Virginia Code § 8.01-399 – Applying the physician-patient privilege when representing defendants in personal injury cases.

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I. Introduction

This article is intended to address the impact of Virginia Code Section 8.01-399 on civil litigation in Virginia. First, a brief historical perspective of the physician-patient privilege and its role in civil litigation is set out. Second, decisions by the Supreme Court of Virginia and the circuit courts interpreting the current statutory language are considered.

II. History of the physician-patient privilege and Virginia Code Section 8.01-399

Common law did not recognize a physician-patient privilege.[1] The failure of the common law to provide for a privilege is perhaps best explained or justified by both the idea that medical confidentiality is really a question of medical ethics[2] and the long-standing notion that in litigation there is a duty to disclose and a mandate to allow one to investigate for the truth. It is a battle of competing legal principles, similar to the competing principles in the attorney-client privilege.

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[1] Pierce v. Caday, 244 Va. 285, 289, 422 S.E.2d 371, 373 (1992).
[2] "What I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself holding such things shameful to be spoken about." Ludwig Edelstein, The Hippocratic Oath: Text, Translation, and Interpretation (Johns Hopkins Press 1943).

With respect to the general duty to disclose, there is a fundamental principle behind civil litigation that requires the search for truth.[3] In his criticism of the physician-patient privilege, Wigmore has long noted that "[i]t is certain that the practical employment of the privilege has come to mean little but the suppression of useful truth . . . [i]n all of these medical testimony is absolutely needed for the purpose of learning the truth. In none of them is there any reason for the party to conceal the facts, except as a tactical maneuver in litigation."[4] The latter principle more likely than not lead to the exception in Virginia that once a medical condition is at issue in litigation, the plaintiff's medical records are discoverable if relevant to the condition which gave rise to the suit. This has been recognized as an improvement over other jurisdictions which have not adopted this exception.[5] Wigmore would approve of Virginia's exception because it still protects the confidentiality of the patients medical records, but waives the privilege because there is no reason to conceal the facts when the patient's condition is at issue.

Medical confidentiality has historically been enacted through state legislation. Virginia's current legislative embodiment of this principle is found in Virginia Code Section 8.01-399.[6]

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[3] ERIC D. GREEN ET AL., PROBLEMS, CASES, AND MATERIALS ON EVIDENCE 601 (2000).
[4] 8 WIGMORE, EVIDENCE, § 2380, at 831-32 (McNaughton Rev. 1961).
[5] *Id.*
[6] VA. CODE ANN. § 8.01-399 (Repl. Vol. 2002 & Cum. Supp. 2003).

A) Except at the request or with the consent of the patient, or as provided in this section, no duly licensed practitioner of any branch of the healing arts shall be required to testify in any civil action, respecting any information that he may have acquired in attending, examining or treating the patient in a professional capacity.

B) If the physical or mental condition of the patient is at issue in a civil action, the diagnosis or treatment plan of the practitioner, as documented in the patient's medical record, during the time of the practitioner's treatment, together with the facts communicated to, or otherwise learned by, such practitioner in connection with such attendance, examination or treatment shall be disclosed but only in discovery pursuant to the Rules of Court or through testimony at the trial of the action. In addition, disclosure may be ordered when a court, in the exercise of sound discretion, deems it necessary to the proper administration of justice. However, no order shall be entered compelling a party to sign a release for medical records from a health

care provider unless the health care provider is not located in the Commonwealth or is a federal facility. If an order is issued pursuant to this section, it shall be restricted to the medical records that relate to the physical or mental conditions at issue in the case. No disclosure of diagnosis or treatment plan facts communicated to, or otherwise learned by, such practitioner shall occur if the court determines, upon the request of the patient, that such facts are not relevant to the subject matter involved in the pending action or do not appear to be reasonably calculated to lead to the discovery of admissible evidence. Only diagnosis offered to a reasonable degree of medical probability shall be admissible at trial.

C) This section shall not (i) be construed to repeal or otherwise affect the provisions of §65.2-607 relating to privileged communications between physicians and surgeons and employees under the Workers' Compensation Act, (ii) apply to information communicated to any such practitioner in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug, or (iii) prohibit a duly licensed practitioner of the healing arts, or his agents, from disclosing information as required by state of federal law.

D) Neither a lawyer nor anyone acting on the lawyer's behalf shall obtain, in connection with pending or threatened litigation, information concerning a patient from a practitioner of any branch of the healing arts without the consent of the patient, except through discovery pursuant to the Rules of the Court as herein provided. However, the prohibition of this subsection shall not apply to:

1. Communication between a lawyer retained to represent a practitioner of the healing arts, or that lawyer's agent, and that practitioner's employers, partners, agents, servants, employees, co-employees or others for whom, at law, the practitioner is or may be liable or who, at law, are or may be liable for the practitioner's acts or omissions;
2. Information about a patient provided to a lawyer or his agent by a practitioner of the healing arts employed by that lawyer to examine or evaluate the patient in accordance with Rule 4:10 of the Rules of the Supreme Court; or
3. Contact between a lawyer or his agent and a non-physician employee or agent of a practitioner of healing arts for any of the following purposes: (i) scheduling appearances, (ii) requesting a written recitation by the practitioner of handwritten records obtained by the lawyer or his agent from the practitioner, provided the request is made in writing and, if litigation is pending, a copy of the request and the practitioner's response is provided simultaneously to the patient or his attorney, (iii) obtaining information necessary to obtain service upon the practitioner in pending litigation, (iv) determining when records summoned will be provided by the practitioner or his agent, (v) determining what patient records the practitioner possesses in order to summons records in pending litigation, (vi) explaining any summons that the lawyer or his agent caused to be issued and served on the practitioner, (vii) verifying dates the practitioner treated the patient, provided that if litigation is pending the information obtained by the lawyer or his agent is promptly given, in writing, to the patient or his attorney, (viii) determining charges by the practitioner for appearance at a deposition or to testify before any tribunal or administrative body, or (ix) providing to or obtaining from the practitioner directions to a place to which he is or will be summoned to give testimony.

E) A clinical psychologist duly licensed under the provisions of Chapter 36 (§ 54.1-3600 et seq.) of Title 54.1 shall be considered a practitioner of a branch of the healing arts within the meaning of this section.

F) Nothing herein shall prevent a duly licensed practitioner of the healing arts, or his agents, from disclosing any information that he may have acquired in attending, examining or treating a patient in a professional capacity where such disclosure is necessary in connection with the care of the patient, the protection or enforcement of the practitioner's legal rights including such rights with respect to medical malpractice actions, or the operations of a health care facility or health maintenance organization or in order to comply with state or federal law.

Id. § 8.01-399.

The statutory language has not changed substantially since the statute was first enacted by the General Assembly in 1956.[7] The Supreme Court of Virginia has recognized that the legislature has enacted a qualified statutory physician-patient privilege expressly confined to civil proceedings.[8] This has been interpreted by the Court to be an evidentiary rule restricted to testimony in civil actions.[9]

Our Supreme Court recognizes that the element of confidentiality "is an integral aspect of the relationship between a health care provider and a patient, and often, to give the health care provider the necessary information to provide proper treatment, the patient must reveal the most intimate aspects of his or her life to the health care provider during the course of treatment."[10]

III. 8.01-399(B) - The privilege is waived when the condition of the patient is at issue.

The physician-patient privilege is codified by statute in Section 8.01-399(A); however, when the plaintiff files suit, she waives her right to assert the privilege. By filing suit and putting her medical condition at issue, the plaintiff loses any expectation of

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[7] VA. CODE ANN. § 8-289.1 (1956).

> Except at the request of, or with consent of, the patient, no duly licensed practitioner of any branch of the healing arts shall be required to testify in any civil action, suit or proceeding at law or in equity respecting any information which he may have acquired in attending, examining or treating a patient in a professional capacity if such information was necessary to enable him to furnish professional care to the patient; provided, however that when the physical or mental condition of the patient is at issue in such action, suit or proceeding or when a judge of a court of record, in the exercise of sound discretion, deems such disclosure necessary to the proper administration of justice, no fact communicated to, or otherwise learned by, such practitioner in connection with such attendance, examination or treatment shall be privileged and disclosure may be required.

Id. § 8-289.1.

[8] *Pierce*, 244 Va. at 289–290, 422 S.E.2d at 373.

[9] *Id.*

[10] Fairfax Hosp. v. Curtis, 254 Va. 437, 442, 492 S.E.2d 642, 644 (1997).

privacy regarding communications with the treating physicians.[11] The privilege is designed to prevent disclosure of the plaintiff's secret communications that she intended to keep between doctor and patient. Once the plaintiff files suit, the law treats this as a voluntarily disclosure of her medical condition. Once the plaintiff's medical condition is at issue, the plaintiff's medical records and her communications between doctor and patient must be disclosed, because the rationale underlying the privilege is destroyed and the privilege is waived.

A. What is the scope of the communications that can be disclosed by the patient's physician?

The treating physician may disclose the patient's medical record, along with the facts communicated by the patient, and his diagnosis and treatment plan as documented in the patient's medical record.[12] The scope of the information to be disclosed was changed by statute in 2002. Before 2002, Section 8.01-399(B) did not give a specific definition of the word "facts," which led to disputes about what information could be disclosed. *McCoy v. Gibson*[13] involved a circuit court's determination of whether a physician's diagnosis was a "fact" or an "opinion".[14]

The *McCoy* case is a good example of a dispute over whether a diagnosis is a fact or an opinion. In this case, the plaintiff sued the defendant over injuries that she alleges were sustained in an automobile accident in which they were involved. The plaintiff received medical attention from several physicians, including a local orthopedic surgeon, G. Edward Chappell, M.D. In the course to treating the plaintiff, Dr. Chappell opined

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[11] VA. CODE ANN. § 8.01-399(B) (Repl. Vol. 2002 & Cum. Supp. 2003). *See* City of Portsmouth v. Cilumbrello, 204 Va. 11, 129 S.E.2d 31 (1963).
[12] VA. CODE ANN. § 8.01-399(B) (Repl. Vol. 2002 & Cum. Supp. 2003).
[13] 52 Va. Cir. 400 (2000) (Rockingham County).
[14] *Id*. at 400.

that her injuries were due to causes other than the automobile accident. As a result, the plaintiff did not designate Dr. Chappell as an expert medical witness for trial, but the defendant, in turn, did designate Dr. Chappell as her expert. The plaintiff objected to Dr. Chappell's opinion testimony on the grounds of the physician-patient privilege and Virginia Code Section 8.01-399. The essential issue was a determination of whether a treating physician's diagnosis was a "fact" or an "opinion". [15]

The Supreme Court had defined facts as "events within the personal knowledge and observation of the recorder."[16] The nebulous difference between "fact" and "opinion" is most acute in the medical field. A treating physician uses his personal knowledge, training, experience and observation of the patient's symptoms (facts) to reach a conclusion as to the patient's condition (opinion).[17] The diagnosis documented by a patient's treating physician is not a mere opinion, but a conclusion drawn from alleged facts, sometimes called the "collective facts rule". [18] The "collective facts rule" is used when a witness had "actual personal observation of the pertinent facts, [then] he may testify as to the impression which he gained from his personal observation."[19]

The General Assembly settled the dispute illustrated in *McCoy* by including the "diagnosis or treatment plan of the practitioner" as one of the communications that may be disclosed by the physician; however, the diagnosis opinion must be included in the patient's medical records and be "offered to a reasonable degree of medical probability."[20] The "proximate cause" of a plaintiff's injury is required to prove a prima facie case of

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[15] *Id*.
[16] Neely v. Johnson, 215 Va. 565, 571, 211 S.E.2d 100, 106 (1975).
[17] *See* Stigliano v. Connaught Lab., Inc., 658 A.2d 715, 719 (N.J. 1995).
[18] Chesapeake and Ohio Ry. Co. v. Arrington, 126 Va. 194 (1919). *See* Lafon v. Commonwealth, 17 Va. App. 411, 420 (1993).
[19] Virginia Ry and Power Co. v. Burr, 145 Va. 338, 352 (1926).
[20] 2002 Va. Acts ch. 308.

medical negligence, and a treating physician's belief as to the cause of the plaintiff's injury may be disclosed without violating the physician-patient privilege. In *Goodloe v. Sharpe*, Judge McGrath overturned his own earlier decision in *McCoy* and concluded, "since 'causation' is a part of 'diagnosis,' a treating physician may be compelled to provide expert evidence on the issue of causation."[21] The proximate cause of an injury or ailment is included in a treating physician's diagnosis and treatment plan.[22] But this evidence of causation must be included in the patient's medical records, or it is not a "fact" and only the physician's "opinion".

B. How are confidential communications properly disclosed?

If the physical or mental condition of the patient is at issue in a civil action, then the statute specifically states that privileged communications between a physician and his patient may only be disclosed "in discovery pursuant to the Rules of Court or through testimony at the trial of the action."[23] The reasoning behind restricting disclosure of the communications is the "sanctity of the physician-patient relationship and [there is] the inherent potential for abuse when court oversight is absent."[24] The statute allows disclosure in other cases "when a court . . . deems it necessary to the proper administration of justice."[25] However, this phrase has not been interpreted to give a court the discretion to allow disclosure by means other than through formal discovery.[26] This

[21] Goodloe v. Sharpe, 61 Va. Cir. 520, 523 (2003) (Rockingham County)
[22] "The practice of medicine includes the diagnosis and treatment of human physical ailments, conditions, diseases, pain and infirmities. The term 'diagnose' is defined as 'to determine the type and cause of a health condition on the basis of signs and symptoms of the patient.' Thus, the question of causation of a human injury is a component part of diagnosis, which in turn is part of the practice of medicine." John v. Im, 263 Va. 315, 321, 559 S.E.2d 694, 697 (2002) (internal citations omitted). Note that this opinion was decided after the General Assembly amended Virginia Code § 8.01-399(B), and added "diagnosis" to the statute.
[23] VA. CODE ANN. § 8.01-399(B) (Repl. Vol. 2002 & Cum. Supp. 2003). *See* McCauley v. Purdue Pharma, L.P., 224 F. Supp. 2d 1066 (2002).
[24] Curtis v. Fairfax Hosp., 36 Va. Cir. 35 (1995) (Fairfax County).
[25] VA. CODE ANN. § 8.01-399(B) (Repl. Vol. 2002 & Cum. Supp. 2003).
[26] *McCauley*, 224 F. Supp. 2d at 1069.

provision of the statute "allows a court to order disclosure of privileged information in other cases, i.e. in cases other than those in which the physical or mental condition of the patient is at issue."[27]

The patient may also consent to the release of his or her medical records, but this consent must comply with the provisions of Virginia Code Section 32.1-127.1:03(G).[28] The consent must include a description of the records to be disclosed, a discussion of the patient's rights including the waiver of them, and the signature of the patient along with the date the consent will expire.[29]

The privileged communications between a patient and his or her treating physician may be disclosed only through formal discovery, which is governed by Part Four of the Rules of the Supreme Court of Virginia or with the written consent of the patient.

C. Does disclosure of medical records have additional rules?

There are additional rules that restrict the disclosure of medical records, but these rules are unrelated to the physician-patient privilege. While the patient's medical record is specifically included in Virginia Code Section 8.01-399(B) as a discoverable communication,[30] a patient has a right of privacy in the content of his or her own medical records.[31] "Patient records are the property of the provider maintaining them, and, except when permitted by this section . . . no provider . . . may disclose the records of a patient."[32] The statute has specific rules concerning the disclosure of a patient's records

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[27] *Id*.
[28] VA. CODE ANN. § 32.1-127.1:03(G).
[29] *Id*.
[30] VA. CODE ANN. § 8.01-399(B) (Repl. Vol. 2002 & Cum. Supp. 2003).
[31] VA. CODE ANN. § 32.1-127.1:03. *See* 45 C.F.R. § 160 (2003).
[32] *Id*. § 32.1-127.1:03(A).

in the course of a judicial or administrative proceeding.[33] However, it appears that these rules will only realistically bar disclosure in formal discovery when the records to be disclosed involve a non-party to the civil action.[34] Formal discovery practices should also be used when disclosing information to co-defendants and other parties to the litigation. (i.e. Requests for Production, Rule 4:9, Rules of the Supreme Court of Virginia.)

Attorneys who receive medical records should be aware of the patient's right to privacy and must take special precautions to maintain the confidentiality of these medical records. The Health Insurance Portability and Accountability Act (HIPAA) requires that attorneys enter into business associate agreements with third parties who have access to a patient's protected health information (PHI).[35] Some examples of common third parties within the meaning of the statute are copying services, medical imaging services, and expert witnesses. In accordance with HIPAA, these third parties must enter into business associate agreements.[36] In addition, Virginia Code Section 8.01-413 provides additional procedures to obtain the medical records by subpoena and restricts the amounts for copy costs and administrative fees.[37]

There are additional procedures required for the issuance of a *Subpoena Duces Tecum* (SDT). The patient privacy act requires a SDT to be issued along with a statement that outlines the procedures for filing a Motion to Quash.[38] In the event a Motion to Quash is filed, a provider shall only return the sealed records to the Court pending

[33] *Id*. § 32.1-127.1:03(D).
[34] *Id.*
[35] 45 C.F.R. § 164.504(e) (2003).
[36] *Id.*
[37] VA. CODE ANN. § 8.01-413 (Repl. Vol. 2002 & Cum. Supp. 2003).
[38] *Id*. § 32.1-127.1:03(H).

resolution of the matter.[39] If no Motion to Quash is filed within 15 days of the issuance of the SDT, then the party issuing the request must provide a written certification to the provider that no Motion to Quash has been filed.[40] The provider must then produce the records within the next five days.[41]

IV. 8.01-399(D)—When a lawyer may communicate with a treating physician without the patient's consent.

To sum up the physician-patient privilege, the general rule is that privileged health information should not be disclosed to anyone except the patient, or to someone with the consent of the patient, except through the formal rules of discovery. This general rule covers most cases, but there are three specific exceptions.[42] The first exception allows disclosure in a situation of vicarious liability, which involves a practitioner who treated the plaintiff.[43] This provision allows a corporate health care provider, such as a hospital, to talk to their employees or anyone for whom it may bare liability, regarding the care of a plaintiff.[44]

The second exception allows a physician who is performing an independent physical or mental examination ("IME") of the plaintiff, in accordance with Rule 4:10 of the Rules of the Supreme Court, to speak with the lawyer who requested the examination about the plaintiff's condition.[45] For example, if the defendant requests an IME of the plaintiff in a personal injury action, the statutory exception allows the examining physician to report his findings to defense counsel. Absent this exception, a doctor

[39] *Id*. § 32.1-127.1:03(H)(4).
[40] *Id*. § 32.1-127.1:03(H)(5).
[41] *Id*.
[42] *Id*. § 8.01-399(D).
[43] *Id*. § 8.01-399(D)(1).
[44] *See* Dupont v. Winchester Med. Ctr., 34 Va. Cir. 105 (Cir. Ct. 1994) (Winchester County).

performing an IME of the plaintiff would be subject to the patient-physician privilege and could not speak to the very lawyer who requested his service. The final exception allows a lawyer or his agent to contact a treating physician's employee for limited administrative purposes, such as determining when the patient was treated by that practitioner, the extent of that practitioner's notes, including translation of the notes, and for scheduling purposes.[46]

These exceptions were added to the statute in 1998 in response to *Fairfax Hospital v. Curtis*.[47] In this case, Patricia Curtis brought suit against Fairfax Hospital, as executrix of Jessie Curtis' estate, due to the alleged negligence of a nurse who treated her newborn baby ("Jessie"). The defense attorney informally asked the hospital to provide the nurse with a copy of the Mrs. Curtis' medical records to prepare for a deposition taken on behalf of the plaintiff.[48] This same defense attorney represented both the hospital and the nurse for the action.[49] Jessie's medical condition was immediately brought in issue due to the suit, but her mother's medical condition was not inherently at issue because she was not a party to the suit.[50] The Court found that the hospital had disclosed Mrs. Curtis' confidential medical records without her permission and she had a cause of action to recover against the hospital for the emotional distress caused by the disclosure.[51] Several months later, the General Assembly added the three exceptions to Virginia Code Section 8.01-399(D) "to facilitate litigation while maintaining confidentiality."[52] After the

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[45] VA. CODE ANN. § 8.01-399(D)(2) (Repl. Vol. 2002 & Cum. Supp. 2003).
[46] VA. CODE ANN. § 8.01-399(D)(3) (Repl. Vol. 2002 & Cum. Supp. 2003).
[47] 254 Va. 437, 492 S.E.2d 642 (1997).
[48] *Id.*
[49] *Id.*
[50] Curtis v. Fairfax Hosp., 36 Va. Cir. 35 (1995).
[51] *Curtis*, 254 Va. at 441, 492 S.E.2d at 644.
[52] 1998 Va. Acts ch. 314 (summary), available at http://leg1.state.va.us/cgi-bin/legp504.exe?981+ful+CHAP0314 (last visited June 21, 2004).

codification of the vicarious liability exception, the unauthorized disclosure from *Curtis* is now an allowable disclosure of the patient's medical records.

V. § 8.01-399(F)—Physicians may disclose privileged communications to protect their own legal rights.

The final paragraph of the statute includes three additional exceptions to the physician-patient privilege.[53] The statute begins with a broad exception that allows a treating physician to consult another physician so that the patient may receive appropriate care, and ends by repeating an earlier exception that allows disclosure in order to comply with state or federal law.[54]

The remaining exception in this final paragraph of the statute "expressly allows a physician to disclose information acquired in attending a patient where such disclosure is necessary in connection with the protection or enforcement of the physician's legal rights."[55] *Archambault v. Roller* is the only case from the Supreme Court of Virginia which interprets Section 8.01-399(F).[56] The plaintiff, Colleen Roller, alleged that Dr. John Jane exceeded the authorized scope of a surgery on her spine and, as a result, she was rendered a paraplegic.[57] William H. Archambault, was staff counsel for The Piedmont Liability Trust ("Trust"), the entity which provided malpractice liability coverage and legal representation to the attending physicians of the University of Virginia ("UVA"). The Trust hired outside counsel to represent Dr. Jane, but Mr. Archambault supervised and monitored all litigation involving UVA's attending

[53] VA. CODE ANN. § 8.01-399(F) (Repl. Vol. 2002 & Cum. Supp. 2003).
[54] Exception also stated in VA. CODE ANN. § 8.01-399(C)(iii) (Repl. Vol. 2002 & Cum. Supp. 2003).
[55] *Archambault v. Roller*, 254 Va. 210, 212, 491 S.E.2d 729, 730–31 (1997).
[56] *Id.*
[57] *Id*. at 211, 491 S.E.2d at 730.

physicians. Dr. Jane's counsel informed Mr. Archambault that the plaintiff's counsel wanted to depose another treating attending physician at UVA, Dr. Schwenzer. When Mr. Archambault contacted Dr. Schwenzer to inform her of the deposition, Dr. Schwenzer requested that Mr. Archambault represent her at the deposition, and he agreed.[58] Prior to the deposition, Mr. Archambault and Dr. Schwenzer met and discussed the malpractice case, including her recollections of the events during the surgery. Mr. Archambault conveyed this information to Dr. Jane's counsel. The trial court found that Mrs. Roller's confidential medical information had been wrongfully disclosed to Mr. Archambault because Dr. Schwenzer was not a party to the malpractice litigation and she could not have been drawn into the litigation because all applicable statutes of limitations had run.[59] However, the Supreme Court of Virginia reversed the trial court's ruling, and found that Dr. Schwenzer's "legal rights . . . include such rights with respect to being deposed [and that] [s]ubsection F does not require that the physician be an actual or potential party to a medical malpractice action."[60]

Accordingly, the Supreme Court has interpreted the statute to allow treating physicians to disclose a patient's confidential information in order to protect their own legal rights.[61]

VI. Frequently asked questions regarding the physician-patient privilege.

A. May a defense attorney speak with a treating physician who is also a co-defendant?

[58] *Id*. at 212, 491 S.E.2d at 730.
[59] *Id*. at 213, 491 S.E.2d at 731.
[60] *Id*.
[61] *Id*.

Yes, but only through the formal discovery process. Co-defendants may bond together in a "joint defense" against the plaintiff's claims but this situation has no effect on the physician-patient privilege. A treating physician may speak with his own lawyer about his legal rights under Virginia Code Section 8.01-399(F), but there is no exception from the physician-patient privilege that would apply to co-defense counsel.[62] However, the attorney of a treating physician may speak with co-defense counsel about the malpractice case and the treating physician's recollection of the events.[63] All communication between a defendant's attorney and a co-defendant/treating physician must be through the formal discovery process.

B. May an attorney conduct an *ex parte* interview with the opposing party's medical expert?

No, but this is not because of the physician-patient privilege. Since Virginia Code Section 8.01-399 only applies to treating physicians, it does not prohibit an attorney from communicating with an adverse party's medical expert who has not treated or personally evaluated that party. The Standing Committee on Legal Ethics has concluded that it is not *per se* improper for an attorney to communicate with an adverse party's medical expert who has not treated or personally evaluated the party.[64] However, Rule 4:1(b)(4) of the Rules of the Supreme Court allows discovery of facts known and opinions held by experts only by interrogatory or deposition, unless the court authorizes discovery by other means.[65]

C. Is the partner of a treating expert barred from testifying against the patient?

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[62] VA. CODE ANN. § 8.01-399 (Repl. Vol. 2002 & Cum. Supp. 2003).
[63] *Archambault*, 254 Va. at 213, 491 S.E.2d at 731.
[64] *See* Va. Legal Ethics Op. 1235 (1989).
[65] Rule 4:1(b)(4) of the Rules of the Supreme Court of Virginia.

A doctor affiliated with a treating physician is not automatically barred from testifying for a party adverse to the patient.[66] The party seeking disqualification has the burden to offer sufficient evidence that the affiliated experts exchanged confidential information regarding the patient's treatment.[67] The physician-patient privilege only bars the type of testimony that is acquired by a practitioner in attending, examining or treating the patient in a professional capacity.[68]

VII. Conclusion

Since Virginia Code Section 8.01-399 was codified, it has become used increasingly for purposes for which it was not originally intended. The confidentiality between a health care provider and patient must be protected to preserve a relationship founded on honesty and candor. When the statute was originally passed, the patient waived her right to privacy when she filed suit and put her medical condition at issue in litigation. Over the years, the courts have limited this waiver more and more, further restricting access to information from treating physicians.[69] The trend continued until the statutory changes in 2002, which allowed a treating physician to discuss his diagnosis and treatment plan without the consent of his patient. Now the unfavorable diagnosis of a patient's treating physician is more likely to be admissible at trial. The recent amendments to the statute and courts' interpretations of the statutory language, may be a sign that Section 8.01-399 is fertile ground for motions practice going forward because access to the treating physician's information may not be as restricted.

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[66] Wright v. Kaye, 267 Va. 510, 593 S.E.2d 307 (2004).
[67] *Id*. at 526, 593 S.E.2d at 316.
[68] *Id*. at 527, 593 S.E.2d at 316.
[69] *See Curtis*, 254 Va. at 441, 492 S.E.2d at 644 and *McCoy*, 52 Va. Cir. 400.