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Privileged Communication Attorney - Client

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tiff brought his wife and week-old baby to the defendant hospital. Nine days later the wife died and plaintiff left the baby at the hospital until he became settled, being assured that for $1.00 per day the child would receive the best of care. At about this time, the daughter of one Vlemminck gave birth to a child at the hospital, the result of an incestuous relationship between her and her father. She too left her baby at the hospital. Vlemminck came for the child and was given plaintiff's baby by accident. Later the mistake was discovered but Vlemminck claimed that he had given the baby to strangers passing through the city. The child was never recovered and there was strong suspicion that Vlemminck had disposed of the baby. Plaintiff was not allowed to recover from the hospital either in tort or in contract.

Can we reasonably say that the father felt he was leaving his child in one nurse's care? Is it not more logical to say that he left the baby under the care of the hospital? Here is a case involving extreme mental anguish, and yet immunity of a so called charitable institution prevented any recovery. Natural justice and the moral law seem to be considerably outweighed by "immunity." But this is not an exceptional case. It is the general rule in a large number of states. Fortunately, as has been stated, the trend today is away from immunity and towards liability. It is to be hoped that our courts will soon rid themselves of this doctrine completely, so that eventually we may say that in the American legal system, for every wrong that occurs, there is an existing legal remedy.

PRIVILEGED COMMUNICATION

ATTORNEY-CLIENT

Generally, there is privileged communication between a client and his attorney relevant to matters about which the attorney is giving legal advice. This is found in early common law by virtue of a theory that the attorney by his oath and honor would not divulge the secrets of his client. Under this theory the attorney had the ability to waive the privilege if his conscience would permit. Over the years this theory was weakened by the courts, and by the last quarter of the 1700's was entirely repudiated.[1]

By the time this doctrine was repudiated, however, a new theory had found its way into the thinking of the courts to justify the same general rule. It was said that the privilege belonged not to the attorney, but to the client. It is important during litigation for the attorney to know all of the facts so that he might better protect the interests of his client. If the client were to believe that his statements to his attorney could be

[1] Wigmore, Evidence, § 2290 (3d ed., 1940).

used in court against him, he would tell the attorney only the things most favorable to himself and would not say anything that might hurt his position in court. The courts recognize that the ordinary individual needs the advice of an attorney and can not depend upon his own knowledge to protect his interests in court. If there were no privilege, the individual skilled in law would be in a better position to protect his own interests in court than one without legal training. He would not need to divulge to anyone, who could testify against him, any facts which would not be to his best advantage.

As Justice Jessel explained:

> The object and meaning of the rule is this: That as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule.[2]

At first, communications made during litigation concerning that litigation only were privileged. Under the new theory the rule was extended to include communications made during other litigation, then those made in contemplation of litigation, until the privilege was granted for any consultation for legal advice even with no litigation in mind.[3]

The general rule is recognized by the courts and has seldom been questioned. The main argument against the privilege is that, when it is used in criminal cases, it only benefits the guilty and that there is no reason to set up obstructions which will allow the guilty to escape the punishment they deserve; and even if the privilege were abolished, the basic rights of the individual would not be taken away.[4] The courts have taken the attitude that the greater good is obtained by allowing the privilege. However, since the privilege results in the exclusion of evidence and also at times in an incomplete disclosure of facts, the rule of the privilege concerning communication for legal advice has been strictly construed by the courts.[5]

[2] Anderson v. Bank, [1876] L.R. 2 Ch. D. 644, 649.

[3] Wigmore, Evidence § 2290 (3d ed., 1940).

[4] Bentham, Rational of Judicial Evidence, b. IX, pt. IV, c. 5 (Bowring's ed., 1827, vol. VII, pp. 474 ff.).

[5] Peoples Bank v. Brown, 112 Fed. 652 (C.A. 3rd, 1902).

For the privilege to apply there must be an attorney-client relationship or the communication must be made with a view to employment of the attorney.[6] Of course it is not necessary that the attorney charge a fee for the attorney-client relationship to exist,[7] but a casual request for an opinion as to the law will not of itself give rise to the relationship.[8] It does not mean that the client himself need be the one to pay the fee, but just that the attorney is receiving compensation for his advice.

The attorney must be employed in his capacity as an attorney. Where the attorney is merely requested to draw up a deed and no legal advice is asked or given, there is no privilege since he is acting only as a conveyancer.[9] The privilege will extend to agents of the attorney such as a secretary or a clerk,[10] but not to an attorney-in-fact[11] or a law student.[12] The attorney must be admitted to practice before the bar in the jurisdiction to which the client belongs or the communication must be concerning the law of the jurisdiction where the attorney has been admitted.[13] The client is entitled to some peace of mind. Therefore when he has used due care in ascertaining whether the individual he consults is an attorney who comes under the privilege, the privilege will exist even if the individual is not an attorney.[14]

The communication must be made in confidence, and it must be relevant and material to the matter with which the consultation is concerned.[15] This does not mean that it can be concerning only the things necessary for the attorney to know for the individual case, since the client does not know exactly what is relevant and what is not. The main test seems to be whether the statement is made as a part of the purpose of the client to obtain advice on that subject.[16] No actual request for secrecy is needed for the privilege to exist, and no pledge of secrecy will extend the privilege beyond its usual limits.[17]

Since the confidential relationship must exist while the client is communicating with the attorney, generally it will not be deemed privileged

[6] Keir v. State, 152 Fla. 389, 11 So. 2d 886 (1943).

[7] Robinson v. U.S., 144 F. 2d 392 (C.A. 6th, 1944).

[8] Goltra v. Wolcott, 14 Ill. 89 (1852).

[9] U.S. v. De Vasto, 52 F. 2d 26 (C.A. 2d, 1931).

[10] State v. Krich, 123 N.J.L. 519, 9 A. 2d 803 (1939).

[11] State v. Smith, 138 N.C. 700, 50 S.E. 859 (1905).

[12] Holman v. Kimball, 22 Vt. 555 (1850).

[13] Lawrence v. Campbell, 4 Drew 485, 62 E.R. 186 (Ch., 1859).

[14] People v. Barker, 60 Mich. 277, 27 N.W. 539 (1886).

[15] Modern Woodmen of America v. Watkins, 132 F. 2d 352 (C.A. 5th, 1942).

[16] Wigmore, Evidence, § 2310 (3rd ed., 1940).

[17] McLellan v. Longfellow, 32 Me. 494 (1851).

if it is stated while a third party is present.[18] An exception to this arises when the third party is an agent for the attorney (stenographer or clerk)[19] or a confidential agent of the client.[20] If the communication is to be related to someone else later, it is not considered confidential and therefore no privilege attaches to it.[21]

A problem presents itself when the attorney is acting for another party who has an interest in the case. If the attorney is acting for two people who are parties on the same side of a case, communications made by one of the parties while the other one is present will still be privileged, except when the parties are opposing each other in a later action.[22] When a client divulges information to his attorney, or to an attorney in contemplation of employment to represent him in a certain matter and there already exists an attorney-client relationship between the attorney and the opposing party, the privilege will still exist unless the individual who made the communication knew that the attorney was representing the opposing party against his interest.[23]

Since it is not always possible for the attorney and client to confer personally, the privilege is extended to communications made by the agent of the client under his authority when there is good reason for using an intermediary.[24] The necessity of this rule can easily be seen where the client is a corporation. Likewise, a communication made through the attorney's clerk as his agent is also considered privileged.[25]

The privilege exists for the benefit of the client. Therefore, the attorney cannot testify as to the privileged communications whether he is willing or not.[26] The client cannot be required to testify as to the communications.[27] Even though the attorney and the client cannot be required to testify concerning the communications, the client may waive the privilege. Generally, it is not necessary that the waiver be explicitly stated by the client at the trial. There may be a general waiver before

[18] Hartford Fire Ins. Co. v. Reynolds, 36 Mich. 502 (1877).

[19] State v. Krich, 123 N.J.L. 519, 9 A. 2d 803 (1939).

[20] In re Busse's Estate, 332 Ill. App. 258, 75 N.E. 2d 36 (1947).

[21] Hill v. Hill, 106 Colo. 492, 107 P. 2d 597 (1940).

[22] Grand Trunk Western R. Co. v. H. W. Nelson Co., 116 F. 2d 823 (C.A. 6th, 1941).

[23] Wigmore, Evidence, § 2312 (3rd ed., 1940).

[24] Webb v. Lewald Coal Co., 214 Cal. 182, 4 P. 2d 532 (1931).

[25] Barnes v. Harris, 7 Cush. 576 (Mass., 1851).

[26] Koontz v. Owens, 109 Mo. 1, 18 S.W. 928 (1892); Bacon v. Frisbie, 80 N.Y. 394 (1880).

[27] State v. White, 19 Kan. 445 (1887).

the trial.[28] The mere statement by the client that he has no objection to the attorney testifying will not constitute a waiver, however.

If the client calls his attorney to the stand and asks questions concerning the communications, he is waiving the privilege and the attorney can be cross-examined about the conversation in question.[29] Once the client has waived the privilege at the trial, he cannot assert it later in the proceedings.[30]

When the client has the attorney act as a subscribing witness to a document, the privilege is waived and the attorney may be required to testify as to its execution, consideration, and other pertinent details of the transaction.[31] Likewise, when an attorney is a witness to a will, the testator is deemed to have waived the privilege.[32]

When the client dies, the privilege remains; and the attorney is not allowed to reveal the communications.[33] However, just as the client can waive the privilege, the executor or administrator of the client can waive it in his place to the extent that he succeeds to the decedent's interest.[34]

In a suit between a third person and the heirs of the client, only the heirs can waive the privilege.[35] However, in a suit contesting a will, the privilege is of no practical value as some jurisdictions say that it is then non-existent[36] while others hold either party may waive it.[37]

Although all the requirements might be present to give rise to the privilege, there will be no privilege when the client consults the attorney with a view to using the information for fraudulent or criminal activities. As Mr. Justice Cardozo said in obiter in *Clark v. United States*:[38] "The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law."[39]

There is no question of an existing privilege when the attorney and the client conspire for fraudulent purposes. However, it is not necessary

[28] Phillips v. Chase, 201 Mass. 444, 87 N.E. 755 (1909).

[29] Bloumont v. Kimpton, 155 Mass. 378, 29 N.E. 590 (1892).

[30] Green v. Crapo, 181 Mass. 55, 62 N.E. 956 (1902).

[31] Larson v. Dahlstrom, 214 Minn. 304, 8 N.W. 2d 48 (1943).

[32] Eicholtz v. Grunewald, 313 Mich. 666, 21 N.W. 2d 914 (1946).

[33] Baldwin v. Com'r. of Int. Rev., 125 F. 2d 812 (C.A. 9th, 1942).

[34] Brooks v. Holden, 175 Mass. 137, 55 N.E. 802 (1900).

[35] Winters v. Winters, 102 Iowa 53, 71 N.W. 184 (1897).

[36] Wilkinson v. Service, 249 Ill. 146, 94 N.E. 50 (1911).

[37] Winters v. Winters, 102 Ia. 53, 71 N.W. 184 (1897).

[38] 289 U.S. 1 (1933).

[39] Ibid., at 15.

that the attorney know of the purpose of the communication.[40] He may be innocent of any wrong and there still will be no privilege for the client.

In one instance where the attorney acted for his client over a period of one year, during which time he had more than two hundred conferences with the client who was considered a notorious gambler in his community, the privilege was held not to exist since the probable reason for the conferences must have been to further the criminal intentions of the client.[41]

In order for the attorney to be required to testify on the basis that there was a criminal or fraudulent purpose involved, a prima facie case, showing that the communication probably concerned acts which came within this exception, must be established.[42] In all cases it is the court, and not the attorney, who ultimately decides whether the privilege is applicable.[43] The attorney can merely state the privilege exists, but if the court finds that under the circumstances it does not, he must testify.

In *United States v. United Shoe Machinery Corporation*[44] the Court succinctly summed up the general rule:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[45]

Although some states have adopted statutes recognizing this rule, the courts have generally interpreted them to be merely codifications of the common law.[46] Even though it would seem at times that an individual might escape justice by hiding behind the privilege, it would seem to be far more important for every individual to be able to have his interests properly represented. The individual should be able to receive the aid he needs without having to feel that what he tells his attorney will be repeated or publicized later. The law has recognized this need and the courts have been careful throughout the years to uphold the right of the privilege and protect the client's communications.

[40] Regina v. Cox, [1884] 14 Q.B.D. 153.

[41] In re Selser, 15 N.J. 393, 105 A. 2d 395 (1954).

[42] State v. Childers, 196 La. 554, 199 So. 640 (1940).

[43] Steiner v. U.S., 134 F. 2d 931 (C.A. 5th, 1943).

[44] 89 F. Supp. 357 (D. Mass., 1950).

[45] Ibid., at 358.

[46] 58 Am. Jur., Witness § 463 (1948).