time of operation, physician was suffering from physical disability or illness that limited or reduced his ability to perform surgery, plaintiffs sufficiently showed that physician's physical condition was in controversy, so as to allow them to obtain limited medical records pertaining to physician without violating physician-patient privilege under CLS CPLR § 4504, where plaintiffs presented evidence that physician had made certain admissions to injured plaintiff regarding physician's medical condition. Physician-patient privilege under CLS CPLR § 4504 did not protect medical records limited to dates on which

physician had received medical treatment, including any consultations, from 6 months before to 60 days after injured plaintiff's surgery, because privilege does not protect mere facts and incidents of person's medical history. Klein v Levin, 242 A.D.2d 682, 662 N.Y.S.2d 793, 1997 N.Y. App. Div. LEXIS 9223 (N.Y. App. Div. 2d Dep't 1997).

In vehicular accident case in which defendant motorist admitted taking medication for "nerves" before accident, name of her treating psychiatrist was not privileged from disclosure, but name of specific nerve condition from which she suffered was privileged unless waived. Her pharmacy records were not subject to physician-patient privilege, but court would limit disclosure to 6-month period immediately preceding accident. Neferis v DeStefano, 265 A.D.2d 464, 697 N.Y.S.2d 108, 1999 N.Y. App. Div. LEXIS 10434 (N.Y. App. Div. 2d Dep't 1999).

Plaintiff wife had no cause of action against defendant physician for alleged damages to her mind and body, when physician revealed to her husband information obtained in the course of treating plaintiff. Curry v Corn, 52 Misc. 2d 1035, 277 N.Y.S.2d 470, 1966 N.Y. Misc. LEXIS 1802 (N.Y. Sup. Ct. 1966).

Physicians and nurses are forbidden to disclose information obtained from a patient which they have acquired for the purpose of treatment unless the patient waives the privilege and the same restriction binds hospital records insofar as they are recordings of information made by physicians and nurses. Lynch v County of Lewis, 68 Misc. 2d 78, 326 N.Y.S.2d 243, 1971 N.Y. Misc. LEXIS 1081 (N.Y. Sup. Ct. 1971).

Family counseling agency's records and reports covering consultation, examination, and interviews relating to spouses, who had sought agency's help in an attempt to preserve their marriage, were within ambit of privileges afforded with regard to certified social worker-client relationships, registered psychologist-client relationships, and physician (psychiatrist)-patient relationships; such records and reports were not admissible in marriage dissolution proceeding, absent waiver of such privileges by spouses. Yaron v Yaron, 83 Misc. 2d 276, 372 N.Y.S.2d 518, 1975 N.Y. Misc. LEXIS 2895 (N.Y. Sup. Ct. 1975).

By commencing wrongful death action, administratrix of decedent's estate put in controversy decedent's physical condition, and administratrix could not claim physician-patient privilege with respect to medical records of doctors who had treated decedent prior to his death. Sito v Neumann, 92 Misc. 2d 97, 399 N.Y.S.2d 833, 1977 N.Y. Misc. LEXIS 2506 (N.Y. Sup. Ct. 1977).

The husband of the psychiatrist author of an unauthorized book containing the verbatim disclosures of a patient during the course of a lengthy psychoanalysis, who knowing of its source manufactured, advertised and circulated the book, despite the fact he was not involved in a physician-patient or contractual relationship with the patient, is a co-violator of the patient's right of confidentiality and therefore equally liable. Doe v Roe, 93 Misc. 2d 201, 400 N.Y.S.2d 668, 1977 N.Y. Misc. LEXIS 2650 (N.Y. Sup. Ct. 1977).

Exception to physician-patient privilege contained in CLS Pub Health § 3373 applies to Article 220 of Penal Law as matter of law, and thus nurse's testimony that she saw doctor surgically remove 70 packets of cocaine from defendant, and that she turned cocaine over to hospital police, did not violate defendant's physician-patient privilege as stated in CLS CPLR § 4504. People v Fonseca, 134 Misc. 2d 1078, 514 N.Y.S.2d 189, 1987 N.Y. Misc. LEXIS 2163 (N.Y. Sup. Ct. 1987).

Dentist-patient privilege of CLS CPLR § 4504(a) could not be invoked to defeat subpoena duces tecum issued by State Department of Health for production of patient records, appointment calendars, logs and billing records of deceased dentist who had been infected with HIV virus, since threshold foundation supporting issuance of subpoenas was established by showing of department's authority under CLS Pub Health § 206(1)(d),(j) and (4)(a) to engage in epidemiological investigation of deceased dentist's patients. McBarnette v Feldman, 153 Misc. 2d 627, 582 N.Y.S.2d 900, 1992 N.Y. Misc. LEXIS 96 (N.Y. Sup. Ct. 1992).

In prosecution involving death of defendant's wife, statements he made to emergency medical technician who treated wife at scene, concerning circumstances leading to her condition, were not confidential communications protected from disclosure by physician-patient privilege; although privilege may be applied to persons who speak to physician on behalf of patient, it was

not intended to protect communications about how events occurred or information not product of confidential communication between patient and third party. People v Hanf, 159 Misc. 2d 748, 611 N.Y.S.2d 85, 1994 N.Y. Misc. LEXIS 117 (N.Y. County Ct. 1994).

Defendant charged with attempted second degree murder was entitled to disclosure of medical examiner's report regarding serology testing of victim's blood, and victim could not assert physician-patient privilege (CLS CPLR § 4504) to shield evidence from release, where report contained exculpatory Brady material. People v Davis, 168 Misc. 2d 26, 637 N.Y.S.2d 297, 1995 N.Y. Misc. LEXIS 640 (N.Y. County Ct. 1995).

Where defendant made incriminating statements to a triage nurse that were related to defendant's treatment, the doctor-patient privilege under N.Y. C.P.L.R. 4504(a) extended to the nurse. People v Jaffarian, 799 N.Y.S.2d 733, 9 Misc. 3d 455, 2005 N.Y. Misc. LEXIS 1640 (N.Y. J. Ct. 2005).

Neither CPLR 4504(a) nor any other statute specifically includes emergency medical technicians (EMT's) among those to whom communications may be privileged. To the contrary, the legislature has in Social Services Law § 413 specifically included EMT's as well as physicians as mandated reporters of suspected child abuse or maltreatment. People v Sergio, 864 N.Y.S.2d 264, 21 Misc. 3d 451, 240 N.Y.L.J. 54, 2008 N.Y. Misc. LEXIS 5304 (N.Y. Sup. Ct. 2008).

Although the observations of a nurse practitioner, a social worker, and other health care professionals employed by the employer of a woman accused of killing her baby, when made in the course of treating her pregnancy, should not have been admissible at the woman's trial, the error was harmless because the evidence was sufficient to convict her anyway. People v Strawbridge, 299 A.D.2d 584, 751 N.Y.S.2d 606, 2002 N.Y. App. Div. LEXIS 10572 (N.Y. App. Div. 3d Dep't 2002), app. denied, 99 N.Y.2d 632, 760 N.Y.S.2d 114, 790 N.E.2d 288, 2003 N.Y. LEXIS 1226 (N.Y. 2003), app. denied, 100 N.Y.2d 599, 766 N.Y.S.2d 175, 798 N.E.2d 359, 2003 N.Y. LEXIS 3642 (N.Y. 2003).

Because a pre-hospital care report prepared by an emergency medical technician clearly contained pertinent medical information of defendant, the physician-patient privilege in N.Y. C.P.L.R. 4504(a) applied; however, the People could elicit testimony from the technician concerning defendant's condition. People v Brito, 892 N.Y.S.2d 752, 26 Misc. 3d 1097, 243 N.Y.L.J. 9, 2010 N.Y. Misc. LEXIS 9 (N.Y. Sup. Ct. 2010).

Health Insurance Portability and Accountability Act of 1996's antipreemption exception has spared more stringent state statutes from preemptive effect; it has not, however, given more stringent state regulations the force of federal law. Thus, N.Y. C.P.L.R. 4504(a) remains the law in areas in which New York State has the authority to regulate, but it has not become the law in areas within the federal domain. Nat'l Abortion Fedn v Ashcroft, 2004 U.S. Dist. LEXIS 4530 (S.D.N.Y. Mar. 18, 2004).

**5. Non-professional information**

The physician-patient privilege does not apply to ordinary incidents and facts which can be perceived by laymen and which are not necessary for a physician to treat his patient. Gourdine v Phelps Memorial Hospital, 40 A.D.2d 694, 336 N.Y.S.2d 316, 1972 N.Y. App. Div. LEXIS 3757 (N.Y. App. Div. 2d Dep't 1972).

To assert the dentist-patient privilege as a bar to the discovery of information known by a dentist, the holder of the privilege must demonstrate that the dentist acquired the information while attending the patient in a professional capacity, that the dentist's acquisition of the information was necessary to enable him to act in that capacity, and that the information was intended to be confidential. Thus, in a widow's action to recover the accidental death benefits available under life insurance policies issued to her deceased husband by defendant insurers, who alleged that the husband's death had been a suicide and thus was not compensable under the policies, the trial court erred in denying the insurers' motion to reopen the examination of a dentist where information which the dentist had learned from the husband regarding his mental condition had not been necessary for the dentist's professional relationship with the husband.

Polsky v Union Mut. Stock Life Ins. Co., 80 A.D.2d 777, 436 N.Y.S.2d 744, 1981 N.Y. App. Div. LEXIS 10568 (N.Y. App. Div. 1st Dep't 1981).

In dental malpractice case, patient's discovery request for names and captions of other cases brought against dentist in which there were allegations of unauthorized work was properly granted where complaint alleged dentist had performed unauthorized surgery while patient was unconscious in preparation for root canal procedure; information would be material to show intent and lack of mistake, and since request was limited to items in captions of previous cases, disclosure of such information would not violate other patients' privileges of confidentiality. Davis v Solondz, 122 A.D.2d 401, 504 N.Y.S.2d 804, 1986 N.Y. App. Div. LEXIS 59715 (N.Y. App. Div. 3d Dep't 1986).

In medical malpractice case brought on behalf of infant, questions by defendants posed to mother of infant at examination before trial regarding her past medical history did not seek to obtain information protected by physician-patient privilege since questions sought only factual matter and did not inquire into communications between mother and any medical professional. De Angelis v Westchester Gynecologists & Obstetricians, P. C., 145 A.D.2d 593, 536 N.Y.S.2d 469, 1988 N.Y. App. Div. LEXIS 13832 (N.Y. App. Div. 2d Dep't 1988).

In action for injuries sustained in automobile accident, defendant was entitled to discovery of appointment books, billing invoices, and medical records of plaintiff's wife's ophthalmological practice, after records were redacted so as not to violate physician-patient privilege, where plaintiff alleged that he was medical ophthalmic technologist and assisted his wife in her practice, that his injuries resulted in lost earnings to himself and loss of income to practice, and that practice operated as per se partnership. Rubin v Alamo Rent-A-Car, 190 A.D.2d 661, 593 N.Y.S.2d 284, 1993 N.Y. App. Div. LEXIS 851 (N.Y. App. Div. 2d Dep't), app. denied, 82 N.Y.2d 661, 605 N.Y.S.2d 6, 625 N.E.2d 591, 1993 N.Y. LEXIS 4212 (N.Y. 1993).

If a physician has acquired any information which was not necessary to enable him to treat the patient, he can be compelled to disclose such information even though he acquired it while attending a patient, and any information plainly apparent or obtained by a layman is not within

the purview of the privilege statute. Mayer v Albany Medical Center Hospital, 56 Misc. 2d 239, 288 N.Y.S.2d 771, 1968 N.Y. Misc. LEXIS 1704 (N.Y. Sup. Ct. 1968), modified, 37 A.D.2d 1011, 325 N.Y.S.2d 517, 1971 N.Y. App. Div. LEXIS 3091 (N.Y. App. Div. 3d Dep't 1971).

The nature of the privilege has never been extended to prohibit the disclosure of information not acquired in a professional activity. Montwill Corp. v Lefkowitz, 66 Misc. 2d 724, 321 N.Y.S.2d 975, 1971 N.Y. Misc. LEXIS 1955 (N.Y. Sup. Ct. 1971).

Where juvenile was brought into hospital in an unconscious state and his condition was diagnosed as a respiratory distress syndrome resulting from an overdose of drugs and where treating physician examined his clothing for any indication that defendant was suffering from diabetes or any other disease which might cause such symptoms and in so doing discovered heroin, physician did not violate physician-patient privilege by turning such heroin over to the police. In re Cross, 72 Misc. 2d 192, 338 N.Y.S.2d 494, 1972 N.Y. Misc. LEXIS 1339 (N.Y. Fam. Ct. 1972).

In wrongful death action wherein plaintiff sought names and addresses of blood donors whose blood was supplied for transfusion into plaintiff’s decedent who died of AIDS, blood bank was entitled to protective order since (1) information sought was within patient-physician privilege under CLS CPLR § 4504, and (2) even if privilege were inapplicable, blood bank’s interest in maintaining anonymity of donors outweighed plaintiff’s right to disclosure because test for AIDS antibody was not available at time in question and disclosure would have only marginal utility in advancing plaintiff’s theory of liability, inasmuch as blood bank’s liability would be premised on its screening of prospective donors under common-law negligence principles. Krygier v Airweld, Inc., 137 Misc. 2d 306, 520 N.Y.S.2d 475, 1987 N.Y. Misc. LEXIS 2692 (N.Y. Sup. Ct. 1987).

Prosecution was entitled to limited disclosure of test results indicating whether defendant charged with rape was infected with any sexually transmissible disease since (1) defendant’s testing was not voluntary but was incident to his post-arrest status, and thus public policy guaranteeing privacy to encourage afflicted persons to seek treatment was inapplicable, (2) generalized screening of prisoners entering prison is not related directly to treatment so as to

give rise to physician-patient privilege, and (3) minimal intrusion to defendant was outweighed by fears and health concerns of his alleged victims and their families. People v Toure, 137 Misc. 2d 1066, 523 N.Y.S.2d 746, 1988 N.Y. Misc. LEXIS 3 (N.Y. Sup. Ct. 1988).

In proceeding to contest probate of will, proponent of will was entitled to depose decedent's treating physician, notwithstanding contention by objectants that physician could not be examined because he was their expert witness, since (1) physician had information concerning decedent's mental condition which was based on his observations of her at relevant time, (2) information was exclusive, material and necessary to proponent in preparation for trial in which testamentary capacity of decedent was at issue, and (3) although objectants planned to call physician as expert witness, he was also factual witness with personal knowledge relevant to issues before court. In re Estate of DeFilippo, 149 Misc. 2d 598, 564 N.Y.S.2d 667, 1990 N.Y. Misc. LEXIS 662 (N.Y. Sur. Ct. 1990).

In action by medical provider against its assignor's insurance company which had denied payment on ground that services were not reasonable and necessary, defendant insurance company could not claim privilege under CLS CPLR § 4504(a) in refusing to answer interrogatories regarding other health care providers who treated and examined plaintiff's assignor, as insurance company is not "a person authorized to practice" medicine, nursing, dentistry, podiatry or chiropractic, and information sought by plaintiff was not obtained by insurance company in attending patient "in a professional capacity." Hudson Med., P.C. v Allstate Ins. Co., 183 Misc. 2d 749, 704 N.Y.S.2d 437, 1999 N.Y. Misc. LEXIS 637 (N.Y. App. Term 1999).

Physician-patient privilege was not violated when a hospital administrator, in response to a detective's question about whether any "male blacks" were treated on a certain date for any kind of slash wounds to the face, gave the detective an admission slip with defendant's name and address and told him that defendant had received stitches on the left side of his face because the privilege does not prevent a person from testifying about ordinary facts that are plain to a layperson's observation. Defendant's facial wound, a fresh scar that extended from below his

ear almost to his chin, was conspicuous to the average layperson, and the administrator's identification of defendant's injury and location revealed no more than what had been readily observable. People v Greene, 36 A.D.3d 219, 824 N.Y.S.2d 48, 2006 N.Y. App. Div. LEXIS 13270 (N.Y. App. Div. 1st Dep't 2006), aff'd, 9 N.Y.3d 277, 849 N.Y.S.2d 461, 879 N.E.2d 1280, 2007 N.Y. LEXIS 3276 (N.Y. 2007).

Tenant's pretrial disclosure that she went to California to care for her father afforded the landlord the opportunity to inquire further and to conduct additional discovery concerning the parents' alleged infirmities, and the absence of medical and testimonial proof of the nature of the maladies afflicting the tenant's parents did not support an adverse inference that their alleged infirmities were merely a pretext to excuse tenant's absence from her rent-stabilized apartment; while information concerning the diseases or conditions for which the parents were treated was protected by the physician-patient privilege, the fact of medical treatment, including the frequency and dates thereof, was not. 542 E. 14th St. LLC v Lee, 66 A.D.3d 18, 883 N.Y.S.2d 188, 2009 N.Y. App. Div. LEXIS 5525 (N.Y. App. Div. 1st Dep't 2009).

Where a school district provided a suspended teacher's physician with a medical report disclosing information, concerning the district's reasons for finding the teacher unfit, which was not necessary for treatment, such information would not be insulated from further disclosure by the physician-patient privilege of CLS CPLR 4504, subd. a. Doe v Anker, 451 F. Supp. 241, 1978 U.S. Dist. LEXIS 17828 (S.D.N.Y. 1978).

**6. Photographs**

Doctor, director of federally funded drug treatment program, could not rely on New York's physician-patient privilege to justify nonproduction of photographs for identification purposes under CPLR 4504, subd [a], but federal legislation (Comprehensive Drug Abuse Prevention and Control Act of 1970) relating to confidentiality of persons undergoing treatment barred such disclosure. CPLR 4504, subd a would not protect photographs taken of patients at methadone clinic for purpose of identification where disclosure of such photographs was sought by police in

their investigation of a homicide. People v Newman, 32 N.Y.2d 379, 345 N.Y.S.2d 502, 298 N.E.2d 651, 1973 N.Y. LEXIS 1211 (N.Y. 1973), cert. denied, 414 U.S. 1163, 94 S. Ct. 927, 39 L. Ed. 2d 116, 1974 U.S. LEXIS 1668 (U.S. 1974).

**7. Death certificates**

In action by next of kin on accidental death policy, death certificate was admissible to establish cause of death where legally admissible factual cause was set forth therein. Regan v National Postal Transport Ass'n, 53 Misc. 2d 901, 280 N.Y.S.2d 319, 1967 N.Y. Misc. LEXIS 1493 (N.Y. Sup. Ct. 1967).

A death certificate, though admissible to prove the fact of death, is as to cause of death subject to the same non-waivable privilege against disgracing the memory of decedent as are hospital records. Tinney v Neilson's Flowers, Inc., 61 Misc. 2d 717, 305 N.Y.S.2d 713, 1969 N.Y. Misc. LEXIS 1377 (N.Y. Sup. Ct. 1969), aff'd, 35 A.D.2d 532, 314 N.Y.S.2d 161, 1970 N.Y. App. Div. LEXIS 4190 (N.Y. App. Div. 2d Dep't 1970).

**8. Hospital records**

A hospital director should not be prevented under subd (a) of this section by the physician-patient privilege from inspecting the hospital records although patients had not waived the privilege, for the supposed strict secrecy did not exist where the records had been seen, read, and copied by numerous hospital staff members and employees. Hyman v Jewish Chronic Disease Hospital, 15 N.Y.2d 317, 258 N.Y.S.2d 397, 206 N.E.2d 338, 1965 N.Y. LEXIS 1501 (N.Y.), reh'g denied, 16 N.Y.2d 618, 1965 N.Y. LEXIS 2282 (N.Y. 1965).

Physician-patient privilege did not bar the New York State Commission on Correction (Commission) from subpoenaing the records of a deceased inmate’s pre-mortem medical treatment at a hospital operated by the New York City, N.Y., Health and Hospitals Corporation because (1) N.Y. Correct. Law § 47(1)(a) required the Commission to investigate inmate deaths,

(2) the legislature did not intend to bar disclosure due to the inmate's pre-mortem treatment at a non-prison facility while allowing disclosure had the inmate been treated at a prison, and (3) a specific, narrow, exception to the physician-patient privilege in N.Y. C.P.L.R. 4504(a) was implied from the requirement to investigate inmate deaths and the Commission's plenary authority to conduct such investigations, as the exception had no untoward effect on the physician-patient relationship, and, if the exception did, the extent of the authorized review made the abrogation of the privilege in this context relatively insignificant. Matter of New York City Health & Hosps. Corp. v New York State Commn. of Correction, 19 N.Y.3d 239, 946 N.Y.S.2d 547, 969 N.E.2d 765, 2012 N.Y. LEXIS 983 (N.Y. 2012).

Although, pursuant to a subpoena duces tecum, a psychiatric clinic shall produce records relating to a mother who is a respondent in a child custody proceeding for such use as the Special Term Justice may direct, there shall be no disclosure of such records to adverse parties except to the extent directed and in making such direction, the Justice shall consider any psychiatric testimony offered or proposed; whether there has been a waiver of privilege; and whether the records are material and necessary to determine custody, or whether the court and the parties have sufficient information to determine custody without such disclosure, or perhaps even preliminary examination by the Justice himself. Before permitting disclosure, the Justice shall examine the records and determine which if any parts of the records shall be disclosed. Disclosure of the records of a psychiatric clinic relating to a wife to enable the husband in a pending divorce action to attempt to prove adultery by the wife is improper. People ex rel. Hickox v Hickox, 64 A.D.2d 412, 410 N.Y.S.2d 81, 1978 N.Y. App. Div. LEXIS 12759 (N.Y. App. Div. 1st Dep't 1978).

Court erred in granting plaintiff's motion under CLS CPLR § 3124 directing in camera review of defendant's hospital records "for the limited review of blood alcohol content" where plaintiff failed to show that defendant's physical condition at time of accident was "in controversy" (CLS CPLR § 3121(a)), defendant validly asserted patient-physician privilege, and defendant did not testify that he could not recall events leading up to and including accident to excuse complained of

conduct. Navedo v Nichols, 233 A.D.2d 378, 650 N.Y.S.2d 15, 1996 N.Y. App. Div. LEXIS 11641 (N.Y. App. Div. 2d Dep't 1996).

New York City Health & Hospitals Corporation, in action alleging that it was negligent in its treatment and premature release of patient who killed plaintiff's decedent, could not be compelled to divulge patient's medical records in absence of express waiver by patient; however, any nonmedical information in patient's records was subject to disclosure. Lee v New York City Transit Auth., 257 A.D.2d 611, 685 N.Y.S.2d 84, 1999 N.Y. App. Div. LEXIS 335 (N.Y. App. Div. 2d Dep't 1999).

Tortfeasor's admission, in the course of treatment, that he had been drinking alcohol prior to the automobile accident he was involved in, was privileged. Goldin v Mejia, 294 A.D.2d 231, 743 N.Y.S.2d 13, 2002 N.Y. App. Div. LEXIS 5320 (N.Y. App. Div. 1st Dep't 2002).

The physician-patient privilege extends to hospital records. Mayer v Albany Medical Center Hospital, 56 Misc. 2d 239, 288 N.Y.S.2d 771, 1968 N.Y. Misc. LEXIS 1704 (N.Y. Sup. Ct. 1968), modified, 37 A.D.2d 1011, 325 N.Y.S.2d 517, 1971 N.Y. App. Div. LEXIS 3091 (N.Y. App. Div. 3d Dep't 1971).

County prosecutors violated plaintiff's due process rights and First Amendment right to privacy, as well as his right to have his privacy protected under CLS Men Hyg § 33.13, where they subpoenaed records of his psychiatric treatment although his mental capacity was not raised as defense to criminal charges and his mental condition was never at issue, they caused subpoena to be issued without complying with applicable statutes which deprived him or his attorney of chance to object, and subpoena improperly directed hospital to deliver records directly to prosecutors rather than to court. Schwenk v Kavanaugh, 4 F. Supp. 2d 110 (N.D.N.Y. 1998).

**9. —Not privileged**

Privileges against disclosure are not applicable with respect to the release of medical records in a civil investigation by the Department of Social Services because of the important public

interest in seeing that Medicaid funds are properly used and where the information sought is essential in determining whether there had been intentional double billing, or billing without rendition of services or without furnishing medicine or other items. Doe v Kuriansky, 59 N.Y.2d 836, 464 N.Y.S.2d 755, 451 N.E.2d 502, 1983 N.Y. LEXIS 3164 (N.Y. 1983).

Patient who brought action against physician and hospital for alleged malpractice in the performance of hysterectomy was not entitled to discovery of hospital records of every hysterectomy performed by defendant physician at the hospital during the two years prior to the alleged malpractice unless there was express waiver by the other patients of the privilege; patient was entitled to discovery of the records relating to her surgery. Boddy v Parker, 45 A.D.2d 1000, 358 N.Y.S.2d 218, 1974 N.Y. App. Div. LEXIS 4237 (N.Y. App. Div. 2d Dep't 1974).

The trial court properly ordered the board of managers of a county medical center to grant petitioner access to certain medical records, where the board did not satisfy its burden of showing that the records were exempt from disclosure; since the board did not show or even allege that the records contained information obtained by an employee of the county department of social services, Soc Serv Law § 136(2), which protects the confidentiality of such records, was inapplicable. Moreover, the prohibition against disclosure of confidential information obtained in the course of a physician-patient relationship set forth in CPLR § 4504(a) was inapplicable, where the request for access to medical records was made under the Freedom of Information Law, identifying details were deleted, and there was no possibility that the identity of the patients would be known. Short v Board of Managers of Nassau County Medical Center, 85 A.D.2d 606, 444 N.Y.S.2d 686, 1981 N.Y. App. Div. LEXIS 16418 (N.Y. App. Div. 2d Dep't 1981), rev'd, 57 N.Y.2d 399, 456 N.Y.S.2d 724, 442 N.E.2d 1235, 1982 N.Y. LEXIS 3787 (N.Y. 1982).

A motion to quash a subpoena duces tecum issued to hospital and its executive vice president instructing them to produce documents pertaining to the medical treatment of a deceased patient for purposes of investigating allegations that the decedent’s respirator and respirator

alarm had been improperly turned off shortly before his death and that, when the effects of the act became known, certain hospital personnel deliberately withheld effective resuscitating measures from her, was properly denied, since the claim of patient-physician cannot be invoked successfully by, or on behalf of, a patient when the latter is merely the victim of a crime for which another has been criminally charged or is being investigated by a grand jury. Moreover, an allegation that disclosure would violate the patient's constitutional right to privacy would be rejected in view of the overriding public interest in having the grand jury investigate all avenues which might help detect criminal conduct. In addition, the conditional privilege from disclosure set forth in CPLR 3101 could not be invoked where the grand jury had demonstrated good cause for discovery of the items. In re Application to Quash Subpoena Duces Tecum in Grand Jury Proceedings, 86 A.D.2d 672, 446 N.Y.S.2d 382, 1982 N.Y. App. Div. LEXIS 15214 (N.Y. App. Div. 2d Dep't), aff'd, 56 N.Y.2d 348, 452 N.Y.S.2d 361, 437 N.E.2d 1118, 1982 N.Y. LEXIS 3428 (N.Y. 1982).

Inmate's claim of privilege with respect to his medical records would not be sustained, and thus determination that he had ingested morphine based on medical tests would be upheld, since claim of privilege cannot be raised for first time on appeal, physician-patient privilege was waived by inmate's failure to object to introduction of records at outset of disciplinary hearing, and his voluntary disclosures at hearing concerning his medical condition and treatment destroyed any privilege which might have attached to records. Rivera v Coughlin, 133 A.D.2d 694, 519 N.Y.S.2d 865, 1987 N.Y. App. Div. LEXIS 51731 (N.Y. App. Div. 2d Dep't 1987).

In actions involving plaintiffs seeking damages against various drug companies for injuries allegedly incurred due to use of diethylstilbestrol by mothers of plaintiffs before plaintiffs' births, drug companies were entitled to discovery of medical histories of plaintiffs' mothers for period that plaintiffs were in utero since plaintiffs' medical histories for such periods were inseparable from their mothers' histories for such periods. In re New York County DES Litigation, 168 A.D.2d 44, 570 N.Y.S.2d 804, 1991 N.Y. App. Div. LEXIS 7628 (N.Y. App. Div. 1st Dep't 1991).

In personal injury action arising out of plaintiff's fall in lobby of defendant hospital, court erred in denying plaintiff's motion to compel hospital to disclose name and address of individual who fell in lobby 13 days before plaintiff fell, notwithstanding hospital's assertion that information was privileged because incident report contained medical information, since disclosure of identity of nonparty witness did not violate physician-patient privilege provided by CLS CPLR § 4504(a) and CLS Pub Health § 2803-c(3)(f), especially in view of fact that hospital failed to allege that witness was its patient at time of incident. Gechoff v Our Lady of Victory Hosp., 190 A.D.2d 1060, 593 N.Y.S.2d 682, 1993 N.Y. App. Div. LEXIS 1288 (N.Y. App. Div. 4th Dep't 1993).

The petitioner, surviving spouse of an inmate of the Bronx State Hospital, was entitled to an order directing the hospital to furnish him, at his expense, a transcript or abstract of its records of every kind relating to the hospitalization of his deceased wife. Application of Hofberg, 50 Misc. 2d 147, 269 N.Y.S.2d 919, 1966 N.Y. Misc. LEXIS 1894 (N.Y. Ct. Cl. 1966).

In a proceeding in which a hospital moved for an order quashing or modifying two grand jury subpoenas calling for the production of the billing and medical records pertaining to approximately 96 specific former patients, the motion would be denied since, even assuming that the physician-patient privilege was applicable to the records, any such privilege would give way to the overriding public interest in facilitating the paramount right of the grand jury to use the records in investigating allegations of possible criminal activity. People v Doe, 107 Misc. 2d 605, 435 N.Y.S.2d 656, 1981 N.Y. Misc. LEXIS 2070 (N.Y. Sup. Ct. 1981).

A hospital may not assert the physician-patient privilege in CPLR § 4504 to bar compliance with subpoenas from a Grand Jury investigating the death of a patient and the hospital's policy concerning life-saving and support measures, in that the purpose of the privilege is to protect the patient and not to shield possible criminal activity. In re Application to Quash Subpoena Duces Tecum in Grand Jury Proceedings, 116 Misc. 2d 626, 455 N.Y.S.2d 945, 1982 N.Y. Misc. LEXIS 3931 (N.Y. Sup. Ct. 1982).

Introduction into evidence before Grand Jury of hospital records pertaining to observations and treatment of defendant following accident, which lead to charges of second degree vehicular

assault and driving under influence of alcohol, did not fatally compromise proceedings since the only entries which plausibly could have been considered by grand jury related to defendant's intoxication and were not privileged because they pertained to facts within plain observation of persons without expert or professional knowledge. People v Beneway, 148 Misc. 2d 177, 560 N.Y.S.2d 96, 1990 N.Y. Misc. LEXIS 442 (N.Y. County Ct. 1990).

Defendant's medical records were obtained in connection with a grand jury investigation and criminal prosecution of defendant, and the records were, therefore, not subject to outright suppression; even if the grand jury judge should not have issued a judicial subpoena, precluding further use of the records would not necessarily be the remedy because the physician-patient privilege was purely a legislative creation and was not absolute. People v Marrero, 71 Misc. 3d 1078, 146 N.Y.S.3d 455, 2021 N.Y. Misc. LEXIS 1661 (N.Y. Sup. Ct. 2021).

Patient's assertion that there was a doctor-patient relationship between her and the State that prevented the disclosure of the patient's information to the cancer center failed because the State was not a physician, was not authorized to practice medicine, and the patient did not assert any of the State's employees or agents were involved in providing medical treatment. M.V. v State of New York, 78 Misc. 3d 1037, 186 N.Y.S.3d 785, 2022 N.Y. Misc. LEXIS 10034 (N.Y. Ct. Cl. 2022).

Defendant's name and other identifying information through which authenticity of his blood sample could be established was not considered information within the meaning of the physician-patient privilege per CPLR 4504 as facts regarding the name of the patient from whom blood was drawn, as well as the date on which it was drawn and the name of the hospital employee who drew the blood were not pertinent to the diagnosis and treatment of defendant. People v Moreno, 83 Misc. 3d 993, 209 N.Y.S.3d 896, 2024 N.Y. Misc. LEXIS 1770 (N.Y. Sup. Ct. 2024).

**10. — —Mental patients**

Doctor’s testimony was properly admitted in a proceeding to appoint a guardian for an alleged incompetent person and admission of that testimony did not violate the doctor-patient privilege under N.Y. C.P.L.R. 4504(a) because the doctor was not the alleged incompetent person’s treating physician. The doctor was part of a crisis team under N.Y. Mental Hyg. Law § 9.57 that was empowered by N.Y. Mental Hyg. Law § 9.40 to mandate involuntary psychiatric treatment and prohibiting the doctor’s testimony in a hearing on that issue would hinder the ability to provide involuntary treatment for mental illness and would be contrary to the legislative scheme. Matter of Marie H., 25 A.D.3d 704, 811 N.Y.S.2d 708, 2006 N.Y. App. Div. LEXIS 676 (N.Y. App. Div. 2d Dep't 2006).

In wrongful death claim in Court of Claims arising out of a homicidal assault inflicted by a mental patient who had been released from an institution on convalescent status, the institution’s record of such patient was admissible, in the absence of proof that any information obtained by the medical authorities in the institution had been intended by the patient to be confidential, and that the application of the privilege was necessary to protect the patient’s interest. Milano v State, 44 Misc. 2d 290, 253 N.Y.S.2d 662, 1964 N.Y. Misc. LEXIS 1372 (N.Y. Ct. Cl. 1964).

In an action for annulment of a marriage on ground of fraud where defendant wife went berserk four days after the wedding and was thereafter confined in the state mental hospital and it was alleged that she was insane at the time of marriage and her guardian ad litem denied knowledge or information with respect to pertinent material allegations of the complaint, although the attorney general opposed the disclosure of all hospital records pertaining to hospitalization, care and treatment of the defendant on the basis of subd (a) of CPLR § 4504, disclosure was permitted in the interests of justice under CPLR Art 30. Jansons v Jansons, 45 Misc. 2d 795, 257 N.Y.S.2d 703, 1965 N.Y. Misc. LEXIS 2207 (N.Y. Sup. Ct. 1965).

In a habeas corpus proceeding instituted to determine the custody of the parties’ three children, petitioner’s application for an order requiring his wife to furnish authorization permitting him to make copies of hospital records from January of 1963 to date was denied, since in awarding custody of the children the court was concerned only with respondent’s present mental condition

and the records sought would not disclose the present mental condition of respondent and were material only upon a showing reflecting a relationship between her past and present mental condition. Application of Do Vidio, 56 Misc. 2d 79, 288 N.Y.S.2d 21, 1968 N.Y. Misc. LEXIS 1710 (N.Y. Fam. Ct. 1968).

Statements made by defendant to a psychiatric social worker employed by a State hospital in Utah during a court-ordered evaluation for the purpose of sentencing on a Utah conviction, defendant having initiated the conversations concerning his involvement in a New York homicide and been told by the social worker that there would be no confidentiality, are not privileged communications since the fact that the interview was conducted in a State hospital does not give rise to a physician-patient privilege (CPLR 4504) and the social worker-client privilege (CPLR 4508) is inapplicable since the social worker who interviewed defendant was not duly registered under the provisions of article 154 of the Education Law as required by the statute; even assuming that the social worker privilege requirements have been technically met, the statements would still not be privileged since defendant was not the client of the social worker when he made disclosures during the initial interview and defendant thereafter could have been under no misapprehension in regard to confidentiality. People v Lipsky, 102 Misc. 2d 19, 423 N.Y.S.2d 599, 1979 N.Y. Misc. LEXIS 2817 (N.Y. County Ct. 1979).

No physician-patient or nurse-patient privilege extended to communications with physicians responsible for involuntary commitment in psychiatric center or to communications with other physicians and nurses subsequent to patient’s commitment. In re Barbara W., 142 Misc. 2d 542, 537 N.Y.S.2d 427, 1988 N.Y. Misc. LEXIS 814 (N.Y. Sup. Ct. 1988).

**11. — —Non-medical data**

In claim against state based on assault by mental patient, privilege (CPLR § 4504, subd a), although not permitting unlimited discovery of defendant-patient’s hospital records, did not proscribe discovery of nonmedical data in such records pertaining to prior assault by defendant patient; nor was there anything in former Mental Hygiene L § 20 or § 34, subd 9 prohibiting

disclosure of such data pursuant to court order. Katz v State, 41 A.D.2d 879, 342 N.Y.S.2d 906, 1973 N.Y. App. Div. LEXIS 4630 (N.Y. App. Div. 3d Dep't 1973).

Person, who while on parole from state hospital allegedly murdered claimant's father, was in hospital for treatment, not punishment, and information conveyed by him, whether or not willingly, was confidential, and thus claimant, who had brought action against state for conscious pain and suffering and wrongful death alleging that parole of such person from hospital was negligent, was entitled to discover only non-medical information contained in hospital records. Dowling v State, 49 A.D.2d 982, 374 N.Y.S.2d 148, 1975 N.Y. App. Div. LEXIS 11300 (N.Y. App. Div. 3d Dep't 1975).

In an action in which plaintiff alleged that a hospital was negligent in its treatment and release of a former patient without warning law enforcement officials with whom an assault complaint had been filed against the patient by plaintiff's deceased husband, Special Term should have limited discovery to the non-medical portions of the hospital records sought, since CPLR § 4504 shields the patient's medical information from disclosure. Ashford v Brunswick Psychiatric Center, 90 A.D.2d 848, 456 N.Y.S.2d 96, 1982 N.Y. App. Div. LEXIS 19114 (N.Y. App. Div. 2d Dep't 1982).

Defendant was entitled to discovery and inspection of plaintiff physician's employment records and surgery schedules for relevant period, after redacting therefrom names of plaintiff's surgical patients, where plaintiff's bill of particulars claimed employment-related disability as result of defendant's negligence; information sought was not privileged since physician is free to testify as to fact that he has treated patient and occasions of his treatment. Lohmann v Trans World Airlines, 205 A.D.2d 666, 613 N.Y.S.2d 640, 613 N.Y.S.2d 652, 1994 N.Y. App. Div. LEXIS 6437 (N.Y. App. Div. 2d Dep't 1994).

Plaintiffs were seeking witnesses to an accident involving their decedent at a hospital. The plaintiffs discovery demand that the hospital furnish the names and addresses of all patients who passed through the treatment area of its emergency room area within a 72-hour period, although not privileged by N.Y. C.P.L.R. 4504(a), was overly broad and burdensome.

Rabinowitz v St. John's Episcopal Hosp., 24 A.D.3d 530, 808 N.Y.S.2d 280, 2005 N.Y. App. Div. LEXIS 14084 (N.Y. App. Div. 2d Dep't 2005).

Plaintiffs sought the names and addresses of patients who may have been in the hospital's emergency room area so that they could locate witnesses to their decedent's fall. Because of the broad range of services provided and medical conditions treated in a hospital's emergency room, the information requested by plaintiffs did not fall within the ambit of N.Y. C.P.L.R. 4504(a). Rabinowitz v St. John's Episcopal Hosp., 24 A.D.3d 530, 808 N.Y.S.2d 280, 2005 N.Y. App. Div. LEXIS 14084 (N.Y. App. Div. 2d Dep't 2005).

In a fraud action related to plaintiff's murder trial, plaintiff was entitled to compel discovery under N.Y. C.P.L.R. § 3124 of redacted hospital records of the victim that contained non-medical information related to time data for the date of the victim's death, such as the time of the arrival at the emergency room, as that information was not privileged under N.Y. C.P.L.R. § 4504(a) because it was not related to the medical treatment received. Jackson v Jam. Hosp. Med. Ctr., 61 A.D.3d 1166, 876 N.Y.S.2d 246, 2009 N.Y. App. Div. LEXIS 2641 (N.Y. App. Div. 3d Dep't 2009).

In plaintiff's action arising out of assault by a hospital patient while performing her duties as a certified nursing assistant, the supreme court erred in denying plaintiff's cross-motion for discovery of certain hospital records, including the patient's medical records, because plaintiff sought information as to any prior aggressive or violent acts by the patient, and such information of a nonmedical nature regarding prior aggressive or violent acts was not privileged. Gooden v New York City Health & Hosps. Corp., 216 A.D.3d 1143, 191 N.Y.S.3d 79, 2023 N.Y. App. Div. LEXIS 2885 (N.Y. App. Div. 2d Dep't 2023).

A motion to quash a subpoena issued to obtain records of a pharmacy's transactions with its customers would be denied, since the right of confidentiality afforded patients under CPLR § 4504 in their communications with physicians, dentists and nurses is not extended to a patient's communications with his pharmacist. John Doe, Inc. v Kuriansky, 120 Misc. 2d 508, 466 N.Y.S.2d 202, 1983 N.Y. Misc. LEXIS 3749 (N.Y. Sup. Ct. 1983).

Patient's motion to disclose the name of a roommate at a rehabilitation center which allegedly negligently caused the patient's neck injury was granted; N.Y. C.P.L.R. 4504(a) and N.Y. Pub. Health Law § 2803-c(3)(f) did not preclude the disclosure of the roommate's name, as the disclosure of the name did not also indicate the treatment given to the roommate, and the disclosure also did not violate 42 U.S.C.S. § 1320d. Rogers v NYU Hosps. Ctr., 795 N.Y.S.2d 438, 8 Misc. 3d 730, 233 N.Y.L.J. 104, 2005 N.Y. Misc. LEXIS 1022 (N.Y. Sup. Ct. 2005).

**12. —Privileged**

Attempts by a district attorney to subpoena hospital records in an attempt to garner a medical determination as to causation through the application of professional skill or knowledge, in this case, whether an assailant accused of stabbing an individual was treated, goes to the heart of doctor-patient privilege, and the subpoena should properly be quashed. N.Y. City Health & Hosps. Corp. v Morgenthau (In re Grand Jury Investigation), 98 N.Y.2d 525, 749 N.Y.S.2d 462, 779 N.E.2d 173, 2002 N.Y. LEXIS 3140 (N.Y. 2002).

Patient who brought action against physician and hospital for alleged malpractice in the performance of hysterectomy was not entitled to discovery of hospital records of every hysterectomy performed by defendant physician at the hospital during the two years prior to the alleged malpractice unless there was express waiver by the other patients of the privilege; patient was entitled to discovery of the records relating to her surgery. Boddy v Parker, 45 A.D.2d 1000, 358 N.Y.S.2d 218, 1974 N.Y. App. Div. LEXIS 4237 (N.Y. App. Div. 2d Dep't 1974).

Records of all patients treated for knife wounds during a three-day period are protected from disclosure by the physician-patient privilege. In re Grand Jury Investigation, 90 A.D.2d 990, 456 N.Y.S.2d 586, 1982 N.Y. App. Div. LEXIS 19277 (N.Y. App. Div. 4th Dep't 1982), aff'd, 59 N.Y.2d 130, 463 N.Y.S.2d 758, 450 N.E.2d 678, 1983 N.Y. LEXIS 3109 (N.Y. 1983).

Court properly denied defendants' application to admit into evidence in medical malpractice case hospital delivery room records of 2 nonparty patients where symbol sought to be

introduced in records constituted medical information; such information is shielded under physician-patient privilege. Schwartzberg v Kai-Shun Li, 141 A.D.2d 530, 529 N.Y.S.2d 146, 1988 N.Y. App. Div. LEXIS 6380 (N.Y. App. Div. 2d Dep't 1988).

In actions involving plaintiffs seeking damages against various drug companies for injuries allegedly incurred due to use of diethylstilbestrol by mothers of plaintiffs before plaintiffs' births, drug companies were not entitled to obtain copies of hospital and medical records of plaintiffs' mothers, fathers, siblings and other family members on basis that information was necessary to show that claimed injuries were product of genetic or hereditary origin since such information fell within scope of physician-patient privilege; there was no presumption, rebuttable or not, that nonparty family members waived their right of confidentiality over their medical histories and files because they must have, at one point or another, directly or indirectly made disclosures to plaintiffs about their medical histories. In re New York County DES Litigation, 168 A.D.2d 44, 570 N.Y.S.2d 804, 1991 N.Y. App. Div. LEXIS 7628 (N.Y. App. Div. 1st Dep't 1991).

Court erred in admitting into evidence redacted version of defendant's hospital records where redacted version contained more than mere facts plain to observation of anyone without expert or professional knowledge, and thus violated defendant's physician-patient privilege. People v Ballard, 173 A.D.2d 480, 570 N.Y.S.2d 101, 1991 N.Y. App. Div. LEXIS 7414 (N.Y. App. Div. 2d Dep't), app. denied, 78 N.Y.2d 961, 574 N.Y.S.2d 940, 580 N.E.2d 412, 1991 N.Y. LEXIS 4260 (N.Y. 1991).

Court properly granted protective order to hospital against disclosure of names of other patients who received same substance on same day as plaintiff, notwithstanding plaintiff's contention that if dosage of her injection were incorrect, then other patients who received similar injections might have had similar side effects and their testimony would provide proof of alleged acts of medical negligence, since other patients were not witnesses to event at issue, and disclosure of names and records of medical treatment of other patients would be in contradiction of CLS CPLR § 4504(a). Beck v Albany Medical Ctr. Hosp., 191 A.D.2d 854, 594 N.Y.S.2d 844, 1993 N.Y. App. Div. LEXIS 2380 (N.Y. App. Div. 3d Dep't 1993).

Court improperly ordered hospital to comply with grand jury subpoenas seeking records as to persons who sought treatment for “injury caused by or possibly caused by a cutting instrument and/or sharp object, said injury being plainly observable to a lay person without expert or professional knowledge...except any and all information acquired by a physician, registered nurse or licensed practical nurse in attending said patient in a professional capacity and which was necessary to enable said doctor and /or nurse to act in that capacity”; despite semantic gloss that subject records involved only injuries of nature obvious to laypersons, and that physicians and nurses were not being required to divulge privileged information, assessment of nature and cause of injuries triggering production of relevant documents involved inherently medical evaluation. N.Y. City Health & Hosps. Corp. v Morgenthau (In re Grand Jury Investigation), 287 A.D.2d 287, 731 N.Y.S.2d 17, 2001 N.Y. App. Div. LEXIS 9342 (N.Y. App. Div. 1st Dep't 2001), aff'd, 98 N.Y.2d 525, 749 N.Y.S.2d 462, 779 N.E.2d 173, 2002 N.Y. LEXIS 3140 (N.Y. 2002).

In a medical malpractice action, plaintiff had established that the medical condition of an individual defendant was at issue, however, defendants were entitiled to a protective order because there was no showing that defendant had ever waived the physician-patient privilege, as contemplated by N.Y. C.P.L.R. §§ 3101(b), 4504(a). Bongiorno v Livingston, 20 A.D.3d 379, 799 N.Y.S.2d 98, 2005 N.Y. App. Div. LEXIS 7574 (N.Y. App. Div. 2d Dep't 2005).

Subpoena issued to superintendent of state penal institution seeking all medical and psychiatric records of individual who was a prospective witness would be quashed as it applied to hospital, medical and psychiatric records, as such records, in the absence of the patient’s waiver, are privileged as a matter of law. People v Dodge, 73 Misc. 2d 80, 341 N.Y.S.2d 471, 1973 N.Y. Misc. LEXIS 2132 (N.Y. County Ct. 1973).

Psychiatric reports written by doctors at state institution when prosecution’s key witness was a patient there were privileged as a matter of law and thereby fell within statutory protection of the patient-privilege conferred by CPLR 4504. People v Bartholomew, 73 Misc. 2d 541, 342

N.Y.S.2d 798, 1973 N.Y. Misc. LEXIS 2097 (N.Y. County Ct. 1973), aff'd, 56 A.D.2d 633, 391 N.Y.S.2d 936, 1977 N.Y. App. Div. LEXIS 10744 (N.Y. App. Div. 2d Dep't 1977).

Subpoena issued by deputy Attorney General in connection with an investigation of nursing home and other health care abuses and which directed petitioners to produce medical charts of patients was violative of physician-patient privilege insofar as it concerned records of current residents and living former residents of nursing home owned by petitioners. Lewis v Hynes, 82 Misc. 2d 256, 368 N.Y.S.2d 738, 1975 N.Y. Misc. LEXIS 2615 (N.Y. Sup. Ct. 1975), aff'd, 51 A.D.2d 550, 379 N.Y.S.2d 374, 1976 N.Y. App. Div. LEXIS 10799 (N.Y. App. Div. 2d Dep't 1976).

In a proceeding by a Special Guardian seeking the appointment of a conservator under the Mental Hygiene Law, the petitioner could not introduce, for the purpose of establishing one of the conditions required by statute for the granting of the petition, certain hospital and medical records pertaining to the respondent, who was represented by a Guardian ad litem, since such evidence was privileged under CPLR § 4504(a) (patient-doctor privilege). In re D., 107 Misc. 2d 288, 433 N.Y.S.2d 717, 1980 N.Y. Misc. LEXIS 2863 (N.Y. Sup. Ct. 1980).

In a medical malpractice action brought on behalf of a learning-disabled infant against a hospital and physicians, the hospital was entitled to discovery of any records bearing on the infant's medical, educational or social history, and no physician-patient privilege could be asserted with respect to the records, since any such privilege was waived by the bringing of the action. However, the hospital was not entitled to medical histories of the infant plaintiff's siblings who asserted their privilege under applicable statute, and defendants were not entitled to discovery of such records relating to the infant's mother, with the exception of records pertaining to that period during which the infant was in utero. Burgos v Flower & Fifth Ave. Hospital, 108 Misc. 2d 225, 437 N.Y.S.2d 218, 1980 N.Y. Misc. LEXIS 2928 (N.Y. Sup. Ct. 1980).

Psychiatric and psychological examination and evaluation records pertaining to an infant student, for use in an administrative appeal taken by the student's parents, pursuant to Educ Law § 4404, to review a recommendation of the school district's committee on the handicapped,

although partially admissible at the de novo administrative hearing required by § 4404, fall within the privilege for confidential communications between physician and patient, under CPLR § 4504 which would preclude release of the information sought over the objection of one of the student's parents. In re Handicapped Child, 118 Misc. 2d 137, 460 N.Y.S.2d 256, 1983 N.Y. Misc. LEXIS 3279 (N.Y. Sup. Ct. 1983).

While defendant was incorrect in suggesting that N.Y. Veh. & Traf. Law § 1194(3) had to be complied with in requiring a person to submit to a chemical test in a case where the person was suspected of driving while intoxicated, as a blood sample could be obtained pursuant to a validly-issued search warrant without resorting to that statutory section, the blood and blood test results were nevertheless inadmissible at defendant's trial because they were protected by the physician-patient privilege. People v Muscarnera, 842 N.Y.S.2d 241, 16 Misc. 3d 622, 237 N.Y.L.J. 95, 2007 N.Y. Misc. LEXIS 3843 (N.Y. Dist. Ct. 2007).

Presentment agency's application for a judicial subpoena duces tecum that a hospital produce its records of an alleged assault victim was denied because the victim did not waive the physician-patient privilege under N.Y. C.P.L.R. § 4504(a) based upon the fact that he obtained emergency medical treatment and provided a narrative of the event to the police. Furthermore, the New York physician-patient privilege was more stringent than the provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C.S. § 1320a through 1320d-8; thus, the New York physician-patient privilege was not preempted by HIPAA in the situation. Matter of Antonia E., 838 N.Y.S.2d 872, 16 Misc. 3d 637, 237 N.Y.L.J. 120, 2007 N.Y. Misc. LEXIS 3901 (N.Y. Fam. Ct. 2007).

Trial court's order directing the hospital to disclose the names and addresses of other patients that were in the cardiac care unit on the day of the patient's accident was reversed because such disclosure would necessarily reveal that the patients were being treated for a cardiac condition and would violate the physician-patient privilege. Gunn v Sound Shore Med. Ctr., 5 A.D.3d 435, 772 N.Y.S.2d 714, 2004 N.Y. App. Div. LEXIS 2480 (N.Y. App. Div. 2d Dep't 2004).

Trial court properly denied a motion by doctors and a hospital, who were defendants in a medical malpractice action commenced by a mother in her representative capacity as parent and natural guardian of her child, seeking a medical authorization in order to obtain medical records regarding the mother's labor and delivery of another child subsequent to the child who was the patient in the instant action, as well as records of the mother's prenatal care, as those records were protected by the physician-patient privilege, and had not been waived by the mother's action, which was only in a representative capacity. Schaner v Mercy Hosp. of Buffalo, 15 A.D.3d 997, 789 N.Y.S.2d 561, 2005 N.Y. App. Div. LEXIS 1194 (N.Y. App. Div. 4th Dep't 2005).

Where a treating medical/healthcare facility sought to admit into evidence a treating physician's testimony and medical records regarding an alleged incapacitated person (AIP), such records and testimony, even for the salutary purpose of securing an appropriate placement for the AIP, remained privileged under N.Y. C.P.L.R. 4504(a) and would not be admitted unless the AIP waived the privilege or affirmatively placed his/her medical condition in issue. The refusal to admit the medical records did not eviscerate the right of a medical institution to be a petitioner as explicitly allowed in N.Y. Mental Hyg. Law § 81.06(7) because there were other ways to prove incapacity such as the testimony of family members; negating the physician/patient privilege would likely frustrate the twin goals of "independence" and "self-determination" found in N.Y. Mental Hyg. Law § 81.01 by causing an AIP to distrust his or her treating physician; and enforcing the privilege did not interfere with the speedy trial under N.Y. Mental Hyg. Law § 81.07(a)(1); and the rules of evidence could only be waived under N.Y. Mental Hyg. Law § 81.12 (b) in an uncontested matter. Matter of Q.E.J., 824 N.Y.S.2d 882, 14 Misc. 3d 448, 2006 N.Y. Misc. LEXIS 3378 (N.Y. Sup. Ct. 2006).

**13. Blood samples**

Denial of a doctor's motion to compel a decedent's representative in a wrongful death medical malpractice action to provide an authorization for the release of the representative's treatment

records, and an order granting the representative's motion for a protective order were proper because, inter alia, although the decedent's medical records were discoverable, the representative's psychiatric treatment records were privileged; the mere fact that the representative commenced the action did not result in an automatic waiver of the physician-patient privilege and there was no evidence that the representative affirmatively placed her psychiatric condition in issue so as to effect a waiver of the privilege and permit disclosure. The doctor failed to establish that the records she sought to discover were material and necessary to the defense of the action, and the representative's psychiatric treatment records were not subject to disclosure. Napoli v Crovello, 49 A.D.3d 699, 854 N.Y.S.2d 176, 2008 N.Y. App. Div. LEXIS 2566 (N.Y. App. Div. 2d Dep't 2008).

Physical blood specimen taken from a patient by a medical professional is not "information" protected by the physician-patient privilege as defined in N.Y. C.P.L.R. 4504(a) and, accordingly, such a blood sample is subject to seizure pursuant to a warrant issued under the authority of N.Y. Crim. Proc. Law § 690.10. Nothing in the language of N.Y. C.P.L.R. 4504(a) or in the case law interpreting it supported its application to the physical blood samples at issue in the case on review of the denial of a motion to suppress, and no compelling public policy interest justified expanding the physician-patient privilege to a physical blood sample. People v Elysee, 49 A.D.3d 33, 847 N.Y.S.2d 654, 2007 N.Y. App. Div. LEXIS 12853 (N.Y. App. Div. 2d Dep't 2007), aff'd, 12 N.Y.3d 100, 876 N.Y.S.2d 677, 904 N.E.2d 813, 2009 N.Y. LEXIS 15 (N.Y. 2009).

Phrase "information acquired in attending a patient in a professional capacity" in the context of the physician-patient privilege under N.Y. C.P.L.R. 4504 does not include a physical blood sample standing alone, prior to being tested by a treating physician or other medical professional, since it neither communicates nor renders observable any information about a patient upon which treatment can be based or a diagnosis made. People v Elysee, 49 A.D.3d 33, 847 N.Y.S.2d 654, 2007 N.Y. App. Div. LEXIS 12853 (N.Y. App. Div. 2d Dep't 2007), aff'd, 12 N.Y.3d 100, 876 N.Y.S.2d 677, 904 N.E.2d 813, 2009 N.Y. LEXIS 15 (N.Y. 2009).

## C. Waiver Of Privilege

### 14. Generally

Defendant in automobile accident case would not be deemed to have waived physician-patient privilege with respect to blood test administered at hospital for treatment of her injuries simply by her denial of allegations in complaint, by her testimony that she could not remember any details of incident (where fact of her memory loss was not being advanced to excuse her conduct), or by her assertion of defenses of comparative negligence and failure of plaintiffs to wear seat belts. Once it has been shown that requested information is privileged under CLS CPLR § 4504, only patient or authorized representative may waive privilege and permit disclosure. Dillenbeck v Hess, 73 N.Y.2d 278, 539 N.Y.S.2d 707, 536 N.E.2d 1126, 1989 N.Y. LEXIS 265 (N.Y. 1989).

Waiver or suspension of the statutorily created privileges protecting the confidentiality of communications between a physician and his patient, a psychologist and his client, and a certified social worker and his client (CPLR 4504, 4507, 4508) is a drastic remedy which should be granted only upon an evidentiary showing by the party seeking examination of the protected records that a party's physical, mental or emotional condition is in controversy. Perry v Fiumano, 61 A.D.2d 512, 403 N.Y.S.2d 382, 1978 N.Y. App. Div. LEXIS 9768 (N.Y. App. Div. 4th Dep't 1978).

In a medical malpractice action brought on behalf of an infant plaintiff arising out of alleged negligence in the providing of prenatal, intranatal, and postnatal care, the infant plaintiff's mother, named in the action in her capacity as plaintiff's mother and natural guardian, did not waive the physician-patient privilege merely by acting in a representative capacity but did waive her right to assert it with regard to time periods other than when the infant plaintiff was in utero by responding to counsel's inquiries relating to her medical history at her deposition. However, defendants' demand for medical authorizations for the mother's records relating to those periods for which she waived the privilege would be stricken, even though plaintiff, as the party opposing disclosure, had the burden of establishing the material was privileged, since there was an

insufficient demonstration of the relevancy of each particular record sought to the defense of the infant plaintiff's claims. Maternal records relating to the period when the infant was in utero were discoverable upon the theory of impossibility of severance. Herbst v Bruhn, 106 A.D.2d 546, 483 N.Y.S.2d 363, 1984 N.Y. App. Div. LEXIS 21576 (N.Y. App. Div. 2d Dep't 1984).

Mother waives physician-patient privilege as to other pregnancies where she reveals past medical history of miscarriages to various physicians for purpose of aiding in treatment of infant plaintiff during year subsequent to his birth; privilege is waived since information was furnished by mother not in confidence with respect to treatment being provided to her but rather in connection with treatment of infant plaintiff. Yetman v St. Charles Hospital, 112 A.D.2d 297, 491 N.Y.S.2d 742, 1985 N.Y. App. Div. LEXIS 56085 (N.Y. App. Div. 2d Dep't 1985).

Waiver results from failure to object to disclosure of privileged information; parent may waive physician-patient privilege with respect to nonparty minor children by permissively indicating intention to do so. Riccardi v Tampax, Inc., 113 A.D.2d 880, 493 N.Y.S.2d 798, 1985 N.Y. App. Div. LEXIS 52508 (N.Y. App. Div. 2d Dep't 1985).

In infant's medical malpractice action, mother's physician-patient privilege was personal to mother and thus was not waived by letter from infant's attorneys to defendants indicating that authorizations to obtain mother's medical records (requested by defendants) would be forthcoming. Sibley v Hayes 73 Corp., 126 A.D.2d 629, 511 N.Y.S.2d 65, 1987 N.Y. App. Div. LEXIS 41761 (N.Y. App. Div. 2d Dep't 1987).

In infant's medical malpractice action, mother's physician-patient privilege was not waived by allegation in infant's bill of particulars that defendants failed "to read and review past and current medical and hospital records, so as to be cognizant . . . of . . . mother's and infant's condition and progress"; however, if mother continued to invoke privilege, infant would be precluded at trial from introducing evidence concerning matters as to which privilege was asserted. Sibley v Hayes 73 Corp., 126 A.D.2d 629, 511 N.Y.S.2d 65, 1987 N.Y. App. Div. LEXIS 41761 (N.Y. App. Div. 2d Dep't 1987).

In medical malpractice action arising from infant's prenatal and postnatal care, mother waived physician-patient privilege with respect to her prior miscarriage and treatment with psychiatric medication by answering questions at deposition about her own medical background and treatment, and thus her motion for protective order as to medical records concerning those occurrences was properly denied; however, disclosure would be limited to period from 10 months before miscarriage until infant's birth, since disclosure for longer period would be overly broad and intrusive. De Silva v Rosenberg, 129 A.D.2d 609, 514 N.Y.S.2d 104, 1987 N.Y. App. Div. LEXIS 45296 (N.Y. App. Div. 2d Dep't 1987).

In trial for second degree assault arising from incident in which prison inmate was burned as result of flammable liquid being thrown on him and ignited, defendant did not waive nurse-patient privilege on ground that he placed his physical condition in issue by telling police investigator that he scalded his hand while mishandling pot used to heat water in his cell, and thus it was error to admit in evidence nurse's testimony describing burns on defendant's hands and opining that they were not caused by scalding water. People v Fitzroy, 132 A.D.2d 810, 517 N.Y.S.2d 805, 1987 N.Y. App. Div. LEXIS 49309 (N.Y. App. Div. 3d Dep't), app. denied, 70 N.Y.2d 874, 523 N.Y.S.2d 501, 518 N.E.2d 12, 1987 N.Y. LEXIS 19141 (N.Y. 1987).

Defendant was entitled to dismissal of action for breach of promise of confidentiality since by authorizing her friend to inquire about her condition and concerns, plaintiff waived her right to enforce defendant's duty to maintain confidentiality, and by authorizing friend to use her influence with hospital to see whether she was getting best care possible, plaintiff waived physician-patient privilege. Heidi E. v Wanda W., 210 A.D.2d 918, 620 N.Y.S.2d 665, 1994 N.Y. App. Div. LEXIS 13388 (N.Y. App. Div. 4th Dep't 1994).

Medical malpractice defendants were not entitled to order compelling plaintiff mother to provide authorizations for release of medical records outside period of subject pregnancy since, by suing in her representative capacity as mother of infant plaintiff, mother did not waive her physician-patient privilege even though she alleged in bill of particulars that defendants failed to record or appreciate her medical history. Mother's assertion of derivative cause of action in her individual

capacity as mother of injured infant plaintiff, together with infant's father, did not constitute waiver of her physician-patient privilege, and thus medical malpractice defendants were not entitled to order compelling mother to provide authorizations for release of medical records outside period of subject pregnancy, where she did not place her physical condition in issue. Murphy v LoPresti, 232 A.D.2d 461, 648 N.Y.S.2d 169, 1996 N.Y. App. Div. LEXIS 10215 (N.Y. App. Div. 2d Dep't 1996).

Court properly admitted that portion of hospital records disclosing result of defendant's initial blood test since he waived physician-patient privilege when defense counsel, during cross-examination of police officer who observed defendant and spoke to him at hospital, attempted to show that defendant's appearance was result of his injuries instead of intoxication. People v Gonzalez, 239 A.D.2d 931, 659 N.Y.S.2d 591, 1997 N.Y. App. Div. LEXIS 6312 (N.Y. App. Div. 4th Dep't), app. denied, 90 N.Y.2d 893, 662 N.Y.S.2d 436, 685 N.E.2d 217, 1997 N.Y. LEXIS 2784 (N.Y. 1997).

Defendant, administratrix of decedent's estate, did not waive physician-patient privilege by affirmatively asserting decedent's medical condition either by way of counterclaim or to excuse conduct complained of my plaintiffs. Scinta v Van Coevering, 249 A.D.2d 889, 672 N.Y.S.2d 186, 1998 N.Y. App. Div. LEXIS 4960 (N.Y. App. Div. 4th Dep't 1998).

In mother's action on behalf of child for medical malpractice and products liability, defendant was not entitled to compel mother to provide authorizations for release of medical records outside period of subject pregnancy where mother did not waive her physician-patient privilege by (1) suing in her representative capacity, (2) asserting derivative cause of action for loss of child's services, or (3) revealing non-privileged family medical history. Roman v Turner Colours, Inc., 255 A.D.2d 571, 681 N.Y.S.2d 69, 1998 N.Y. App. Div. LEXIS 12877 (N.Y. App. Div. 2d Dep't), app. dismissed, 255 A.D.2d 571, 682 N.Y.S.2d 609, 1998 N.Y. App. Div. LEXIS 12849 (N.Y. App. Div. 2d Dep't 1998).

Gynecologist whose license to practice medicine was revoked for professional misconduct was not unduly restricted by administrative law judge in defending charges where (1) he was given

sufficient leeway in questioning patients and exploring relevant matters bearing on the credibility of each, (2) he was allowed to present expert opinion of psychiatrist, who reviewed patients' testimony and speculated as to possible memory distortions and motives to fabricate, and (3) gynecologist was allowed to question particular patient about any psychiatric treatment that she received before or after alleged misconduct, although as mere witness she did not place her mental condition in controversy and thus did not waive physician-patient privilege. Although physician charged with one-on-one misconduct occurring many years in past, for which insignificant corroboration exists, is afforded great latitude in questioning accuser, such latitude does not include waiver of accuser's physician-patient privilege or allow disclosure of otherwise protected medical records. Giffone v DeBuono, 263 A.D.2d 713, 693 N.Y.S.2d 691, 1999 N.Y. App. Div. LEXIS 8030 (N.Y. App. Div. 3d Dep't 1999).

Once the patient had agreed to waive of the privilege in order for his psychiatrist to mail a Tarasoff warning letter to his wife and parents, he also waived the privilege for purposes of the admissibility of testimony regarding the letter at his eventual trial for murdering his wife. People v Bierenbaum, 301 A.D.2d 119, 748 N.Y.S.2d 563, 2002 N.Y. App. Div. LEXIS 10057 (N.Y. App. Div. 1st Dep't 2002), app. denied, 99 N.Y.2d 626, 760 N.Y.S.2d 107, 790 N.E.2d 281, 2003 N.Y. LEXIS 1052 (N.Y. 2003), cert. denied, 540 U.S. 821, 124 S. Ct. 134, 157 L. Ed. 2d 40, 2003 U.S. LEXIS 6039 (U.S. 2003).

While defendant's hospital medical records were privileged, he placed his physical and mental condition at the time of his consent as well as his condition before and after directly in issue by calling the emergency room treating physician to testify regarding his ability to consent, thereby waiving the privilege; defendant called upon that physician, and the treating nurse during cross-examination, to testify to their recollection and based upon the medical records regarding his condition, treatment and capacity at the hospital and at the time of his consent and, thus, no error occurred. People v Centerbar, 80 A.D.3d 1008, 914 N.Y.S.2d 784, 2011 N.Y. App. Div. LEXIS 320 (N.Y. App. Div. 3d Dep't 2011).

Trial court properly vacated an order directing a mother to provide authorizations to release the records pertaining to the births of her six non-party children because the mother did not waive the physician-patient privilege in N.Y. C.P.L.R. 4504(a) with respect to her own medical history even though the defendants established that the children's records were material and necessary under N.Y. C.P.L.R. 3101(a) to the defense of the mother's medical malpractice action. Farkas v Orange Regional Med. Ctr., 97 A.D.3d 720, 948 N.Y.S.2d 651, 2012 N.Y. App. Div. LEXIS 5529 (N.Y. App. Div. 2d Dep't 2012).

Litigant in a personal injury action who makes a claim for lost earnings and loss of enjoyment of life waives the physician-patient privilege with respect to prior injuries not raised in the lawsuit only for injuries affirmatively placed in controversy; in this case, plaintiff did not claim that her prior knee injuries were exacerbated or aggravated as a result of the 2014 accident, and thus her claim for lost earnings did not affirmatively place the condition of her knees in controversy, and the privilege was not waived. Brito v Gomez, 168 A.D.3d 1, 88 N.Y.S.3d 166, 2018 N.Y. App. Div. LEXIS 8024 (N.Y. App. Div. 1st Dep't 2018), rev'd, 33 N.Y.3d 1126, 131 N.E.3d 904, 107 N.Y.S.3d 797, 2019 N.Y. LEXIS 2555 (N.Y. 2019).

Any communication which is privileged when made remains privileged forever unless privilege is waived by client. Yaron v Yaron, 83 Misc. 2d 276, 372 N.Y.S.2d 518, 1975 N.Y. Misc. LEXIS 2895 (N.Y. Sup. Ct. 1975).

In a manslaughter and reckless driving prosecution in which defendant offered a hospital record into evidence at a suppression hearing for the sole purpose of showing his physical condition and treatment as it related to the issue of voluntariness of statements and the taking of a blood sample, defendant would not have waived the nurse-patient (CPLR § 4504) and social worker (CPLR § 4508) privileges and the District Attorney may not offer at trial the incriminatory and otherwise privileged statements made to nurses and social workers. People v McHugh, 124 Misc. 2d 823, 478 N.Y.S.2d 754, 1984 N.Y. Misc. LEXIS 3345 (N.Y. Sup. Ct. 1984).

In a probate proceeding in which the decedent's testamentary capacity was in issue, medical evidence concerning the decedent's volitional capacity was admissible, since the decedent had

waived the physician-patient privilege by contesting this evidence in a prior conservatorship proceeding, since the evidence would not tend to disgrace the memory of the decedent, thus allowing admission under CPLR § 4504(c)(3), and since a balancing-of-interests test dictates suspension of the physician-patient privilege in any probate proceeding involving issues of testamentary capacity. In re Estate of Postley, 125 Misc. 2d 416, 479 N.Y.S.2d 464, 1984 N.Y. Misc. LEXIS 3426 (N.Y. Sur. Ct. 1984).

In prosecution for third degree sodomy, endangering welfare of child, and first degree reckless endangerment, medical records which disclosed that defendant had AIDS were properly introduced before grand jury since physician-patient privilege, if it existed, had been waived by defendant's disclosure of his condition to several persons prior to engaging in acts of deviate sexual intercourse. People v Hawkrigg, 138 Misc. 2d 764, 525 N.Y.S.2d 752, 1988 N.Y. Misc. LEXIS 190 (N.Y. County Ct. 1988).

In proceeding to terminate parental rights, statutory privileges did not preclude disclosure of substance abuse records kept by agencies at which parents had allegedly been treated for substance abuse, since parents had agreed to limited waiver of privileges by virtue of suspended judgment orders pursuant to CLS Family Ct Act §§ 631 and 633, under which parents were to obtain substance abuse evaluation and county department of social services was to be permitted access to information from "court ordered services, limited to evaluation, attendance, progress and recommendations." In re Brandon A., 165 Misc. 2d 736, 630 N.Y.S.2d 850, 1995 N.Y. Misc. LEXIS 308 (N.Y. Fam. Ct. 1995).

In malpractice action arising out of alleged negligence in connection with birth of infant plaintiff who suffered from mental retardation, cerebral palsy and gross motor disfunction, defendants were not entitled to disclosure of records of social workers, mental health care providers, social service agencies, and police concerning alleged domestic violence in plaintiff's home, on theory that plaintiff's behavior problems were caused not by defendants' alleged negligence but by trauma of witnessing domestic abuse, as demanded disclosure would conflict with privileges recognized in CLS CPLR §§ 4504, 4507 and 4508; by suing in representative capacity, plaintiff's

parents did not put their own histories in issue or otherwise waive their evidentiary privileges. Siesto by Siesto v Lenox Hill Hosp., 167 Misc. 2d 918, 640 N.Y.S.2d 737, 1996 N.Y. Misc. LEXIS 79 (N.Y. Sup. Ct. 1996).

Police officer who was guarding defendant was precluded by physician-patient privilege from testifying at trial as to inculpatory conversation between defendant and psychiatrist, where defendant did not have option or ability to request private session with psychiatrist, and his post-Miranda refusal to speak with police coupled with his voluntary conversation with psychiatrist indicated that he intended conversation to be confidential. People v Sanders, 169 Misc. 2d 813, 646 N.Y.S.2d 955, 1996 N.Y. Misc. LEXIS 264 (N.Y. Sup. Ct. 1996).

Where a victim/patient had no expectation that her medical condition and treatment would be kept confidential and had waived the physician-patient privilege by putting her information into the hands of a third party, the privilege did not apply. People v Pagan, 190 Misc. 2d 474, 738 N.Y.S.2d 825, 2002 N.Y. Misc. LEXIS 59 (N.Y. Sup. Ct. 2002).

Defendant's objection to a witness, who was a sexual offender treatment therapist, at his probation revocation hearing was overruled, as he had previously waived the privilege and allowed disclosure of his treatment information, which was then shared with the probation department, and his subsequent revocation did not result in an impediment to that disclosure because the privilege was already waived under N.Y. C.P.L.R. § 4504; the Privacy Rule, 45 C.F.R. pts. 160 and 164, of the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C.S. §§ 1320d-2(d), 1320d-3(a), allowed for revocation of the disclosure authorization, but did not bar testimony except as to events that post-dated the revocation. People v Bercume, 789 N.Y.S.2d 664, 6 Misc. 3d 420, 2004 N.Y. Misc. LEXIS 2130 (N.Y. Sup. Ct. 2004).

Defendant did not waive the doctor-patient privilege under N.Y. C.P.L.R. 4504(a) when defendant made incriminating statements to the nurse while the police officer was present; the officer was obligated to stay with defendant, who was under arrest, and defendant, therefore, did not waive the privilege by speaking to the nurse in the officer's presence. People v Jaffarian, 799 N.Y.S.2d 733, 9 Misc. 3d 455, 2005 N.Y. Misc. LEXIS 1640 (N.Y. J. Ct. 2005).

*Unpublished decision:* Court properly sanctioned the passenger for failing to comply with its six discovery orders compelling the production of her medical records because, during the six months of non-compliance, the court repeatedly warned her that it would entertain a motion for appropriate relief. Doe v Delta Airlines, Inc., 672 Fed. Appx. 48, 2016 U.S. App. LEXIS 21270 (2d Cir. N.Y. 2016).

**15. —Commencement of action**

Privilege is waived when patient not only files claim for compensation, but prosecutes it, and gives testimony with respect to the injuries caused by the accident. Trotta v Ward Baking Co., 21 A.D.2d 701, 249 N.Y.S.2d 262, 1964 N.Y. App. Div. LEXIS 3861 (N.Y. App. Div. 3d Dep't 1964).

The bringing of a personal injury action in no way constituted a waiver by plaintiff of the privilege afforded as to information arising from a totally unconnected illness and treatment. Gorman v Goldman, 36 A.D.2d 767, 321 N.Y.S.2d 296, 1971 N.Y. App. Div. LEXIS 4396 (N.Y. App. Div. 2d Dep't 1971).

Although executrix of patient who had commenced personal injury action against hospital could be substituted as party plaintiff, she could not amend complaint to assert a wrongful death cause of action solely on the affidavit of herself and her attorney that original accident had caused death; physician’s affidavit and affidavit of merit by person having knowledge of facts were required in support of such an application. Hollister v Mohawk Valley General Hospital, 43 A.D.2d 802, 350 N.Y.S.2d 264, 1973 N.Y. App. Div. LEXIS 2910 (N.Y. App. Div. 4th Dep't 1973).

By commencing medical malpractice action, plaintiff put her physical condition in controversy and could not thereafter invoke physician-patient privilege to prevent defendant physician from examining physicians who had treated plaintiff, and obtaining photostatic copies of such physicians’ medical records, whether or not such physicians would be called by plaintiff to testify in her suit. Greuling v Breakey, 56 A.D.2d 540, 391 N.Y.S.2d 585, 1977 N.Y. App. Div. LEXIS 10545 (N.Y. App. Div. 1st Dep't 1977).

In litigation concerning the sale of a motel, the contract of which contained a clause requiring that an affidavit from a licensed physician be furnished prior to closing stating that defendant had the mental capacity to contract, the trial court properly denied defendants' motion for a protective order based on the physician-patient privilege after defendants' brought an action to enforce the contract, since by so commencing the action defendants placed the mental condition of defendant in controversy and thus waived the privilege. Cole v Lawas, 97 A.D.2d 912, 470 N.Y.S.2d 747, 1983 N.Y. App. Div. LEXIS 20704 (N.Y. App. Div. 3d Dep't 1983).

Where infant plaintiff's mother is either representative of plaintiff or nonparty, she has not placed her own medical history in issue and accordingly waiver of physician-patient privilege may not be found on that basis; defendants in medical malpractice case are precluded from compelling mother to answer questions at examination before trial or otherwise disclose information relating to her medical history where malpractice action is brought by infant plaintiff for injuries sustained as result of negligently provided prenatal, labor, and postnatal care; mother waives privilege by revealing past medical history to physicians for purpose of aiding treatment of infant plaintiff. Yetman v St. Charles Hospital, 112 A.D.2d 297, 491 N.Y.S.2d 742, 1985 N.Y. App. Div. LEXIS 56085 (N.Y. App. Div. 2d Dep't 1985).

Personal injury plaintiff who files negligence action against owner of building alleging injuries to head, neck, right hip and left leg waives physician-patient privilege with respect to alleged injuries; however, privilege is not waived with respect to plaintiff's eyes or eyesight notwithstanding defendant's claim that plaintiff's defective eyesight is possible cause of fall. Iseman v Delmar Medical-Dental Bldg., Inc., 113 A.D.2d 276, 495 N.Y.S.2d 747, 1985 N.Y. App. Div. LEXIS 52363 (N.Y. App. Div. 3d Dep't 1985).

Doctor's expectation that medical malpractice claim would be instituted against him was sufficiently reasonable, as matter of law, to justify his disclosure of patient's medical records to his liability insurer where patient had retained counsel to investigate claim and had authorized release of his medical records to his lawyer; accordingly, doctor was entitled to summary judgment dismissing cause of action for wrongful disclosure of medical records. Malpractice

liability insurer may persuade doctor to disclose certain medical secrets of patient, and doctor may share such information with insurer, when doctor has reasonable belief that medical malpractice claim will be made against him by patient, and doctor's belief is reasonable only if patient knows or suspects that he is victim of malpractice and has expressed intent to pursue his legal rights by informing doctor of his intention to make such claim or by performing some other affirmative act from which doctor reasonably may infer such intention; however, while doctor and insurer may take reasonable measures to investigate and prepare to meet anticipated claim, insurer may not investigate in such manner as to disclose confidential information to others. Rea v Pardo, 132 A.D.2d 442, 522 N.Y.S.2d 393, 1987 N.Y. App. Div. LEXIS 50857 (N.Y. App. Div. 4th Dep't 1987).

Administratrix of her husband's estate, acting in her capacity as personal representative and distributee, did not waive physician-patient privilege with respect to her own medical history by commencing wrongful death action for alleged medical malpractice. Scalone v Phelps Memorial Hosp. Center, 184 A.D.2d 65, 591 N.Y.S.2d 419, 1992 N.Y. App. Div. LEXIS 13639 (N.Y. App. Div. 2d Dep't 1992).

In medical malpractice action predicated on defendant obstetrician's alleged negligence in allowing Pitocin-induced labor to continue too long, with result that plaintiff's infant developed cerebral palsy, court did not err in allowing pediatric neurologist who had been consulted by plaintiff regarding infant's condition to testify for defendant and offer opinion that infant's brain injury was unrelated to labor and delivery process since (1) plaintiff's physician-patient privilege was waived when infant's medical condition was placed in issue, (2) admission of neurologist's testimony did not violate rule prohibiting defendant in medical malpractice action from privately interviewing plaintiff's nonparty treating physician without first obtaining court order or patient's express consent, and (3) requirement of CLS CPLR § 3121(b) that party disclose medical records prepared in anticipation of litigation was not violated because neurologist's records were available to plaintiff well in advance of litigation, and all other evidence on which he based his

opinions was entered into evidence by plaintiff. Tiborsky v Martorella, 188 A.D.2d 795, 591 N.Y.S.2d 547, 1992 N.Y. App. Div. LEXIS 13908 (N.Y. App. Div. 3d Dep't 1992).

In product liability and negligence action seeking recovery for injuries sustained by infant plaintiff as result of her mother's exposure to spray paint during pregnancy, plaintiff mother, by including derivative count for loss of infant's services and thus placing her physical condition in controversy, waived physician-patient privilege as to those portions of medical records relating to her subsequent pregnancies which might be relevant to whether infant's birth defects resulted from genetic disorder. Kaplowitz v Borden, Inc., 189 A.D.2d 90, 594 N.Y.S.2d 744, 1993 N.Y. App. Div. LEXIS 2221 (N.Y. App. Div. 1st Dep't 1993).

In action for damages against New York physician for her disclosure, pursuant to subpoena, of patient's HIV-positive status to attorney representing patient's employer in Pennsylvania workers' compensation proceeding, in violation of physician's alleged oral promise to patient not to disclose his HIV status, court erred in concluding that patient's commencement of Pennsylvania proceeding waived his right to challenge physician's breach of confidentiality, since physician failed to establish that commencement of compensation proceeding, which sought benefits for ear and sinus problems, placed patient's HIV status in issue. Doe v Roe, 190 A.D.2d 463, 599 N.Y.S.2d 350, 1993 N.Y. App. Div. LEXIS 5673 (N.Y. App. Div. 4th Dep't), app. dismissed, 82 N.Y.2d 846, 606 N.Y.S.2d 597, 627 N.E.2d 519, 1993 N.Y. LEXIS 4307 (N.Y. 1993).

In medical malpractice action wherein parents of infant plaintiff alleged that defendants were negligent in failing to note mother's medical history, and parents also asserted derivative cause of action in their individual capacities to recover for loss of services and medical expenses, court properly denied defense motion to compel mother to provide authorizations for release of her obstetrical records for pregnancies subsequent to birth of infant plaintiff, since such records were protected by physician-patient privilege; mother did not put her physical condition in issue by asserting derivative cause of action. Teresi by Teresi v Grecco, 206 A.D.2d 517, 615 N.Y.S.2d 893, 1994 N.Y. App. Div. LEXIS 7632 (N.Y. App. Div. 2d Dep't 1994).

Plaintiff placed her physical and mental condition in controversy by commencing action alleging negligence by hospital and doctors in connection with prenatal care, labor, and delivery of plaintiff's child; where prenatal injury is involved, physician-patient privilege is waived as to period child is in utero. Napoleoni v Union Hosp., 207 A.D.2d 660, 616 N.Y.S.2d 38, 1994 N.Y. App. Div. LEXIS 8653 (N.Y. App. Div. 1st Dep't 1994).

At examination before trial in medical malpractice action, court improperly limited scope of questioning of mother about her medical history to period of time when infant plaintiff was in utero, rather than limiting questioning to "relevant medical incidents or facts concerning herself or her children"; mother may not refuse to answer questions such as whether her children had any physical or congenital problems, or whether she was in care of physician or was taking medication during certain period of time, merely because those topics related to events that required medical care or advice from physician. Bolos v Staten Island Hosp., 217 A.D.2d 643, 629 N.Y.S.2d 809, 1995 N.Y. App. Div. LEXIS 8101 (N.Y. App. Div. 2d Dep't 1995).

In medical malpractice action, court properly denied defendants' motion to compel mother to provide authorizations for release of medical records pertaining to her entire medical history and medical history of infant plaintiff's brother, as she did not waive her physician-patient privilege with respect to medical records concerning her medical history outside period of pregnancy by suing in her representative capacity as mother of infant plaintiff, or by asserting derivative cause of action for medical expenses and loss of services. Bolos v Staten Island Hosp., 217 A.D.2d 643, 629 N.Y.S.2d 809, 1995 N.Y. App. Div. LEXIS 8101 (N.Y. App. Div. 2d Dep't 1995).

Firefighter waived doctor-patient privilege by filing application for supplemental wage benefits under CLS Gen Mun § 207-a and contending that his diagnosed arteriosclerosis and myocardial infarction were job related, and thus hearing officer properly allowed testimony by firefighter's treating physicians despite their alleged violation of doctor-patient privilege. Furch v Bucci, 245 A.D.2d 749, 666 N.Y.S.2d 300, 1997 N.Y. App. Div. LEXIS 12950 (N.Y. App. Div. 3d Dep't 1997), app. dismissed, 91 N.Y.2d 953, 671 N.Y.S.2d 711, 694 N.E.2d 880, 1998 N.Y. LEXIS 998 (N.Y. 1998).

Waiver of physician-patient privilege resulting from bringing of personal injury action extends not only to records of postaccident treatment but also to records of pre-accident treatment of same anatomical parts to which plaintiff claims injury. Personal injury plaintiff was properly required to execute broad medical authorizations and to disclose names of medical providers who treated his other illnesses and conditions where plaintiff waived physician-patient privilege by bringing action alleging that he suffered injury, pain, emotional upset, confinement to bed and house, and loss of enjoyment of life as result of accident, those broad allegations placed his entire physical condition in controversy, especially insofar as he might have experienced other potentially debilitating medical problems before or since accident, and such other medical conditions were relevant to damages. Geraci v National Fuel Gas Distrib. Corp., 255 A.D.2d 945, 680 N.Y.S.2d 776, 1998 N.Y. App. Div. LEXIS 12190 (N.Y. App. Div. 4th Dep't 1998).

In a personal injury suit, the trial court did not abuse its discretion in granting defendants' motion to compel the injured plaintiff to provide medical authorizations that were unrestricted as to date because plaintiffs put his entire medical condition in controversy through the broad allegations in their bill of particulars, and intended to prove exacerbation of his preexisting injuries and to seek damages for his loss of enjoyment of life. O'Brien v Village of Babylon, 153 A.D.3d 547, 60 N.Y.S.3d 92, 2017 N.Y. App. Div. LEXIS 5903 (N.Y. App. Div. 2d Dep't 2017), dismissed, 2019 N.Y. Misc. LEXIS 4323 (N.Y. Sup. Ct. Aug. 5, 2019).

The protection afforded doctor-patient relationship by CPLR § 4504 does not limit the right of a party to examine hospital records which contain doctor reports, and if a party begins or defends an action where his physical condition is in controversy he exposes himself to the disclosure provisions of CPLR § 3121. Fisher v Fossett, 45 Misc. 2d 757, 257 N.Y.S.2d 821, 1965 N.Y. Misc. LEXIS 2379 (N.Y. Sup. Ct. 1965).

The service of the complaint in a malpractice action does not effect a waiver of the physician-patient privilege (CPLR 4504) to the extent of permitting defendants to privately interview a nonparty treating physician without a court order or the patient’s express consent; the adequacy of formal discovery procedures, the high value the State places on the physician-patient

privilege whose purpose is to prevent physicians from disclosing confidential information, the difficulty of determining whether a medical condition is in controversy and what medical information is relevant and the possibility of doctors or insurers becoming the object of lawsuits for unauthorized, improper disclosure of confidential information about a patient (see Education Law, § 6509; 8 NYCRR 29.1 [b] [8]), require that medical discovery be conducted within formal discovery procedures and that there be no private interviews without a patient's express consent; compliance with formal discovery procedures would insulate a physician against improper pressures to disclose and, by restricting disclosure to that obtainable pursuant to statute, court rule or express consent, the patient's attorney will be afforded an opportunity to object to the disclosure of medical information that is remote, irrelevant or otherwise improper and the court will be afforded an opportunity to regulate disclosure and needless lawsuits for breach of confidences will be avoided. Anker v Brodnitz, 98 Misc. 2d 148, 413 N.Y.S.2d 582, 1979 N.Y. Misc. LEXIS 2056 (N.Y. Sup. Ct.), aff'd, 73 A.D.2d 589, 422 N.Y.S.2d 887, 1979 N.Y. App. Div. LEXIS 14371 (N.Y. App. Div. 2d Dep't 1979).

Both husband and wife plaintiffs in a personal injury action would be ordered to supply the defendant with authorizations to obtain the records of all hospitals, physicians, and psychologists consulted by them, notwithstanding the contention that since the wife's action was only derivative in nature her physical condition was not an issue, since if the wife were herself shown to be disabled or unable to provide society for her husband then her damages due to the husband's disability would be an issue which the jury would have to determine; in addition, the plaintiffs did not sustain their burden of establishing the non-waiver of the physician-patient privilege. Sarner v Cordis Corp., 108 Misc. 2d 402, 437 N.Y.S.2d 536, 1981 N.Y. Misc. LEXIS 2213 (N.Y. Sup. Ct. 1981).

The commencement of an action for wrongful death, based on the alleged medical malpractice of decedent's psychiatrist and the hospital where he received psychiatric treatment, by the widow and legal representative of decedent's estate, the decedent having committed suicide shortly after his discharge, would not constitute a waiver of plaintiff's doctor-patient privilege in

regard to her own mental and physical condition and plaintiff would thus be granted a protective order prohibiting disclosure of her mental and/or psychiatric records, where plaintiff's status as a nominal party, a legal representative, and as an actual party, a distributee, was insufficient to overcome the strong public policy underlying the doctor-patient privilege in CPLR § 4504, and where defendant doctor had failed to discharge his burden of establishing that plaintiff had placed her condition in issue and thereby waived the privilege. Lewkow v Gracie Square Hospital, 114 Misc. 2d 732, 452 N.Y.S.2d 290, 1982 N.Y. Misc. LEXIS 3555 (N.Y. Sup. Ct. 1982).

A cause of action for breach of confidence would not lie against a doctor who revealed communications between himself and a patient to the patient's opponent in a personal injury action in which the patient's physical and mental states were at issue, where such communications were outside the procedure required by the CPLR; plaintiff waived the physician-patient privilege by commencing the personal injury action which put into issue her physical and mental condition, and the waiver covered the subject matter disclosed. Although defendant's conduct was outrageous, unprofessional, and improper under the CPLR, it was not a breach of confidence since the privilege had been waived. Fedell v Wierzbieniec, 127 Misc. 2d 124, 485 N.Y.S.2d 460, 1985 N.Y. Misc. LEXIS 2563 (N.Y. Sup. Ct. 1985).

**16. —Defense of action**

Where defendant in personal injury action validly asserts physician-patient privilege and has not affirmatively placed his or her medical condition in issue, plaintiff may not effect waiver of privilege merely by submitting evidence demonstrating that defendant's physical condition is genuinely "in controversy" within meaning of statute permitting discovery of medical records (CLS CPLR § 3121). Dillenbeck v Hess, 73 N.Y.2d 278, 539 N.Y.S.2d 707, 536 N.E.2d 1126, 1989 N.Y. LEXIS 265 (N.Y. 1989).

Defendant, who was charged with criminal possession of methadone and elected to defend on basis that bottle of methadone was lawfully possessed by him in connection with his

participation in methadone maintenance treatment clinic's program, waived benefit of statutory right to anonymity, and thus it was improper to quash subpoena duces tecum served on clinic to extent of precluding State from subpoenaing defendant's records at the clinic. People v Still, 48 A.D.2d 366, 369 N.Y.S.2d 759, 1975 N.Y. App. Div. LEXIS 9894 (N.Y. App. Div. 2d Dep't 1975).

Defendant, by asserting decedent's mental condition as a defense to wrongful death action, affected a complete waiver of physician-patient privilege and, hence, decedent's medical records were subject to discovery and inspection on motion of plaintiff, and defendant was subject to examination before trial. McDonnell v County of Nassau, 59 A.D.2d 550, 397 N.Y.S.2d 140, 1977 N.Y. App. Div. LEXIS 13341 (N.Y. App. Div. 2d Dep't 1977).

In a medical malpractice action against a doctor and a hospital, the trial court properly denied plaintiffs' motion to compel the examination of another doctor who had diagnosed and treated the defendant for a condition which rendered the defendant-doctor unable to testify in the case, where the defendant-doctor did not raise his physical condition as a counterclaim or defense in the action, and where the defendant-doctor had settled the case with the plaintiffs and was no longer a party to the action and thus had not waived his physician-patient privilege. Frederick v Maslyn, 84 A.D.2d 888, 444 N.Y.S.2d 970, 1981 N.Y. App. Div. LEXIS 16143 (N.Y. App. Div. 3d Dep't 1981).

In trial for second degree vehicular manslaughter arising out of defendant's driving while intoxicated, court erred in concluding that defendant waived physician-patient privilege by cross-examining certain witnesses about her physical condition at time of arrest and in admitting hospital's diagnostic test, since party does not waive privilege when forced to defend action in which his or her mental or physical condition is in controversy. People v Osburn, 155 A.D.2d 926, 547 N.Y.S.2d 749, 1989 N.Y. App. Div. LEXIS 14780 (N.Y. App. Div. 4th Dep't 1989), app. denied, 75 N.Y.2d 816, 552 N.Y.S.2d 566, 551 N.E.2d 1244, 1990 N.Y. LEXIS 382 (N.Y. 1990).

In wrongful death action arising from motor vehicle accident, plaintiffs were not entitled to disclosure of defendant's medical records since such records were privileged and defendant did not waive privilege simply by stating that he had no recollection of accident. Pierson v Dayton,

168 A.D.2d 173, 572 N.Y.S.2d 142, 1991 N.Y. App. Div. LEXIS 8889 (N.Y. App. Div. 4th Dep't 1991).

Defendants did not waive physician-patient privilege by asserting defenses of comparative negligence and failure of plaintiffs to wear seat belts, since neither defense sought to excuse conduct complained of by asserting physical or mental condition. Williams v McGinty, 205 A.D.2d 617, 613 N.Y.S.2d 218, 1994 N.Y. App. Div. LEXIS 6205 (N.Y. App. Div. 2d Dep't 1994).

Defendant’s interposition of general denial to complaint that he had knowingly infected plaintiff with herpes virus did not place issue of his physical condition in controversy, and thus he was entitled to order vacating plaintiff’s request for production of medical documents on ground that they were protected by physician-patient privilege. Physician-patient privilege need not give way to necessity of protecting public from sexually transmissible diseases, and thus defendant’s interposition of general denial to complaint that he had knowingly infected plaintiff with herpes virus would be given effect and would not be deemed placing issue of his physical condition in controversy. Schenk v Devall, 205 A.D.2d 900, 613 N.Y.S.2d 478, 1994 N.Y. App. Div. LEXIS 6283 (N.Y. App. Div. 3d Dep't 1994).

Supreme court erred in granting plaintiff’s motion to compel defendant to provide authorizations for the subject medical records because defendant did not waive the privilege attached to the medical records, as defendant did not assert a counterclaim or seek to excuse his conduct due to any condition, nor was a waiver effected by defendant’s apparent agreement to provide material responsive to plaintiff’s prior disclosure demands; the record was insufficient to establish that defendant voluntarily disclosed any information to plaintiff or other third parties which would have served as waiver of privilege. Hausman v Smith, 219 A.D.3d 955, 195 N.Y.S.3d 533, 2023 N.Y. App. Div. LEXIS 4437 (N.Y. App. Div. 2d Dep't 2023).

The protection afforded doctor-patient relationship by CPLR § 4504 does not limit the right of a party to examine hospital records which contain doctor reports, and if a party begins or defends an action where his physical condition is in controversy he exposes himself to the disclosure

provisions of CPLR § 3121. Fisher v Fossett, 45 Misc. 2d 757, 257 N.Y.S.2d 821, 1965 N.Y. Misc. LEXIS 2379 (N.Y. Sup. Ct. 1965).

In action to recover for injuries suffered as result of contracting genital herpes after sexual relationship, defendant who denied that he had genital herpes was required to disclose hospital and medical records or have his answer stricken, since defendant's denial put his physical condition into controversy within meaning of CLS CPLR § 3121, and defendant thereby waived any physician-patient privilege pursuant to CLS CPLR § 4504. Shalhoub v Viverito, 133 Misc. 2d 765, 508 N.Y.S.2d 135, 1986 N.Y. Misc. LEXIS 2945 (N.Y. Sup. Ct. 1986).

As plaintiff's medical records included psychiatric progress notes and other clinical records that were part of his psychiatric admission, they were protected from disclosure under N.Y. Mental Hyg. Law § 33.13 because the hospital did not have plaintiff's permission or a court order authorizing it to release them to its attorneys for use in defending plaintiff's suit againt the hospital. Midgett v Beth Israel Med. Ctr., 916 N.Y.S.2d 888, 30 Misc. 3d 224, 2010 N.Y. Misc. LEXIS 5444 (N.Y. Sup. Ct. 2010).

**17. —Disgrace of memory of deceased, generally**

Although holding that by bringing or defending a personal injury action in which mental or physical condition is affirmatively put in issue, a party waives the doctor-patient privilege, the Court of Appeals qualified the holding with respect to the defense of an action as follows: The privilege with respect to a defendant is not waived in all actions in which the defendant's mental or physical condition is in controversy merely by reason of the defense as where defendant simply denies allegations of the complaint, but that the waiver is effective in those cases in which a defendant affirmatively asserts his condition either by way of counterclaim or to excuse the conduct complained of by plaintiff. Koump v Smith, 25 N.Y.2d 287, 303 N.Y.S.2d 858, 250 N.E.2d 857, 1969 N.Y. LEXIS 1112 (N.Y. 1969).

Under this section there was no error in receiving physicians' testimony as to the deterioration of decedent's mental and physical condition. In re Will of Potter, 24 A.D.2d 812, 263 N.Y.S.2d 910, 1965 N.Y. App. Div. LEXIS 3125 (N.Y. App. Div. 3d Dep't 1965).

As to information which would tend to disgrace the memory of the decedent there can be neither an express waiver nor a waiver by failure to object. Tinney v Neilson's Flowers, Inc., 61 Misc. 2d 717, 305 N.Y.S.2d 713, 1969 N.Y. Misc. LEXIS 1377 (N.Y. Sup. Ct. 1969), aff'd, 35 A.D.2d 532, 314 N.Y.S.2d 161, 1970 N.Y. App. Div. LEXIS 4190 (N.Y. App. Div. 2d Dep't 1970).

Scope of section denying waiver when material disgraces memory of a decedent would not be extended by federal court to cover testimony of psychiatric social worker where there was doubt as to whether the privilege extended to such an individual and where denying the social worker's testimony would make it impossible to rebut testimony as to the happiness of the plaintiff and decedent's marriage. Fitzgerald v A. L. Burbank & Co., 451 F.2d 670, 1971 U.S. App. LEXIS 7132 (2d Cir. N.Y. 1971).

**18. —Alcoholism**

Because the privilege accorded by CPLR 4504 to information disgracing decedent's memory cannot be waived, neither the bringing of a personal injury action nor the relevance of alcoholism to the issue of damages makes privileged hospital records admissible in proof of alcoholism. Evidence of chronic alcoholism in a form not protected by CPLR 4504(c) is admissible notwithstanding that it disgraces memory. Tinney v Neilson's Flowers, Inc., 61 Misc. 2d 717, 305 N.Y.S.2d 713, 1969 N.Y. Misc. LEXIS 1377 (N.Y. Sup. Ct. 1969), aff'd, 35 A.D.2d 532, 314 N.Y.S.2d 161, 1970 N.Y. App. Div. LEXIS 4190 (N.Y. App. Div. 2d Dep't 1970).

**19. Insurance claim form waiver**

A subpoena directing a psychiatrist to produce medical records of 15 persons who may have falsely claimed group health policy benefits for services allegedly rendered by the psychiatrist

would be quashed except in relation to the dates and times of treatments contained in the records, since the individuals' records fell within the physician-patient privilege in CPLR § 4504 and the medical information release contained in insurance claim forms did not constitute a waiver of that privilege, and since the dates and times of treatments are not privileged information. Henry v Lewis, 102 A.D.2d 430, 478 N.Y.S.2d 263, 1984 N.Y. App. Div. LEXIS 18804 (N.Y. App. Div. 1st Dep't 1984).

Where wife knew that insurance claim forms detailing her physical condition and physician's diagnosis would be delivered to her husband for transmittal to the insurer, she had, under subd (a) of this section, waived her privilege, and copies of the claim forms and the testimony of the physician were properly admitted in evidence in a marital action. Johnson v Johnson, 47 Misc. 2d 805, 263 N.Y.S.2d 404, 1965 N.Y. Misc. LEXIS 1571 (N.Y. Sup. Ct. 1965), aff'd, 25 A.D.2d 672, 268 N.Y.S.2d 403, 1966 N.Y. App. Div. LEXIS 4732 (N.Y. App. Div. 2d Dep't 1966).

Beneficiary's execution of "Request for Payment of Death Benefit" form authorizing insurer to obtain details of treatment, diagnosis and medical history of insured held to effectively waive privilege even though not made at trial in open court or by stipulation. Lynch v Mutual Life Ins. Co., 55 Misc. 2d 179, 284 N.Y.S.2d 768, 1967 N.Y. Misc. LEXIS 1104 (N.Y. Sup. Ct. 1967).

An insured under a life insurance policy did not waive her physician-patient privilege with respect to transactions with physicians which occurred subsequent to the insured's execution of an application for her policy where the two provisions in the application which were relied upon by the insurer to constitute such a prospective waiver, a provision waiving the privilege with respect to any physician "who has attended or examined" the insured and a provision authorizing any physician "having" any knowledge concerning the insured's health to release such knowledge to the insurer, applied only to information which had been acquired by a physician previous to the insured's execution of the application. Greene v New England Mut. Life Ins. Co., 108 Misc. 2d 540, 437 N.Y.S.2d 844, 1981 N.Y. Misc. LEXIS 2236 (N.Y. Sup. Ct. 1981).

Patient was entitled to summary judgment in action for damages against physician and insurer for breach of confidentiality where physician committed breach, and his malpractice insurer wrongfully induced that breach, in responding to patient's attorney's request made before initiation of any malpractice action for copies of patient's medical records by first contacting insurer and complying with insurer's request that physician send records to insurer before sending them to patient's attorney; patient did not waive confidentiality by acting through attorney, and physician was not justified in sending records to insurer either under policy language that merely called for "notice" and "cooperation" by physician toward insurer or under apprehension that patient was planning to bring malpractice suit. Rea v Pardo, 133 Misc. 2d 516, 507 N.Y.S.2d 361, 1986 N.Y. Misc. LEXIS 2889 (N.Y. Sup. Ct. 1986), rev'd, 132 A.D.2d 442, 522 N.Y.S.2d 393, 1987 N.Y. App. Div. LEXIS 50857 (N.Y. App. Div. 4th Dep't 1987).

**20. Mental condition**

Although holding that by bringing or defending a personal injury action in which mental or physical condition is affirmatively put in issue, a party waives the doctor-patient privilege, the Court of Appeals qualified the holding with respect to the defense of an action as follows: The privilege with respect to a defendant is not waived in all actions in which the defendant's mental or physical condition is in controversy merely by reason of the defense as where defendant simply denies allegations of the complaint, but that the waiver is effective in those cases in which a defendant affirmatively asserts his condition either by way of counterclaim or to excuse the conduct complained of by plaintiff. Koump v Smith, 25 N.Y.2d 287, 303 N.Y.S.2d 858, 250 N.E.2d 857, 1969 N.Y. LEXIS 1112 (N.Y. 1969).

Where defendant asserted insanity as a defense and offered evidence tending to show his insanity in support of plea, a complete waiver of doctor-patient privilege was effected and prosecution thus properly was permitted to call psychiatrist who had treated defendant at facility for criminally insane to testify regarding defendant's sanity. People v Abdul Karim Al-Kanani, 33

N.Y.2d 260, 351 N.Y.S.2d 969, 307 N.E.2d 43, 1973 N.Y. LEXIS 838 (N.Y. 1973), cert. denied, 417 U.S. 916, 94 S. Ct. 2619, 41 L. Ed. 2d 220, 1974 U.S. LEXIS 1804 (U.S. 1974).

In action to recover for injuries sustained by plaintiff's son at birth, alleging lack of informed consent under CLS Pub Health § 2805-d, Supreme Court properly granted application pursuant to CLS CPLR § 3121 by defendant hospital for order enabling hospital to obtain plaintiff's medical records relative to her treatment at psychiatric center, but limited disclosure to period when son was in utero; although language in CLS Pub Health § 2805-d(1) suggests that subjective ability to make informed decision is relevant, plaintiff had not placed her mental condition in issue so as to waive privilege attendant to physician-or psychologist-patient relationship, since she did not claim that she was mentally incapable of understanding her medical situation, but that risks were not disclosed to her. McGoldrick v Whitney M. Young, Jr., Health Center, Inc., 144 A.D.2d 156, 534 N.Y.S.2d 483, 1988 N.Y. App. Div. LEXIS 10135 (N.Y. App. Div. 3d Dep't 1988).

Plaintiff waived physician-patient privilege by affirmatively placing his psychological condition at issue in his bill of particulars; thus, court properly directed disclosure of psychiatric records regarding plaintiff's earlier hospitalization for attempted suicide. Levine v Morris, 157 A.D.2d 567, 550 N.Y.S.2d 289, 1990 N.Y. App. Div. LEXIS 831 (N.Y. App. Div. 1st Dep't 1990).

Plaintiff who alleged that she was sexually assaulted at one of defendant's resorts placed her psychiatric condition in issue by claiming extensive and severe psychological trauma as result of incident, and thus court properly denied plaintiff's motion for protective order precluding defendant's examination of records maintained by her treating psychiatrist, including those relating to her condition prior to incident, since plaintiff failed to demonstrate that records contained confidences disclosure of which would injure or embarrass herself or others. Evans v Club Mediteranee, S.A., 184 A.D.2d 277, 585 N.Y.S.2d 33, 1992 N.Y. App. Div. LEXIS 7818 (N.Y. App. Div. 1st Dep't 1992).

In personal injury action arising from physical altercation between plaintiff and defendant, plaintiff's psychiatric and social worker's records were not discoverable under CLS CPLR §

3121, since plaintiff did not allege any mental injury, and his alleged propensity for violent behavior was not placed in issue by defendant's contention that he was aggressor of their altercation; moreover, privilege under CLS CPLR §§ 4504 and 4508 was not deemed waived simply because defendant contended that plaintiff was aggressor of altercation. Zimmer v Cathedral Sch., 204 A.D.2d 538, 611 N.Y.S.2d 911, 1994 N.Y. App. Div. LEXIS 5308 (N.Y. App. Div. 2d Dep't 1994).

Defendant did not waive her physician-patient privilege by denying allegations in complaint or by merely stating that she could not remember any details of accident, since she had not offered fact of her memory loss to excuse her conduct. Physician-patient privilege was not waived because defendants interposed counterclaim for contribution and indemnity, since such counterclaim did not affirmatively assert any physical or mental condition of individual defendant, especially given that counterclaim did not seek damages from plaintiff for any injuries which individual defendant may have incurred as result of accident, but only sought to obtain relief accorded under doctrine of comparative negligence. Williams v McGinty, 205 A.D.2d 617, 613 N.Y.S.2d 218, 1994 N.Y. App. Div. LEXIS 6205 (N.Y. App. Div. 2d Dep't 1994).

Plaintiff waived her physician-patient privilege as to her psychological and psychiatric records by filing personal injury action alleging that, as result of automobile accident, she suffered permanently from "mental anxiety" and "emotional distress" where in camera review of those records revealed that they related partly to therapy and treatment that plaintiff received in connection with her complaints of chronic pain and emotional distress stemming from physical injuries sustained in traffic accident; however, portions of records unrelated to traffic accident and potentially embarrassing to plaintiff and others could be redacted. Syron v Paolelli, 238 A.D.2d 710, 656 N.Y.S.2d 419, 1997 N.Y. App. Div. LEXIS 3738 (N.Y. App. Div. 3d Dep't 1997).

Although question of fact was raised as to whether a doctor's departure from the good and accepted standards of medical practice proximately caused a patient's injuries, because the patient placed the patient's mental condition in controversy, the privilege of N.Y. C.P.L.R. 4504 was waived, and the doctor was entitled to the patient's mental health records under N.Y.

C.P.L.R. 3121(a) from and after a point five years prior to the date the patient started treatment with the doctor. Roca v Perel, 51 A.D.3d 757, 859 N.Y.S.2d 203, 2008 N.Y. App. Div. LEXIS 4198 (N.Y. App. Div. 2d Dep't 2008).

Plaintiff failed to demonstrate that the driver or his estate waived the privilege attached to the driver's medical records because the driver's alleged invocation of dementia in September 2006, by submission of a letter from his social worker, did not establish a waiver of the privilege attached to his medical records from October 22, 1999. Peterson v Estate of John Rozansky, 171 A.D.3d 805, 97 N.Y.S.3d 724, 2019 N.Y. App. Div. LEXIS 2543 (N.Y. App. Div. 2d Dep't 2019).

Because no objection to disclosure of medical records was asserted within 20 days in a medical malpractice case, appellate review was limited to determining whether the material was privileged or the demand was palpably improper. Documents referencing a mental condition were discoverable because physician-patient privilege had been waived by bringing an action sounding in personal injury, which placed mental and physical condition at issue, and disability benefits were relevant to lost income. Aesch v Lambarski, 229 A.D.3d 945, 215 N.Y.S.3d 215, 2024 N.Y. App. Div. LEXIS 3914 (N.Y. App. Div. 3d Dep't 2024), app. denied, 42 N.Y.3d 912, 252 N.E.3d 534, 227 N.Y.S.3d 595, 2025 N.Y. LEXIS 105 (N.Y. 2025).

Where the mental or physical condition of a party is in controversy, the disclosure provisions of CPLR 3121 apply and the physician-patient privilege gives way as circumstances might require in the interests of justice. Application of Do Vidio, 56 Misc. 2d 79, 288 N.Y.S.2d 21, 1968 N.Y. Misc. LEXIS 1710 (N.Y. Fam. Ct. 1968).

The psychologist-patient privilege is not broader than the physician-patient privilege which is waived by a defendant who asserts the defense of insanity and thereby affirmatively puts his

mental condition in controversy. State of Florida v Axelson, 80 Misc. 2d 419, 363 N.Y.S.2d 200, 1974 N.Y. Misc. LEXIS 1903 (N.Y. Sup. Ct. 1974).

A voluntary statement by a complainant, who is the sole eyewitness to the crime with which the defendant is charged, that he suffers from brain damage which impairs his thinking and communication abilities, qualifies as a waiver regarding further inquiry into his mental condition. People v Lowe, 96 Misc. 2d 33, 408 N.Y.S.2d 873, 1978 N.Y. Misc. LEXIS 2544 (N.Y. City Crim. Ct. 1978).

Patient, who was involuntarily committed to psychiatric center and requested court hearing on question of need for commitment, did not waive nurse-patient privilege in regard to communications with nurse/psychiatric therapist prior to commitment since it was psychiatric center that placed patient's mental health in issue by receiving her for involuntary treatment, and patient had merely invoked her due process right to put psychiatric center to its burden of proof on issue. In re Barbara W., 142 Misc. 2d 542, 537 N.Y.S.2d 427, 1988 N.Y. Misc. LEXIS 814 (N.Y. Sup. Ct. 1988).

Filing of CLS CPL § 250.10(2) notice of intent to present psychiatric evidence at trial constituted waiver of defendant's physician-patient privilege, and thus he was required to submit to pretrial psychiatric examination by People's expert and People's psychiatric expert was entitled to obtain and review his relevant medical records in preparation for such examination. People v Chavis, 181 Misc. 2d 540, 696 N.Y.S.2d 365, 1999 N.Y. Misc. LEXIS 356 (N.Y. Sup. Ct. 1999).

**21. Testimony by patient as privileged matter**

Medical records and statements made to physicians during examinations made pursuant to Mental Hygiene Law § 207 were properly admissible in evidence at their addiction hearings, and the patient-physician privilege has no application. People v Fuller, 24 N.Y.2d 292, 300 N.Y.S.2d 102, 248 N.E.2d 17, 1969 N.Y. LEXIS 1682 (N.Y. 1969).

Privilege is waived when patient not only files claim for compensation, but prosecutes it, and gives testimony with respect to the injuries caused by the accident. Trotta v Ward Baking Co., 21 A.D.2d 701, 249 N.Y.S.2d 262, 1964 N.Y. App. Div. LEXIS 3861 (N.Y. App. Div. 3d Dep't 1964).

In a murder prosecution of an army private for the random shootings of three black males, the trial court properly admitted statements made by defendant to a military police officer assigned to guard him while defendant was a patient at the base hospital psychiatric unit, to a nurse at the unit during an intake interview, and to a psychiatric nurse, where the statements to the military policeman did not fall within the physician-patient privilege in CPLR § 4504, in that the officer was not a doctor, dentist, or nurse, and was not acting in concert with covered medical personnel, where during the intake interview defendant expressed, contemporaneously, an intention to notify law enforcement officials of his actions and thus never intended that the communication to the intake nurse remain confidential or privileged under § 4504, where the statement to the intake nurse was an unsolicited gratuitous comment that was not a necessary incident to the rendering of professional services and thus was not a privileged communication, and where at the time of the communication to the psychiatric nurse defendant had already communicated essentially the same information to the police officer and the intake nurse with no expectation that the information would be kept confidential, and that the information, in addition to being unprivileged, was merely cumulative. People v Christopher, 101 A.D.2d 504, 476 N.Y.S.2d 640, 1984 N.Y. App. Div. LEXIS 18141 (N.Y. App. Div. 4th Dep't 1984), rev'd in part, 65 N.Y.2d 417, 492 N.Y.S.2d 566, 482 N.E.2d 45, 1985 N.Y. LEXIS 15922 (N.Y. 1985).

Waiver occurs when patient personally, or through his witnesses, either lay or medical, introduces testimony or documents concerning privileged information, or when legal representative of deceased patient presents such evidence. Riccardi v Tampax, Inc., 113 A.D.2d 880, 493 N.Y.S.2d 798, 1985 N.Y. App. Div. LEXIS 52508 (N.Y. App. Div. 2d Dep't 1985).

Plaintiff waived his right to assert physician-patient privilege by testifying on direct examination about his medical history and condition at both deposition and contempt hearing, and by tendering 2 letters from physicians as to privileged information. Rosenthal v Cullen & Dykman, 233 A.D.2d 313, 649 N.Y.S.2d 180, 1996 N.Y. App. Div. LEXIS 11588 (N.Y. App. Div. 2d Dep't 1996).

In vehicular accident case, defendant motorist's deposition testimony that she took medication for "nerves" before accident waived her physician-patient privilege with respect to specific name of condition from which she suffered. Neferis v DeStefano, 265 A.D.2d 464, 697 N.Y.S.2d 108, 1999 N.Y. App. Div. LEXIS 10434 (N.Y. App. Div. 2d Dep't 1999).

Trial court's admission of the testimony of an incapacitated person's former physician regarding his treatment of her was an improper violation of the doctor-patient privilege in a guardianship proceeding, as the incapacitated person neither waived the privilege nor affirmatively asserted her mental condition at trial; however, this error did not warrant a new trial since the testimony of the incapacitated person's children established her inability to care for her medical, personal, or financial needs, and N.Y. Mental Hyg. Law art. 81 did not require medical testimony in a guardianship proceeding. In re Rosa B.-S., 1 A.D.3d 355, 767 N.Y.S.2d 33, 2003 N.Y. App. Div. LEXIS 11503 (N.Y. App. Div. 2d Dep't 2003).

**D. Particular Actions and Proceedings**

**22. Generally**

Where a motion for a new trial was based upon newly-discovered evidence which might be inadmissible if offered upon the trial because allegedly violative of the statutory privilege contained in CPLR 4504, but such evidence clearly indicates that the determination in the case was erroneous, unjust and oppressive when made, the court may, in the exercise of its discretion, consider such evidence solely for the purpose of the motion. Delagi v Delagi, 34

A.D.2d 1005, 313 N.Y.S.2d 265, 1970 N.Y. App. Div. LEXIS 4296 (N.Y. App. Div. 2d Dep't 1970).

A subpoena directing a psychiatrist to produce medical records of 15 persons who may have falsely claimed group health policy benefits for services allegedly rendered by the psychiatrist would be quashed except in relation to the dates and times of treatments contained in the records, since the individuals' records fell within the physician-patient privilege in CPLR § 4504 and the medical information release contained in insurance claim forms did not constitute a waiver of that privilege, and since the dates and times of treatments are not privileged information. Henry v Lewis, 102 A.D.2d 430, 478 N.Y.S.2d 263, 1984 N.Y. App. Div. LEXIS 18804 (N.Y. App. Div. 1st Dep't 1984).

In an action for damages for injuries to plaintiff's knee, trial court's decision not to exclude testimony of doctor who had examined plaintiff two days prior to trial based on plaintiff's failure to serve defendant with copy of doctor's medical report was not an abuse of discretion where doctor testified that his opinion as to causation and permanency of plaintiff's injuries was based solely on his examination of plaintiff's hospital records, which had been served on defendant and which defendant conceded showed plaintiff's knee had had reconstructive surgery. Rivera v New York, 107 A.D.2d 331, 486 N.Y.S.2d 730, 1985 N.Y. App. Div. LEXIS 48240 (N.Y. App. Div. 1st Dep't), app. dismissed, 66 N.Y.2d 912, 498 N.Y.S.2d 793, 489 N.E.2d 762, 1985 N.Y. LEXIS 17997 (N.Y. 1985).

The claim of privilege between physician and patient may be exerted to exclude the revelation of a confidential communication before a grand jury to the same extent that the objection may be raised during a trial. People v McAlpin, 50 Misc. 2d 579, 270 N.Y.S.2d 899, 1966 N.Y. Misc. LEXIS 1828 (N.Y. County Ct. 1966).

Defendant was not entitled to open access to prosecution witnesses' psychiatric treatment and child welfare records for purpose of attacking their credibility with any inconsistent statements records might contain since those records were confidential; however, court would undertake in camera review of records and segregate statements which might be inconsistent with proposed

testimony and, after weighing competing interests of need for confidentiality and right of confrontation, maintain confidentiality of records by allowing jury to hear only those portions remotely favorable to defendant. People v Reidout, 140 Misc. 2d 632, 530 N.Y.S.2d 938, 1988 N.Y. Misc. LEXIS 334 (N.Y. Sup. Ct. 1988).

Physician-patient evidentiary privilege codified in CLS CPLR § 4504 does not absolutely prohibit treating psychiatrist from submitting affidavit or giving testimony in support of CLS Men Hyg § 9.60 petition under all circumstances. In re Sullivan, 184 Misc. 2d 666, 710 N.Y.S.2d 804, 2000 N.Y. Misc. LEXIS 247 (N.Y. Sup. Ct. 2000).

As there was no private cause of action pursuant to N.Y. C.P.L.R. 4504, those claims by an employee against his personal physician and an employer's medical director were properly dismissed. Burton v Matteliano, 81 A.D.3d 1272, 916 N.Y.S.2d 438, 2011 N.Y. App. Div. LEXIS 858 (N.Y. App. Div. 4th Dep't), app. denied, 17 N.Y.3d 703, 929 N.Y.S.2d 93, 952 N.E.2d 1088, 2011 N.Y. LEXIS 1457 (N.Y. 2011).

**23. Abortion-related matters**

Requirement of city department of health that termination of pregnancy certificate include name and address of patient obtaining abortion was rationally related to compelling state interest in maternal health during second trimester of pregnancy and was not invalid as violating the physician-patient privilege, infringing upon right to an abortion or infringing upon right to privacy connected with use of one's name. Schulman v New York City Health & Hospitals Corp., 38 N.Y.2d 234, 379 N.Y.S.2d 702, 342 N.E.2d 501, 1975 N.Y. LEXIS 2347 (N.Y. 1975).

Requirement of Department of Health of City of New York that fetal death certificate include name and address of patient upon whom abortion is performed was not invalid as infringing on physician-patient privilege, permitting invasion of patient's right to privacy by facilitating consolidation of such information in central filing registry, or being contrary to public policy of state. Schulman v New York City Health & Hospitals Corp., 44 A.D.2d 482, 355 N.Y.S.2d 781,

1974 N.Y. App. Div. LEXIS 4906 (N.Y. App. Div. 1st Dep't 1974), aff'd, 38 N.Y.2d 234, 379 N.Y.S.2d 702, 342 N.E.2d 501, 1975 N.Y. LEXIS 2347 (N.Y. 1975).

A “hair pin” used in a self-induced non-therapeutic abortion is not such a weapon as a “knife, ice pick, or other sharp pointed instrument” within the purview of Penal Law § 1902(a), and would not serve to suspend the privilege extended by CPLR 4504. People v McAlpin, 50 Misc. 2d 579, 270 N.Y.S.2d 899, 1966 N.Y. Misc. LEXIS 1828 (N.Y. County Ct. 1966).

In an investigation by the Attorney General of an abortion referral agency, a subpoena which demanded disclosure of the hospital, doctor and fees charged for each patient referred by the agency and also information relating to patients seeking abortions not referred by a commercial agency, such information did not come within the protection of the privilege as set forth in CPLR 4504. Montwill Corp. v Lefkowitz, 66 Misc. 2d 724, 321 N.Y.S.2d 975, 1971 N.Y. Misc. LEXIS 1955 (N.Y. Sup. Ct. 1971).

Requirement of regulation promulgated under Public Health Law § 4161 that doctors disclose parents of aborted fetuses to Department of Public Health was not a violation of parents’ right to privacy, nor could such requirements be defeated by the doctor-patient privilege (CPLR § 4504, subd a); but such disclosure could not be compelled until the confidentiality of such records was protected. State v Jacobus, 75 Misc. 2d 840, 348 N.Y.S.2d 907, 1973 N.Y. Misc. LEXIS 1384 (N.Y. Sup. Ct. 1973).

**24. Assault**

In action against state for injuries suffered when claimant was allegedly assaulted by nonparty, mentally disabled patient who was under state’s care, it was error to grant claimant’s application for disclosure of information regarding patient’s medical diagnosis and treatment; claimant’s intent to expand on theory of liability provided no basis to override privilege surrounding such information or patient’s need for and right of confidentiality. Exelbert v State, 140 A.D.2d 665, 529 N.Y.S.2d 15, 1988 N.Y. App. Div. LEXIS 6175 (N.Y. App. Div. 2d Dep't 1988).

In action for injuries sustained by plaintiff's daughter when fellow student grabbed her hand and twisted her finger while they were waiting for school bus, court improperly directed fellow student and his mother to provide authorization for release of medical records and directed school district to provide each party with copy of fellow student's medical records where plaintiff failed to show that fellow student's physical or mental condition at time of incident was in controversy. Joyner v Oakfield Ala. Cent. Sch. Dist., 284 A.D.2d 936, 726 N.Y.S.2d 312, 2001 N.Y. App. Div. LEXIS 5790 (N.Y. App. Div. 4th Dep't 2001).

In wrongful death claim in Court of Claims arising out of a homicidal assault inflicted by a mental patient who had been released from an institution on convalescent status, the institution's record of such patient was admissible, in the absence of proof that any information obtained by the medical authorities in the institution had been intended by the patient to be confidential, and that the application of the privilege was necessary to protect the patient's interest. Milano v State, 44 Misc. 2d 290, 253 N.Y.S.2d 662, 1964 N.Y. Misc. LEXIS 1372 (N.Y. Ct. Cl. 1964).

Physician's testimony to grand jury concerning possibility that three-month-old child had been beaten was competent and properly considered by the grand jury since, regardless of any physician-patient privilege existing between the physician and the child, the physician was under a duty to disclose the information indicating that the child had been the victim of a crime. People v Easter, 90 Misc. 2d 748, 395 N.Y.S.2d 926, 1977 N.Y. Misc. LEXIS 2145 (N.Y. County Ct. 1977).

In an action based on an alleged assault by a psychiatric patient under the care of the State of New York, although the confidentiality of a hospital record containing medical information pertaining to the assailant was guaranteed by both Men Hyg Law § 33.13 and the physician-patient privilege, CPLR § 4504, the court had discretionary power to release the record under the authority of Men Hyg Law § 33.13(c)(1), where the interest of justice significantly outweighed the need for confidentiality. Villano v State, 127 Misc. 2d 761, 487 N.Y.S.2d 276, 1985 N.Y. Misc. LEXIS 2812 (N.Y. Ct. Cl. 1985).

In action against New York City Health and Hospitals Corporation (HHC) and transit authority arising from incident wherein plaintiff's decedent was assaulted by nonparty recently-released psychiatric patient and caused to fall under subway train, plaintiff was entitled to disclosure of all information in hospital records necessary to establish HHC's knowledge of patient's violent propensities and treatment or lack thereof, irrespective of whether or not action sounded in medical malpractice. Lee v New York City Transit Auth., 175 Misc. 2d 632, 668 N.Y.S.2d 1014, 1998 N.Y. Misc. LEXIS 21 (N.Y. Sup. Ct. 1998), modified, aff'd, 257 A.D.2d 611, 685 N.Y.S.2d 84, 1999 N.Y. App. Div. LEXIS 335 (N.Y. App. Div. 2d Dep't 1999).

Trial court's refusal to conduct an in camera inspection of an eyewitness's psychiatric records and refusal to permit cross-examination regarding the eyewitness's mental health history did not violate an inmate's Sixth Amendment right of confrontation because the eyewitness had an expectation of confidentiality, the prosecution represented that the eyewitness suffered from no serious psychiatric problems that would have affected the eyewitness's perception, and evidence of the eyewitness's psychiatric condition was not necessary to evaluate whether the eyewitness's testimony regarding an assault was credible. Drake v Woods, 547 F. Supp. 2d 253, 2008 U.S. Dist. LEXIS 29570 (S.D.N.Y. 2008).

**25. Automobile accident cases**

Court of Appeals would decline to import provisions of criminal discovery statute regarding blood alcohol test results (CLS Veh & Tr § 1195) into civil motor vehicle accident case to compel disclosure of hospital records containing information acquired by defendant's physician for express purpose of medical treatment, absent legislative intent to abrogate protection accorded ordinary physician-patient communications under CLS CPLR §§ 3101 and 4504. Dillenbeck v Hess, 73 N.Y.2d 278, 539 N.Y.S.2d 707, 536 N.E.2d 1126, 1989 N.Y. LEXIS 265 (N.Y. 1989).

Seizure of defendant's blood samples taken after a fatal traffic accident was not improper because, pursuant to N.Y. Veh. & Traf. Law § 1194(2)(a), defendant, the driver of a vehicle involved in the accident, was deemed to have given consent to a blood alcohol test, and the

physician-patient privilege defined by N.Y. C.P.L.R. 4504 was overcome when police officers executed a court order for an additional blood sample pursuant to N.Y. Veh. & Traf. Law 1194(3). People v Elysee, 12 N.Y.3d 100, 876 N.Y.S.2d 677, 904 N.E.2d 813, 2009 N.Y. LEXIS 15 (N.Y. 2009).

In a negligence action where the plaintiff put in issue his mental and psychological condition following the accident, and his attribution of those conditions to the accident, he was entitled to inspect and examine records of a state hospital pursuant to Mental Hygiene Law §§ 20 and 34, inasmuch as he had waived the privilege against disclosure. Mancinelli v Texas Eastern Transmission Corp., 34 A.D.2d 535, 308 N.Y.S.2d 882, 1970 N.Y. App. Div. LEXIS 5258 (N.Y. App. Div. 1st Dep't 1970).

Plaintiffs should have been precluded from obtaining results of any blood alcohol test that may have been administered to defendant in hospital as result of accident where defendant did not waive her physician-patient privileges. Williams v McGinty, 205 A.D.2d 617, 613 N.Y.S.2d 218, 1994 N.Y. App. Div. LEXIS 6205 (N.Y. App. Div. 2d Dep't 1994).

In personal injury action arising out of motor vehicle accident, court erred in granting plaintiff’s motion to compel disclosure of hospital records concerning treatment received by defendant following accident and denying defendant’s motion for protective order, where defendant invoked physician-patient privilege and did not make affirmative claims which waived it; defendant did not place his condition in controversy by testifying at examination before trial that he could not recall accident and that his doctor told him that he had retrograde amnesia, where he did not assert retrograde amnesia as excuse for his conduct. Casimiro v Thayer, 217 A.D.2d 951, 629 N.Y.S.2d 897, 1995 N.Y. App. Div. LEXIS 8373 (N.Y. App. Div. 4th Dep't), app. dismissed, 87 N.Y.2d 861, 639 N.Y.S.2d 313, 662 N.E.2d 794, 1995 N.Y. LEXIS 4895 (N.Y. 1995).

It was abuse of discretion to compel plaintiff to provide unrestricted authorizations for medical records without first conducting in camera review of those records to determine whether they were material and related to any physical and mental conditions affirmatively placed in

controversy by plaintiffs. Mayer v Cusyck, 284 A.D.2d 937, 725 N.Y.S.2d 782, 2001 N.Y. App. Div. LEXIS 5742 (N.Y. App. Div. 4th Dep't 2001).

Defendant indicted for the crime of driving while intoxicated and vehicular homicide entitled to discovery of hospital records of decedent on the grounds that the cause of death might have been from causes unrelated to injuries caused by the defendant and the state may not invoke the physician-patient privilege. People v Christiano, 53 Misc. 2d 433, 278 N.Y.S.2d 696, 1967 N.Y. Misc. LEXIS 1721 (N.Y. County Ct. 1967).

In a death action wherein it was claimed that decedent was intoxicated at the time of the accident, a new trial was granted because of the admission of hospital records showing treatment of decedent for alcoholism, even though there was other evidence that decedent had a drinking problem. Tinney v Neilson's Flowers, Inc., 61 Misc. 2d 717, 305 N.Y.S.2d 713, 1969 N.Y. Misc. LEXIS 1377 (N.Y. Sup. Ct. 1969), aff'd, 35 A.D.2d 532, 314 N.Y.S.2d 161, 1970 N.Y. App. Div. LEXIS 4190 (N.Y. App. Div. 2d Dep't 1970).

In personal injury action arising out of automobile collision, in which plaintiff alleged only physical injuries, defendant would be granted disclosure of plaintiff’s mental health records in view of showing that records might contain relevant information as to whether plaintiff’s medication or lack thereof affected his physical or mental capability; however, in order to protect plaintiff’s privacy rights under CLS Men Hyg § 33.13 and CLS CPLR § 4504, court would conduct in camera inspection of records to determine relevancy. Martin v Martelli, 146 Misc. 2d 1056, 554 N.Y.S.2d 787, 1990 N.Y. Misc. LEXIS 190 (N.Y. Sup. Ct. 1990).

In action arising from one-car accident that occurred after plaintiff’s decedent and driver of car participated in wine-tasting event, defendant driver’s medical records were not protected from discovery by physician-patient privilege insofar as they related to his blood alcohol content and claim of retrograde amnesia, since defendant—who was sole surviving witness to accident—raised actual medical condition (retrograde amnesia) as reason for his inability to recall circumstances of accident; moreover, blood alcohol results would clearly have been available had investigating law enforcement officers ordered tests. Casimiro v Thayer, 163 Misc. 2d 50,

619 N.Y.S.2d 493, 1994 N.Y. Misc. LEXIS 513 (N.Y. Sup. Ct. 1994), modified, aff'd, 217 A.D.2d 951, 629 N.Y.S.2d 897, 1995 N.Y. App. Div. LEXIS 8373 (N.Y. App. Div. 4th Dep't 1995).

**26. Child abuse; child neglect**

Duty of health care professionals to report suspected cases of child abuse to social services agency under CLS Soc Serv §§ 413 and 415 suspends application of CLS CPLR § 4504(a) physician-patient privilege in all judicial proceedings involving child abuse or maltreatment, not just child protective proceedings under CLS Family Ct Act § 1046(a)(vii); thus, physician is not precluded by privilege from testifying before grand jury as to incriminating statements made to him by defendant where those statements were impetus for statutorily required report of suspected child abuse or maltreatment. People v Gearhart, 148 Misc. 2d 249, 560 N.Y.S.2d 247, 1990 N.Y. Misc. LEXIS 423 (N.Y. County Ct. 1990).

Alleged child victim of sexual abuse by a Catholic priest was entitled to production of documents in the priest’s personnel file pertaining to his treatment for sexual misconduct; the privilege asserted by the Diocese belonged to the priest, and the privilege was destroyed when the records were provided by the priest to his employer. Doe v Haight, 70 Misc. 3d 715, 139 N.Y.S.3d 476, 2020 N.Y. Misc. LEXIS 10174 (N.Y. Sup. Ct. 2020).

**27. Child custody proceedings**

In a child custody proceeding, disclosure may not be had of records protected by the privileges which attach to communications between a physician and his patient, a psychologist and his client, and a certified social worker and his client (CPLR 4504, 4507, 4508) unless it is shown that resolution of the custody issue requires revelation of the protected material. Where it is demonstrated that invasion of protected communications between a party and a physician, psychologist or certified social worker is necessary and material to a determination of the custody of a minor child, the rule of privilege protecting such communications (CPLR 4504, 4507, 4508) must yield to the dominant duty of the court to guard the welfare of its wards. The

mother of a minor child, who, in a custody proceeding, alleges that the child's father, the custodial parent, is mentally and emotionally unstable, but offers purely conclusory and largely inadmissible opinions as to his condition, is not entitled to disclosure of the records of a counseling agency and a certified social worker at that agency, pertaining to consultations of the child's father with that agency prior to the termination of the parties' marriage, which records are privileged by statute (CPLR 4504, 4507, 4508); disclosure may be had upon a showing that the records are required by the psychiatrist who has been appointed by the court to examine both parties and the child, in aid of a complete evaluation of the father's mental and emotional condition, and whether such material is essential to his diagnosis and prognosis can best be determined by him. Perry v Fiumano, 61 A.D.2d 512, 403 N.Y.S.2d 382, 1978 N.Y. App. Div. LEXIS 9768 (N.Y. App. Div. 4th Dep't 1978).

CLS CPLR § 4504, as well as other statutory privileges, applies to permanent neglect cases when doctor-patient or medical provider-patient relationship exists, information is acquired while patient is being treated, information is necessary for treatment, and there is expectation of confidentiality. In re Brandon A., 165 Misc. 2d 736, 630 N.Y.S.2d 850, 1995 N.Y. Misc. LEXIS 308 (N.Y. Fam. Ct. 1995).

Because the notes and records of a child's psychologists were subject to the privileges in N.Y. C.P.L.R. 4504 and 4507, pursuant to N.Y. C.P.L.R. 3103, the court determined that it was in the child's best interests that neither the parties nor their counsel have access to the notes and records and that all such notes and records in their possession be returned to the provider or given to the child's attorney for immediate destruction. Liberatore v Liberatore, 955 N.Y.S.2d 762, 37 Misc. 3d 1034, 2012 N.Y. Misc. LEXIS 4925 (N.Y. Sup. Ct. 2012).

**28. Drug-related matters**

Physician-patient privilege was inapplicable to subpoena duces tecum requiring methadone maintenance treatment clinic to produce all of its books and records relating to patient who had been indicted and charged with criminal possession of a controlled substance. Defendant, who

was charged with criminal possession of methadone and elected to defend on basis that bottle of methadone was lawfully possessed by him in connection with his participation in methadone maintenance treatment clinic's program, waived benefit of statutory right to anonymity, and thus it was improper to quash subpoena duces tecum served on clinic to extent of precluding State from subpoenaing defendant's records at the clinic. Records of methadone maintenance clinic pertaining to patient were not protected from disclosure by physician-patient privilege in prosecution of the patient. People v Still, 80 Misc. 2d 831, 364 N.Y.S.2d 125, 1975 N.Y. Misc. LEXIS 2273 (N.Y. Sup. Ct.), aff'd in part, modified, 48 A.D.2d 366, 369 N.Y.S.2d 759, 1975 N.Y. App. Div. LEXIS 9894 (N.Y. App. Div. 2d Dep't 1975).

Testimony of police officer, who was present during emergency surgery when cocaine packages were removed from defendant's stomach, was neither incompetent nor inadmissible by virtue of physician-patient privilege under CLS CPLR § 4504(a) since information obtained by officer was not acquired by attending patient in professional medical capacity, defendant had voluntarily entered hospital complaining of stomach problems, and officer was requested to be present during surgery. Where defendant had voluntarily entered hospital complaining of stomach problems, and emergency surgery was performed during which cocaine packages were removed from defendant's stomach, testimony of physician and other personnel present during surgery was not barred by physician-patient privilege under CLS CPLR § 4504(a) since CLS Pub Health Art 33 prohibits any person from possessing or transporting controlled substances and provides for disclosure of privileged information pursuant to judicial subpoena or court order in criminal investigation or proceeding. People v Gomez, 147 Misc. 2d 704, 556 N.Y.S.2d 961, 1990 N.Y. Misc. LEXIS 253 (N.Y. Sup. Ct. 1990).

**29. Employment matters, generally**

Court refused to quash subpoenas issued by comptroller for production of disabled police officer's medical records in connection with application seeking his involuntary retirement, and rejected officer's claim that his records were protected under CLS CPLR § 4504, as (1)

comptroller is authorized to issue subpoenas for production of records required in determining applications for retirement benefits, (2) to exempt medical records would vitiate purpose of CLS Retire & S S § 363-c(c)(2) permitting municipal employer to seek involuntary retirement of disabled officers, and (3) by applying for benefits under CLS Gen Mun § 207-c and contending that his injury was work related, police officer affirmatively placed his medical condition in issue and effectively waived physician-patient privilege. Burns v State & Local Police & Fire Retirement Sys., 258 A.D.2d 692, 685 N.Y.S.2d 322, 1999 N.Y. App. Div. LEXIS 967 (N.Y. App. Div. 3d Dep't 1999).

**30. —Worker's compensation**

Privilege is waived when patient not only files claim for compensation, but prosecutes it, and gives testimony with respect to the injuries caused by the accident. Trotta v Ward Baking Co., 21 A.D.2d 701, 249 N.Y.S.2d 262, 1964 N.Y. App. Div. LEXIS 3861 (N.Y. App. Div. 3d Dep't 1964).

When medical proof of causation of disability or death is tendered in support of a Workmen's Compensation claim, the physician-patient privilege is waived because claimant's own essential proof has opened the door, and medical testimony which revealed claimant's decedent's prior attempt at suicide and suicidal tendencies was admissible. Beeler v Hildan Crown Container Corp., 26 A.D.2d 163, 271 N.Y.S.2d 373, 1966 N.Y. App. Div. LEXIS 3756 (N.Y. App. Div. 3d Dep't 1966).

In action under Workmen's Compensation Law for death of nurse who allegedly contracted tuberculosis from a patient in a psychiatric ward, claimant would only be allowed to an examination of those parts of patient records as would reveal any physical ailments suffered by patients on the nurse's floor, but not to a revelation of the patients' names. Williams v Buffalo General Hospital, 28 A.D.2d 777, 280 N.Y.S.2d 699, 1967 N.Y. App. Div. LEXIS 3796 (N.Y. App. Div. 3d Dep't 1967).

Treating physician did not breach her physician-patient fiduciary duty of confidentiality under CLS CPLR § 4504(a) by releasing Pennsylvania resident patient's medical history to Pennsylvania Workers' Compensation Board pursuant to subpoena which was invalid under rule that New York does not recognize validity of subpoena served by foreign jurisdiction, since having received presumptively valid workers' compensation subpoena, physician's duty was to comply, leaving issue of relevance, privilege and validity of subpoena to compensation board or to court on motion to quash. Doe v Roe, 155 Misc. 2d 392, 588 N.Y.S.2d 236, 1992 N.Y. Misc. LEXIS 407 (N.Y. Sup. Ct. 1992), modified, aff'd, 190 A.D.2d 463, 599 N.Y.S.2d 350, 1993 N.Y. App. Div. LEXIS 5673 (N.Y. App. Div. 4th Dep't 1993).

**31. Estates**

In proceeding to contest probate of will in which proponent and objectants were next of kin to decedent, both sides had right to review hospital records pertaining to decedent, and hospital records subpoenaed by objectants would be made available for copying by both sides. In re Estate of DeFilippo, 149 Misc. 2d 598, 564 N.Y.S.2d 667, 1990 N.Y. Misc. LEXIS 662 (N.Y. Sur. Ct. 1990).

**32. Medicaid fraud**

In a proceeding challenging the State Department of Social Services' subpoena seeking all patient records of a physician in an investigation of Medicaid billing practices, the physician-patient privilege (CPLR § 4504) did not absolutely protect the doctor's records of treatment, notwithstanding that there is no expressed statutory exemption to the privilege for Medicaid-related records, since the federal and state record keeping and recording requirements evidence a clear intention to abrogate the privilege to the extent necessary to satisfy the important public interest in seeing that such funds are properly applied; this exception to the privilege is no broader than necessary for effective oversight of the Medicaid program. Camperlengo v Blum, 56 N.Y.2d 251, 451 N.Y.S.2d 697, 436 N.E.2d 1299, 1982 N.Y. LEXIS 3356 (N.Y. 1982).

Once physician under investigation for Medicaid fraud established at hearing that medical records sought through grand jury subpoena duces tecum contained information on patients that was highly sensitive and of no apparent relevance to investigation, burden would fall on investigator to show why disclosure of record was nonetheless necessary. In Medicaid fraud investigation, grand jury subpoenas duces tecum for medical records were too broadly worded and entitled psychiatrists under investigation to hearing as to whether records contained highly sensitive matter having no apparent relevance to investigation where subpoenas required disclosure of all records relating to treatment, including notes of all psychotherapeutic sessions with patients, and no waivers had been provided by patients. Fact that psychiatrists under investigation for Medicaid fraud did not raise issue of overbreadth of grand jury subpoenas duces tecum in trial court did not preclude Court of Appeals from considering issue, in context of physicians' argument that subpoenas' call for disclosure of medical records violated physician-patient privilege, where rights of patients who had not waived privilege and who were not before court would be affected by such disclosure. Psychiatrists subject to Medicaid fraud investigation were not entitled to quashing of grand jury subpoenas duces tecum to produce medical records, on ground that act of producing records would be incriminatory under Fifth Amendment of US Constitution because psychiatrists would be admitting that records existed, that they were in their possession, and that they were accurate, where records either were required to be kept by law or were corporate records; there is no Fifth Amendment privilege with respect to records required to be kept by law nor as to corporate records even if they may incriminate corporate custodian personally. Grand Jury Subpoena Duces Tecum etc. v Kuriansky, 69 N.Y.2d 232, 513 N.Y.S.2d 359, 505 N.E.2d 925, 1987 N.Y. LEXIS 15361 (N.Y.), cert. denied, 482 U.S. 928, 107 S. Ct. 3211, 96 L. Ed. 2d 698, 1987 U.S. LEXIS 2666 (U.S. 1987).

In an investigation of Medicaid fraud in a hospital, the trial court improperly quashed portions of a Grand Jury subpoena duces tecum regarding patient names in medical records and medical information in non-medical records, where the physician-patient privilege was inapplicable, in that the information sought was essential to determining whether there had been intentional double billing, billing without rendition of services, or billing without the furnishing of medicine or

other items to a Medicaid patient. Doe v Kuriansky, 91 A.D.2d 1068, 458 N.Y.S.2d 678, 1983 N.Y. App. Div. LEXIS 16406 (N.Y. App. Div. 2d Dep't), aff'd, 59 N.Y.2d 836, 464 N.Y.S.2d 755, 451 N.E.2d 502, 1983 N.Y. LEXIS 3164 (N.Y. 1983).

**33. Medical malpractice, generally**

Court properly excluded habit evidence, which was offered to prove absence of malpractice by defendant physician. Acevedo by Rodriguez v New York City Health & Hosps. Corp., 251 A.D.2d 21, 673 N.Y.S.2d 656, 1998 N.Y. App. Div. LEXIS 6399 (N.Y. App. Div. 1st Dep't), app. denied, 92 N.Y.2d 808, 678 N.Y.S.2d 594, 700 N.E.2d 1230, 1998 N.Y. LEXIS 2834 (N.Y. 1998).

In a medical malpractice case, plaintiffs showed that the physical condition of defendant, from whom a medical examination and further deposition was sought, at the time of the subject incident was in controversy; thus, the trial court was permitted to compel defendant to make himself available for a medical examination under N.Y. C.P.L.R. 3121(a), and the physician-patient privilege was inapplicable to the case under N.Y. C.P.L.R. 4504(a). Nappi v North Shore Univ. Hosp., 31 A.D.3d 509, 819 N.Y.S.2d 71, 2006 N.Y. App. Div. LEXIS 9102 (N.Y. App. Div. 2d Dep't 2006).

Trial court erred in granting a protective order prohibiting an administrator’s request to conduct an on-site inspection of a hospital’s chemical dependency unit because the inspection was not a request to discover medical information and might yield evidence that was “material and necessary” under N.Y. C.P.L.R. 3101(a) to the administrator’s medical malpractice and wrongful death action; however, because the inspection might reveal the status of patients in the unit, in violation of N.Y. C.P.L.R. 4504(a), the inspection was limited to ascertaining the physical layout of the premises. Suchorzepka v Mukhtarzad, 103 A.D.3d 878, 960 N.Y.S.2d 157, 2013 N.Y. App. Div. LEXIS 1211 (N.Y. App. Div. 2d Dep't 2013).

Plaintiff, who developed a post-operative infection, allegedly as the result of defendants’ negligence in placing her in close proximity to a bacterial infection originating from a leaking

colostomy of a nonparty patient who occupied an adjoining bed in the same hospital room, is not entitled to discover the hospital records of said nonparty patient since such records are unqualifiedly privileged under the physician-patient privilege (CPLR 4504, subd [a]) and such nonparty patient has not waived the privilege; however, plaintiff is entitled to discover the name and address of said nonparty patient since such nonparty patient may be a potential witness to the alleged occurrence of malpractice as well as being the possible carrier or source of the alleged bacterial infection allegedly transmitted to plaintiff. King v O'Connor, 103 Misc. 2d 607, 426 N.Y.S.2d 415, 1980 N.Y. Misc. LEXIS 2150 (N.Y. Sup. Ct. 1980).

An application for an order directing a doctor to furnish the husband of a deceased patient with a complete copy of his office records pertaining to the decedent was granted where the physician-patient privilege had been waived by the surviving spouse; furthermore a wrongful death action or a negligence-malpractice action based on personal injury to a decedent may be brought by the decedent’s personal representative on behalf of decedent’s distributees. Gerkin v Werner, 106 Misc. 2d 643, 434 N.Y.S.2d 607, 1980 N.Y. Misc. LEXIS 2744 (N.Y. Sup. Ct. 1980).

In medical malpractice action, defendant physician would be permitted to subpoena plaintiff’s treating physician for testimony at trial, and to interview him privately prior to trial, since plaintiff implicitly waived physician-patient privilege by placing his physical condition in issue. Nielsen v John G. Apisson, M.D., P. C., 138 Misc. 2d 74, 524 N.Y.S.2d 161, 1988 N.Y. Misc. LEXIS 16 (N.Y. Sup. Ct. 1988).

Administratrix waived the doctor-patient privilege pertaining to the decedent’s past medical conditions related to his cardiac condition and abdominal pains because the essence of the administratrix’s wrongful death medical malpractice claim was an alleged failure to evaluate and monitor the decedent’s cardiac condition or to treat him for abdominal pain; otherwise, there was no showing that all of the decedent’s medical records were material and necessary to the defense. Friedman v Frank, 835 N.Y.S.2d 872, 16 Misc. 3d 321, 237 N.Y.L.J. 104, 2007 N.Y. Misc. LEXIS 3310 (N.Y. Sup. Ct. 2007).

Lower court's order for an in camera inspection of defendant's medical records related to the diagnosis or treatment of defendant for hepatitis C was reversed and the motion to compel was denied because plaintiffs had not sustained their initial burden of showing that the individual's physical condition was in controversy at the time of the alleged medical malpractice and even if plaintiffs had met the burden, defendant had validly asserted a physician patient privilege and the privilege had not been waived. Lombardi v Hall, 5 A.D.3d 739, 774 N.Y.S.2d 560, 2004 N.Y. App. Div. LEXIS 3632 (N.Y. App. Div. 2d Dep't 2004).

**34. —Infants as victims**

In medical malpractice action by infant and his father alleging that infant suffered brain damage as result of negligent obstetrical care, infant's mother, as nonparty witness at examination before trial, can invoke physician-patient privilege under CLS CPLR § 4504 to avoid revealing substance of confidential communications made to her physician, but she cannot refuse to answer questions concerning her prior health history and birth and physical condition of her 2 eldest children. Williams v Roosevelt Hospital, 66 N.Y.2d 391, 497 N.Y.S.2d 348, 488 N.E.2d 94, 1985 N.Y. LEXIS 17615 (N.Y. 1985).

In a medical malpractice action commenced on behalf of an infant by her father to recover for personal injuries allegedly sustained by the infant as a result of the improper rendering of prenatal and delivery care to the infant's mother, the mother as a nonparty witness could claim the physician-patient privilege with respect to the protected portions of her medical history and records; if she did so, the infant would be precluded at trial from introducing any evidence of the privileged information for the period other than the time the infant was in utero. Hughson v St. Francis Hospital, 93 A.D.2d 491, 463 N.Y.S.2d 224, 1983 N.Y. App. Div. LEXIS 17502 (N.Y. App. Div. 2d Dep't 1983).

In malpractice action, physician-patient privilege was not violated by admission of testimony of physician who treated infant plaintiff prior to commencement of action since (1) plaintiffs waived privilege with regard to all aspects of infant's medical condition placed in issue at trial, (2)

medical records on which physician's opinions were based were clearly not confidential in that plaintiffs had introduced them in evidence and used them in examining other witnesses during presentation of their case-in-chief, and (3) physician did not testify until after plaintiffs rested their case. Zimmerman v Jamaica Hospital, Inc., 143 A.D.2d 86, 531 N.Y.S.2d 337, 1988 N.Y. App. Div. LEXIS 8157 (N.Y. App. Div. 2d Dep't), app. denied, 73 N.Y.2d 702, 537 N.Y.S.2d 490, 534 N.E.2d 328, 1988 N.Y. LEXIS 3460 (N.Y. 1988).

In mother's action on behalf of child for medical malpractice and products liability, defendant was not entitled to compel authorizations for release of medical records of child's father and siblings where those persons were not parties to action, and their medical records were protected by physician-patient privilege. Plaintiffs would be precluded from introducing evidence at trial concerning matters as to which they asserted physician-patient privilege. Roman v Turner Colours, Inc., 255 A.D.2d 571, 681 N.Y.S.2d 69, 1998 N.Y. App. Div. LEXIS 12877 (N.Y. App. Div. 2d Dep't), app. dismissed, 255 A.D.2d 571, 682 N.Y.S.2d 609, 1998 N.Y. App. Div. LEXIS 12849 (N.Y. App. Div. 2d Dep't 1998).

In medical malpractice action brought on behalf of infant plaintiff adopted at birth, alleging that defendants failed to properly diagnose and treat infant's encephalocele ("bulging eye"), court would grant plaintiff's application for release of hospital "newborn birth records" by authority of CLS Dom Rel § 114 and CLS CPLR §§ 4504 and 3120; further, since CLS Soc Serv § 373-a provides exception to physician-patient privilege and protects anonymity of biological mother, application seeking release of her prenatal and perinatal treatment records would be granted without notice to her. Coleman v Weiner, 139 Misc. 2d 267, 528 N.Y.S.2d 480, 1988 N.Y. Misc. LEXIS 255 (N.Y. Sup. Ct. 1988).

In claim by infant alleging that birth defects were caused by malpractice and other factors, court would order disclosure of mother's medical records for periods prior and subsequent to in utero period to develop or discover etiology of defect, since such records were necessary, relevant and material to issue of causation. St. Amand v Merrell Dow Pharmaceuticals, Inc., 140 Misc. 2d 278, 530 N.Y.S.2d 428, 1988 N.Y. Misc. LEXIS 422 (N.Y. Sup. Ct. 1988).

**35. Products liability**

In action for injuries sustained by infant, allegedly as result of drug manufactured and sold by defendant, court should have granted defendant's motion for protective order redacting identities of patients and physicians contained in drug application file kept at direction of Food and Drug Administration (FDA) since (1) identities of reporting sources were not material and necessary to prosecution of plaintiffs' case, (2) disclosure could raise numerous irrelevant collateral issues, (3) revealing identities of reporting sources could compromise FDA's voluntary reporting procedure, (4) federal Freedom of Information Act exempts from disclosure identities of reporting sources, and (5) disclosure of patients' names would violate physician-patient privilege. Stahl v Rhee, 136 A.D.2d 539, 523 N.Y.S.2d 159, 1988 N.Y. App. Div. LEXIS 282 (N.Y. App. Div. 2d Dep't 1988).

In mother's action on behalf of child for medical malpractice and products liability, defendant was not entitled to compel authorizations for release of medical records of child's father and siblings where those persons were not parties to action, and their medical records were protected by physician-patient privilege. Plaintiffs would be precluded from introducing evidence at trial concerning matters as to which they asserted physician-patient privilege. Roman v Turner Colours, Inc., 255 A.D.2d 571, 681 N.Y.S.2d 69, 1998 N.Y. App. Div. LEXIS 12877 (N.Y. App. Div. 2d Dep't), app. dismissed, 255 A.D.2d 571, 682 N.Y.S.2d 609, 1998 N.Y. App. Div. LEXIS 12849 (N.Y. App. Div. 2d Dep't 1998).

**36. Other and miscellaneous**

Where a complaint alleged a hospital and treating physician allowed the filming, without consent, of a patient's treatment and death in an emergency room and the broadcasting of the footage as part of a documentary, it sufficiently stated a claim for breach of physician-patient confidentiality; that the patient was not identifiable on the aired episode of the televised program was immaterial, as the complaint also alleged an improper disclosure of medical

information to the network employees who filmed and edited the recording. Chanko v American Broadcasting Cos. Inc., 27 N.Y.3d 46, 49 N.E.3d 1171, 29 N.Y.S.3d 879, 2016 N.Y. LEXIS 702 (N.Y. 2016).

Plaintiff's verified complaint and accompanying exhibits, coupled with affidavit of defendant's physician, were sufficient to state cause of action sounding in defamation where affidavit detailed defendant's defamatory statements concerning plaintiff; defendant's communications to physician were not protected by physician-patient privilege since they were not related to diagnosis or treatment. Jacobs v Haber, 133 A.D.2d 739, 520 N.Y.S.2d 28, 1987 N.Y. App. Div. LEXIS 51782 (N.Y. App. Div. 2d Dep't 1987).

In skater's action against ice rink owner for broken arm in fall allegedly caused by defective rented skates, owner's discovery of pre-accident medical and psychiatric records was properly limited to information regarding types and quantities of drugs that had been prescribed for plaintiff's depression during 6-month period immediately before accident where that limitation preserved skater's physician-patient privilege while still allowing owner to explore possibility that skater suffered adverse side effects from drugs that might have contributed to accident, particularly in causing skater to be unsteady on his feet. Moore v Superior Ice Rink, Inc., 251 A.D.2d 305, 674 N.Y.S.2d 390, 1998 N.Y. App. Div. LEXIS 6341 (N.Y. App. Div. 2d Dep't 1998).

In a former tenant's action against the premises owners, alleging that he suffered injuries as a result of his exposure to lead paint, the trial court erred in partially granting the owners' motion to compel discovery of, inter alia, medical records of the tenant's nonparty family members because although it was relevant, material, and necessary, they had not consented or waived the doctor-patient privilege. Perez v Fleischer, 122 A.D.3d 1157, 997 N.Y.S.2d 773, 2014 N.Y. App. Div. LEXIS 8060 (N.Y. App. Div. 3d Dep't 2014).

Defendant's physician-client privilege was not violated because defendant put his medical condition in issue by claiming that he had been assaulted by the victims, defendant's disclosure of his medical condition to a state trooper to whom he reported the incident waived the privilege, and defendant's medical records were not introduced at trial and no medical witness testified to

the treatment of defendant after the incident or to any statements made by him while receiving treatment. People v Guzy, 167 A.D.3d 1230, 89 N.Y.S.3d 783, 2018 N.Y. App. Div. LEXIS 8665 (N.Y. App. Div. 3d Dep't 2018), app. denied, 33 N.Y.3d 948, 123 N.E.3d 821, 100 N.Y.S.3d 162, 2019 N.Y. LEXIS 1029 (N.Y. 2019).

Physician-patient relationship existed between the doctor and the student, the information disclosed was acquired during the doctor's treatment of the student, and the student did not consent to such disclosure; the school officials were not aware that the doctor was of the professional medical opinion that the student's mental health condition was deteriorating, and defendant failed to make a prima facie showing that no confidential information had been disclosed by the doctor. Bonner v Lynott, 203 A.D.3d 1526, 166 N.Y.S.3d 325, 2022 N.Y. App. Div. LEXIS 2036 (N.Y. App. Div. 3d Dep't 2022).

Negligence per se claim alleging a health care system improperly disclosed a patient's confidential medical information through a statewide computer network that collected medical records, in violation of N.Y. C.P.L.R. 4504 and N.Y. Pub. Health Law § 2803-c, was properly dismissed, as the system was expressly authorized by statute to share the patient's confidential medical information with the network. The standard of care established by § 2803-c applied only to residential health care facilities and did not include hospitals, and because the network was a qualified entity and the system was a qualified entity participant, the network was not, as a matter of law, a person not connected with the patient's medical treatment under state law. Klein v Catholic Health Sys. of Long Is., Inc., 231 A.D.3d 797, 220 N.Y.S.3d 757, 2024 N.Y. App. Div. LEXIS 5275 (N.Y. App. Div. 2d Dep't 2024).

Where medical records of state's key witness were sought in post-conviction motion to set aside manslaughter conviction in connection with issue of credibility of witness who had ongoing mental condition which might have affected his accurateness, perception, truthfulness and susceptibility to suggestion and question whether such records were privileged was never at issue in the trial, rule prohibiting disclosure of communications between patient and physician did not preclude disclosure of medical records. People v Maynard, 80 Misc. 2d 279, 363

N.Y.S.2d 384, 1974 N.Y. Misc. LEXIS 1887 (N.Y. Sup. Ct. 1974), limited, People v Walsh, 90 Misc. 2d 291, 394 N.Y.S.2d 374, 1977 N.Y. Misc. LEXIS 2043 (N.Y. County Ct. 1977).

Private physician would be required to produce decedent's medical records notwithstanding physician-patient privilege of CLS CPLR § 4504 where doctor had treated patient, who was prison inmate, within one month of death and Commission of Correction was investigating circumstances surrounding death pursuant to CLS Corr § 47; public interest in maintaining safe and secure penal institutions overrides normal non-disclosure privileges notwithstanding lack of specific statutory exception on matter. In re Kaminsky, 134 Misc. 2d 218, 510 N.Y.S.2d 450, 1986 N.Y. Misc. LEXIS 3088 (N.Y. Sup. Ct. 1986).

Plaintiff, whose picture was taken by newspaper photographer in waiting room at infectious disease unit of hospital after project nurse and physician with unit assured him that unrecognizable silhouette picture from back angle would be taken, stated cause of action against hospital, nurse and doctor for breach of physician-patient privilege following publication of allegedly recognizable photograph in newspaper since privilege encompasses patient's identity as well as treatment he receives, and permitted presence of newspaper photographer and reporter in disease unit waiting room violated plaintiff's immunity from disclosure as patient. Anderson v Strong Memorial Hospital, 140 Misc. 2d 770, 531 N.Y.S.2d 735, 1988 N.Y. Misc. LEXIS 473 (N.Y. Sup. Ct. 1988), aff'd, 151 A.D.2d 1033, 542 N.Y.S.2d 96, 1989 N.Y. App. Div. LEXIS 8388 (N.Y. App. Div. 4th Dep't 1989).

In divorce action commenced by husband after wife became pregnant by in vitro fertilization, physician at infertility clinic where wife was treated could not be compelled to testify because wife did not waive physician-patient privilege, husband was never patient at clinic although some of his sperm was used to fertilize wife's eggs, and there was no proof that physician aided, abetted, encouraged or directed wife's alleged forgery of husband signature on consent form. McDonald v McDonald, 179 Misc. 2d 211, 684 N.Y.S.2d 414, 1998 N.Y. Misc. LEXIS 630 (N.Y. Sup. Ct. 1998).

In action for injuries allegedly sustained by infant plaintiffs as result of lead poisoning, defendants were not entitled to discovery of medical records and information as to plaintiffs' parents and sibling from sources including Department of Health and Department of Social Services, in addition to questioning plaintiffs' mother as to sibling's medical history, since neither parents nor sibling were parties to action, nor had they placed their mental or physical condition at issue, and there had not been explicit waiver of privilege as to any nonparty. Van Epps v County of Albany, 184 Misc. 2d 159, 706 N.Y.S.2d 855, 2000 N.Y. Misc. LEXIS 122 (N.Y. Sup. Ct. 2000).

Because the physician patient privilege applied in a contested N.Y. Surr. Ct. Proc. Act. art. 17A guardianship proceeding, the affirmations of a treating and supervising doctor had to be stricken because of a failure to observe both the physician patient privilege under N.Y. C.P.L.R. § 4504 and the patient confidentiality rules. Matter of Derek, 821 N.Y.S.2d 387, 12 Misc. 3d 1132, 2006 N.Y. Misc. LEXIS 1598 (N.Y. Sur. Ct. 2006).

In an insurance fraud investigation initiated by the New York State Attorney General, a N.Y. C.P.L.R. § 2304 motion to quash six grand jury subpoenas duces tecum against a group of medical corporations was denied as to materials, other than the sample documents, which did not fall under the physician-patient privilege codified under N.Y. C.P.L.R. § 4504. But, the court granted the corporations the opportunity to identify any highly sensitive patient information contained in the subpoenaed documents, which was both privileged and not relevant to the investigation, and if they did so, then the Attorney General was to explain its relevance. Matter of Bergamo Med. P.C., 840 N.Y.S.2d 709, 17 Misc. 3d 182, 238 N.Y.L.J. 38, 2007 N.Y. Misc. LEXIS 5149 (N.Y. Sup. Ct. 2007).

Even if the physician-patient privilege had been violated when a hospital administrator, in response to a detective's question about whether any "male blacks" were treated on a certain date for any kind of slash wounds to the face, gave the detective an admission slip with defendant's name and address and told him that defendant had received stitches on the left side of his face, suppression of the information imparted in defendant's criminal prosecution was not

required because the physician-patient privilege is not one of constitutional magnitude; thus, a violation of N.Y. C.P.L.R. 4504(a) cannot be remedied by suppression. People v Greene, 36 A.D.3d 219, 824 N.Y.S.2d 48, 2006 N.Y. App. Div. LEXIS 13270 (N.Y. App. Div. 1st Dep't 2006), aff'd, 9 N.Y.3d 277, 849 N.Y.S.2d 461, 879 N.E.2d 1280, 2007 N.Y. LEXIS 3276 (N.Y. 2007).

Pastor's and an assistant pastor's medical/psychological reports were privileged under N.Y. C.P.L.R. 4504 and 4507; the victim's negligent supervision claim against the pastor did not implicate the pastor's sexual conduct and therefore, documents pertaining to his care, treatment and counseling for improper sexual conduct were not relevant. Krystal G. v Roman Catholic Diocese of Brooklyn, 933 N.Y.S.2d 515, 34 Misc. 3d 531, 2011 N.Y. Misc. LEXIS 4903 (N.Y. Sup. Ct. 2011).

Because medical records were clearly confidential, to the extent they may were relevant to the adoption proceeding, they were to remain under seal. In re Doe, 237 N.Y.L.J. 76, 2007 N.Y. Misc. LEXIS 2979 (N.Y. Sur. Ct. Mar. 26, 2007), modified, 842 N.Y.S.2d 200, 16 Misc. 3d 714, 237 N.Y.L.J. 76, 2007 N.Y. Misc. LEXIS 4635 (N.Y. Sur. Ct. 2007).

Parolee's rights were violated when a psychiatrist was permitted to testify, during a revocation proceeding, to confidential information he acquired in attending to the parolee in a professional capacity because the parolee did not waive the physician-patient privilege, there was no court order requiring disclosure, and there was no finding that the interests of justice significantly outweighed the need for confidentiality; the parolee was entitled to a writ of habeas corpus. People ex rel. Davis v Warden, Anna M. Kross Ctr., 51 Misc. 3d 849, 26 N.Y.S.3d 452, 2016 N.Y. Misc. LEXIS 685 (N.Y. Sup. Ct. 2016).

N.Y. C.P.L.R. §§ 4504, 4507, and 4508 were intended to deal with an unauthorized release of confidential information by a person's physician, psychologist, or social worker and, even if violated, an inmate had not stated an actionable claim under 42 U.S.C.S. § 1983 based on those state statutes, when he claimed that his psychiatric records were attached to a pre-sentence report. Smith v Stanton, 545 F. Supp. 2d 302, 2008 U.S. Dist. LEXIS 31886 (W.D.N.Y. 2008).

## II. Under Former Civil Practice Laws

### A. In General

#### 37. Generally

The purpose of CPA § 352, prohibiting a physician from disclosing information acquired in attending a patient, was to protect those who are required to consult physicians from the disclosure of secrets imparted to them; to protect the relationship of patient and physician and to prevent physicians from disclosing information which might result in humiliation, embarrassment or disgrace to patients. Steinberg v New York Life Ins. Co., 263 N.Y. 45, 188 N.E. 152, 263 N.Y. (N.Y.S.) 45, 1933 N.Y. LEXIS 795 (N.Y. 1933); Hethier v Johns, 198 A.D. 127, 189 N.Y.S. 605, 1921 N.Y. App. Div. LEXIS 8054 (N.Y. App. Div. 1921), rev'd, 233 N.Y. 370, 135 N.E. 603, 233 N.Y. (N.Y.S.) 370, 1922 N.Y. LEXIS 885 (N.Y. 1922), rev'd, 233 N.Y. 645, 135 N.E. 953, 233 N.Y. (N.Y.S.) 645, 1922 N.Y. LEXIS 1068 (N.Y. 1922).

The provisions of CPA § 352, forbidding a physician or nurse to disclose information acquired in attending a patient in a professional capacity, were not abrogated by CPA § 354, permitting a physician or a nurse attached to a hospital to give testimony before a referee as to information acquired in attending a patient. Woernley v Electromatic Typewriters, Inc., 271 N.Y. 228, 2 N.E.2d 638, 271 N.Y. (N.Y.S.) 228, 1936 N.Y. LEXIS 1191 (N.Y. 1936).

CPA § 354, permitting, in an action to recover for personal injuries, a physician or a nurse attached to a hospital to give testimony before a referee as to information acquired in attending a patient, was not intended to abrogate the provisions of CPA § 352 forbidding a physician or nurse to disclose information acquired in attending a patient in a professional capacity. Woernley v Electromatic Typewriters, Inc., 271 N.Y. 228, 2 N.E.2d 638, 271 N.Y. (N.Y.S.) 228, 1936 N.Y. LEXIS 1191 (N.Y. 1936).

CPA § 352, the purpose of which was to prevent disclosure, was to be read in connection with RCP 126 (Rule 3109 herein) and its ban on disclosures given effect in the absence of an express or implied consent of the patient to whom the privilege belonged. Rodner v Buchman, 246 A.D. 777, 284 N.Y.S. 99, 1935 N.Y. App. Div. LEXIS 10146 (N.Y. App. Div. 1935).

Motion to take testimony of plaintiff's physician before referee, to use in opposition to plaintiff's motion for increased alimony and counsel fee and for other relief, granted. Dollard v Dollard, 257 A.D. 836, 12 N.Y.S.2d 897, 1939 N.Y. App. Div. LEXIS 8096 (N.Y. App. Div. 1939).

Ordinarily physician may not disclose any information acquired in attending patient in professional capacity and which was necessary to enable him to act in that capacity. Eder v Cashin, 281 A.D. 456, 120 N.Y.S.2d 165, 1953 N.Y. App. Div. LEXIS 3067 (N.Y. App. Div. 1953).

CPA § 352 was remedial, and should have been liberally construed in favor of patient. People v Decina, 1 A.D.2d 592, 152 N.Y.S.2d 169, 1956 N.Y. App. Div. LEXIS 5193 (N.Y. App. Div. 4th Dep't), aff'd, 2 N.Y.2d 133, 157 N.Y.S.2d 558, 138 N.E.2d 799, 1956 N.Y. LEXIS 631 (N.Y. 1956).

There was no conflict between the Statement of Readiness Rule and CPA §§ 352 and 354. Kriger v Holland Furnace Co., 12 A.D.2d 44, 208 N.Y.S.2d 285, 1960 N.Y. App. Div. LEXIS 6673 (N.Y. App. Div. 2d Dep't 1960).

There was no conflict between the Statement of Readiness Rule and CPA §§ 253 (Rule 3022 herein) and 354. Kriger v Holland Furnace Co., 12 A.D.2d 44, 208 N.Y.S.2d 285, 1960 N.Y. App. Div. LEXIS 6673 (N.Y. App. Div. 2d Dep't 1960).

Physicians who attended plaintiff prior to the infliction of the injuries complained of cannot be examined as to the prior physical condition of plaintiff when plaintiff has not put such condition in issue. Butler v Manhattan R. Co., 23 N.Y.S. 163, 3 Misc. 453, 1893 N.Y. Misc. LEXIS 298 (N.Y. Super. Ct. 1893), aff'd, 143 N.Y. 630, 37 N.E. 826, 143 N.Y. (N.Y.S.) 630, 1894 N.Y. LEXIS 1008 (N.Y. 1894).

A physician for plaintiff in an injury action should not permit himself to be employed by defendant as medical expert for hire at the trial. Bauch v Schultz, 180 N.Y.S. 188, 109 Misc. 548, 1919 N.Y. Misc. LEXIS 675 (N.Y. Sup. Ct. 1919).

In an action by an insurance company to rescind a policy of life insurance because of material misrepresentations of fact by the insured as to his physical condition, if plaintiff fails to produce evidence of the falsity of the representations made in the application for insurance, no unfavorable inferences may be drawn as the result of defendant’s exercise of his privilege as to the testimony of physicians granted him by the statute. Travelers' Ins. Co. v Pomerantz, 207 N.Y.S. 81, 124 Misc. 250, 1924 N.Y. Misc. LEXIS 1029 (N.Y. Sup. Ct. 1924), aff'd, 218 A.D. 431, 218 N.Y.S. 490, 1926 N.Y. App. Div. LEXIS 5950 (N.Y. App. Div. 1926).

The statute recognizes that it is a hardship to compel a physician engaged in active practice to attend court as a witness. Paparone v Ader, 248 N.Y.S. 321, 139 Misc. 281, 1931 N.Y. Misc. LEXIS 1124 (N.Y. Sup. Ct. 1931).

History of statutes relating to privileged quality of professional communications to physicians, considered. In re Cashman's Will, 289 N.Y.S. 328, 159 Misc. 881, 1936 N.Y. Misc. LEXIS 1347 (N.Y. Sur. Ct. 1936), aff'd, 250 A.D. 871, 297 N.Y.S. 150, 1937 N.Y. App. Div. LEXIS 9497 (N.Y. App. Div. 1937).

Whether the witness was actuated by curiosity or by a higher motive makes no difference. Grossman v Supreme Lodge of Knights & Ladies of Honor, 6 N.Y.S. 821, 53 Hun 637, 1889 N.Y. Misc. LEXIS 802 (N.Y. Sup. Ct. 1889).

It is not necessary to establish that the knowledge which a physician has acquired in respect to his patient while attending her professionally, was necessary to enable him to prescribe for her; it is only necessary in order to exclude his testimony to show that he acquired the information during the course of his professional visits. In re Darragh's Estate, 5 N.Y.S. 58, 52 Hun 591, 1889 N.Y. Misc. LEXIS 2813 (N.Y. Sup. Ct. 1889).

The purpose of the amendment, made by Chap. 295 of 1893, to § 836 of the Code of Civil Procedure was to open more widely the door to the introduction of the evidence of medical attendants upon a deceased person, when the validity of his will should be called in question. Before this amendment the right to waive the provisions of § 834 of said Code forbidding a physician or surgeon to disclose any information as to the mental or physical condition of a deceased patient which he acquired while attending the patient professionally was, in a contest relating to the validity of his will, confined to his executors, but it was then extended to the surviving husband, widow, or any heir at law, or any of the next of kin, or any other party in interest. In re Murphy's Will, 33 N.Y.S. 198, 85 Hun 575, 2 N.Y. Ann. Cas. 77 (1895).

CPA §§ 349 (§ 4502 herein) and 352 provided separate privileges, and had to be individually evaluated and applied. Salamon v Indemnity Ins. Co., 10 F.R.D. 232, 1950 U.S. Dist. LEXIS 3610 (D.N.Y. 1950).

**38. Scope of section**

The fact that the testimony of the physicians related to patients who were not parties to the proceeding or interested therein, and who were dead at that time, does not take it out of the prohibition of the statute. In re Myer's Will, 184 N.Y. 54, 76 N.E. 920, 184 N.Y. (N.Y.S.) 54, 1906 N.Y. LEXIS 1334 (N.Y. 1906).

CPA §§ 351–353 (§§ 4503(a), (b), 4504(a), (b), 4505 herein) applied to any examination of person as witness unless waived. New York City Council v Goldwater, 284 N.Y. 296, 31 N.E.2d 31, 284 N.Y. (N.Y.S.) 296, 1940 N.Y. LEXIS 838 (N.Y. 1940).

Sanitary Code § 90 did not operate to annul CPA § 352 so as to permit use of all hospital records in all abortion cases, but related only to cases currently being treated by doctors. Application of Grand Jury of County of Kings, 286 A.D. 270, 143 N.Y.S.2d 501, 1955 N.Y. App. Div. LEXIS 4026 (N.Y. App. Div. 1955).

Mental Hygiene Law §§ 20 and 34 did not create exception to privilege and did not permit disclosure thereof except as could be done under CPA § 354. Jaffe v New York, 94 N.Y.S.2d 60, 196 Misc. 710, 1949 N.Y. Misc. LEXIS 3041 (N.Y. Sup. Ct. 1949).

Disclosures authorized by Mental Hygiene Law were not prohibited by CPA § 354. Application of Failla, 95 N.Y.S.2d 645, 197 Misc. 673, 1950 N.Y. Misc. LEXIS 1445 (N.Y. Sur. Ct. 1950).

CPA § 352 had to be read with CPA § 354 to determine admissibility of physician's testimony. Bolts v Union Cent. Life Ins. Co., 20 N.Y.S.2d 675, 1940 N.Y. Misc. LEXIS 1838 (N.Y. City Ct. 1940).

Matters of description, relating to physical surroundings of patient or to her companions, are not privileged, and registered nurse may testify to observed matters. In re Schermerhorn, 98 N.Y.S.2d 361, 1950 N.Y. Misc. LEXIS 1776 (N.Y. Sup. Ct.), rev'd, 277 A.D. 845, 98 N.Y.S.2d 367, 1950 N.Y. App. Div. LEXIS 3527 (N.Y. App. Div. 1950).

**39. Who may assert privilege**

The privilege is that of the patient and not of the witness. Edington v Mutual Life Ins. Co., 67 N.Y. 185, 67 N.Y. (N.Y.S.) 185, 1876 N.Y. LEXIS 369 (N.Y. 1876).

The privilege does not belong to the witness, but to the patient; but a refusal to compel a physician to answer a question as to what he had treated decedent for a number of years before was held not prejudicial where there had been no express waiver. Trieber v New York & Q. C. R. Co., 149 A.D. 804, 134 N.Y.S. 267, 1912 N.Y. App. Div. LEXIS 6509 (N.Y. App. Div. 1912).

Protection of patient, and no one else, was intention of CPA §§ 352 and 354. Application of Warrington, 277 A.D. 1076, 100 N.Y.S.2d 655, 1950 N.Y. App. Div. LEXIS 4530 (N.Y. App. Div. 1950), aff'd, 303 N.Y. 129, 100 N.E.2d 170, 303 N.Y. (N.Y.S.) 129, 1951 N.Y. LEXIS 696 (N.Y. 1951).

A physician cannot be compelled to deliver to a receiver of his property, his original books of account which contain privileged information concerning his patients. Kelly v Levy, 8 N.Y.S. 849, 1890 N.Y. Misc. LEXIS 1810 (N.Y. City Ct. 1890).

**40. —Assignee of patient**

The right of objecting to the disclosure as a privileged communication is not limited to the patient and his personal representatives, but may be exercised by an assignee, and his right is not affected by the decease of the patient. Edington v Mutual Life Ins. Co., 67 N.Y. 185, 67 N.Y. (N.Y.S.) 185, 1876 N.Y. LEXIS 369 (N.Y. 1876).

Assignee of policy of life insurance may object to disclosure. Dilleber v Home Life Ins. Co., 69 N.Y. 256, 69 N.Y. (N.Y.S.) 256, 1877 N.Y. LEXIS 832 (N.Y. 1877).

**41. Witnesses restrained by section**

Prohibiting revelations of confidential communications made to a physician, runs only against the physician himself. Nowak v Brotherhood of American Yeomen, 249 N.Y. 78, 162 N.E. 589, 249 N.Y. (N.Y.S.) 78, 1928 N.Y. LEXIS 763 (N.Y. 1928), limited, Jenkins v John Hancock Mut. Life Ins. Co., 257 N.Y. 289, 178 N.E. 9, 257 N.Y. (N.Y.S.) 289, 1931 N.Y. LEXIS 853 (N.Y. 1931).

A nurse, not registered or professional, properly gave testimony of conversations between doctor, patient’s husband and herself as to patient’s condition. Hobbs v Hullman, 183 A.D. 743, 171 N.Y.S. 390, 1918 N.Y. App. Div. LEXIS 6028 (N.Y. App. Div. 1918).

A physician suing to recover for professional services rendered a patient, since deceased, cannot question another attending physician, whose answers would disclose, the nature of the treatment given the patient; the rule is not changed because a duly licensed physician had never registered his license as required by law. McGillicuddy v Farmers' Loan & Trust Co., 55 N.Y.S. 242, 26 Misc. 55, 1899 N.Y. Misc. LEXIS 1150 (N.Y. Sup. Ct. 1899).

The provisions of CPA § 352 disqualifying physicians and surgeons from testifying to information acquired in a professional capacity were not applicable to a dentist. Howe v Regensburg, 132 N.Y.S. 837, 75 Misc. 132, 1912 N.Y. Misc. LEXIS 627 (N.Y. App. Term 1912).

The words “duly authorized to practice physic or surgery” applied to those persons not prohibited from practicing by the Penal Code. Wiel v Cowles, 45 Hun 307, 12 N.Y. St. 427 (N.Y.).

**42. —Patient**

The privilege under CPA § 352 extended to the testimony of the patient as well as of the physician. Galligano v Galligano, 245 A.D. 743, 280 N.Y.S. 419, 1935 N.Y. App. Div. LEXIS 10717 (N.Y. App. Div. 1935).

The rule as to confidential communications between physician and patient being for the protection of the patient in her subjective freedom of consultation, the patient when a witness can no more be compelled to disclose them than can the physician; the relation of physician and patient being established, it will be assumed that communications made by the patient to the physician were necessary to enable him to treat her in a professional capacity and will receive protection; where the testimony of a physician has been taken by deposition and part of the testimony is inadmissible, the objectionable portion is not therefore to be excluded. Dambmann v Metropolitan S. R. Co., 106 N.Y.S. 221, 55 Misc. 60, 1907 N.Y. Misc. LEXIS 534 (N.Y. Sup. Ct. 1907), rev'd, 135 A.D. 909, 119 N.Y.S. 1122, 1909 N.Y. App. Div. LEXIS 4093 (N.Y. App. Div. 1909).

Privilege extends to both patient and physician, and while patient may not be compelled to divulge information received from his physician, he is obliged to disclose whether he was treated professionally and names of his physicians and dates of his visits. Baum v Pennsylvania R. Co., 14 F.R.D. 398, 1953 U.S. Dist. LEXIS 3868 (D.N.Y. 1953).

**43. Presence of third parties**

Presence of police guard in doorway of hospital room where he could overhear conversation between doctor and defendant did not destroy privilege arising under CPA § 352 and defendant's communications to doctor should not have been admitted in evidence. People v Decina, 2 N.Y.2d 133, 157 N.Y.S.2d 558, 138 N.E.2d 799, 1956 N.Y. LEXIS 631 (N.Y. 1956).

**44. Determining admissibility of evidence generally**

CPA § 352 excluded information derived from the sense of sight, as well as the sense of hearing, and it was not requisite to its exclusion that formal proof should be given, in the first instance, that the information was necessary to enable the physician to prescribe. Grattan v Metropolitan Life Ins. Co., 80 N.Y. 281, 80 N.Y. (N.Y.S.) 281, 1880 N.Y. LEXIS 98 (N.Y. 1880).

Hypothetical questions may be put to a physician who attended the deceased, with directions to lay aside all interest or knowledge which he acquired by reason of his attendance on the deceased and to answer the questions without regard to such information. Meyer v Standard Life & Acci. Ins. Co., 8 A.D. 74, 40 N.Y.S. 419, 1896 N.Y. App. Div. LEXIS 2290 (N.Y. App. Div. 1896).

While it is better practice to put physician on stand and ask questions, it was competent for justice with consent of opposing counsel to accept and rule upon offer of proof. Sparer v Travelers' Ins. Co., 185 A.D. 861, 173 N.Y.S. 673, 1919 N.Y. App. Div. LEXIS 5560 (N.Y. App. Div. 1919).

Where statements of a physician were submitted without protest, they constituted admissions and did not violate CPA § 352. Emanuele v Metropolitan Life Ins. Co., 242 N.Y.S. 715, 137 Misc. 542, 1930 N.Y. Misc. LEXIS 1346 (N.Y. City Ct. 1930).

**45. Burden of proof**

Where a party sought to exclude the testimony of a physician, the burden was upon such party to bring the case within CPA § 352. People v Scuyler, 106 N.Y. 298, 12 N.E. 783, 106 N.Y. (N.Y.S.) 298, 8 N.Y. St. 860, 1887 N.Y. LEXIS 889 (N.Y. 1887).

The burden is on the person seeking to exclude evidence of physician. He must show that physician acquired evidence while attending the patient and that it enabled him to perform some professional services. People v Koerner, 154 N.Y. 355, 48 N.E. 730, 154 N.Y. (N.Y.S.) 355, 1897 N.Y. LEXIS 575 (N.Y. 1897).

In an action of negligence, where plaintiff sought to exclude the testimony of a physician, he has the burden of proving that it came within CPA § 352 and the exclusion of such testimony was error unless the plaintiff had proven facts from which it might be proved that the relation of physician and patient existed. Griffiths v Metropolitan S. R. Co., 171 N.Y. 106, 63 N.E. 808, 171 N.Y. (N.Y.S.) 106, 1902 N.Y. LEXIS 836 (N.Y. 1902).

The burden of showing the incompetency of the evidence of a physician rests on the party who interposes the objection. Van Bergen v Catholic Relief & Beneficiary Ass'n, 99 A.D. 72, 91 N.Y.S. 362, 1904 N.Y. App. Div. LEXIS 3016 (N.Y. App. Div. 1904).

Party objecting had to show that testimony is within prohibition of CPA § 352. Mulligan v Sinski, 156 A.D. 35, 140 N.Y.S. 835, 1913 N.Y. App. Div. LEXIS 5163 (N.Y. App. Div. 1913), aff'd, 214 N.Y. 678, 108 N.E. 1101, 214 N.Y. (N.Y.S.) 678, 1915 N.Y. LEXIS 1390 (N.Y. 1915).

Burden of showing evidence excludable under CPA § 352 rested on person seeking to exclude it. In re Judicial Inquiry, 8 A.D.2d 842, 190 N.Y.S.2d 406, 1959 N.Y. App. Div. LEXIS 7889 (N.Y. App. Div. 2d Dep't 1959).

The burden of proof is upon a party who seeks to exclude the testimony to show not only that the information is such as the witness acquired in attending the patient in a professional capacity, but he must also show that it was such as was necessary to enable him to act in that capacity. Stowell v American Co-operative Relief Ass'n, 5 N.Y.S. 233, 52 Hun 613, 1889 N.Y. Misc. LEXIS 2907 (N.Y. Sup. Ct. 1889).

**46. Necessity for objection**

The rule of evidence excluding communications between physician and patient must be invoked by an objection at the time the evidence is given. Hoyt v Hoyt, 112 N.Y. 493, 20 N.E. 402, 112 N.Y. (N.Y.S.) 493, 1889 N.Y. LEXIS 844 (N.Y. 1889).

The testimony of a physician that he was acquainted with the plaintiff and attended her professionally at his office and in her house for a certain period was not incompetent under CPA § 352; even if it was improper to permit the physician to identify, as being in his handwriting, certain prescriptions which he had delivered to the plaintiff, the reception of the testimony did not constitute error where the objection of the plaintiff was that such testimony was incompetent, irrelevant and immaterial; the prohibition did not prevent a druggist from identifying prescriptions filled by him and the person for whom he filled them; it was proper for the court to refuse to charge that no inference unfavorable to the plaintiff or her cause of action could be drawn because of her failure to waive her privilege. Deutschmann v Third A. R. Co., 87 A.D. 503, 84 N.Y.S. 887, 14 N.Y. Ann. Cas. 106, 1903 N.Y. App. Div. LEXIS 2681 (N.Y. App. Div. 1903).

The prohibition is absolute that physician shall not be allowed to testify, and he cannot testify against defendant who defaults and does not appear to object to it. Weil v Weil, 151 A.D. 622, 136 N.Y.S. 190, 1912 N.Y. App. Div. LEXIS 7800 (N.Y. App. Div. 1912).

Objection held to sufficiently indicate the ground of objection. Mulligan v Sinski, 156 A.D. 35, 140 N.Y.S. 835, 1913 N.Y. App. Div. LEXIS 5163 (N.Y. App. Div. 1913), aff'd, 214 N.Y. 678, 108 N.E. 1101, 214 N.Y. (N.Y.S.) 678, 1915 N.Y. LEXIS 1390 (N.Y. 1915).

Physician’s objection to production of his records on ground that they contained confidential information was premature where there was nothing before court to show what they contained or that they did contain any privileged information. Petition of Brooklyn Bar Ass'n, 16 Misc. 2d 127, 181 N.Y.S.2d 892, 1958 N.Y. Misc. LEXIS 2266 (N.Y. Sup. Ct. 1958), aff'd, 8 A.D.2d 842, 190 N.Y.S.2d 633, 1959 N.Y. App. Div. LEXIS 7888 (N.Y. App. Div. 2d Dep't 1959).

An objection as to the proof of the medical attendant being duly authorized to practice physic and surgery, to be available on appeal, must be taken at the trial. Record v Saratoga Springs, 46 Hun 448, 12 N.Y. St. 395 (N.Y.), aff'd, 120 N.Y. 646, 24 N.E. 1102, 120 N.Y. (N.Y.S.) 646, 1890 N.Y. LEXIS 1336 (N.Y. 1890).

**47. Inference from assertion of privilege**

In an action by an insurance company to rescind a policy of life insurance for the reason that the insured had made misrepresentations of fact as to his physical condition, if plaintiff failed to produce evidence of the falsity of the representations made in the application for insurance, no unfavorable inferences might be drawn as the result of the defendant’s exercise of his privilege as to the testimony of physicians granted him by CPA § 352. Travelers' Ins. Co. v Pomerantz, 207 N.Y.S. 81, 124 Misc. 250, 1924 N.Y. Misc. LEXIS 1029 (N.Y. Sup. Ct. 1924), aff'd, 218 A.D. 431, 218 N.Y.S. 490, 1926 N.Y. App. Div. LEXIS 5950 (N.Y. App. Div. 1926).

**48. Striking pleadings disclosing information**

Allegations in complaint of physician in action for services disclosing information acquired while attending defendant should be stricken. Schamberg v Whitman, 135 N.Y.S. 262, 75 Misc. 215, 1912 N.Y. Misc. LEXIS 643 (N.Y. City Ct.), aff'd, 151 A.D. 939, 135 N.Y.S. 1141, 1912 N.Y. App. Div. LEXIS 8336 (N.Y. App. Div. 1912).

**49. Review**

The exclusion of evidence of a physician touching the condition of the patient, when there had been an express waiver of the provisions of CPA § 352, did not constitute reversible error, where it was manifest that the rulings could not have substantially harmed the party. Roche v Nason, 185 N.Y. 128, 77 N.E. 1007, 185 N.Y. (N.Y.S.) 128, 1906 N.Y. LEXIS 882 (N.Y.), reh'g denied, 185 N.Y. 619, 78 N.E. 1111, 185 N.Y. (N.Y.S.) 619, 1906 N.Y. LEXIS 1078 (N.Y. 1906).

Where the question whether the surrogate erred in receiving the testimony of witnesses over objection to their competency is raised, it cannot be intelligently determined whether the exceptant was prejudiced by the ruling, if erroneous, unless there is included in the case on appeal all the material evidence. In re Goldsticker's Will, 105 N.Y.S. 931, 54 Misc. 175, 1907 N.Y. Misc. LEXIS 387 (N.Y. Sur. Ct. 1907).

Evidence, apparently disregarded by the trial judge on the theory that it was incompetent under CPA § 352, but not stricken out, was considered on review. Naudzius v Metropolitan Life Ins. Co., 238 N.Y.S. 702, 136 Misc. 167, 1929 N.Y. Misc. LEXIS 1054 (N.Y. App. Term 1929).

It was reversible error to admit evidence incompetent under CPA § 352. Titus v Spencer, 151 N.Y.S. 515 (N.Y. App. Term 1915).

**B. Requisites For Privilege**

**50. Professional relationship of witness to patient**

A physician is not excluded from testifying unless the information was acquired by him while professionally attending a patient and was such as was necessary to enable him to prescribe as a physician, or do some act as a surgeon. Edington v Aetna Life Ins. Co., 77 N.Y. 564, 77 N.Y. (N.Y.S.) 564, 1879 N.Y. LEXIS 822 (N.Y. 1879).

A physician who attended with the attending physician for the purpose of consultation with the latter in regard to the condition of the patient was within CPA § 352. Reinhan v Dennin, 103 N.Y. 573, 9 N.E. 320, 103 N.Y. (N.Y.S.) 573, 4 N.Y. St. 261, 1886 N.Y. LEXIS 1094 (N.Y. 1886).

The prohibition applies only to information the physician acquired in attending the patient in a professional capacity, and does not apply to information obtained by him in any other way. Fisher v Fisher, 129 N.Y. 654, 29 N.E. 951, 129 N.Y. (N.Y.S.) 654, 1892 N.Y. LEXIS 913 (N.Y. 1892); In re Loewenstine's Estate, 21 N.Y.S. 931, 2 Misc. 323, 1893 N.Y. Misc. LEXIS 64 (N.Y.C.P. 1893).

Where one is treated by a physician even against his will, he becomes the patient of that physician by operation of law, and any information obtained by such physician to enable him to act is prohibited. Meyer v Supreme Lodge K. P., 178 N.Y. 63, 70 N.E. 111, 178 N.Y. (N.Y.S.) 63, 1904 N.Y. LEXIS 687 (N.Y. 1904), aff'd, 198 U.S. 508, 25 S. Ct. 754, 49 L. Ed. 1146, 1905 U.S. LEXIS 1083 (U.S. 1905).

Evidence concerning a conversation between a physician and the alleged patient, conducted through an interpreter, failed to show that there was a professional consultation. Nowak v Brotherhood of American Yeomen, 249 N.Y. 78, 162 N.E. 589, 249 N.Y. (N.Y.S.) 78, 1928 N.Y. LEXIS 763 (N.Y. 1928), limited, Jenkins v John Hancock Mut. Life Ins. Co., 257 N.Y. 289, 178 N.E. 9, 257 N.Y. (N.Y.S.) 289, 1931 N.Y. LEXIS 853 (N.Y. 1931).

Communications between defendant and hospital doctor who took his medical history while other hospital doctors treated him was privileged under CPA § 352. People v Decina, 2 N.Y.2d 133, 157 N.Y.S.2d 558, 138 N.E.2d 799, 1956 N.Y. LEXIS 631 (N.Y. 1956).

A statement by a party to an action to a physician who only rendered “first aid” and did not thereafter attend him, was not within the prohibition of CPA § 352. Griffiths v Metropolitan S. R. Co., 63 A.D. 86, 71 N.Y.S. 406, 1901 N.Y. App. Div. LEXIS 1553 (N.Y. App. Div. 1901), rev'd, 171 N.Y. 106, 63 N.E. 808, 171 N.Y. (N.Y.S.) 106, 1902 N.Y. LEXIS 836 (N.Y. 1902).

In an action on an insurance policy, the physician of a rival company which had refused to insure the person whose policy is sued upon, is a competent witness, as his information was acquired while acting as agent of the company. Lynch v Germania Life Ins. Co., 132 A.D. 571, 116 N.Y.S. 998, 1909 N.Y. App. Div. LEXIS 1547 (N.Y. App. Div. 1909).

A physician was not disqualified to testify as to those matters which were apparent to all persons skilled in medicine, whether called to attend professionally or not; CPA § 352 excluded such information as could be acquired only by professional attendance. In re Loewenstine's Estate, 21 N.Y.S. 931, 2 Misc. 323, 1893 N.Y. Misc. LEXIS 64 (N.Y.C.P. 1893).

It was immaterial that patient was a free patient. Bauch v Schultz, 180 N.Y.S. 188, 109 Misc. 548, 1919 N.Y. Misc. LEXIS 675 (N.Y. Sup. Ct. 1919).

A physician who had never treated an insured but conducted an autopsy was properly permitted to testify as to aggravated condition of heart and kidneys. Felska v John Hancock Mut. Life Ins. Co., 259 N.Y.S. 35, 144 Misc. 508, 1932 N.Y. Misc. LEXIS 1186 (N.Y. Sup. Ct. 1932).

Testimony of a doctor was not privileged where he was not called in a professional capacity. In re Strong's Estate, 6 N.Y.S.2d 300, 168 Misc. 716, 1938 N.Y. Misc. LEXIS 1844 (N.Y. Sur. Ct. 1938), aff'd, 256 A.D. 971, 11 N.Y.S.2d 225 (N.Y. App. Div. 1939).

Relation between patient committed to mental institution and official in charge was not professional relation within CPA § 352. Munzer v Blaisdell, 49 N.Y.S.2d 915, 183 Misc. 773, 1944 N.Y. Misc. LEXIS 2235 (N.Y. Sup. Ct. 1944), aff'd, 269 A.D. 970, 58 N.Y.S.2d 359, 1945 N.Y. App. Div. LEXIS 4798 (N.Y. App. Div. 1st Dep't 1945).

Relation between patient in state insane hospital and official physician was not privileged in action against state for assault on inmate by another inmate. Scolavino v State, 62 N.Y.S.2d 17, 187 Misc. 253, 1946 N.Y. Misc. LEXIS 2172 (N.Y. Ct. Cl.), modified, 271 A.D. 618, 67 N.Y.S.2d 202, 1946 N.Y. App. Div. LEXIS 2807 (N.Y. App. Div. 1946).

Reports of medical examination of teacher, made by board of education to determine fitness of teacher, were not privileged because of physician-patient relationship, nor because they were documents which should not be disclosed as a matter of public policy. Sherman v Hoffman, 19 Misc. 2d 895, 192 N.Y.S.2d 214, 1959 N.Y. Misc. LEXIS 2862 (N.Y. Sup. Ct. 1959).

It was sufficient to bring the case within CPA § 352 that the physician attended as such and acquired his information in that capacity. Brigham v Gott, 3 N.Y.S. 518, 51 Hun 636, 1889 N.Y. Misc. LEXIS 27 (N.Y. Sup. Ct. 1889); see In re Will of Freeman, 46 Hun 458, 12 N.Y. St. 175 (N.Y.).

A physician was called as witness for plaintiff and was permitted to testify as to what occurred between the decedent and one Dr. W. The witness was not the physician of the decedent at the time, nor did he attend for the purpose of prescribing for him. Held, the evidence not within the prohibition of CPA § 352. Stowell v American Co-operative Relief Ass'n, 5 N.Y.S. 233, 52 Hun 613, 1889 N.Y. Misc. LEXIS 2907 (N.Y. Sup. Ct. 1889).

To enforce the prohibition, it must clearly appear that the witness was attending the party in a professional capacity, and the information acquired by him was acquired in that attendance, and was necessary to enable him to act in that capacity. The burden of proof that such prohibition exists is upon the party claiming to enforce it. Heath v Broadway & S. A. R. Co., 8 N.Y.S. 863, 57 N.Y. Super. Ct. 496, 1890 N.Y. Misc. LEXIS 1823 (N.Y. Super. Ct. 1890); Henry v New York, L. E. & W. R. Co., 10 N.Y.S. 508, 57 Hun 76, 1890 N.Y. Misc. LEXIS 820 (N.Y. Sup. Ct. 1890).

Relation arising by operation of law between insane patient committed and official physician was not professional relation contemplated by CPA § 352. Liske v Liske, 135 N.Y.S. 176 (N.Y. Sup. Ct. 1912).

The physician who attended the testator during the last year of his life, was asked whether he observed the testator during this time when he was not attending him as a physician. Held, competent for him to answer that he had, and to answer questions which went only to the observations made of the outward visible facts that were seen by him on these occasions when he was not attending as a physician. Burley v Barnhard, 9 N.Y. St. 587.

The provision does not apply to a physician who merely makes a casual prescription for a friend when meeting him on the street. Edington v Mutual Life Ins. Co., 5 Hun 1 (N.Y.), rev'd, 67 N.Y. 185, 67 N.Y. (N.Y.S.) 185, 1876 N.Y. LEXIS 369 (N.Y. 1876).

It makes no difference, upon the question whether the evidence of the physician is incompetent under this section, either (1) that the physician had not known the patient until the first interview, or (2) that he was not consulted for a prescription, and did not prescribe, but only for advice as to the patient’s ability to continue in a business, wherein he was employed by another, or (3) that

the patient's employer requested the physician to examine him for that purpose, and paid for the physician's services. Grattan v Metropolitan Life Ins. Co., 24 Hun 43 (N.Y.).

**51. —Physician selected and employed by adversary**

In an action against a life insurance company upon a policy, a physician testified in behalf of the defendant that he had attended the policyholder for several months, and then ceased to attend him professionally, but his acquaintance continued till the policyholder's death. Held, that he might testify whether the patient was cured when he left the witness' hands, and as to his general health, judging only from his appearance, since the relation between them ceased. Edington v Aetna Life Ins. Co., 77 N.Y. 564, 77 N.Y. (N.Y.S.) 564, 1879 N.Y. LEXIS 822 (N.Y. 1879).

Where a physician is selected by the prosecution and sent to a prisoner after a crime has been committed, and she accepts his services in a professional character, disclosures made by her to him are privileged, and this rule applies to actions both civil and criminal. People v Murphy, 101 N.Y. 126, 4 N.E. 326, 101 N.Y. (N.Y.S.) 126, 1886 N.Y. LEXIS 604 (N.Y. 1886).

A physician employed by the county to attend patients confined in jail may, on trial for murder, answer a hypothetical question as to defendant's sanity, from which is excluded all personal knowledge he had of defendant and based exclusively on facts which occurred before defendant came to the jail. People v Scuyler, 106 N.Y. 298, 12 N.E. 783, 106 N.Y. (N.Y.S.) 298, 8 N.Y. St. 860, 1887 N.Y. LEXIS 889 (N.Y. 1887).

As to jail physicians. People v Scuyler, 106 N.Y. 298, 12 N.E. 783, 106 N.Y. (N.Y.S.) 298, 8 N.Y. St. 860, 1887 N.Y. LEXIS 889 (N.Y. 1887).

The testimony of a physician sent by a prosecuting authority to make a report upon the sanity of a prisoner is not privileged; he acquires no information while attending a patient, and was not acting as the professional advisor of the prisoner. People v Sliney, 137 N.Y. 570, 33 N.E. 150, 137 N.Y. (N.Y.S.) 570, 1893 N.Y. LEXIS 767 (N.Y. 1893).

In inquisition to determine competency, it was error to permit defendant's personal physician to testify as to incompetency of patient, though he was hired by the third party to make an examination for the purpose of testifying against him. In re Gates, 170 A.D. 921, 154 N.Y.S. 782, 1915 N.Y. App. Div. LEXIS 9078 (N.Y. App. Div. 1915).

A physician not employed by the plaintiff, but sent by defendant to procure information for his employer as to the extent of plaintiff's injury and to obtain admissions as to the accident, and who makes an examination for that purpose, is not within the prohibition. Heath v Broadway & S. A. R. Co., 8 N.Y.S. 863, 57 N.Y. Super. Ct. 496, 1890 N.Y. Misc. LEXIS 1823 (N.Y. Super. Ct. 1890).

**52. —Effect of death of patient**

The obligation of secrecy not removed because of death of patient. Grattan v Metropolitan Life Ins. Co., 80 N.Y. 281, 80 N.Y. (N.Y.S.) 281, 1880 N.Y. LEXIS 98 (N.Y. 1880).

The fact that the testimony of the physicians related to patients who were not parties to the proceeding or interested therein, and who were dead at that time, did not take it out of the prohibition of CPA § 352. In re Myer's Will, 184 N.Y. 54, 76 N.E. 920, 184 N.Y. (N.Y.S.) 54, 1906 N.Y. LEXIS 1334 (N.Y. 1906).

**53. Requirement that information be connected with treatment**

The prohibition extends to such information only as may be acquired by a physician for the purpose of enabling him to act in that capacity. Reinhan v Dennin, 103 N.Y. 573, 9 N.E. 320, 103 N.Y. (N.Y.S.) 573, 4 N.Y. St. 261, 1886 N.Y. LEXIS 1094 (N.Y. 1886).

Testimony as to how an accident happened, although the witness acquired his information from the injured party while attending him in a professional capacity as a surgeon, did not come within the prohibition of CPA § 352, unless it also appeared that the information was "necessary to enable him to act in that capacity"; and, in the absence of evidence of that fact, the exclusion

of such testimony, upon the ground that it was privileged, constituted reversible error. Green v Metropolitan S. R. Co., 171 N.Y. 201, 63 N.E. 958, 171 N.Y. (N.Y.S.) 201, 1902 N.Y. LEXIS 844 (N.Y. 1902).

The prohibition does not extend to admissions made by a party to an action, of facts which have and can have no possible relation to the professional conduct of the medical or surgical practitioner. De Jong v Erie R. Co., 43 A.D. 427, 60 N.Y.S. 125, 1899 N.Y. App. Div. LEXIS 1992 (N.Y. App. Div. 1899).

Information obtained by a surgeon of a hospital of a patient as to how an accident happened, in order that the surgeon might make a hospital record, is not admissible. Green v Metropolitan S. R. Co., 65 A.D. 54, 72 N.Y.S. 524, 1901 N.Y. App. Div. LEXIS 2074 (N.Y. App. Div. 1901), rev'd, 171 N.Y. 201, 63 N.E. 958, 171 N.Y. (N.Y.S.) 201, 1902 N.Y. LEXIS 844 (N.Y. 1902).

Where the mother of the child claims that the illicit act took place in August, 1903, a practicing physician whom the mother consulted in September or October, 1903, is not precluded from answering the following question: “In that conversation did she make any charge against any person as being the cause of her condition at that time?” as the information sought to be elicited by the question was not information acquired by the doctor which was necessary to enable him to act as such. People ex rel. Mendelovich v Abrahams, 96 A.D. 27, 88 N.Y.S. 924, 1904 N.Y. App. Div. LEXIS 2204 (N.Y. App. Div. 1904).

Admissions made by the plaintiff to the physician who attend her as to the manner in which the accident happened were not within the protection of CPA § 352, where the information was not necessary to enable him to act in his professional capacity. Benjamin v Tupper Lake, 110 A.D. 426, 97 N.Y.S. 512, 1905 N.Y. App. Div. LEXIS 3933 (N.Y. App. Div. 1905).

In action for personal injuries, court erred in not permitting defendants to interrogate a physician as to conversation with plaintiff when he called upon physician to find out what testimony he would give if called as a witness. Kelly v Dykes, 174 A.D. 786, 161 N.Y.S. 551, 1916 N.Y. App.

Div. LEXIS 8262 (N.Y. App. Div. 1916), app. dismissed, 220 N.Y. 653, 115 N.E. 1042, 220 N.Y. (N.Y.S.) 653, 1917 N.Y. LEXIS 1112 (N.Y. 1917).

Privilege does not extend to prevent doctor from testifying as to whether he referred patient to a certain attorney. In re Judicial Inquiry, 8 A.D.2d 842, 190 N.Y.S.2d 406, 1959 N.Y. App. Div. LEXIS 7889 (N.Y. App. Div. 2d Dep't 1959).

Conversations and transaction with other persons wholly outside scope of physician's professional duties in attending decedent were not excluded by CPA § 352. In re Meyer's Estate, 132 N.Y.S.2d 825, 206 Misc. 368, 1954 N.Y. Misc. LEXIS 2697 (N.Y. Sur. Ct. 1954).

Testimony of physicians concerning the rendition of services of a claimant as a nurse to their patient is not objectionable. Knowledge of such fact is not information at all entering into their professional conduct as the physicians of the intestate. In re McQueen's Estate, 13 N.Y.S. 705, 59 Hun 625, 1891 N.Y. Misc. LEXIS 1648 (N.Y. Sup. Ct. 1891).

Physician is privileged to testify to any fact that is unnecessary to his diagnosis or treatment, whether patient is alive or dead when testimony is given. Bolts v Union Cent. Life Ins. Co., 20 N.Y.S.2d 675, 1940 N.Y. Misc. LEXIS 1838 (N.Y. City Ct. 1940).

Matters of description, relating to physical surroundings of patient or to her companions are not privileged, and registered nurse may testify to them. In re Schermerhorn, 98 N.Y.S.2d 361, 1950 N.Y. Misc. LEXIS 1776 (N.Y. Sup. Ct.), rev'd, 277 A.D. 845, 98 N.Y.S.2d 367, 1950 N.Y. App. Div. LEXIS 3527 (N.Y. App. Div. 1950).

A physician who attended an injured person at a railroad crossing may testify as to his declarations concerning means taken to warn him of an approaching train. Brown v Rome, W. & O. R. Co., 45 Hun 439, 12 N.Y. St. 446 (N.Y.).

**54. —Testimony by physician as to connection with treatment**

A physician himself is a competent witness to show whether his knowledge of a fact regarding his patient was or was not necessary to the due performance of his professional duties. In re Darragh's Estate, 15 N.Y. St. 452.

Nor is he precluded from testifying to statement made to him by testator while attending him, where he testifies the making of such statement was not necessary to enable him to act in his professional capacity. In re Halsey, 9 N.Y.S. 441 (N.Y. Sur. Ct. 1890).

A physician called for the purpose of showing that decedent was unconscious on a certain day, should be permitted to testify as to whether the information which he obtained was necessary to enable him to prescribe professionally, and as to whether he obtained any information on that day that was so necessary, and as to whether the decedent’s condition was such that any person of ordinary intelligence could understand it as well as a physician. Herrington v Winn, 14 N.Y.S. 612, 60 Hun 235, 1891 N.Y. Misc. LEXIS 2424 (N.Y. Sup. Ct. 1891).

**55. Manner or form of communication claimed to be privileged**

A physician is prohibited from divulging any knowledge derived from his patient, either by the patient’s statements, or the statements of others present, or his own observation of the patient’s symptoms, etc. Edington v Mutual Life Ins. Co., 67 N.Y. 185, 67 N.Y. (N.Y.S.) 185, 1876 N.Y. LEXIS 369 (N.Y. 1876).

Letters, containing case histories of patients and confidential communications between physician and patients, were privileged. Hipsley v Hipsley, 60 N.Y.S.2d 10, 186 Misc. 458, 1946 N.Y. Misc. LEXIS 1811 (N.Y. App. Term 1946).

Communications to druggist and prescriptions given to him by his customer are not confidential communications, and may under proper circumstances be received in evidence. In re Miner's Will, 133 N.Y.S.2d 27, 206 Misc. 234, 1954 N.Y. Misc. LEXIS 2734 (N.Y. Sur. Ct. 1954).

Visits and payments by certain undisclosed patients, not relating to their condition or treatment, were not privileged, in wife’s action on separation agreement involving amount of husband’s

income. Zilboorg v Zilboorg, 131 N.Y.S.2d 122, 1954 N.Y. Misc. LEXIS 2122 (N.Y. Sup. Ct.), aff'd, 283 A.D. 942, 131 N.Y.S.2d 300, 1954 N.Y. App. Div. LEXIS 5861 (N.Y. App. Div. 1954).

**56. Communications to or in presence of third persons**

Physician cannot testify as to disclosures made in the presence of a patient's family. Denaro v Prudential Ins. Co., 154 A.D. 840, 139 N.Y.S. 758, 1913 N.Y. App. Div. LEXIS 4593 (N.Y. App. Div. 1913).

In action by doctor against husband for services performed for wife, doctor could not testify to conversation with husband as to patient's condition, nor as to particulars of patient's condition. Hobbs v Hullman, 183 A.D. 743, 171 N.Y.S. 390, 1918 N.Y. App. Div. LEXIS 6028 (N.Y. App. Div. 1918).

**C. Scope Of Privilege; Particular Testimony And Evidence**

**57. The facts of attendance and treatment, dates and number of visits**

In action for personal injuries, a physician upon whom plaintiff called the day after the accident was asked by defendant's counsel if he conversed with her about her injuries, and if he made an examination of her. Held, calling for a privileged communication. Feeney v Long I. R. Co., 116 N.Y. 375, 22 N.E. 402, 116 N.Y. (N.Y.S.) 375, 1889 N.Y. LEXIS 1345 (N.Y. 1889).

CPA § 352 did not prohibit a physician from testifying to the fact that a person was his patient; that he attended such person as a patient; and the dates and number of times, hourly or daily, that he so attended such patient. Patten v United Life & Acc. Ins. Ass'n, 133 N.Y. 450, 31 N.E. 342, 133 N.Y. (N.Y.S.) 450, 1892 N.Y. LEXIS 1335 (N.Y. 1892).

The prohibition by CPA § 352, extended to the existence of the ailment which the physician found although not the subject of his attendance or treatment. Nelson v Oneida, 156 N.Y. 219, 50 N.E. 802, 156 N.Y. (N.Y.S.) 219, 5 N.Y. Ann. Cas. 244, 1898 N.Y. LEXIS 695 (N.Y. 1898).

It is error to exclude the testimony of a physician who attended deceased as to certain dates when he made calls or visits to deceased, or when the latter called at the physician’s office for medical attendance. Becker v Metropolitan Life Ins. Co., 99 A.D. 5, 90 N.Y.S. 1007, 1904 N.Y. App. Div. LEXIS 2997 (N.Y. App. Div. 1904).

Physician could testify that on a certain date and place he performed an operation though he could not describe the operation. Sparer v Travelers' Ins. Co., 185 A.D. 861, 173 N.Y.S. 673, 1919 N.Y. App. Div. LEXIS 5560 (N.Y. App. Div. 1919).

Asking an attending physician if his patient was ill on a certain date and the number of visits he thereafter made until death of the patient was not within the prohibition of CPA § 352. Cirrincioni v Metropolitan Life Ins. Co., 223 A.D. 461, 228 N.Y.S. 354, 1928 N.Y. App. Div. LEXIS 6238 (N.Y. App. Div. 1928).

In an action on an insurance policy, a question to a physician as to whether deceased insured was “sick or well” at the time of examination, sought information which was privileged and inadmissible. Lande v Travelers' Ins. Co., 241 A.D. 96, 271 N.Y.S. 551, 1934 N.Y. App. Div. LEXIS 8176 (N.Y. App. Div.), aff'd, 265 N.Y. 655, 193 N.E. 430, 265 N.Y. (N.Y.S.) 655, 1934 N.Y. LEXIS 1242 (N.Y. 1934).

Privilege does not extend to prevent doctor from testifying as to dates on which he saw patient, fees charged, and whether he referred patient to a certain attorney. In re Judicial Inquiry, 8 A.D.2d 842, 190 N.Y.S.2d 406, 1959 N.Y. App. Div. LEXIS 7889 (N.Y. App. Div. 2d Dep't 1959).

Interrogation designed to elicit whether patient was treated professionally, names of physicians who treated him, date of entry in hospital and date of discharge, does not violate privilege. McGrath v State, 104 N.Y.S.2d 882, 200 Misc. 165, 1950 N.Y. Misc. LEXIS 2511 (N.Y. Ct. Cl. 1950).

In an action on a life insurance policy, defendant may prove by physicians that they attended the insured professionally, though information acquired in such attendance cannot be disclosed.

Numrich v Supreme Lodge Knights & Ladies of Honor, 3 N.Y.S. 552, 1889 N.Y. Misc. LEXIS 32 (N.Y. City Ct. 1889).

On a reference of a claim against the estate of an intestate for services as a professional nurse, physicians who had attended deceased testified that the claimant acted as his nurse, and that their knowledge of the fact was derived from having seen her acting in that capacity and from statements to that effect made to them by intestate. Held, not without the prohibition. In re McQueen's Estate, 13 N.Y.S. 705, 59 Hun 625, 1891 N.Y. Misc. LEXIS 1648 (N.Y. Sup. Ct. 1891).

In an action on an insurance policy attending physicians should have been permitted to answer an inquiry as to whether at the time of their attendance the insured was sick or well, although it appeared quite conclusively that the insured was sick at such time. Rossetti v Metropolitan Life Ins. Co., 10 N.Y.S.2d 437, 1939 N.Y. Misc. LEXIS 1583 (N.Y. County Ct. 1939).

In action to recover life insurance physicians may testify that they attended deceased insured professionally and as to the dates and frequency of his professional visits to their offices. Hindin v Mutual Trust Life Ins. Co., 195 N.Y.S.2d 457 (N.Y. Sup. Ct. 1959), aff'd, 12 A.D.2d 763, 210 N.Y.S.2d 969, 1961 N.Y. App. Div. LEXIS 12946 (N.Y. App. Div. 1st Dep't 1961).

**58. Specific nature of illness and treatment**

It is incompetent for a physician to testify whether a party had a venereal disease while under his care. Sloan v New York C. R. Co., 45 N.Y. 125, 45 N.Y. (N.Y.S.) 125, 1871 N.Y. LEXIS 112 (N.Y. 1871).

In beneficiary’s action on policy, testimony as to nature of illness of insured and remedies prescribed by physicians was excluded as incompetent. Minsker v John Hancock Mut. Life Ins. Co., 254 N.Y. 333, 173 N.E. 4, 254 N.Y. (N.Y.S.) 333, 1930 N.Y. LEXIS 1043 (N.Y. 1930).

In an action to recover double indemnity, under life insurance policies, in which the sole issue of fact raised at the trial was as to whether the death of the insured was caused by carbon

monoxide alone, or by carbon monoxide and heart trouble, or by heart trouble alone, it was prejudicial error to admit in evidence an affidavit of the insured's physician that the cause of death was heart trouble. Poses v Travelers' Ins. Co., 245 A.D. 304, 281 N.Y.S. 126, 1935 N.Y. App. Div. LEXIS 10287 (N.Y. App. Div. 1935).

In probate proceeding wherein claimant asserted gift causa mortis, testimony of physician, offered on behalf of claimant, as to heart condition of decedent, was incompetent. In re Presender's Estate, 285 A.D. 109, 135 N.Y.S.2d 418, 1954 N.Y. App. Div. LEXIS 3290 (N.Y. App. Div. 1954), app. denied, 285 A.D. 806, 137 N.Y.S.2d 821, 1955 N.Y. App. Div. LEXIS 5636 (N.Y. App. Div. 1955).

In action on life insurance policy, physicians could not testify to the specific disease for which they treated insured. Malchak v Metropolitan Life Ins. Co., 236 N.Y.S. 300, 134 Misc. 640, 1929 N.Y. Misc. LEXIS 1210 (N.Y. Sup. Ct. 1929).

Diagnosis of consultations with physicians was excluded as confidential communications. Metropolitan Life Ins. Co. v Goldsmith, 112 N.Y.S.2d 385, 201 Misc. 569, 1952 N.Y. Misc. LEXIS 2656 (N.Y. Sup. Ct. 1952).

In probate proceeding presenting issue whether testator knew that his son was unable to beget children, testimony of son's physicians as to son's inability to beget children was both incompetent and irrelevant. In re Ames' Estate, 139 N.Y.S.2d 327, 207 Misc. 746, 1955 N.Y. Misc. LEXIS 3442 (N.Y. Sur. Ct.), aff'd, 286 A.D. 1010, 146 N.Y.S.2d 662, 1955 N.Y. App. Div. LEXIS 4983 (N.Y. App. Div. 1955).

In action for personal injuries, plaintiff's physician in attendance on the day of amputation of plaintiff's leg, was asked by defendant's attorney, "What was the condition of plaintiff's leg at that time?" Excluded as calling for privileged information acquired in attending patient in professional capacity. Held no error. Jones v Booklyn, B. & W. E. R. Co., 3 N.Y.S. 253, 1888 N.Y. Misc. LEXIS 577 (N.Y. City Ct. 1888), aff'd, 121 N.Y. 683, 24 N.E. 1098, 121 N.Y. (N.Y.S.) 683, 1890 N.Y. LEXIS 1517 (N.Y. 1890).

If the result of the whole examination could not be given because forbidden by CPA § 352, no part thereof was proper. Grattan v Metropolitan Life Ins. Co., 28 Hun 430 (N.Y.), aff'd, 92 N.Y. 274, 92 N.Y. (N.Y.S.) 274, 1883 N.Y. LEXIS 145 (N.Y. 1883).

In an action on a life insurance policy where the defense is a false representation in the application that the insured had not a certain disease, the testimony of physicians that they treated the insured prior to the date of the policy, and that they were specialists and competent to treat such disease is incompetent. McCormick v United Life & Acci. Ins. Asso., 29 N.Y.S. 364, 79 Hun 340 (1894).

**59. Testimony that patient was well**

As to whether a physician can testify that his patient was free from a disease. People v Scuyler, 106 N.Y. 298, 12 N.E. 783, 106 N.Y. (N.Y.S.) 298, 8 N.Y. St. 860, 1887 N.Y. LEXIS 889 (N.Y. 1887).

General questions, as to the health and physical condition of the testatrix, intended to show that she was not prevented by sickness from returning to a certain place for certain years, when asked her attending physician without any attempt to limit the answers of the witness as to what he had observed when not in attendance upon her, are properly excluded. In re Newcomb's Estate, 192 N.Y. 238, 84 N.E. 950, 192 N.Y. (N.Y.S.) 238, 1908 N.Y. LEXIS 876 (N.Y. 1908).

**60. Mental condition generally**

In an action under an accident insurance policy it was reversible error to permit physicians to testify to the physical and mental condition of their former patient, the decedent, including suicidal tendencies and threats. Scheiner v Metropolitan Life Ins. Co., 236 A.D. 24, 257 N.Y.S. 783, 1932 N.Y. App. Div. LEXIS 5877 (N.Y. App. Div. 1932).

In action to annul marriage, order directing defendant wife to submit to mental and psychiatric examination by physician appointed by court, authorizing him to inspect hospital records of

hospital where she has been confined, and directing physicians and hospitals to permit inspection of her case history, was too broad. Rosenblum v Rosenblum, 278 A.D. 863, 104 N.Y.S.2d 747, 1951 N.Y. App. Div. LEXIS 5001 (N.Y. App. Div. 1951).

Disclosures authorized by Mental Hygiene Law were not prohibited by CPA § 352. Application of Failla, 95 N.Y.S.2d 645, 197 Misc. 673, 1950 N.Y. Misc. LEXIS 1445 (N.Y. Sur. Ct. 1950).

Nurse may testify that decedent was mentally alert at all times and that his memory was good. In re Avery's Estate, 76 N.Y.S.2d 790, 1948 N.Y. Misc. LEXIS 2111 (N.Y. Sur. Ct. 1948).

Mental condition of patient while in sanitarium tending to show that he was not responsible for his own destruction, was not privileged. Stiles v Clifton Springs Sanitarium Co., 74 F. Supp. 907, 1947 U.S. Dist. LEXIS 1987 (D.N.Y. 1947).

**61. Testamentary capacity**

When probate is contested on the ground of the unsoundness of mind of the testator, a physician who has attended upon deceased in a professional capacity is not a competent witness for the contestants to testify from knowledge acquired while so attending him as to his mental capacity. In re Coleman's Will, 111 N.Y. 220, 19 N.E. 71, 111 N.Y. (N.Y.S.) 220, 19 N.Y. St. 501, 1888 N.Y. LEXIS 1006 (N.Y. 1888).

Certain physicians were examined by proponent as to interviews with testator upon the subject of contestant’s mental incapacity. Held, no error, as they were not communications necessary to enable witness to act in a professional capacity toward decedent. Hoyt v Hoyt, 112 N.Y. 493, 20 N.E. 402, 112 N.Y. (N.Y.S.) 493, 1889 N.Y. LEXIS 844 (N.Y. 1889).

The testimony of an attending physician who secured his knowledge in his professional capacity and also his certificate as to the cause of death are inadmissible in an action on a policy of life insurance of the deceased. Davis v Supreme Lodge, K. of H., 165 N.Y. 159, 58 N.E. 891, 165 N.Y. (N.Y.S.) 159, 1900 N.Y. LEXIS 792 (N.Y. 1900), limited, Regan v National Postal Transport Ass'n, 53 Misc. 2d 901, 280 N.Y.S.2d 319, 1967 N.Y. Misc. LEXIS 1493 (N.Y. Sup. Ct. 1967).

A physician who attended the testatrix, called by the contestant on the issue of testamentary capacity, should not have been allowed to answer questions relative to her condition. The disclosure of information thus acquired violated this section. In re Cashman's Will, 280 N.Y. 681, 21 N.E.2d 193, 280 N.Y. (N.Y.S.) 681, 1939 N.Y. LEXIS 1489 (N.Y. 1939).

In will contest wherein issue was testamentary capacity, attending physician may not testify to mental condition of testatrix based on information acquired in confidence, nor to facts tending to disgrace memory of patient. In re Coddington's Will, 307 N.Y. 181, 120 N.E.2d 777, 307 N.Y. (N.Y.S.) 181, 1954 N.Y. LEXIS 991 (N.Y. 1954).

When in an action to test the validity of a will, the court has in effect ruled that the privilege of a physician from testifying as to confidential communications with a deceased patient or as to facts which tend to disgrace his memory, must be waived by the widow and all the beneficiaries, the ruling will not be construed as denying the right of a physician to testify to any information as to the mental or physical condition of the testator, unless all parties waive the privilege. Lippe v Brandner, 120 A.D. 230, 105 N.Y.S. 225, 1907 N.Y. App. Div. LEXIS 1149 (N.Y. App. Div. 1907).

A physician may testify as to declarations of testator as to making a will and his advice to testator on that subject. In re O'Neil's Estate, 7 N.Y.S. 197, 1889 N.Y. Misc. LEXIS 1006 (N.Y. Sur. Ct. 1889).

Testimony of testatrix’s physician is not competent on the question of her testamentary capacity. In re Connor's Will, 7 N.Y.S. 855, 55 Hun 606, 1889 N.Y. Misc. LEXIS 1342 (N.Y. Sup. Ct. 1889), aff'd, 124 N.Y. 663, 27 N.E. 413, 124 N.Y. (N.Y.S.) 663, 1891 N.Y. LEXIS 1449 (N.Y. 1891).

In a proceeding to probate a will the opinion of a physician based on facts and observations derived by him while attending the testator, as to whether the testator could correctly and intelligently comprehend the nature and condition and value of his property is admissible. Van

Orman v Van Orman, 11 N.Y.S. 931, 58 Hun 606, 1890 N.Y. Misc. LEXIS 2434 (N.Y. Sup. Ct. 1890).

In an action contesting validity of a will, the physician who attended upon deceased upon being asked what his impression in his interview with her was, as to the condition of testatrix, whether rational or irrational, testified that “her gestures and conversation, language, everything that I could observe, impressed me as coming from a person of ordinarily sound mind.” Held, evidence not prohibited. Steele v Ward, 30 Hun 555 (N.Y.).

**62. Statement or certificate as to cause of death**

Admission in evidence of physician’s certificate as to cause of death of person insured for the purpose of proving an admission of fact by the beneficiary did not violate the provisions of CPA § 352 and § 354. Rudolph v John Hancock Mut. Life Ins. Co., 251 N.Y. 208, 167 N.E. 223, 251 N.Y. (N.Y.S.) 208, 1929 N.Y. LEXIS 707 (N.Y. 1929).

Where, in an action upon a benefit certificate of life insurance, it is alleged as a defense that the insured made a false representation as to the cause of his father’s death, the physician who attended the insured’s father during his last illness is incompetent to testify in behalf of the defendant, an assessment beneficiary order, as to the cause of his patient’s death. Robinson v Supreme Commandery, United Order of Golden Cross, 77 A.D. 215, 79 N.Y.S. 13, 1902 N.Y. App. Div. LEXIS 2837 (N.Y. App. Div. 1902), aff'd, 177 N.Y. 564, 69 N.E. 1130, 177 N.Y. (N.Y.S.) 564, 1904 N.Y. LEXIS 1004 (N.Y. 1904).

Where a physician making out proofs of death of an insured, in answer to questions touching his treatment of the deceased prior to his last illness, stated: “Phimosis operation ten years ago. Nothing else of any importance,” he should have been allowed to explain, while testifying in an action on the policy brought by the beneficiary thereof, what he meant by the statement in the proofs of death, so far as he was able to do so without divulging confidential information derived from the deceased while so treating him. Saad v New York Life Ins. Co., 201 A.D. 544, 194

N.Y.S. 445, 1922 N.Y. App. Div. LEXIS 6355 (N.Y. App. Div. 1922), aff'd, 235 N.Y. 550, 139 N.E. 730, 235 N.Y. (N.Y.S.) 550, 1923 N.Y. LEXIS 1268 (N.Y. 1923).

In action on an insurance policy, physician's certificate which stated that insured had been treated for tuberculosis prior to applying for insurance formed a part of the proofs of death, and was admissible in evidence as an admission by the person presenting the proofs, namely, the plaintiff. Naudzius v Metropolitan Life Ins. Co., 238 N.Y.S. 702, 136 Misc. 167, 1929 N.Y. Misc. LEXIS 1054 (N.Y. App. Term 1929).

In an action by an administratrix, who was also decedent's widow, to recover on an industrial life insurance policy, physician's statement as to the cause of death disclosed professional information in violation of CPA § 352. Kane v Metropolitan Life Ins. Co., 256 N.Y.S. 917, 143 Misc. 631, 1932 N.Y. Misc. LEXIS 1050 (N.Y. Mun. Ct.), rev'd, 292 N.Y.S. 395, 161 Misc. 303, 1932 N.Y. Misc. LEXIS 1807 (N.Y. App. Term 1932).

**63. Records of hospitals and physicians generally**

A special committee, appointed by the City Council of the city of New York, in accordance with § 43 of the charter of that city (effective January 1, 1938) to investigate charges of negligence and maladministration in the treatment of patients at a city hospital, may not properly require the production, by the Commissioner of Hospitals and the medical superintendent of such hospital, under subpoenas duces tecum, of case cards and records which would disclose confidential information relating to the diagnosis and treatment of patients. An application, therefore, for an order of the Supreme Court directing the Commissioner of Hospitals of the city of New York and the medical superintendent of the hospital in question to produce such case cards and records should have been denied. New York City Council v Goldwater, 284 N.Y. 296, 31 N.E.2d 31, 284 N.Y. (N.Y.S.) 296, 1940 N.Y. LEXIS 838 (N.Y. 1940).

In action by public administrator of decedent's estate against state for wrongful death while decedent was inmate of hospital for insane, inspection of hospital records pursuant to an order

under Mental Hygiene Law §§ 20, 34(9), was not subject to CPA §§ 352, 354. In re Warrington, 303 N.Y. 129, 100 N.E.2d 170, 303 N.Y. (N.Y.S.) 129, 1951 N.Y. LEXIS 696 (N.Y. 1951).

In an action for damages for the death of plaintiff's intestate, it is improper to admit over the defendant's objection the books of a hospital, to which place plaintiff was taken when he was injured and on which books his name was entered; the plaintiff, however, by calling the assistant surgeon and interrogating him concerning the condition of the intestate after the accident, and by introducing in evidence the record that he made of the occurrence, waived the prohibition, relative to the disclosure by a physician of information received in his professional capacity; and it was consequently improper for the court to refuse to allow the assistant surgeon, when called by the defendant, to state what it was that the intestate said to him from which he made the record which had been admitted in evidence. Kemp v Metropolitan S. R. Co., 94 A.D. 322, 88 N.Y.S. 1, 1904 N.Y. App. Div. LEXIS 1366 (N.Y. App. Div. 1904).

In action on insurance policy, defendant was not entitled to prove by operating and assistant surgeon at hospital or by hospital records condition in which insured was at time of operation. Sparer v Travelers' Ins. Co., 185 A.D. 861, 173 N.Y.S. 673, 1919 N.Y. App. Div. LEXIS 5560 (N.Y. App. Div. 1919).

Application for order appointing referee to take testimony of plaintiff's witness, a doctor who attended plaintiff at a hospital, and for a further order directing production of records of hospital as to treatment of plaintiff and X-rays taken, granted. Blaine v New York, 238 A.D. 788, 238 A.D. 789, 262 N.Y.S. 900, 262 N.Y.S. 905, 1933 N.Y. App. Div. LEXIS 9964 (N.Y. App. Div. 1933).

In action to recover on a policy of life insurance defendant was not entitled to the production of the record of insured's medical treatment while a patient at a hospital, and of X-ray plates and photographs made by physicians in the course of attending the insured in a professional capacity at the hospital. Such information is privileged but interrogatories designed to elicit whether the deceased was treated professionally, the names of the physicians who treated him, the date of his entry into the hospital, and the date of his discharge, are proper. Lorde v

Guardian Life Ins. Co., 252 A.D. 646, 300 N.Y.S. 721, 1937 N.Y. App. Div. LEXIS 5751 (N.Y. App. Div. 1937).

In action for proceeds of industrial life policy, hospital records offered by insurer to show nature of insured's medical impairment prior to issuance of policy were properly rejected. Thompson v Prudential Ins. Co., 266 A.D. 783, 41 N.Y.S.2d 621, 1943 N.Y. App. Div. LEXIS 4458 (N.Y. App. Div. 1943).

Where hospital records subpoenaed would necessarily disclose information acquired by hospital doctors during course and in aid of their professional treatment of patients, such information is privileged regardless of medium through which it is sought to be obtained. Application of Grand Jury of County of Kings, 286 A.D. 270, 143 N.Y.S.2d 501, 1955 N.Y. App. Div. LEXIS 4026 (N.Y. App. Div. 1955).

Sanitary Code § 90 did not operate to annul CPA § 352 so as to permit use of all hospital records in all abortion cases, but related only to cases currently being treated by doctors. Application of Grand Jury of County of Kings, 286 A.D. 270, 143 N.Y.S.2d 501, 1955 N.Y. App. Div. LEXIS 4026 (N.Y. App. Div. 1955).

In prosecution of defendant for criminal negligence in operating automobile knowing that he was subject to epileptic fits, where evidence showed that he was arrested and taken by police to county hospital and there examined by resident house physician who extracted incriminating facts and entered same on hospital chart such examination was privileged, though physician held pink slip from police department. People v Decina, 1 A.D.2d 592, 152 N.Y.S.2d 169, 1956 N.Y. App. Div. LEXIS 5193 (N.Y. App. Div. 4th Dep't), aff'd, 2 N.Y.2d 133, 157 N.Y.S.2d 558, 138 N.E.2d 799, 1956 N.Y. LEXIS 631 (N.Y. 1956).

Where no pretrial activities which could be construed as a waiver of privilege have taken place, plaintiff, despite disclosures of her mental and physical condition in her pleadings, has absolute privilege to insist that information which she gave to her doctors shall not be disclosed either through their testimony or by production of hospital records until time comes when they must be

revealed at trial. However, though she has absolute right to assert her privilege, she does not have the right to force defendant to proceed to trial so long as she is unwilling to permit pretrial inquiry with respect to injuries she claims. Kriger v Holland Furnace Co., 12 A.D.2d 44, 208 N.Y.S.2d 285, 1960 N.Y. App. Div. LEXIS 6673 (N.Y. App. Div. 2d Dep't 1960).

In an action on a policy of life insurance a hospital record was not competent to prove the diagnosis which was privileged under CPA § 354. Palmer v John Hancock Mut. Life Ins. Co., 270 N.Y.S. 10, 150 Misc. 669, 1934 N.Y. Misc. LEXIS 1123 (N.Y. App. Term 1934).

Recordings of privileged communications in hospital records are inadmissible, but not ordinary incidents and facts observable by anybody. Westphal v State, 79 N.Y.S.2d 634, 191 Misc. 688, 1948 N.Y. Misc. LEXIS 2447 (N.Y. Ct. Cl. 1948).

Post-operative condition of patient, see Waldron v State, 82 N.Y.S.2d 822, 193 Misc. 113, 1948 N.Y. Misc. LEXIS 3235 (N.Y. Ct. Cl. 1948).

Admission or diagnosis of deceased grantor, as shown in hospital records, was inadmissible to show his incompetency at time he executed deed. Kinbacher v Schneider, 89 N.Y.S.2d 350, 194 Misc. 969, 1949 N.Y. Misc. LEXIS 2272 (N.Y. Sup. Ct. 1949).

Hospital records are privileged. In re Ericson's Will, 106 N.Y.S.2d 203, 200 Misc. 1005, 1951 N.Y. Misc. LEXIS 2024 (N.Y. Sur. Ct. 1951).

Hospital records, showing treatment of patient, are privileged communications between physician and patient. Vilardi v Vilardi, 107 N.Y.S.2d 342, 200 Misc. 1043, 1951 N.Y. Misc. LEXIS 2353 (N.Y. Sup. Ct. 1951).

The patient-physician privilege is not bar to examination of hospital and its records to learn names of doctors who operated on him in hospital for purpose of suing them for malpractice, because it is patient himself who wants information. Application of Weiss, 147 N.Y.S.2d 455, 208 Misc. 1010, 1955 N.Y. Misc. LEXIS 3033 (N.Y. Sup. Ct. 1955).

In action for death of hospital patient who jumped from hospital window while temporarily insane and was injured, examination of hospital employees and records to enable plaintiff to prepare complaint was authorized, despite claim that such examination would disclose information as would tend to disgrace memory of patient. Killip v Rochester General Hospital, 1 Misc. 2d 349, 146 N.Y.S.2d 164, 1955 N.Y. Misc. LEXIS 2208 (N.Y. Sup. Ct. 1955).

Defendant in personal injury action is not entitled to production of plaintiff's hospital records in connection with his examination of plaintiff before trial where plaintiff asserts his privilege against disclosure of confidential communications, plaintiff's examination at the instance of a defendant not constituting a waiver of the privilege. Racioppa v Hanson, 30 Misc. 2d 565, 219 N.Y.S.2d 76, 1961 N.Y. Misc. LEXIS 2552 (N.Y. Sup. Ct. 1961).

Names and addresses of patients of hospital physician admitted to hospital in specified years were obtainable from hospital records and admissible in federal income investigation. In re Albert Lindley Lee Memorial Hospital, 209 F.2d 122, 1953 U.S. App. LEXIS 4243 (2d Cir. N.Y. 1953), cert. denied, 347 U.S. 960, 74 S. Ct. 709, 98 L. Ed. 1104, 1954 U.S. LEXIS 2139 (U.S. 1954).

Hospital records made by physician in course of attending patient held privileged. Munzer v Swedish American Line, 35 F. Supp. 493, 1940 U.S. Dist. LEXIS 2579 (D.N.Y. 1940).

**64. —Of state or mental hospital**

Committee of incompetent may petition court of claims for order authorizing inspection of state hospital records to ascertain facts surrounding injury to patient by fall while patient in hospital and to determine if any agent or employee of state was guilty of actionable negligence. In re Warrington, 303 N.Y. 129, 100 N.E.2d 170, 303 N.Y. (N.Y.S.) 129, 1951 N.Y. LEXIS 696 (N.Y. 1951).

In action by committee of incompetent for her personal injuries which allegedly caused loss of her sanity, hospital records where she was treated for mental illness, were privileged. La Plante

v Garrett, 282 A.D. 1096, 126 N.Y.S.2d 470, 1953 N.Y. App. Div. LEXIS 5905 (N.Y. App. Div. 1953), reh'g denied, 283 A.D. 987, 130 N.Y.S.2d 910, 1954 N.Y. App. Div. LEXIS 6010 (N.Y. App. Div. 1954).

In action by bowling alley patron against owners for assault by allegedly insane employee, for negligently employing and retaining him, records of state hospital containing statements by employee as to prior history, which plaintiff offered to show prior irrational conduct, were inadmissible as privileged communications. Vanderhule v Berinstein, 285 A.D. 290, 136 N.Y.S.2d 95, 1954 N.Y. App. Div. LEXIS 3318 (N.Y. App. Div.), amended, 284 A.D. 1089, 136 N.Y.S.2d 349, 1954 N.Y. App. Div. LEXIS 4634 (N.Y. App. Div. 1954).

Relationship between patient committed to mental institution and official physician was not a professional relation within CPA § 352. Munzer v Blaisdell, 49 N.Y.S.2d 915, 183 Misc. 773, 1944 N.Y. Misc. LEXIS 2235 (N.Y. Sup. Ct. 1944), aff'd, 269 A.D. 970, 58 N.Y.S.2d 359, 1945 N.Y. App. Div. LEXIS 4798 (N.Y. App. Div. 1st Dep't 1945).

Case records of mental patients in state hospital are privileged unless waived as provided by law. Greff v Havens, 66 N.Y.S.2d 124, 186 Misc. 914, 1946 N.Y. Misc. LEXIS 2999 (N.Y. Sup. Ct. 1946).

State hospital records were privileged in action for death by administratrix against city, under CPA § 352. Jaffe v New York, 94 N.Y.S.2d 60, 196 Misc. 710, 1949 N.Y. Misc. LEXIS 3041 (N.Y. Sup. Ct. 1949).

Where claimant patient injured in state hospital, hospital’s records pertaining to assailant so far as entry referring to his diagnosis, propensities, etc., are confidential and should not be disclosed but hospital should produce for claimant’s inspection any entries of observations as to his activities and comments and as to protection in custodio, care given both with respect to the assailant and his relations with other inmates. Boykin v State, 13 Misc. 2d 1037, 179 N.Y.S.2d 197, 1958 N.Y. Misc. LEXIS 3765 (N.Y. Ct. Cl.), aff'd, 7 A.D.2d 819, 180 N.Y.S.2d 884, 1958 N.Y. App. Div. LEXIS 3753 (N.Y. App. Div. 3d Dep't 1958).

Claimant suing State for assault by former mental patient allegedly discharged from hospital while still seriously ill and dangerous was granted inspection of former patient's records except insofar as they refer to patient's propensities, diagnosis and prognosis. Taig v State, 15 Misc. 2d 1098, 182 N.Y.S.2d 892, 1959 N.Y. Misc. LEXIS 4276 (N.Y. Ct. Cl. 1959).

Hospital records containing information obtained by physicians employed by state institution in course of diagnosis and treatment of patient committed to its care was privileged communication within CPA § 352, and must not be released without permission of patient. Munzer v State, 41 N.Y.S.2d 98, 1943 N.Y. Misc. LEXIS 1792 (N.Y. Ct. Cl. 1943).

In action for personal injuries received in automobile accident, where since its occurrence plaintiff has been patient at various mental institutions, application seeking to examine plaintiff's records at such hospitals was denied as such records are confidential communications. Sobel v Feldhamer, 137 N.Y.S.2d 187, 1954 N.Y. Misc. LEXIS 3608 (N.Y. Sup. Ct. 1954).

Where wife's action for separation was dismissed on her default and judgment for separation granted to husband on his counterclaim and where she moved to open her default on ground of mental illness, husband was denied permission to examine state hospital records where she was treated. Cook v Cook, 154 N.Y.S.2d 205 (N.Y. Sup. Ct. 1956).

**65. —X rays**

In action to recover on a policy of life insurance, defendant was not entitled to the production of the record of insured's medical treatment while a patient at a hospital, and of X-ray plates and photographs made by physicians in the course of attending the insured in a professional capacity at the hospital. Such information is privileged. But interrogatories designed to elicit whether the deceased was treated professionally, the names of the physicians who treated him, the date of his entry into the hospital, and the date of his discharge, were proper. Lorde v Guardian Life Ins. Co., 252 A.D. 646, 300 N.Y.S. 721, 1937 N.Y. App. Div. LEXIS 5751 (N.Y. App. Div. 1937).

X rays and examination reports of plaintiff, made by physicians and nurses in aid of diagnosis and treatment for physical ailment, were privileged. Hurd v Republic Steel Corp., 275 A.D. 725, 87 N.Y.S.2d 64, 1949 N.Y. App. Div. LEXIS 4218 (N.Y. App. Div. 1949).

Where defendant sought to compel discovery and inspection of X rays taken of the plaintiff, the court denied the motion on the ground that such X rays were privileged under CPA § 352 on the facts of the case. Parker v Boston & M. Railroad, 5 A.D.2d 1035, 173 N.Y.S.2d 842, 1958 N.Y. App. Div. LEXIS 6192 (N.Y. App. Div. 3d Dep't 1958).

In an action by a beneficiary under a policy of life insurance, the testimony of the physician as to his having been consulted by the insured and as to his having prescribed for him and recommended the taking of X-ray pictures was not privileged and was admissible. Entian v Provident Mut. Life Ins. Co., 279 N.Y.S. 580, 155 Misc. 227, 1935 N.Y. Misc. LEXIS 1158 (N.Y. City Ct. 1935).

**66. Public health records and vital statistics**

Public records reporting communicable diseases and compiled pursuant to law, are not privileged, and are available in negligence action to prove that defendant knew she was typhoid carrier. Thomas v Morris, 286 N.Y. 266, 36 N.E.2d 141, 286 N.Y. (N.Y.S.) 266, 1941 N.Y. LEXIS 1437 (N.Y. 1941).

In an action on a life insurance policy, where the beneficiary has attacked the certificate of a physician showing that he attended the insured by showing it was false, the physician can testify in support of such certificate. Becker v Metropolitan Life Ins. Co., 99 A.D. 5, 90 N.Y.S. 1007, 1904 N.Y. App. Div. LEXIS 2997 (N.Y. App. Div. 1904).

Notwithstanding the provisions making an official record of a department of the city of New York on file for twenty years presumptive evidence of its contents, CPA § 352 forbade the admissibility of a physician’s certificate, as to the cause of death of the applicant’s father, on file in the city health department for more than twenty years. Robinson v Supreme Commandery, U.

O. G. C., 77 N.Y.S. 111, 38 Misc. 97, 1902 N.Y. Misc. LEXIS 312 (N.Y. Sup. Ct.), aff'd, 77 A.D. 215, 79 N.Y.S. 13, 1902 N.Y. App. Div. LEXIS 2837 (N.Y. App. Div. 1902).

In action by the beneficiary on a life insurance policy, subpoena duces tecum to bring in the records of the department of health where deceased was treated, properly denied. McGowan v Metropolitan Life Ins. Co., 253 N.Y.S. 551, 141 Misc. 834, 1931 N.Y. Misc. LEXIS 1515 (N.Y. App. Term 1931), aff'd, 234 A.D. 366, 255 N.Y.S. 130, 1932 N.Y. App. Div. LEXIS 10439 (N.Y. App. Div. 1932).

**67. Testimony as to value of physician's services**

The exclusions of the evidence of the plaintiff and of the surgeon who assisted him as to the nature of the patient's operation, does not require the exclusion of their evidence as experts as to the value of the plaintiff's services. MacEvitt v Maass, 67 N.Y.S. 817, 33 Misc. 552, 1901 N.Y. Misc. LEXIS 7 (N.Y. Sup. Ct.), aff'd, 64 A.D. 382, 72 N.Y.S. 158, 1901 N.Y. App. Div. LEXIS 1813 (N.Y. App. Div. 1901).

The provisions prohibiting the disclosure of information acquired by and necessary for a person duly authorized to practice physic or surgery to act in his professional capacity, is not intended to deprive him of his cause of action for professional services if he can prove them by legal evidence. Schamberg v Whitman, 135 N.Y.S. 262, 75 Misc. 215, 1912 N.Y. Misc. LEXIS 643 (N.Y. City Ct.), aff'd, 151 A.D. 939, 135 N.Y.S. 1141, 1912 N.Y. App. Div. LEXIS 8336 (N.Y. App. Div. 1912).

**68. Application of section to examination before trial or taking of deposition**

Application of CPA § 288 (§ 3101(a), Rule 3106(a) herein) to taking the deposition of a physician as a witness under CPA § 354. Woernley v Electromatic Typewriters, Inc., 246 A.D. 675, 283 N.Y.S. 770, 1935 N.Y. App. Div. LEXIS 9651 (N.Y. App. Div. 1935), aff'd, 271 N.Y. 228, 2 N.E.2d 638, 271 N.Y. (N.Y.S.) 228, 1936 N.Y. LEXIS 1191 (N.Y. 1936).

The examination of witnesses without the state upon a commission is a portion of the trial of the action for the purpose of satisfying the requirements of the statute. Murray v Physical Culture Hotel, Inc., 258 A.D. 334, 17 N.Y.S.2d 862, 1939 N.Y. App. Div. LEXIS 6434 (N.Y. App. Div. 4th Dep't 1939).

Since CPA § 354 provided that privilege applied to “any examination”, proposed interrogatories calling for confidential information between physician and patient were disallowed. Jones v Jones, 144 N.Y.S.2d 820, 208 Misc. 721, 1955 N.Y. Misc. LEXIS 3256 (N.Y. Sup. Ct. 1955).

**69. Grand jury**

Where statements by defendant’s doctor revealed information necessary for purpose of treatment, such testimony would have to be excluded on the trial if objected to and should not have been presented to a grand jury. People v Eckert, 2 N.Y.2d 126, 157 N.Y.S.2d 551, 138 N.E.2d 794, 1956 N.Y. LEXIS 630 (N.Y. 1956).

**70. Probate proceedings**

Where issue of testamentary capacity is to be determined on application for probate, objection to physician’s testimony on the ground of privilege was properly overruled as being within the waiver provisions of this section. In re White's Will, 2 N.Y.2d 309, 160 N.Y.S.2d 841, 141 N.E.2d 416, 1957 N.Y. LEXIS 1206 (N.Y.), reh'g denied, 2 N.Y.2d 996, 1957 N.Y. LEXIS 1664 (N.Y. 1957).

In a contested probate proceeding, the question asked a physician, “At that time . . . what did you find in connection with her condition?” was properly excluded. In re Cashman's Will, 289 N.Y.S. 328, 159 Misc. 881, 1936 N.Y. Misc. LEXIS 1347 (N.Y. Sur. Ct. 1936), aff'd, 250 A.D. 871, 297 N.Y.S. 150, 1937 N.Y. App. Div. LEXIS 9497 (N.Y. App. Div. 1937).

In a contested probate proceeding answer was properly excluded to the question, “Doctor, based upon your experience and observation . . . and your treatment . . . at the times you have

stated, in your opinion," on the date of the alleged will "was she [the decedent] of sound and disposing mind and memory?" In re Cashman's Will, 289 N.Y.S. 328, 159 Misc. 881, 1936 N.Y. Misc. LEXIS 1347 (N.Y. Sur. Ct. 1936), aff'd, 250 A.D. 871, 297 N.Y.S. 150, 1937 N.Y. App. Div. LEXIS 9497 (N.Y. App. Div. 1937).

**71. Death certificate**

In an action on a life insurance policy, the court refused to permit the certificate of the physician, furnished by the guardian to the association, and stating the cause of death to be delirium tremens, to be read in evidence. Held, no error. Buffalo Loan, Trust & Safe-Deposit Co. v Knights Templar & Masonic Mut. Aid Ass'n, 126 N.Y. 450, 27 N.E. 942, 126 N.Y. (N.Y.S.) 450, 1891 N.Y. LEXIS 1651 (N.Y. 1891), limited, Regan v National Postal Transport Ass'n, 53 Misc. 2d 901, 280 N.Y.S.2d 319, 1967 N.Y. Misc. LEXIS 1493 (N.Y. Sup. Ct. 1967).

Admission in evidence of physician's certificate as to cause of death of person insured for the purpose of proving an admission of fact by the beneficiary did not violate the provisions of CPA §§ 352, 354. Rudolph v John Hancock Mut. Life Ins. Co., 251 N.Y. 208, 167 N.E. 223, 251 N.Y. (N.Y.S.) 208, 1929 N.Y. LEXIS 707 (N.Y. 1929).

In probate proceeding one of next of kin of deceased patient may waive privilege by offering certificate of death. In re Monroe's Will, 270 A.D. 1039, 63 N.Y.S.2d 141, 1946 N.Y. App. Div. LEXIS 5245 (N.Y. App. Div. 2d Dep't 1946).

**72. Fellow inmate's records**

Hospital records of fellow inmate, except entries pertaining to inmate's propensities, diagnosis and prognosis, were made available to claimant, who was also an inmate. Boykin v State, 7 A.D.2d 819, 180 N.Y.S.2d 884, 1958 N.Y. App. Div. LEXIS 3753 (N.Y. App. Div. 3d Dep't 1958).

Claimant suing State for assault by former mental patient allegedly discharged from hospital while still seriously ill and dangerous was granted inspection of former patient's records except

insofar as they refer to patient's propensities, diagnosis and prognosis. Taig v State, 15 Misc. 2d 1098, 182 N.Y.S.2d 892, 1959 N.Y. Misc. LEXIS 4276 (N.Y. Ct. Cl. 1959).

**73. Records of health department**

In action by the beneficiary on a life insurance policy, subpoena duces tecum to bring in the records of the health department where insured was treated, properly denied. McGowan v Metropolitan Life Ins. Co., 253 N.Y.S. 551, 141 Misc. 834, 1931 N.Y. Misc. LEXIS 1515 (N.Y. App. Term 1931), aff'd, 234 A.D. 366, 255 N.Y.S. 130, 1932 N.Y. App. Div. LEXIS 10439 (N.Y. App. Div. 1932).

**D. Waiver**

**74. Generally**

Where the plaintiff in an action for damages for personal injuries due to negligence described such injuries and their results, and it appeared that he consulted and was treated by a physician regarding them, he waived the protection of CPA § 352 and such physician might be called by the defendant and examined concerning any information he might have acquired in the course of such consultation and treatment. Hethier v Johns, 233 N.Y. 370, 135 N.E. 603, 233 N.Y. (N.Y.S.) 370, 1922 N.Y. LEXIS 885 (N.Y. 1922).

Claimant under life insurance policy waives privilege as to testimony of attending physician of insured where she procures and supplies insurer with physician's certificate of death. Rudolph v John Hancock Mut. Life Ins. Co., 251 N.Y. 208, 167 N.E. 223, 251 N.Y. (N.Y.S.) 208, 1929 N.Y. LEXIS 707 (N.Y. 1929).

Any voluntary disclosure by a party to an action, at the trial thereof, that he is suffering from disease, whether made through the examination of a physician or other witness, or in the form of

an admission or stipulation, destroys the statutory seal of secrecy. Apter v Home Life Ins. Co., 266 N.Y. 333, 194 N.E. 846, 266 N.Y. (N.Y.S.) 333, 1935 N.Y. LEXIS 1378 (N.Y. 1935).

In an action to restrain the defendant, an insurance company, from revoking its waiver of premiums and canceling policies insuring the life of plaintiff and providing for sick benefits, defended upon the ground that the policies were procured by fraudulent representations and concealment of the fact that the plaintiff, at the time the policies were issued, was suffering from disease, where plaintiff, at the trial, introduced in evidence his application for disability benefits, filed with defendant, containing a statement that he was suffering from a stated disease and at his request the trial judge found accordingly, the defendant may question a physician, who had examined the plaintiff, prior to the date when the policies were issued, as to the information he acquired in regard to the disease disclosed by the plaintiff and the date when that disease originated or became evident to the physician. Apter v Home Life Ins. Co., 266 N.Y. 333, 194 N.E. 846, 266 N.Y. (N.Y.S.) 333, 1935 N.Y. LEXIS 1378 (N.Y. 1935).

What will constitute a waiver of a prohibition against a physician testifying as to the condition of his patient. Fox v Union Turnpike Co., 59 A.D. 363, 69 N.Y.S. 551, 1901 N.Y. App. Div. LEXIS 404 (N.Y. App. Div. 1901).

The amendment by chap. 53 of 1899 has not changed the rule that a patient having since waived his privilege cannot subsequently prevent the physician from testifying to such communications by an objection based solely upon the privilege awarded by § 352. People v Bloom, 124 A.D. 767, 109 N.Y.S. 344, 1908 N.Y. App. Div. LEXIS 2195 (N.Y. App. Div.), aff'd, 193 N.Y. 1, 85 N.E. 824, 193 N.Y. (N.Y.S.) 1, 1908 N.Y. LEXIS 618 (N.Y. 1908).

In the absence of an express waiver by the representatives of a decedent refusal to require decedent’s physician to answer a question as to decedent’s ailments years before, held not reversible error. Trieber v New York & Q. C. R. Co., 149 A.D. 804, 134 N.Y.S. 267, 1912 N.Y. App. Div. LEXIS 6509 (N.Y. App. Div. 1912).

Where plaintiff in a malpractice action called as a witness another physician who had treated her, she thereby waived the right to object to examination of such witness by defendant, on the theory that his information was inadmissible on the ground of privilege. Albers v Wilson, 201 A.D. 775, 195 N.Y.S. 145, 1922 N.Y. App. Div. LEXIS 6416 (N.Y. App. Div. 1922).

Testimony of physicians who had attended an insured that she had suffered from ailments, contrary to representation in her application, cannot be received in evidence unless the statutory disqualification is waived. Acee v Metropolitan Life Ins. Co., 219 A.D. 246, 219 N.Y.S. 152, 1927 N.Y. App. Div. LEXIS 10888 (N.Y. App. Div. 1927).

In action by wife for cruelty of husband seeking to have her committed to mental institution, testimony of her brother in her behalf on trial of separation action that psychiatrist whom she had consulted at her husband’s suggestion told witness that she was mentally ill and in need of hospital treatment, waived privilege against testimony by said psychiatrist who thus became competent to testify. Davis v Davis, 1 A.D.2d 675, 146 N.Y.S.2d 630, 1955 N.Y. App. Div. LEXIS 3907 (N.Y. App. Div. 2d Dep't 1955).

Where provisions of CPA § 352 had been waived at trial, exclusion of attending physician’s testimony as to testatrix’ mental competency, none of which would have tended to disgrace her memory, constituted reversible error. In re Podolak's Will, 10 A.D.2d 794, 197 N.Y.S.2d 904, 1960 N.Y. App. Div. LEXIS 11490 (N.Y. App. Div. 4th Dep't 1960).

A motion by the defendant in action for wrongful death for a discovery and inspection, or an examination before trial, of the records of a hospital relating to plaintiff’s intestate during the period of her confinement therein, was granted where plaintiff’s intestate waived the privilege given by CPA § 352 as to the information sought. Green v M. Nirenberg Sons, Inc., 3 N.Y.S.2d 81, 166 Misc. 652, 1938 N.Y. Misc. LEXIS 1389 (N.Y. Sup. Ct. 1938).

CPA § 352 contemplated in absence of required waiver, confidential information had to be shut off at its source. Kinbacher v Schneider, 89 N.Y.S.2d 350, 194 Misc. 969, 1949 N.Y. Misc. LEXIS 2272 (N.Y. Sup. Ct. 1949).

Requiring production of hospital records as waiver of privilege with respect to such records. Kossar v State, 13 Misc. 2d 941, 179 N.Y.S.2d 71, 1958 N.Y. Misc. LEXIS 2760 (N.Y. Ct. Cl. 1958).

**75. Disclosures disgracing patient or his memory**

In will contest involving testamentary capacity, physician is forbidden to disclose confidential communications and such facts as would tend to disgrace memory of patient. In re Coddington's Will, 307 N.Y. 181, 120 N.E.2d 777, 307 N.Y. (N.Y.S.) 181, 1954 N.Y. LEXIS 991 (N.Y. 1954).

In a proceeding for the discovery of decedent’s property, it was error to permit decedent’s physician to give testimony which tended to discredit the memory of the decedent. In re See’s In re See's Estate, 241 A.D. 525, 272 N.Y.S. 111, 1934 N.Y. App. Div. LEXIS 8292 (May 9, 1934).

Hospital records revealing that deceased’s memory was failing, that he had lost interest in everything and that he believed he was inadequate, were confidential and could not be waived, in action for wrongful death. Eder v Cashin, 281 A.D. 456, 120 N.Y.S.2d 165, 1953 N.Y. App. Div. LEXIS 3067 (N.Y. App. Div. 1953).

Doctors and nurses, when there is waiver by any “interested person”, can testify to confidential communications, provided only that they are not such as tend to disgrace patient or, in case of decedent, his memory. In re Will of Boyle, 145 N.Y.S.2d 386, 208 Misc. 942, 1955 N.Y. Misc. LEXIS 3346 (N.Y. Sur. Ct. 1955).

In view of our present enlightened attitude toward mental illnesses, evidence tending to show deceased was temporarily insane did not tend to disgrace his memory within the rule that the privilege under CPA § 352 could not be waived in such cases. Killip v Rochester General Hospital, 1 Misc. 2d 349, 146 N.Y.S.2d 164, 1955 N.Y. Misc. LEXIS 2208 (N.Y. Sup. Ct. 1955).

**76. —Mental condition**

As to whether when patient calls witness to testify to his mental condition he does not waive his privilege. People v Scuyler, 106 N.Y. 298, 12 N.E. 783, 106 N.Y. (N.Y.S.) 298, 8 N.Y. St. 860, 1887 N.Y. LEXIS 889 (N.Y. 1887).

CPA §§ 352 and 354, which forbade a physician to disclose any information which he acquired in attending a patient in a professional capacity which was necessary to enable him to act in that capacity, applied to cases where a physician attended in a professional capacity a patient who did not employ him or desire his services; declarations by a patient that he attempted to commit suicide “tend to disgrace the memory of the patient,” within the meaning of CPA § 354, and the clause in the application for a policy of life insurance waiving the provisions of CPA §§ 352 and 354 was ineffective. Meyer v Supreme Lodge, Knights of Pythias, 82 A.D. 359, 81 N.Y.S. 813, 1903 N.Y. App. Div. LEXIS 1166 (N.Y. App. Div. 1903), aff'd, 178 N.Y. 63, 70 N.E. 111, 178 N.Y. (N.Y.S.) 63, 1904 N.Y. LEXIS 687 (N.Y. 1904).

Executor could not waive privilege so as to authorize physician to give his opinion that deceased was mentally incompetent by reason of delirium tremens, tending to disgrace the deceased. Mulligan v Sinski, 156 A.D. 35, 140 N.Y.S. 835, 1913 N.Y. App. Div. LEXIS 5163 (N.Y. App. Div. 1913), aff'd, 214 N.Y. 678, 108 N.E. 1101, 214 N.Y. (N.Y.S.) 678, 1915 N.Y. LEXIS 1390 (N.Y. 1915).

Suicidal tendencies tend to disgrace memory of deceased and are privileged from waiver. Eder v Cashin, 281 A.D. 456, 120 N.Y.S.2d 165, 1953 N.Y. App. Div. LEXIS 3067 (N.Y. App. Div. 1953).

In action for death of hospital patient who jumped from hospital window while temporarily insane and was injured, examination of hospital employees and records was authorized, despite claim that such examination would disclose such information as would tend to disgrace memory of patient. Killip v Rochester General Hospital, 1 Misc. 2d 349, 146 N.Y.S.2d 164, 1955 N.Y. Misc. LEXIS 2208 (N.Y. Sup. Ct. 1955).

Mental condition of patient, who died by his own hand while in sanitarium, tending to show he was not mentally responsible for his own destruction, was waivable. Stiles v Clifton Springs Sanitarium Co., 74 F. Supp. 907, 1947 U.S. Dist. LEXIS 1987 (D.N.Y. 1947).

**77. Who may waive privilege generally**

Where the statutory prohibition as to the disclosure has been waived by the patient, and the information has been made public, the right to object is waived. McKinney v Grand S., P. P. & F. R. Co., 104 N.Y. 352, 10 N.E. 544, 104 N.Y. (N.Y.S.) 352, 4 N.Y. St. 349, 1887 N.Y. LEXIS 598 (N.Y. 1887).

Under CPA § 354 the privilege of the physician may have been waived by the widow and heirs at law and executors, or either or any of them. In re Hopkins' Will, 73 A.D. 559, 77 N.Y.S. 178, 1902 N.Y. App. Div. LEXIS 1608 (N.Y. App. Div.), rev'd, 172 N.Y. 360, 65 N.E. 173, 172 N.Y. (N.Y.S.) 360, 12 N.Y. Ann. Cas. 55, 1902 N.Y. LEXIS 677 (N.Y. 1902).

Where in an action for separation the husband is a physician and treated the wife, communications made in connection with the treatment are made between patient and physician and not between husband and wife, and the wife may waive the privilege. Sheldon v Sheldon, 146 A.D. 430, 131 N.Y.S. 291, 1911 N.Y. App. Div. LEXIS 1906 (N.Y. App. Div. 1911).

The contestant of the probate of a will, not being a relative of decedent and sustaining no trust relation to him which would call upon her to guard his privacy was not authorized to waive the privacy provided for in CPA § 352. In re Faiher's Will, 239 A.D. 246, 268 N.Y.S. 120, 1933 N.Y. App. Div. LEXIS 8012 (N.Y. App. Div. 1933), limited, In re Cleveland's Will, 273 A.D. 623, 78 N.Y.S.2d 897, 1948 N.Y. App. Div. LEXIS 4650 (N.Y. App. Div. 1948).

Where in an action under a hospital expense indemnity policy the plaintiff was permitted to testify to what her physician told her concerning her freedom from stomach ulcers and she did not call her own physician to testify, it was an abuse of discretion for the trial court to refuse defendant a reasonable time in which to procure the attendance of plaintiff’s physician. Dolan v

United Casualty Co., 259 A.D. 784, 18 N.Y.S.2d 387, 1940 N.Y. App. Div. LEXIS 6625 (N.Y. App. Div. 1940).

Plaintiff waived protection of CPA § 352 where she became a witness for herself, described her injuries and stated in part what occurred when she consulted with or was treated by the physician. Meshel v Crotona Park Sanitarium, Inc., 276 N.Y.S. 989, 154 Misc. 221, 1935 N.Y. Misc. LEXIS 938 (N.Y. City Ct. 1935).

A hospital may not refuse to divulge the circumstances surrounding the administration of blood transfusions where the patient herself demands the production of the hospital records. Hoyt v Cornwall Hospital, 6 N.Y.S.2d 1014, 169 Misc. 361, 1938 N.Y. Misc. LEXIS 1987 (N.Y. Sup. Ct. 1938).

The patient-physician privilege does not bar examination of hospital and its records to learn names of doctors who operated on him in hospital for purpose of suing them for malpractice, because it is patient himself who wants such information. Application of Weiss, 147 N.Y.S.2d 455, 208 Misc. 1010, 1955 N.Y. Misc. LEXIS 3033 (N.Y. Sup. Ct. 1955).

Where claim against state for injuries to hospital inmate who was infant mental defective, insofar as examination of hospital records may invade the patient’s privilege to keep any information professionally obtained by doctors, dentists and the like, the guardian ad litem in such a case is a person who may waive the privilege. Kossar v State, 13 Misc. 2d 941, 179 N.Y.S.2d 71, 1958 N.Y. Misc. LEXIS 2760 (N.Y. Ct. Cl. 1958).

Widow, seeking to show that deceased was insane when he substituted another as beneficiary in her stead, was allowed to examine before trial hospital records to show his insanity, since she, as widow, could waive privilege afforded by CPA § 352. McKeever v Teachers' Retirement Board, 99 N.Y.S.2d 884, 1950 N.Y. Misc. LEXIS 2045 (N.Y. Sup. Ct. 1950).

Where mother permitted physician to deliver her baby to unknown person and later she changed her mind and desired to examine physician to learn name of such person so that she could sue to determine custody of child, mother may waive professional privilege. Ehrlich v Gerstenhaber,

138 N.Y.S.2d 702, 1955 N.Y. Misc. LEXIS 2667 (N.Y. Sup. Ct.), aff'd, 285 A.D. 1074, 141 N.Y.S.2d 502, 1955 N.Y. App. Div. LEXIS 6703 (N.Y. App. Div. 1955).

**78. Waiver by or on behalf of infant**

An infant is a “patient” within the meaning of CPA § 352; parents being natural guardians of an infant could make waiver contemplated by CPA § 354. Corey v Bolton, 63 N.Y.S. 915, 31 Misc. 138, 7 N.Y. Ann. Cas. 343, 1900 N.Y. Misc. LEXIS 286 (N.Y. App. Term 1900).

Neither an infant plaintiff nor his guardian ad litem have the power to waive the statutory prohibition against disclosure of privileged communications between an insured and his physician, since the prohibition may be waived only by personal representatives of the deceased. Polachek v New York Life Ins. Co., 263 N.Y.S. 230, 147 Misc. 16, 1933 N.Y. Misc. LEXIS 1004 (N.Y. Sup. Ct. 1933), aff'd, 240 A.D. 1028, 268 N.Y.S. 995, 1934 N.Y. App. Div. LEXIS 10819 (N.Y. App. Div. 1934).

Guardian ad litem is personal representative of infant suing state for negligent personal injuries and had power of waiver under CPA § 354, and filing of claim and proof of subject matter, which necessitated use of ordinarily privileged matter, constituted waiver of such privilege. Van Heuverzwyn v State, 134 N.Y.S.2d 922, 206 Misc. 896, 1954 N.Y. Misc. LEXIS 2856 (N.Y. Ct. Cl. 1954).

Where claim against state for injuries to hospital inmate who was infant mental defective, insofar as examination of hospital records may invade the patient’s privilege to keep any information professionally obtained by doctors, dentists and the like, the guardian ad litem in such a case is a person who may waive the privilege, and such waiver is effected by the guardian’s filing claims and making a motion for examination before trial and by requiring production of hospital records. Kossar v State, 13 Misc. 2d 941, 179 N.Y.S.2d 71, 1958 N.Y. Misc. LEXIS 2760 (N.Y. Ct. Cl. 1958).

**79. Waiver by or on behalf of incompetent**

Incompetent patient, confined to institution for criminally insane, could not waive provisions of CPA § 354. Westphal v State, 79 N.Y.S.2d 634, 191 Misc. 688, 1948 N.Y. Misc. LEXIS 2447 (N.Y. Ct. Cl. 1948).

Mother of incompetent hospital patient could not waive provisions of CPA § 354 where she was not his legal representative. Application of Bryant, 105 N.Y.S.2d 446, 1950 N.Y. Misc. LEXIS 2519 (N.Y. Ct. Cl. 1950).

**80. Waiver by personal representatives**

Personal representatives could not waive the prohibition of CPA § 352 (see later amendments). Westover v Aetna Life Ins. Co., 99 N.Y. 56, 1 N.E. 104, 99 N.Y. (N.Y.S.) 56, 2 How. Pr. (n.s.) 184, 1885 N.Y. LEXIS 751 (N.Y. 1885).

The term “personal representatives,” as used in CPA § 354 applied only to the executors and administrators of the decedent and does not extend to a widow who brings an action individually against a benefit association to recover upon a benefit certificate issued to her husband of which she was the beneficiary. Beil v Supreme Lodge, Knights of Honor, 80 A.D. 609, 80 N.Y.S. 751, 1903 N.Y. App. Div. LEXIS 633 (N.Y. App. Div. 1903).

A physician may testify as to the condition of a deceased person on the waiver by the executor of professional secrecy. Twaddell v Weidler, 109 A.D. 444, 96 N.Y.S. 90, 1905 N.Y. App. Div. LEXIS 3575 (N.Y. App. Div. 1905), aff'd, 186 N.Y. 601, 79 N.E. 1117, 186 N.Y. (N.Y.S.) 601, 1906 N.Y. LEXIS 1304 (N.Y. 1906).

The only one who can waive the privilege of preventing the testimony of physicians regarding the ailments of deceased being given is the personal representative and then only on trial when the evidence is offered. Acee v Metropolitan Life Ins. Co., 219 A.D. 246, 219 N.Y.S. 152, 1927 N.Y. App. Div. LEXIS 10888 (N.Y. App. Div. 1927).

Under CPA § 354 an administrator could have waived the privilege of a deceased patient except as to confidential communications and such facts as would tend to disgrace the memory of the patient, but the waivers had to be made in open court on the trial of the action or proceeding. Murray v Physical Culture Hotel, Inc., 258 A.D. 334, 17 N.Y.S.2d 862, 1939 N.Y. App. Div. LEXIS 6434 (N.Y. App. Div. 4th Dep't 1939).

Neither an infant plaintiff nor his guardian ad litem have the power to waive the statutory prohibition against disclosure of privileged communications between an insured and his physician, since the prohibition may be waived only by personal representatives of the deceased. Polachek v New York Life Ins. Co., 263 N.Y.S. 230, 147 Misc. 16, 1933 N.Y. Misc. LEXIS 1004 (N.Y. Sup. Ct. 1933), aff'd, 240 A.D. 1028, 268 N.Y.S. 995, 1934 N.Y. App. Div. LEXIS 10819 (N.Y. App. Div. 1934).

The waiver by the plaintiff in an action to recover on a policy of life insurance of the statutory prohibition against disclosure of privileged communications to a physician is of no effect where the plaintiff was not a “personal representative” of the deceased. Entian v Provident Mut. Life Ins. Co., 279 N.Y.S. 580, 155 Misc. 227, 1935 N.Y. Misc. LEXIS 1158 (N.Y. City Ct. 1935).

Executor and widow of decedent may waive privileged communication, as contained in hospital records, in action by decedent’s son against decedent’s widow to annul marriage for mental incompetency. Greff v Havens, 66 N.Y.S.2d 124, 186 Misc. 914, 1946 N.Y. Misc. LEXIS 2999 (N.Y. Sup. Ct. 1946).

Where inmate of state prison died as result of negligent extraction of tooth, administratrix may waive privilege where testimony sought related to patient’s condition after extraction. Waldron v State, 82 N.Y.S.2d 822, 193 Misc. 113, 1948 N.Y. Misc. LEXIS 3235 (N.Y. Ct. Cl. 1948).

Appointment of representative of deceased is condition precedent to waiver by any party. Kinbacher v Schneider, 89 N.Y.S.2d 350, 194 Misc. 969, 1949 N.Y. Misc. LEXIS 2272 (N.Y. Sup. Ct. 1949).

The words “personal representatives” as used in CPA § 354 applied only to executors and administrators and where a decedent’s will had not been probated and no letters of administration had been issued decedent had no personal representatives within meaning of the section. Humphreys v Board of Education, 5 Misc. 2d 594, 160 N.Y.S.2d 64, 1957 N.Y. Misc. LEXIS 3555 (N.Y. Sup. Ct. 1957).

Where decedent had no personal representatives within meaning of CPA § 354, CPA § 352 stood as a complete bar, since no one was competent to weigh privilege and permit physician to testify as to decedent’s competency. Humphreys v Board of Education, 5 Misc. 2d 594, 160 N.Y.S.2d 64, 1957 N.Y. Misc. LEXIS 3555 (N.Y. Sup. Ct. 1957).

Mother of incompetent hospital patient was not entitled to inspect hospital records, since only legal representative could waive provisions of CPA §§ 352, 354. Application of Bryant, 105 N.Y.S.2d 446, 1950 N.Y. Misc. LEXIS 2519 (N.Y. Ct. Cl. 1950).

**81. Waiver by next of kin or party in interest**

The contestant of the probate of a will, not being a relative of decedent and sustaining no trust relation to him which would call upon her to guard his privacy, was not such a “party in interest” within the meaning of CPA § 354 as would authorize her to waive the privacy provided for in CPA § 352. In re Faiher's Will, 239 A.D. 246, 268 N.Y.S. 120, 1933 N.Y. App. Div. LEXIS 8012 (N.Y. App. Div. 1933), limited, In re Cleveland's Will, 273 A.D. 623, 78 N.Y.S.2d 897, 1948 N.Y. App. Div. LEXIS 4650 (N.Y. App. Div. 1948).

Will contestant, relative of decedent and beneficiary under will in question, may waive disclosure of privileged information acquired by physician and nurse. In re Cleveland's Will, 273 A.D. 623, 78 N.Y.S.2d 897, 1948 N.Y. App. Div. LEXIS 4650 (N.Y. App. Div. 1948).

Where husband filed objections to probate of script purporting to be wife’s last will but died before matter came on for hearing, and his executor was made a party, the executor was a party in interest who could waive privilege and permit physician to testify that testatrix lacked

testamentary capacity. In re Mele's Estate, 157 N.Y.S. 669, 94 Misc. 555, 1916 N.Y. Misc. LEXIS 1215 (N.Y. Sur. Ct. 1916).

The phrase, “any other party in interest,” under CPA § 354, was clearly intended to include all “persons interested,” as the latter expression was defined under § 314 of the Surrogate's Court Act. In re Ackerman's Estate, 298 N.Y.S. 38, 163 Misc. 624, 1937 N.Y. Misc. LEXIS 1439 (N.Y. Sur. Ct. 1937).

In a probate proceeding, the contestants, as legatees under a prior will, were parties in interest, under CPA § 354 and came within the class of persons who could expressly waive the privilege of a physician in respect to confidential communications with decedent, his patient. In re Ackerman's Estate, 298 N.Y.S. 38, 163 Misc. 624, 1937 N.Y. Misc. LEXIS 1439 (N.Y. Sur. Ct. 1937).

Where decedent shortly before death executed propounded paper as will, excluding eight next of kin, they were allowed discovery and inspection of hospital records on placing on record of examination express waiver of provisions of CPA § 354. In re Ericson's Will, 106 N.Y.S.2d 203, 200 Misc. 1005, 1951 N.Y. Misc. LEXIS 2024 (N.Y. Sur. Ct. 1951).

**82. Manner and form of waiver generally**

Where the legal representative of a deceased person calls a physician to the stand and asks him to disclose professional information falling within the provisions of § 352, there is an express waiver contemplated by § 354 and it is not necessary that the person calling the physician should specifically state his intention to make such waiver. Holcomb v Harris, 166 N.Y. 257, 59 N.E. 820, 166 N.Y. (N.Y.S.) 257, 1901 N.Y. LEXIS 1265 (N.Y. 1901).

The waiver must be made in open court or by the attorneys prior to the trial by stipulation; the legislature has not limited the effect of the waiver when once made; whether the waiver is by the affirmative action of the patient in calling forth the privileged testimony, or by not preventing the other party from calling it forth, the logical effect is to deprive the statute of all further power of

protection; the failure of a party on the trial of a civil action to object to prohibited testimony of physicians precludes him from objecting to the same evidence in a subsequent criminal trial. People v Bloom, 193 N.Y. 1, 85 N.E. 824, 193 N.Y. (N.Y.S.) 1, 1908 N.Y. LEXIS 618 (N.Y. 1908).

Written waiver not required. Patnode v Foote, 153 A.D. 494, 138 N.Y.S. 221, 1912 N.Y. App. Div. LEXIS 11109, 1912 N.Y. App. Div. LEXIS 9305 (N.Y. App. Div. 1912).

Express statement of intention to waive is unnecessary. Eder v Cashin, 281 A.D. 456, 120 N.Y.S.2d 165, 1953 N.Y. App. Div. LEXIS 3067 (N.Y. App. Div. 1953).

Waiver of privilege must be in open court, but it need not be expressed in writing nor in particular form but intent to waive must be expressed either by word or act or omission to speak or act. In re Associated Gas & Electric Co., 59 F. Supp. 743, 1944 U.S. Dist. LEXIS 1571 (D.N.Y. 1944).

**83. Contract for waiver**

The provisions of CPA §§ 352 and 354, prohibiting the disclosure by a physician of information obtained by him when acting in his professional capacity, unless expressly waived at the trial, applied to a contract in which the applicant expressly waived such limitations. Meyer v Supreme Lodge K. P., 178 N.Y. 63, 70 N.E. 111, 178 N.Y. (N.Y.S.) 63, 1904 N.Y. LEXIS 687 (N.Y. 1904), aff'd, 198 U.S. 508, 25 S. Ct. 754, 49 L. Ed. 1146, 1905 U.S. LEXIS 1083 (U.S. 1905).

The object of CPA § 354 was to prevent waivers by contract long before the commencement of the action. Clifford v Denver & R. G. R. Co., 188 N.Y. 349, 80 N.E. 1094, 188 N.Y. (N.Y.S.) 349, 1907 N.Y. LEXIS 1134 (N.Y. 1907).

Insurance policy, governed by Georgia law and providing for waiver of privilege, is binding on all who claim under contract. Levy v Mutual Life Ins. Co., 56 N.Y.S.2d 32, 1945 N.Y. Misc. LEXIS 1963 (N.Y. Sup. Ct. 1945).

CPA § 354 did not apply in a case where the privilege was expressly waived by the deceased in the contract on which the action was brought. The legislature may change a rule of evidence, but cannot make a new rule in effect impairing the obligation of a contract. Foley v Royal Arcanum, 28 N.Y.S. 952, 78 Hun 222 (1894), aff'd, 151 N.Y. 196, 45 N.E. 456, 151 N.Y. (N.Y.S.) 196, 3 N.Y. Ann. Cas. 292, 1896 N.Y. LEXIS 877 (N.Y. 1896).

**84. Life insurance contract and proofs of death**

An express provision in an application for the life insurance policy under the provisions of CPA § 352 made after the amendment to this section, in 1891, which provided that such waiver could only be made upon the trial is ineffectual to permit disclosures by a physician of information which he acquired while attending the insured. Holden v Metropolitan Life Ins. Co., 165 N.Y. 13, 58 N.E. 771, 165 N.Y. (N.Y.S.) 13, 8 N.Y. Ann. Cas. 413, 1900 N.Y. LEXIS 773 (N.Y. 1900).

When plaintiff in action on insurance policy in proofs of death of insured refers to death certificate of a hospital physician and agrees that it shall be part of the proofs of death, such certificate is admissible in evidence, and the testimony of the attending physician is not incompetent. Klein v Prudential Ins. Co., 221 N.Y. 449, 117 N.E. 942, 221 N.Y. (N.Y.S.) 449, 1917 N.Y. LEXIS 1322 (N.Y. 1917).

A waiver for an insured person of his right under CPA § 352 was personal to the insured and could not operate beyond him, as he had no power to impose such conditions upon anyone else; a physician who attended insured during last illness could not testify, in an action brought upon an insurance policy, despite waiver of rights made in the policy. Davis v Supreme Lodge Knights of Honor, 35 A.D. 354, 54 N.Y.S. 1023, 1898 N.Y. App. Div. LEXIS 2575 (N.Y. App. Div. 1898), aff'd, 165 N.Y. 159, 58 N.E. 891, 165 N.Y. (N.Y.S.) 159, 1900 N.Y. LEXIS 792 (N.Y. 1900).

CPA §§ 352, 354, applied to cases where the physician attended in a professional capacity a patient who did not employ him or desire his services; declarations by a patient that he attempted to commit suicide “tend to disgrace the memory of the patient,” and the clause in the

application for a policy of life insurance waiving the provisions of such sections was ineffective. Meyer v Supreme Lodge, Knights of Pythias, 82 A.D. 359, 81 N.Y.S. 813, 1903 N.Y. App. Div. LEXIS 1166 (N.Y. App. Div. 1903), aff'd, 178 N.Y. 63, 70 N.E. 111, 178 N.Y. (N.Y.S.) 63, 1904 N.Y. LEXIS 687 (N.Y. 1904).

No effect can be given a policy provision waiving the right to object to the testimony of attending physicians of the deceased as privileged. Acee v Metropolitan Life Ins. Co., 219 A.D. 246, 219 N.Y.S. 152, 1927 N.Y. App. Div. LEXIS 10888 (N.Y. App. Div. 1927).

The mere naming of a physician in an application for insurance, from whom the insurer might inquire of the insured's health, was not a waiver of CPA § 352. Robinson v Supreme Commandery, U. O. G. C., 77 N.Y.S. 111, 38 Misc. 97, 1902 N.Y. Misc. LEXIS 312 (N.Y. Sup. Ct.), aff'd, 77 A.D. 215, 79 N.Y.S. 13, 1902 N.Y. App. Div. LEXIS 2837 (N.Y. App. Div. 1902).

Insurance policy, governed by Georgia law and providing for waiver of privilege, is binding on all who claim under contract. Levy v Mutual Life Ins. Co., 56 N.Y.S.2d 32, 1945 N.Y. Misc. LEXIS 1963 (N.Y. Sup. Ct. 1945).

A physician is incompetent to testify as to physical condition of insured at a time subsequent to the issuing of the policy; nor is the privilege waived by offering the certificate of the death of the insured. Redmond v Industrial Ben. Ass'n, 28 N.Y.S. 1075, 78 Hun 104 (1894), aff'd, 150 N.Y. 167, 44 N.E. 769, 150 N.Y. (N.Y.S.) 167, 1896 N.Y. LEXIS 967 (N.Y. 1896).

A waiver of the provisions of CPA § 352 contained in an application for insurance, makes testimony of his attending physician as to the health of the insured at the time of the application competent on the trial of an action on the policy. Dougherty v Metropolitan Life Ins. Co., 33 N.Y.S. 873, 87 Hun 15 (1895).

Such waiver is not against public policy. Dougherty v Metropolitan Life Ins. Co., 33 N.Y.S. 873, 87 Hun 15 (1895).

An application for a policy of life insurance contained the following stipulation: “The provisions of section 834 of the Code of Civil Procedure of the state of New York, and of similar provisions in the laws of other states, are hereby waived, and it is expressly consented and stipulated that, in any suit on the policy herein applied for, any physician who has attended or may hereafter attend the insured, may disclose any information acquired by him in any wise affecting the declarations and warranties herein made.” Upon the trial of an action brought by the beneficiary of the policy to recover the amount thereof, the defendant attempted to prove by a physician who attended the assured the condition of his health when his application for the insurance was made. The court excluded the evidence, upon the plaintiff’s objection; not, however, upon the ground that the evidence would disclose confidential communications or facts which would tend to disgrace the memory of the patient. Held, that the exclusion of the proposed evidence was erroneous; that such exclusion was not justified by the fact that the waiver of the provisions of CPA § 352 had been made by the assured himself, before the trial, and that they had not “been expressly waived on such trial or examination by the personal representatives of the deceased patient,” within the language of CPA § 354 relative to such waiver. Dougherty v Metropolitan Life Ins. Co., 33 N.Y.S. 873, 87 Hun 15 (1895).

**85. Examination before trial or by deposition as waiver**

CPA § 354, relating to waivers of the provisions of CPA § 352 prohibiting the disclosure of the secrets of a patient, did not permit the plaintiff in an action for damages for personal injuries to take, under a commission, the testimony of his physician as to confidential material facts, and then prevent such evidence from being read before the jury solely upon the ground that it would divulge private matters; waivers are limited to such as are made in open court on the trial, or by the stipulation of the attorneys for the respective parties. Clifford v Denver & R. G. R. Co., 188 N.Y. 349, 80 N.E. 1094, 188 N.Y. (N.Y.S.) 349, 1907 N.Y. LEXIS 1134 (N.Y. 1907).

The fact that plaintiff had, at defendant’s instance, testified on an examination before trial did not constitute a waiver of the physician-patient privilege afforded by CPA § 352 and thus did not

constitute such special circumstances as would authorize an examination of the physician before trial. Hughes v Kackas, 3 A.D.2d 402, 161 N.Y.S.2d 541, 1957 N.Y. App. Div. LEXIS 5880 (N.Y. App. Div. 3d Dep't 1957).

The fact that plaintiff had, at defendant's instance, testified on an examination before trial did not constitute a waiver of the physician-patient privilege afforded by CPA § 352. Hughes v Kackas, 3 A.D.2d 402, 161 N.Y.S.2d 541, 1957 N.Y. App. Div. LEXIS 5880 (N.Y. App. Div. 3d Dep't 1957).

In action for annulment based on husband's premarital fraudulent concealment of mental illness, wife was entitled to examine him, but he could obviate the examination if he authorized his attorney to sign stipulation waiving his statutory privilege as to the testimony of his doctors. O'Connor v O'Connor, 12 A.D.2d 627, 208 N.Y.S.2d 343, 1960 N.Y. App. Div. LEXIS 6703 (N.Y. App. Div. 2d Dep't 1960).

Motion for examination of record before trial as a waiver of privilege with respect to such record. Kossar v State, 13 Misc. 2d 941, 179 N.Y.S.2d 71, 1958 N.Y. Misc. LEXIS 2760 (N.Y. Ct. Cl. 1958).

Defendant in personal injury action is not entitled to production of plaintiff's hospital records in connection with his examination of plaintiff before trial where plaintiff asserts his privilege against disclosure of confidential communications, plaintiff's examination at the instance of a defendant not constituting a waiver of the privilege. Racioppa v Hanson, 30 Misc. 2d 565, 219 N.Y.S.2d 76, 1961 N.Y. Misc. LEXIS 2552 (N.Y. Sup. Ct. 1961).

Waiver by testifying before trial, see Brown v Brown, 65 N.Y.S.2d 602, 1946 N.Y. Misc. LEXIS 2893 (N.Y. Sup. Ct. 1946).

**86. Waiver in prior action**

Failure of a party on the trial of a civil action to object to prohibited testimony of physicians precludes him from objecting to the same evidence in a subsequent criminal trial. People v Bloom, 193 N.Y. 1, 85 N.E. 824, 193 N.Y. (N.Y.S.) 1, 1908 N.Y. LEXIS 618 (N.Y. 1908).

Waiver cannot be predicated on failure to object in another action between the parties. Wallace v Wallace, 158 A.D. 273, 143 N.Y.S. 1148, 1913 N.Y. App. Div. LEXIS 8037 (N.Y. App. Div. 2d Dep't 1913), aff'd, 216 N.Y. 28, 109 N.E. 872, 216 N.Y. (N.Y.S.) 28, 1915 N.Y. LEXIS 769 (N.Y. 1915).

Where administratrix of insured in her separate action against another insurer waived benefit of CPA § 352, such waiver operated also as waiver of benefit of same section in action by another insurer to rescind insurance policy for insured’s misrepresentation. General American Life Ins. Co. v Ettinger, 266 A.D. 876, 42 N.Y.S.2d 836, 1943 N.Y. App. Div. LEXIS 5009 (N.Y. App. Div. 1943).

**87. Waiver by, during, or by default in action or proceeding generally**

By bringing an action against a physician, the plaintiff waives the privilege otherwise existing as to communications between patient and physician. Terier v Dare, 146 A.D. 375, 131 N.Y.S. 51, 1911 N.Y. App. Div. LEXIS 1896 (N.Y. App. Div. 1911).

Allegations in complaint are insufficient to constitute waiver of privilege; waiver must be in open court on trial or by stipulation. Rubin v Equitable Life Assurance Soc., 269 A.D. 677, 53 N.Y.S.2d 351, 1945 N.Y. App. Div. LEXIS 3216 (N.Y. App. Div. 1945).

Physician-patient privilege is waived when claim for compensation is filed and prosecuted by one competent to do so. Petition of Maryland Casualty Co., 274 A.D. 211, 80 N.Y.S.2d 181, 1948 N.Y. App. Div. LEXIS 3041 (N.Y. App. Div. 1948).

Incompetent patient of State hospital waives privilege where her committee files verified complaint asking that hospital records be disclosed. Application of Warrington, 277 A.D. 1076,

100 N.Y.S.2d 655, 1950 N.Y. App. Div. LEXIS 4530 (N.Y. App. Div. 1950), aff'd, 303 N.Y. 129, 100 N.E.2d 170, 303 N.Y. (N.Y.S.) 129, 1951 N.Y. LEXIS 696 (N.Y. 1951).

Privilege was not waived constructively by commencement of action by committee of incompetent wife for her personal injuries which allegedly caused loss of her sanity. La Plante v Garrett, 282 A.D. 1096, 126 N.Y.S.2d 470, 1953 N.Y. App. Div. LEXIS 5905 (N.Y. App. Div. 1953), reh'g denied, 283 A.D. 987, 130 N.Y.S.2d 910, 1954 N.Y. App. Div. LEXIS 6010 (N.Y. App. Div. 1954).

Affidavit, submitted on defendant wife’s motion for alimony and counsel fee in husband’s action for annulment for her sterility, wherein she stated she was operated on by physician and as result was unable to bear children, did not waive physician-patient privilege. Vilardi v Vilardi, 107 N.Y.S.2d 342, 200 Misc. 1043, 1951 N.Y. Misc. LEXIS 2353 (N.Y. Sup. Ct. 1951).

In action to annul marriage for wife’s fraud in concealing her pregnancy by another at time of her marriage, her default in action and her admission of premarital pregnancy did not constitute waiver of privilege. Jones v Jones, 144 N.Y.S.2d 820, 208 Misc. 721, 1955 N.Y. Misc. LEXIS 3256 (N.Y. Sup. Ct. 1955).

Where plaintiff charged defendant in an action for annulment with being addicted to narcotics and defendant prior to trial furnished doctor’s affidavit that she was not so addicted, defendant did not by those acts waive her privilege on the trial as to her hospital record and medical testimony. Baxter v Baxter, 11 Misc. 2d 69, 169 N.Y.S.2d 871, 1957 N.Y. Misc. LEXIS 2005 (N.Y. Sup. Ct. 1957).

In an action to recover for personal injuries held, that the plaintiff by waiving her right in respect to one physician did not authorize defendant to call the others who had attended upon her. Hope v Troy & L. R. Co., 40 Hun 438 (N.Y.), aff'd, 110 N.Y. 643, 17 N.E. 873, 110 N.Y. (N.Y.S.) 643, 16 N.Y. St. 998, 1888 N.Y. LEXIS 944 (N.Y. 1888).

The interposition of a general denial in an action for medical services is not a waiver of the provisions of this section, prohibiting the disclosure by a physician of information acquired in attending a patient professionally. Van Allen v Gordon, 31 N.Y.S. 907, 83 Hun 379 (1894).

Answers to submitted interrogatories disclosing plaintiff's insanity held to have waived privilege under CPA §§ 352, 354. Munzer v Swedish American Line, 35 F. Supp. 493, 1940 U.S. Dist. LEXIS 2579 (D.N.Y. 1940).

**88. Waiver by calling witness to privileged matter**

A physician is incompetent to testify as to facts ascertained while attending a patient, even though the person has called another physician, who testified as to his condition at another time. Hennesy v Kelly, 55 A.D. 449, 66 N.Y.S. 871, 1900 N.Y. App. Div. LEXIS 2636 (N.Y. App. Div. 1900).

In action by wife for cruelty of husband seeking to have her committed to mental institution, testimony of her brother on her behalf on trial of separation action that psychiatrist whom she had consulted at her husband's suggestion told witness that she was mentally ill and in need of hospital treatment, waived privilege against testimony by said psychiatrist who thus became competent to testify. Davis v Davis, 1 A.D.2d 675, 146 N.Y.S.2d 630, 1955 N.Y. App. Div. LEXIS 3907 (N.Y. App. Div. 2d Dep't 1955).

In malpractice case, communications to another physician who treated plaintiff before and after defendant's treatment, with respect to other ailments, were privileged, and privilege was not waived by testifying on redirect following cross-examination with respect thereto. Gunn v Robinson, 171 N.Y.S. 692, 103 Misc. 547, 1918 N.Y. Misc. LEXIS 841 (N.Y. Sup. Ct. 1918), rev'd, 188 A.D. 948, 176 N.Y.S. 901, 1919 N.Y. App. Div. LEXIS 7358 (N.Y. App. Div. 1919).

It is not a waiver by plaintiff of his right to close the lips of his physician by bringing an action to recover for injuries for the loss of his leg, and by offering testimony to the fact that it was broken. Jones v Booklyn, B. & W. E. R. Co., 3 N.Y.S. 253, 1888 N.Y. Misc. LEXIS 577 (N.Y. City Ct.

1888), aff'd, 121 N.Y. 683, 24 N.E. 1098, 121 N.Y. (N.Y.S.) 683, 1890 N.Y. LEXIS 1517 (N.Y. 1890).

**89. —Involuntary testimony**

While the privilege accorded information acquired by a physician in his professional capacity may be waived by a party, either by his own testimony or by that of others given with his knowledge and consent, his testimony or other act of disclosure, although it may be minimal, must be voluntary and it is not voluntary when he is called by his adversary or becomes the latter's witness on cross-examination. Hughes v Kackas, 3 A.D.2d 402, 161 N.Y.S.2d 541, 1957 N.Y. App. Div. LEXIS 5880 (N.Y. App. Div. 3d Dep't 1957).

Where husband sued wife for annulment for sterility and on trial called her as witness and she testified as to hospital treatments but did not testify as part of her own case, she did not waive privilege, and hospital records were inadmissible. Vilardi v Vilardi, 107 N.Y.S.2d 342, 200 Misc. 1043, 1951 N.Y. Misc. LEXIS 2353 (N.Y. Sup. Ct. 1951).

**90. Testimony by patient himself as to privileged matter**

Where a plaintiff in an action for personal injuries testifies as to the operations that were performed on her and as to the treatment she received and as to what the doctors told her as to what happened at the operations, such testimony waives the privilege and permits the defendant to call the physician who performed the operation to testify exactly as to the truth of the plaintiff's statement and as to the treatment she received and the operations performed. Rauh v Deutscher Verein, 29 A.D. 483, 51 N.Y.S. 985, 6 N.Y. Ann. Cas. 22, 1898 N.Y. App. Div. LEXIS 1088 (N.Y. App. Div. 1898).

The privileges under CPA §§ 352 and 354 were waived where the patient testified in court as to treatment by physician in question, but not where testimony was solely as to treatment by other

physicians. Hennesy v Kelly, 55 A.D. 449, 66 N.Y.S. 871, 1900 N.Y. App. Div. LEXIS 2636 (N.Y. App. Div. 1900).

In an action for assault, the fact that the plaintiff tells the character of the injury does not operate as a waiver and entitle the defendant to call the plaintiff's physician to prove the cause of such injury. Dunckle v McAllister, 70 A.D. 273, 74 N.Y.S. 902, 1902 N.Y. App. Div. LEXIS 699 (N.Y. App. Div. 1902).

The mere fact of plaintiff testifying to injuries received and to his condition before the accident did not constitute a waiver of privilege. Bauch v Schultz, 180 N.Y.S. 188, 109 Misc. 548, 1919 N.Y. Misc. LEXIS 675 (N.Y. Sup. Ct. 1919).

The provisions of CPA § 352 disqualifying a physician from disclosing information obtained in attending a patient was waived by the patient's giving testimony as to his physical condition at the time in question. TREANOR v MANHATTAN RY. CO., 16 N.Y.S. 536, 28 Abb. N. Cas. 47, 1891 N.Y. Misc. LEXIS 3384 (N.Y.C.P. 1891).

Where plaintiff in an action for personal injuries has testified without any reservation whatever as to his injuries and their effect upon him, this is a waiver of his privilege, and it is error to exclude the testimony of his physician as to what he had learned of plaintiff's condition. TREANOR v MANHATTAN RY. CO., 16 N.Y.S. 536, 28 Abb. N. Cas. 47, 1891 N.Y. Misc. LEXIS 3384 (N.Y.C.P. 1891).

Where plaintiff in an action for personal injuries testifies as to his consultation with a physician concerning the injury, he waives his privilege. Marx v Manhattan R. Co., 10 N.Y.S. 159, 56 Hun 575, 1890 N.Y. Misc. LEXIS 2009 (N.Y. App. Term 1890).

Where a party himself testifies as to a consultation with a physician and pretends to give the circumstances of the pretended interview, the opposite party is not precluded from assailing such evidence by the testimony of such physician. Marx v Manhattan R. Co., 10 N.Y.S. 159, 56 Hun 575, 1890 N.Y. Misc. LEXIS 2009 (N.Y. App. Term 1890).

**91. Calling physician, nurse or other witness restrained by section**

Where a physician is called as a witness by his patient the attorney for the latter is authorized in his behalf to waive the statutory prohibition. Alberti v New York, L. E. & W. R. Co., 118 N.Y. 77, 23 N.E. 35, 118 N.Y. (N.Y.S.) 77, 1889 N.Y. LEXIS 1556 (N.Y. 1889), reh'g denied, 23 N.E. 1146 (N.Y. 1890).

The calling of a witness by an executor of the testator whom the witness attended as physician is an express waiver of the privilege and the intention to waive need not be stated, where the physician has been allowed to testify as to physical condition of the testator. Holcomb v Harris, 166 N.Y. 257, 59 N.E. 820, 166 N.Y. (N.Y.S.) 257, 1901 N.Y. LEXIS 1265 (N.Y. 1901).

Privilege was waived by acts of patient in testifying herself as to her injuries and calling another physician attending on another occasion. Hethier v Johns, 233 N.Y. 370, 135 N.E. 603, 233 N.Y. (N.Y.S.) 370, 1922 N.Y. LEXIS 885 (N.Y. 1922); Hethier v Johns, 233 N.Y. 645, 135 N.E. 953, 233 N.Y. (N.Y.S.) 645, 1922 N.Y. LEXIS 1068 (N.Y. 1922).

Where in the trial of an action the plaintiff calls the physician and proves by him the physical difficulty from which she suffered as the plaintiff herself has opened the door for an inquiry, the defendant on cross-examination may bring out all facts in regard to such physical difficulty; whatever privilege existed the plaintiff waived. Lawson v Morning Journal Ass'n, 32 A.D. 71, 52 N.Y.S. 484, 1898 N.Y. App. Div. LEXIS 1703 (N.Y. App. Div. 1898).

Where one of the heirs at law of a decedent brings an action against the other heirs at law to set aside the probate of such will on the ground that it was not the voluntary act of the decedent, and all of the defendant heirs at law and next of kin join in the prayer of the complaint, the act of the plaintiff in calling a physician who attended the decedent during the month in which he died to testify concerning the decedent’s condition at the time he attended him, constituted an express waiver under CPA § 354. Pringle v Burroughs, 70 A.D. 12, 74 N.Y.S. 1055, 1902 N.Y. App. Div. LEXIS 648 (N.Y. App. Div. 1902).

Although a party may call his physician to state his condition after he receives certain injuries and the treatment which was given by him, yet the party does not waive his right to object to the testimony of an ambulance surgeon, who had charge of the party before he went under the care of the physician who testified. Duggan v Phelps, 82 A.D. 509, 81 N.Y.S. 916, 1903 N.Y. App. Div. LEXIS 1208 (N.Y. App. Div. 1903).

Where the plaintiff in an action for personal injuries calls as a witness a surgeon connected with the hospital to which he was taken after the accident, and examines such surgeon as to the nature and extent of his injuries, he waives the statutory privilege. Powers v Metropolitan S. R. Co., 105 A.D. 358, 94 N.Y.S. 184, 1905 N.Y. App. Div. LEXIS 2074 (N.Y. App. Div. 1905).

Where the plaintiff calls for a physician who testifies that after an accident he treated a woman for a nervous condition, the defendant upon cross-examination may show that he had treated her for nervousness before the accident, for the privilege is waived, especially so where the plaintiff's attorney in objecting to the cross-examination states that he is not claiming privilege. Marquardt v Brooklyn H. R. Co., 126 A.D. 272, 110 N.Y.S. 657, 20 N.Y. Ann. Cas. 281, 1908 N.Y. App. Div. LEXIS 3327 (N.Y. App. Div. 1908).

Where, in an action to recover for personal injuries the plaintiff has introduced testimony of her own physician, it is error to exclude testimony of another physician who was called in consultation with the plaintiff's physician showing the extent of the injuries; by calling one of the physicians, the plaintiff waived the privilege as to the other. Speck v International R. Co., 133 A.D. 802, 118 N.Y.S. 71, 1909 N.Y. App. Div. LEXIS 2277 (N.Y. App. Div. 1909).

After a physician has testified as to injuries received by plaintiff and treatment prescribed, defendant cannot show by another physician an examination made by him sometime after and not in connection with the visits of the first physician. Milligan v Clayville Knitting Co., 137 A.D. 383, 121 N.Y.S. 763, 1910 N.Y. App. Div. LEXIS 688 (N.Y. App. Div. 1910).

Plaintiff by examining her physician in detail as to her injuries and treatment for five months following injuries, waived her privilege and defendant could examine physician to show what

was discovered in examination immediately before trial. Patnode v Foote, 153 A.D. 494, 138 N.Y.S. 221, 1912 N.Y. App. Div. LEXIS 11109, 1912 N.Y. App. Div. LEXIS 9305 (N.Y. App. Div. 1912).

Plaintiff in a malpractice action, by calling as a witness a physician who had treated her, thereby waived the right to object to his examination touching her condition on the theory of privilege. Albers v Wilson, 201 A.D. 775, 195 N.Y.S. 145, 1922 N.Y. App. Div. LEXIS 6416 (N.Y. App. Div. 1922).

A decedent by requesting physicians called to examine her as to sanity to witness her will, expressly waives her privilege of objecting to information acquired by such examination. In re Will of Freeman, 46 Hun 458, 12 N.Y. St. 175 (N.Y.).

In action for decedent's death at hands of mentally deranged war veteran, privileged character of Veterans' Administration files was waived by interrogating physician attached to staff of such Administration who had previously examined deranged veteran who killed plaintiff's decedent. Fahey v United States, 18 F.R.D. 231, 1955 U.S. Dist. LEXIS 4097 (D.N.Y. 1955).

**92. Waiver by failure to object**

Failure to object to physician's testimony in a civil action is also a waiver as to the same evidence in a subsequent criminal trial. People v Bloom, 193 N.Y. 1, 85 N.E. 824, 193 N.Y. (N.Y.S.) 1, 1908 N.Y. LEXIS 618 (N.Y. 1908).

Where a party fails to object to the testimony of a surgeon who performed an operation on him, he thereby waives the privilege as to another surgeon who assisted; disclosure by a party in his complaint and testimony of the details of his physical condition operates as a waiver of the statute, and he forfeits his right to object to the testimony of the surgeon who treated him afterwards. Capron v Douglass, 193 N.Y. 11, 85 N.E. 827, 193 N.Y. (N.Y.S.) 11, 1908 N.Y. LEXIS 619 (N.Y. 1908).

In an action for personal injuries where the physician of the plaintiff was called by the defendant without objection and a non-suit followed, the plaintiff is precluded from objecting that the physician is incompetent to testify on behalf of the defendant on a new trial of the action, as the act of the plaintiff in permitting the physician to testify upon the first trial was a waiver of her right to object to his competency. Schlotterer v Brooklyn & N. Y. Ferry Co., 89 A.D. 508, 85 N.Y.S. 847, 1903 N.Y. App. Div. LEXIS 3794 (N.Y. App. Div. 1903).

Waiver must be express and physician cannot testify against a defaulting defendant simply because his testimony is not objected to. Weil v Weil, 151 A.D. 622, 136 N.Y.S. 190, 1912 N.Y. App. Div. LEXIS 7800 (N.Y. App. Div. 1912).

Waiver cannot be predicated upon failure to object to testimony in a prior action. Wallace v Wallace, 158 A.D. 273, 143 N.Y.S. 1148, 1913 N.Y. App. Div. LEXIS 8037 (N.Y. App. Div. 2d Dep't 1913), aff'd, 216 N.Y. 28, 109 N.E. 872, 216 N.Y. (N.Y.S.) 28, 1915 N.Y. LEXIS 769 (N.Y. 1915).

A waiver of the privilege accorded information acquired by a physician in his professional capacity may arise by sufferance, as when a failure to object to the testimony of one attending physician will be deemed a waiver of the privilege surrounding that of another. Hughes v Kackas, 3 A.D.2d 402, 161 N.Y.S.2d 541, 1957 N.Y. App. Div. LEXIS 5880 (N.Y. App. Div. 3d Dep't 1957).

Where statements of a physician were submitted without protest, they constituted admissions and did not violate CPA § 354. Emanuele v Metropolitan Life Ins. Co., 242 N.Y.S. 715, 137 Misc. 542, 1930 N.Y. Misc. LEXIS 1346 (N.Y. City Ct. 1930).

In an action against the state for injuries to inmate of a state hospital, a pretrial examination of the hospital staff was granted as to all reports and investigations made by the state hospital but during the examination the state properly objected to questions on the ground that reports and investigations were privileged and such objection is not waived by the failure to raise it when the

order for examination was granted. Castiglione v State, 8 Misc. 2d 932, 169 N.Y.S.2d 145, 1956 N.Y. Misc. LEXIS 1664 (N.Y. Ct. Cl. 1956).

**93. Waiver by order or stipulation**

In action by public administrator against state for death of state hospital patient from fall while in hospital, judge of court of claims may authorize inspection of hospital records as to mental and physical condition of patient and facts surrounding accident. In re Warrington, 303 N.Y. 129, 100 N.E.2d 170, 303 N.Y. (N.Y.S.) 129, 1951 N.Y. LEXIS 696 (N.Y. 1951).

Where a husband sues to annul his marriage on the ground of the physical incapacity of his wife and moves for a physical examination before trial, and the defendant replies that she has been examined by three physicians whose privilege she will waive, the court in denying the motion should require a stipulation waiving the privilege to be signed by the attorneys of the parties. Geis v Geis, 116 A.D. 362, 101 N.Y.S. 845, 1906 N.Y. App. Div. LEXIS 2674 (N.Y. App. Div. 1906).

As the privilege of a physician from testifying against a patient can be waived prior to trial only by a stipulation of the attorneys of the respective parties, an order denying a physical examination before trial on condition that the defendant waive the privilege of physicians who had already examined her, should provide that the stipulation for such waiver be signed by the attorneys for the parties. Geis v Geis, 116 A.D. 362, 101 N.Y.S. 845, 1906 N.Y. App. Div. LEXIS 2674 (N.Y. App. Div. 1906).

Order for physical examination of defendant wife in annulment action reversed on her stipulation to waive privilege. Ga Nun v Ga Nun, 274 A.D. 808, 79 N.Y.S.2d 802, 1948 N.Y. App. Div. LEXIS 3456 (N.Y. App. Div. 1948).

Statutory privilege under CPA § 352 could have been waived by filing stipulation pursuant to CPA § 354. Ga Nun v Ga Nun, 274 A.D. 808, 79 N.Y.S.2d 802, 1948 N.Y. App. Div. LEXIS 3456 (N.Y. App. Div. 1948).

In an action for annulment based on husband's premarital fraudulent concealment of mental illness, wife was entitled to examine him, but he could obviate the examination if he authorized his attorney to sign stipulation waiving his statutory privilege as to the testimony of his doctors. O'Connor v O'Connor, 12 A.D.2d 627, 208 N.Y.S.2d 343, 1960 N.Y. App. Div. LEXIS 6703 (N.Y. App. Div. 2d Dep't 1960).

Court may authorize will contestants to inspect hospital records showing mental state of decedent who entered hospital soon after making alleged will. In re Grabau's Will, 85 N.Y.S.2d 748, 193 Misc. 859, 1948 N.Y. Misc. LEXIS 3856 (N.Y. Sur. Ct. 1948).

**94. Calling one of two or more attending physicians**

Where a party who had been attended by two physicians at the same examination calls one of them as a witness to testify as to what took place at that time, he thereby waives the privilege conferred and cannot object to testimony of the other physician as to the same transaction. Morris v New York, O. & W. R. Co., 148 N.Y. 88, 42 N.E. 410, 148 N.Y. (N.Y.S.) 88, 2 N.Y. Ann. Cas. 293, 1895 N.Y. LEXIS 744 (N.Y. 1895).

Where, in an action to recover upon policies of disability insurance, the plaintiff called a physician as a witness who testified that plaintiff had for several months been suffering from a stated disease, he thereby waived the protection of CPA § 352 and it was error to exclude testimony of other physicians who had treated him, offered by defendant for the purpose of establishing that he was suffering from the same disease at the time of his signing applications for the policies. A contention that though it was proper to permit testimony by defendant's witnesses as to plaintiff's condition during the period referred to by the physician called by him it would have been erroneous to allow testimony by them as to his condition prior to that time, cannot be sustained. Disclosure of the fact that plaintiff had suffered from the disease for a longer period than that testified to by his witness would not cause him additional humiliation, mortification or disgrace. Steinberg v New York Life Ins. Co., 263 N.Y. 45, 188 N.E. 152, 263 N.Y. (N.Y.S.) 45, 1933 N.Y. LEXIS 795 (N.Y. 1933).

Where plaintiff in an action to recover damages for personal injuries alleged to have resulted from his ejection from a train called as a witness his own physician to testify as to the conditions disclosed by his examination of plaintiff three days after the alleged injury, he thereby waived his right to object to the admission of the testimony of another physician who examined him on the morning after the alleged injury, and the exclusion of such physician's testimony was reversible error. Fennelly v Schenectady R. Co., 201 A.D. 211, 193 N.Y.S. 641, 1922 N.Y. App. Div. LEXIS 6288 (N.Y. App. Div. 1922).

**95. Evidence elicited by adversary as waiver**

While the privilege accorded information acquired by a physician in his professional capacity may be waived by a party, either by his own testimony or by that of others given with his knowledge and consent, his act of disclosure, although it may be minimal, must be voluntary and it is not voluntary when he is called by his adversary or becomes the latters' witness on cross-examination. Hughes v Kackas, 3 A.D.2d 402, 161 N.Y.S.2d 541, 1957 N.Y. App. Div. LEXIS 5880 (N.Y. App. Div. 3d Dep't 1957).

**96. Evidence received without objection as waiver as to other evidence**

A waiver of the privilege accorded information acquired by a physician in his professional capacity may arise by sufferance, as when a failure to object to the testimony of one attending physician will be deemed a waiver of the privilege surrounding that of another. Hughes v Kackas, 3 A.D.2d 402, 161 N.Y.S.2d 541, 1957 N.Y. App. Div. LEXIS 5880 (N.Y. App. Div. 3d Dep't 1957).

**97. Waiver by allegations of complaint**

Allegations in complaint are insufficient; waiver must be in open court on trial or by stipulation. Rubin v Equitable Life Assurance Soc., 269 A.D. 677, 53 N.Y.S.2d 351, 1945 N.Y. App. Div. LEXIS 3216 (N.Y. App. Div. 1945).

### 98. Answering adversary's charges before commencement of action as waiver

Where plaintiff charged defendant in an action for annulment with being addicted to narcotics and defendant prior to trial furnished doctor's affidavit that she was not so addicted, defendant did not by those acts waive her privilege on the trial as to her hospital record and medical testimony. Baxter v Baxter, 11 Misc. 2d 69, 169 N.Y.S.2d 871, 1957 N.Y. Misc. LEXIS 2005 (N.Y. Sup. Ct. 1957).

## E. Actions And Proceedings Within Section

### 99. Generally

The statutory privilege might be asserted whenever the power of a court was invoked in the manner authorized by article 33 of the Civil Practice Act to compel a witness to disclose information which under other provisions of the same article he was forbidden to disclose. New York City Council v Goldwater, 284 N.Y. 296, 31 N.E.2d 31, 284 N.Y. (N.Y.S.) 296, 1940 N.Y. LEXIS 838 (N.Y. 1940).

### 100. Examinations before trial

CPA § 352 applied to examination before trial. Kriebel v Commercial Travelers Mut. Acc. Ass'n, 63 N.Y.S.2d 282, 1946 N.Y. Misc. LEXIS 2365 (N.Y. Sup. Ct. 1946).

In absence or denial of waiver of privilege, physician should not be examined before trial as to statements by decedent to physician as to whether patient had attempted suicide. Levine v Grey, 63 N.Y.S.2d 284, 1946 N.Y. Misc. LEXIS 2366 (N.Y. Sup. Ct. 1946).

### 101. Automobile negligence action

In action for death of passenger, defendant's statement to his physician, that he drove colliding car was not privileged. Munson v Model Taxi Corp., 273 A.D. 1039, 78 N.Y.S.2d 629, 1948 N.Y. App. Div. LEXIS 5866 (N.Y. App. Div.), app. denied, 274 A.D. 1016, 85 N.Y.S.2d 323, 1948 N.Y. App. Div. LEXIS 4486 (N.Y. App. Div. 1948).

**102. Traffic law and criminal proceedings arising from operation of motor vehicle**

In a criminal negligence action, statements of defendant's doctor that he had previously warned defendant not to drive, which warnings were necessary for the purpose of treatment of defendant's epilepsy were therefore privileged. It was improper to present this testimony to the Grand Jury. People v Eckert, 2 N.Y.2d 126, 157 N.Y.S.2d 551, 138 N.E.2d 794, 1956 N.Y. LEXIS 630 (N.Y. 1956).

Blood specimen, taken from motorist, charged with driving while intoxicated, to determine alcoholic content, did not disqualify physician from testifying where blood was tested by pathologist. People v Barnes, 98 N.Y.S.2d 481, 197 Misc. 477, 1950 N.Y. Misc. LEXIS 1787 (N.Y. County Ct. 1950).

CPA § 352 applied to both criminal and civil actions, hence a doctor who first treated defendant after the accident could not testify in the prosecution for criminally negligent operation of motor vehicle. People v Fyfe, 6 Misc. 2d 524, 166 N.Y.S.2d 976, 1957 N.Y. Misc. LEXIS 3445 (N.Y. County Ct. 1957).

**103. Criminal proceedings**

On the trial of an indictment for murder, for poisoning one W, a physician who was called to attend W, while sick from the poison, was examined as a witness for the prosecution and stated what he learned from his own examination and the statements of W, although the objection was taken under this section. Held, that the ruling was correct; that the object of the statute was to

protect the patient; and a conviction was affirmed. Pierson v People, 79 N.Y. 424, 79 N.Y. (N.Y.S.) 424, 1880 N.Y. LEXIS 13 (N.Y. 1880).

The statutory privilege was not conferred to shield a person charged with the murder of the patient. People v Harris, 136 N.Y. 423, 33 N.E. 65, 136 N.Y. (N.Y.S.) 423, 1893 N.Y. LEXIS 615 (N.Y. 1893).

In murder prosecution, admissions in defendant's statement to doctor, called into case by district attorney without defendant's knowledge, were improperly received in evidence. People v Leyra, 302 N.Y. 353, 98 N.E.2d 553, 302 N.Y. (N.Y.S.) 353, 1951 N.Y. LEXIS 732 (N.Y. 1951).

Judgment of conviction should not have been reversed because of alleged error in the admission of evidence that defendant, while critically injured and awaiting treatment, told attending physician that he suffered the injuries after a fall, since information was not necessary to enable physician to act in that capacity. People v Runion, 3 N.Y.2d 637, 170 N.Y.S.2d 836, 148 N.E.2d 165, 1958 N.Y. LEXIS 1255 (N.Y.), cert. denied, 356 U.S. 963, 78 S. Ct. 1003, 2 L. Ed. 2d 1070, 1958 U.S. LEXIS 1089 (U.S. 1958).

The privilege of physicians does not apply to criminal prosecution for causing death of the patient, and a physician may state what he learned as to the physical condition of the patient by examination. People v Brecht, 120 A.D. 769, 105 N.Y.S. 436, 1907 N.Y. App. Div. LEXIS 1307 (N.Y. App. Div. 1907), aff'd, 192 N.Y. 581, 85 N.E. 1114, 192 N.Y. (N.Y.S.) 581, 1908 N.Y. LEXIS 1003 (N.Y. 1908).

On the trial of a defendant for the crime of assault in the second degree, in that he shot a woman with a pistol with intent to kill, testimony of a physician who, upon examination and treatment of the victim, found a bullet wound in her body and extracted the bullet, was admissible under CPA § 352. People v Lay, 254 A.D. 372, 5 N.Y.S.2d 325, 1938 N.Y. App. Div. LEXIS 6423 (N.Y. App. Div. 1938), aff'd, 279 N.Y. 737, 18 N.E.2d 686, 1939 N.Y. LEXIS 903 (N.Y. 1939).

The privilege provided by CPA § 353 (§ 4503(a) herein) applies to investigations of grand jury which could not require hospital superintendent to permit inspection by grand jury of all hospital records in abortion cases. Application of Grand Jury of County of Kings, 286 A.D. 270, 143 N.Y.S.2d 501, 1955 N.Y. App. Div. LEXIS 4026 (N.Y. App. Div. 1955).

Statements of a deceased to her physician are not privileged where they tend to disprove murder. People v Benham, 63 N.Y.S. 923, 30 Misc. 466, 1900 N.Y. Misc. LEXIS 92 (N.Y. Sup. Ct. 1900).

Confidential communications relating to abortions were not excluded from privileges accorded by CPA § 352 forbidding physicians to disclose confidential information acquired by them while attending patients in professional capacity, despite Sanitary Code of New York City requiring information in cases of abortion or miscarriage where criminal practice was suspected to be turned over to health department. In re Abortions in County of Kings, 135 N.Y.S.2d 381, 206 Misc. 830, 1954 N.Y. Misc. LEXIS 3006 (N.Y. County Ct. 1954), aff'd, 286 A.D. 270, 143 N.Y.S.2d 501, 1955 N.Y. App. Div. LEXIS 4026 (N.Y. App. Div. 1955).

The exclusion of hospital record disclosing certain information acquired by physicians or nurses is statutory only and although it survives the death of patient and is applicable to preliminary proceedings as well as to trial, it may be invoked in criminal case only by the patient and then only if the testimony tends to prove the guilt of the defendant as withholding such evidence, if it tends to disprove the crime, may violate due process and under no circumstances may the People invoke the physician-patient privilege. People v Preston, 13 Misc. 2d 802, 176 N.Y.S.2d 542, 1958 N.Y. Misc. LEXIS 2908 (N.Y. County Ct. 1958).

Upon trial of an indictment for assisting in procuring a miscarriage. Held, that statements made by defendant to the physician when he called to attend the woman when dangerously ill, in reply to his inquiries and to enable him to prescribe, were privileged. People v Brower, 6 N.Y.S. 730, 53 Hun 217, 1889 N.Y. Misc. LEXIS 749 (N.Y. Sup. Ct. 1889).

**104. Action on policy of insurance**

In an action upon a life insurance policy which contained a clause avoiding it in case insured committed suicide it appeared that insured hanged himself. Plaintiff claimed that he was insane at the time. A physician who attended deceased shortly before his death was asked as a witness by plaintiff “how did you find him?” Objected to and objection overruled. Held, error. Westover v Aetna Life Ins. Co., 99 N.Y. 56, 1 N.E. 104, 99 N.Y. (N.Y.S.) 56, 2 How. Pr. (n.s.) 184, 1885 N.Y. LEXIS 751 (N.Y. 1885).

The attending physician of the assured during his last illness is incompetent to testify in an action on a policy to any knowledge acquired as such attending physician which was necessary to enable him to treat his patient but he may testify that he treated his patient professionally and give the dates of such attendance. Patten v United Life & Acc. Ins. Ass'n, 133 N.Y. 450, 31 N.E. 342, 133 N.Y. (N.Y.S.) 450, 1892 N.Y. LEXIS 1335 (N.Y. 1892).

Ins L § 149, subd 4, providing that beneficiary’s prevention of proof of nature of ailment represented makes prima facie case of misrepresentation applied where physician testified that he treated insured for something other than such ailment represented. Siebern v Mutual Life Ins. Co., 269 A.D. 846, 55 N.Y.S.2d 603, 1945 N.Y. App. Div. LEXIS 4212 (N.Y. App. Div.), app. denied, 269 A.D. 942, 57 N.Y.S.2d 847, 1945 N.Y. App. Div. LEXIS 4664 (N.Y. App. Div. 1945).

**105. Action by physician for services**

Legislature did not intend to deprive a physician of his cause of action for services if he could prove them by proper evidence. Schamberg v Whitman, 135 N.Y.S. 262, 75 Misc. 215, 1912 N.Y. Misc. LEXIS 643 (N.Y. City Ct.), aff'd, 151 A.D. 939, 135 N.Y.S. 1141, 1912 N.Y. App. Div. LEXIS 8336 (N.Y. App. Div. 1912).

**106. Legislative investigations**

Privilege provided by CPA § 352 applies to legislative investigations. New York City Council v Goldwater, 284 N.Y. 296, 31 N.E.2d 31, 284 N.Y. (N.Y.S.) 296, 1940 N.Y. LEXIS 838 (N.Y. 1940).

**107. Lunacy or habitual drunkard proceedings**

The physician-patient privilege is inapplicable to incompetency proceedings. In re Allen, 24 Misc. 2d 763, 204 N.Y.S.2d 876, 1960 N.Y. Misc. LEXIS 3019 (N.Y. Sup. Ct. 1960), app. dismissed, 13 A.D.2d 473, 217 N.Y.S.2d 478, 1961 N.Y. App. Div. LEXIS 12068 (N.Y. App. Div. 1st Dep't 1961).

CPA § 352 did not apply to an inquisition in lunacy. In re Benson, 16 N.Y.S. 111, 1891 N.Y. Misc. LEXIS 343 (N.Y. County Ct.), app. dismissed, 17 N.Y.S. 603, 61 Hun 624, 1891 N.Y. Misc. LEXIS 732 (N.Y. Sup. Ct. 1891).

CPA § 352 was applicable to the affidavit of a physician made for purpose of supporting application for appointment of a committee of a lunatic or habitual drunkard. 46 Hun 677, 11 N.Y. St. 889.

**108. Will probate**

CPA § 352 applied to proceedings for the probate of a will and after the death of the patient it could not be waived by anyone. The fact, therefore, that a physician was called as a witness by an executor and proponent of a will, did not render him competent to disclose information acquired while attending testator. Loder v Whelpley, 111 N.Y. 239, 18 N.E. 874, 111 N.Y. (N.Y.S.) 239, 19 N.Y. St. 631, 1888 N.Y. LEXIS 1008 (N.Y. 1888).

Court order may authorize will contestants to inspect hospital records showing mental state of decedent who entered such hospital soon after making alleged will. In re Grabau's Will, 85 N.Y.S.2d 748, 193 Misc. 859, 1948 N.Y. Misc. LEXIS 3856 (N.Y. Sur. Ct. 1948).

The family physician, on probate of a will can testify to family events in no way connected with physical complaints and which were not obtained for the purpose of treating a patient. Re Boury, 8 N.Y. St. 809.

**109. Workmen's compensation**

Public policy permits use of hospital records relating to compensation claimant's mental condition. Petition of Maryland Casualty Co., 274 A.D. 211, 80 N.Y.S.2d 181, 1948 N.Y. App. Div. LEXIS 3041 (N.Y. App. Div. 1948).

## Opinion Notes

**Agency Opinions**

**1. In general**

Both the State Commissioner of Mental Hygiene and a Community Health Board, in reviewing and evaluating community mental health services, may inspect records of patients served by such facilities, but the names of the particular patients should be kept confidential. 1972 NY Ops Atty Gen June 22 (Informal), 1972 N.Y. AG LEXIS 105.

## Research References & Practice Aids

**Cross References:**

This section referred to in CLS Educ § 1007.; Soc Ser § 384-b.; Fam Ct Act § 1046.

Spouse, § 4502.

Attorney, § 4503.

Evidence, CLS Fam Ct Act § 1046.

**Federal Aspects:**

General rule for privileges in United States courts, USCS Court Rules, Federal Rules of Evidence, Rule 501.

**Jurisprudences:**

32 NY Jur 2d Criminal Law § 1090. .

35B NY Jur 2d Criminal Law § 4818. .

36 NY Jur 2d Death § 26. .

44 NY Jur 2d Disclosure §§ 70., 79., 80., 82., 168. .

47A NY Jur 2d Domestic Relations § 1732. .

57 NY Jur 2d Evidence and Witnesses §§ 3., 109. .

58 NY Jur 2d Evidence and Witnesses §§ 456., 490. .

58A NY Jur 2d Evidence and Witnesses §§ 855., 881., 883., 884., 887., 890., 891., 896. .

76 NY Jur 2d Malpractice §§ 286, 290, 321.

94 NY Jur 2d Schools, Universities, and Colleges § 401. .

81 Am Jur 2d, Witnesses §§ 436., 471.

19B Am Jur Pl & Pr Forms (Rev ed), Physicians, Surgeons, and Other Healers, Forms 171.–173.

17 Am Jur Proof of Facts 785., Privileged Communications Between Physician and Patient.

116 Am Jur Proof of Facts 3d 1., Health Care Provider’s Wrongful Disclosure of Confidential Medical Information.

6 Am Jur Trials 423., Collateral Cross-Examination of Medical Witness.

**Causes of Action:**

Cause of Action Against Physician or Other Health Care Practitioner for Wrongful Disclosure of Confidential Patient Information. 36 COA2d 299.

**Law Reviews:**

Toward a New York evidence code: some notes on the privileges. 19 N.Y.L. Sch. L. Rev. 791.

**Treatises**

**Matthew Bender's New York Civil Practice:**

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 4504, Physician, Dentist, Podiatrist, Chiropractor and Nurse.

1 Carrieri, Lansner, New York Civil Practice: Family Court Proceedings § 3.06; 2 Carrieri, Lansner, New York Civil Practice: Family Court Proceedings §§ 31.10; 3 Carrieri, Lansner, New York Civil Practice: Family Court Proceedings § 38A.06; 4 Carrieri, Lansner, New York Civil Practice: Family Court Proceedings § 65.07.

2 Lansner, Reichler, New York Civil Practice: Matrimonial Actions §§ 35.04, 35A.05; 4 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 66.09.

3 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶ 1403.06, 1404.11, 1407.07.

**Matthew Bender's New York CPLR Manual:**

CPLR Manual § 9.06. Guardian of Incapacitated Adult.

CPLR Manual § 20.02. Scope of disclosure.

CPLR Manual § 34.02. Sealing of court records.

**Matthew Bender's New York Practice Guides:**

1 New York Practice Guide: Domestic Relations § 12.06; 2 New York Practice Guide: Domestic Relations § 34.10.

LexisNexis Practice Guide New York e-Discovery and Evidence § 9.05. Objecting Based on Privilege.

**Matthew Bender's New York AnswerGuides:**

Lexis Nexis AnswerGuide New York Civil Disclosure § 8.13. Asserting Medial or Physician-Patient Privilege.

LexisNexis AnswerGuide New York Civil Litigation § 6.13. Applying Statutory Privileges.

LexisNexis AnswerGuide New York Civil Litigation § 10.04. Protecting Privileged Communications.

LexisNexis AnswerGuide New York Negligence § 7.06. Choosing Appropriate Basis of Liability.

**Matthew Bender's New York Evidence:**

Bender's New York Evidence § 101.09. Privileges.

1 Bender's New York Evidence 101AppA.06. Persons From Whom Disclosure May Be Obtained.

Bender's New York Evidence § 149.04 .Other Evidentiary Rules Applicable to Exclude Records; In General.

4 Bender's New York Evidence § 160.03. Physician-Patient Privilege.

Bender's New York Evidence § 160.01. Evidentiary Privileges.

**Annotations:**

Construction and effect of statute removing or modifying, in personal injury actions, patient's privilege against disclosure by physician. 25 ALR2d 1429.

Evidence: privilege of communications by or to nurse or attendant. 47 ALR2d 742.

Waiver of privilege as regards one physician as a waiver as to other physicians. 5 ALR3d 1244.

Applicability in criminal proceedings of privilege as to communications between physician and patient. 7 ALR3d 1458.

Physician's tort liability, apart from defamation, for unauthorized disclosure of confidential information about patient. 20 ALR3d 1109.

Commencing action involving physical condition of plaintiff or decedent as waiving physician-patient privilege as to discovery proceedings. 21 ALR3d 912.

Admissibility of physician's testimony as to patient's statements or declarations, other than res gestae, during medical examinations. 37 ALR3d 778.

Admissibility of physiological or psychological truth and deception test or its results to support physician's testimony. 41 ALR3d 1369.

Privilege, in judicial or quasi-judicial proceedings, arising from relationship between psychiatrist or psychologist and patient. 44 ALR3d 24.

Physician-patient privilege as extending to patient's medical or hospital records. 10 ALR4th 552.

What constitutes physician-patient relationship for malpractice purposes. 17 ALR4th 132.

Liability of doctor, psychiatrist, or psychologist for failure to take steps to prevent patient's suicide. 17 ALR4th 1128.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor. 43 ALR4th 395.

Validity, construction, and application of statute limiting physician-patient privilege in judicial proceedings relating to child abuse or neglect. 44 ALR4th 649.

Physician's tort liability for unauthorized disclosure of confidential information about patient. 48 A.L.R.4th 668.

Insured-insurer communications as privileged. 55 A.L.R.4th 336.

Scope and extent of protection from disclosure of medical peer review proceedings relating to claim in medical malpractice action. 69 ALR5th 559.

Situations in which federal courts are governed by state law of privilege under Rule 501 of the Federal Rules of Evidence. 48 ALR Fed 259.

**Matthew Bender's New York Checklists:**

Checklist for Evaluating Limitations on Disclosure LexisNexis AnswerGuide New York Civil Litigation § 6.12.

Checklist for Protecting Privileged Communications LexisNexis AnswerGuide New York Civil Litigation § 10.02.

**Forms:**

Bender's Forms for the Civil Practice Form No. CPLR 4503:1 et seq.

LexisNexis Forms FORM 75-CPLR 4504:1.—Waiver of Privileged Communication Made to Physician, Dentist, Podiatrist, Chiropractor or Nurse.

LexisNexis Forms FORM 75-CPLR 4504:2.—Stipulation Waiving Privileged Communication Made to Physician, Dentist, Podiatrist, Chiropractor or Nurse.

LexisNexis Forms FORM 521-35-11.—Interrogatories of Defendant-Physician in an Obstetrical Malpractice Case.

LexisNexis Forms FORM 521-35-14.—Deposition of a Defendant-Physician.

LexisNexis Forms FORM 521-35-15.—Deposition of a Physician-Expert.

**Texts:**

New York Criminal Practice Ch 34.

Jonakait, Baer, Jones, & Imwinkelried, New York Evidentiary Foundations (Michie), Ch 7 .Privileges and Similar Doctrines.

NY Pattern Jury Instructions 3d, PJI 1:76.

1 New York Trial Guide (Matthew Bender) §§ 7.23., 7.51.; 2 New York Trial Guide (Matthew Bender) § 22.30.; 3 New York Trial Guide (Matthew Bender) §§ 51.01., 51.11., 51.12., 51.15.; 4 New York Trial Guide (Matthew Bender) § 60.30.

**Hierarchy Notes:**

NY CLS CPLR, Art. 45

## Forms

**Forms**

**Stipulation Waiving Privilege of Testimony of Physician**

[Nature of paper and

[Title of court and cause] index no._____, if assigned]

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the provisions of Civil Practice Law and Rules, section 4504, are hereby waived in so far as said section prevents Dr. _____, from disclosing upon the [examination before] trial of [in] this action any information acquired in attending the plaintiff in a professional capacity, or otherwise rendering him incompetent as a witness in any way whatsoever.

It is further stipulated that on said trial [or, examination] said Dr. _____ may testify concerning the health and physical condition, past, present, and future of plaintiff.

[Date]

_____

[Print signer’s name

below signature]

Attorney for plaintiff

_____

[Print signer’s name

below signature]

Attorney for defendant



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