

1983 WL 181824 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

March 31, 1983

**\*1 SUBJECT: State Agencies, Medical Examiners, Medicine**

(1) An expert witness testifying as part of the State's case before the State Board of Medical Examiners may not be compelled, in most instances, to repeat his testimony at a subsequent civil proceeding.

N. B. Heyward  
Executive Director  
State Board of Medical Examiners of South Carolina

QUESTION:

Can an expert witness who testifies for the State against a Respondent-physician in a disciplinary proceeding before the State Board of Medical Examiners be compelled to repeat his testimony in a subsequent civil proceeding?

OPINION:

You have asked this Office for an Opinion whether an expert witness who testifies before the State Board of Medical Examiners as part of the State's case may be subpoenaed and compelled to provide similar testimony in a subsequent civil proceeding. To fully respond to your inquiry, a brief discussion of the nature of the proceedings before the State Board of Medical Examiners is required.

[Section 40-47-212, CODE OF LAWS OF SOUTH CAROLINA](#), 1976, as amended, provides:

Every communication, whether oral or written, made by or on behalf of any person, firm or corporation to the Board or any other person designated by it to investigate or otherwise hear matters relating to the revocation, suspension or other restriction on a license or the limitation on or other discipline of a licensee, whether by way of a complaint or testimony, shall be privileged; and no action or proceeding, civil or criminal, shall lie against any such person, firm or corporation by or on whose behalf such communication shall have been made by reason thereof, except upon proof that such communication was made with malice.

There is substantial authority in the case-law and other South Carolina statutes on the meaning of 'privileged communications.' 'Privileged communications' are those which the law protects from disclosure. [Communist Party of the United States of America vs. Subversive Activities Control Board](#), 254 F.2d 314 (D.C.Cir. 1958). In [Communist Party](#), *supra*, at 321, the Court stated that 'privileged means that the contents are of such character that the law as a matter of public policy protects them from disclosure' . . . and 'the law does not permit their disclosure even under subpoena by a Court.' Similarly, see [Mitchell vs. Neylon](#), 27 F.R.D. 438 (NEB. 1960); 81 Am.Jur.2d Witnesses Section 141 and 287 (1976).

Other South Carolina statutes *in pari materia* used the terms 'privileged' and 'confidential' interchangeably in referring to matters not to be disclosed. For example, see [Section 19-11-90, CODE OF LAWS OF SOUTH CAROLINA](#), 1976, as amended, titled 'Priest-penitent privilege' (emphasis added); prohibiting the disclosure of any 'confidential' communication; [Section 24-21-290, CODE OF LAWS OF SOUTH CAROLINA](#), 1976, as amended, making information received by a probation officer 'privileged' information and not to be disclosed; [Section 44-53-140, CODE OF LAWS OF SOUTH CAROLINA](#), 1976, as

amended; [Section 43-31-150, CODE OF LAWS OF SOUTH CAROLINA](#), 1976, as amended; [Section 1-7-70, CODE OF LAWS OF SOUTH CAROLINA](#), 1976, as amended. The General Assembly, in using the term 'privileged communications' in the context of disciplinary investigations intended to bar the Board and all others from disclosing such communications. See Order of the Honorable David W. Harwell, then Resident Judge of the Twelfth Judicial Circuit in [Della Whitt vs. J. H. Scott, M.D.](#), and Order of the Honorable William L. Rhodes, Jr., then Presiding Judge of the Fifth Judicial Circuit and retired Associate Justice of the South Carolina Supreme Court, in [Toussaint vs. State Board of Medical Examiners](#).

**\*2** [Section 40-47-212, CODE OF LAWS OF SOUTH CAROLINA](#), 1976, as amended, sets out three classes of communications which are 'privileged,' i.e., must not be disclosed. They are: (1) every communication, whether oral or written, made by or on behalf of any person to the Board or any person designated by it to investigate or otherwise hear matters relating to discipline of a licensee; (2) every communication by a complaint relating to discipline; (3) every communication by testimony relating to discipline. In other words, the statute provides that any communication relating to a disciplinary investigation, whether in the form of a complaint, statement, or testimony is privileged

Moreover, [Regulation No. 81-20](#), Rules and Regulations of the Board, provides in pertinent part:

No person whomsoever in any way connected with the matter before the board, including witnesses, counsel, counsels' secretaries, the respondent, board members, board employees, reporters or investigators, shall mention the existence of any such proceeding, or disclose any information pertaining thereto or discuss any testimony or evidence therein except to persons directly involved, and then only to such extent as necessary for proper disposition of the matter. (emphasis added)

With this background, this Opinion will address your specific inquiry. In responding, certain assumptions need be made. We shall assume that an expert witness has testified as part of the State's case against the Respondent-physician. We will assume that this expert witness has testified pursuant to a request to review medical records relevant to the disciplinary proceeding. We shall further assume that a party in a subsequent civil action knew or has learned the identity of this witness and his testimony at the earlier Medical Board proceeding. It is the Opinion of this Office that under these circumstances, an expert witness could not be compelled to disclose his testimony if that testimony was requested and given as part of a disciplinary proceeding before the State Board of Medical Examiners. To allow such disclosure, when the expert's testimony was specifically requested for a 'privileged' proceeding, would violate both [Section 40-47-212](#) ('Every communication . . . whether by way of complaint or testimony, shall be privileged') and [Regulation No. 81-20](#) ('No person . . . including witnesses shall . . . discuss any testimony or evidence therein . . .')

A change in the facts might require a different result. For example, assume that the expert witness, at the request of a party to the subsequent civil action, again reviewed the medical records sometime after the completion of the Medical Board's proceedings, and independently thereof. In such case, his subsequent testimony, based on his review of the records independent of Board proceedings, would not be 'privileged.' The expert's testimony, in such case, would not be based on information gained as part of a privileged investigation, but would have an independent basis not protected by statute or regulation. However, even in such case he could not relate any information as to the Medical Board proceedings.

**\*3** Stephen S. Seeling  
State Attorney

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