5.04. Physician, dentist, podiatrist, chiropractor and nurse (CPLR 4504)

(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**
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> **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**
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> **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.

Note

This rule is reproduced verbatim from CPLR 4504 (*see generally* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4504).

New York's physician-patient privilege "is entirely a creature of statute. At common law, confidential communications between physicians and patients received no protection against disclosure in a legal proceeding" (*Dillenbeck v Hess*, 73 NY2d 278, 283 [1989] [tracing history of privilege]). While limited to licensed physicians when first enacted by the New York Legislature in 1828, the privilege has since been expanded to encompass dentists, podiatrists, chiropractors, registered professional nurses, and licensed practical nurses, as well as corporate health care providers specified in CPLR 4504 (a).

The Court of Appeals has stated three rationales for the physician-patient privilege: (1) to encourage patients to make available to their physicians the information necessary for diagnosis and treatment; (2) to promote candid record keeping by medical professionals; and (3) to protect "patients' reasonable privacy expectations against disclosure of sensitive personal information" (*Matter of Grand Jury Investigation in N.Y. County*, 98 NY2d 525, 529 [2002]). While "information" is broader than the "communications" between a patient and physician, the privilege seeks to protect and foster "confidential communications, not the mere facts and incidents of a person's medical history" (*Williams v Roosevelt Hosp.*, 66 NY2d 391, 396-397 [1985] ["a witness may not refuse to answer questions regarding matters of fact, such as those posed in this case, as to whether her children had any physical or congenital problems, whether she was in the care of a physician or was taking medication during a certain period of time, or concerning the facts surrounding an abortion merely because those topics relate to events that required medical care or advice from a physician"]).

The patient is the privilege-holder and may seek damages in tort for a breach of the privilege (*see Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 53-54 [2016] [detailing elements of a cause of action for breach of physician-patient confidentiality]). If the patient is not a party to the proceeding in which disclosure is sought, another party may assert the physician-patient privilege on the patient's behalf (*see Matter of Grand Jury Investigation of Onondaga County*, 59 NY2d 130, 135 [1983] [hospital or physician may assert privilege for protection of patient suspected or accused of a crime]). Whoever asserts the privilege must establish the following elements: (1) the existence of a professional relationship between the patient and one of the health care professionals or providers specified in CPLR 4504 (a); (2) the information sought to be shielded from disclosure was acquired in the course of this professional relationship and was necessary for the patient's diagnosis or treatment; and (3) the patient intended the information to be kept confidential (*see Koump v Smith*, 25 NY2d 287, 294 [1969]; *Dillenbeck*, 73 NY2d at 289; *People v Decina*, 2 NY2d 133, 145 [1956]).

Only the patient may waive the physician-patient privilege. Waiver occurs "when the patient personally, or through his witnesses, either lay or medical, introduces testimony or documents concerning privileged information . . . . It also results from failure to object to disclosure of privileged information" (*Hughson v St. Francis Hosp. of Port Jervis*, 93 AD2d 491, 500 [2d Dept 1983]). CPLR 4504 (a) provides, however, that a patient may authorize disclosure of privileged information for purposes of obtaining insurance benefits without effecting a waiver.

The privilege is waived where a party affirmatively places his or her physical or mental condition in controversy (*see Koump*, 25 NY2d at 294 [patient affirmatively puts his or her physical or mental condition in issue by bringing a personal injury action]). The burden is on the party seeking disclosure to make an evidentiary showing that the patient's physical condition is in controversy (*Dillenbeck*, 73 NY2d at 288). The waiver extends only to medical information related to the physical or mental condition that has been put in issue. (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C4504:3, *supra*.)

Although in derogation of the common law, the physician-patient privilege is "afforded a broad and liberal construction to carry out its policy . . . . Conversely, exceptions that limit the privilege are afforded a narrow construction" (*People v Rivera*, 25 NY3d 256, 262-263 [2015] [citation and internal quotation marks omitted]). Section 4504 itself contains two exceptions; namely, CPLR 4504 (b) (requiring dentists to disclose information necessary for identification of a patient, and health care professionals to disclose information indicating that a patient under 16 years old has been a crime victim); and CPLR 4504 (c) (generally requiring physicians and nurses to disclose otherwise privileged information about the mental or physical condition of a deceased patient).

The legislature has created numerous other specific exceptions. As the Court of Appeals observed in *Rivera* (at 262):

> "When the legislature has sought to either limit or abrogate the privilege beyond the confines of section 4504, it has been clear in its intent (*see* Social Services Law § 384-b [3] [h] [privilege not available in a proceeding seeking an order committing the guardianship and custody of a destitute or dependent child]; Social Services Law § 413 [identifying class of mandatory reporters of suspected child abuse and maltreatment]; Social Services Law § 415 [providing that reports of suspected child abuse or maltreatment must be made in writing and 'shall be admissible in evidence in any proceedings relating to child abuse or maltreatment']; Family Ct Act § 1046 [a] [vii] [stating that the privilege 'shall (not) be a ground for excluding evidence which otherwise would be admissible' in abuse and neglect proceedings]; Mental Hygiene Law § 81.09 [d] [permitting a court evaluator in guardianship proceedings to apply

for permission to inspect medical and psychiatric records of the alleged incapacitated persons, and allowing the court to order such disclosure notwithstanding the physician-patient privilege]; Public Health Law § 3373 [stating that '(f)or the purposes of duties arising out of' article 33, relating to controlled substances, 'no communication made to a practitioner shall be deemed confidential within the meaning of the civil practice law and rules relating to confidential communications between such practitioner and patient']).

"Although the legislature may not always explicitly set forth its intention to limit or abrogate the privilege by expressly cross-referencing CPLR 4504, its intent is evident from the directives of the particular statute (*see* Penal Law § 265.25 [requiring attending physicians to report to police every case of 'any . . . injury arising from or caused by the discharge of a gun or firearm' and 'a wound which is likely to or may result in death and is actually or apparently inflicted by a knife, icepick or other sharp or pointed instrument']; Penal Law § 265.26 [requiring physicians to report certain burn injuries to the office of fire prevention and control]; Public Health Law § 2101 [1] [requiring physicians to 'immediately give notice of every case of communicable disease' to the proper authorities])." (*See also Matter of Grand Jury Investigation of Onondaga County*, 59 NY2d at 135-136.)

Finally, CPLR 4504 (d) provides that when someone not authorized to practice medicine performs acts that are a "competent producing proximate or contributing cause of" personal injuries or death to another, the fact that such person engaged in the unauthorized practice of medicine is prima facie evidence of negligence in any ensuing action for damages for personal injury or death.