Missouri Law Review

Volume 42
Issue 4 *Fall 1977*

Article 9

Fall 1977

Evidence-Attorney-Client Privilege for Communications between Insurer and Insured in Missouri

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Another basis for interdistrict relief, also suggested in *Milliken*,[52] is provided when the suburban school districts to be included in the desegregation plan are themselves engaged in unconstitutional conduct which affects the urban district.[53] In those states where segregation was formerly required or permitted by law, such violations may be common. In other states, where the equal protection clause requires a threshold showing of purposeful state action, success is less likely.[54] Nevertheless, this theory provides the strongest basis for a metropolitan remedy because it involves no interference with the autonomy of innocent local communities.

The new equal protection standard will not halt the search for interdistrict relief; it merely will make the search more difficult. The final resolution of the protracted litigation in *Board of School Commissioners* will indicate the degree of that difficulty. However, the ultimate success of metropolitan desegregation will depend less upon judicial refinement of equal protection analysis than upon popular commitment to a racially integrated society.

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EVIDENCE—ATTORNEY-CLIENT PRIVILEGE FOR COMMUNICATIONS BETWEEN INSURER AND INSURED IN MISSOURI

State ex rel. Cain v. Barker[1]

Defendant Cain was driving a truck on behalf of his employer when he struck a camper driven by Miller. Miller died of injuries resulting from the collision and his widow subsequently brought a wrongful death action

1976), *vacated and remanded*, 97 S. Ct. 800-02 (1977); Newburg Area Council, Inc. v. Board of Educ., 510 F.2d 1358 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975); Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), *aff'd mem.*, 423 U.S. 963 (1975).

52. 418 U.S. at 744-45.

53. Some courts have suggested that an interdistrict remedy is permissible only if each district is in violation of the Constitution. Tasby v. Estes, 517 F.2d 92 (5th Cir.), *cert. denied*, 423 U.S. 939 (1975); Hiett v. Biondi, 389 F. Supp. 1132 (N.D. Tex. 1975). Another court has concluded that if each district is in violation of the Constitution, no interdistrict violation is necessary. Newburg Area Council, Inc. v. Board of Educ., 510 F.2d 1358 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975). However, both interpretations appear inconsistent with the language in *Milliken*.

54. The United States, in *Board of School Comm'rs*, might have attempted proof that suburban resistance to both consolidation with the Indianapolis School District and the location of public housing outside the school district was racially motivated. Both patterns of opposition perpetuated segregation within the school district.

1. 540 S.W.2d 50 (Mo. En Banc 1976).

against the defendant. At the time of the accident, insurance policies provided liability coverage to defendant's employer and to defendant himself. On two occasions immediately following the accident, the insurance adjuster representing the liability insurer took detailed statements from defendant concerning the accident. Approximately six months later, attorneys for the plaintiff in the wrongful death action took defendant's deposition. At the deposition, however, defendant was unable to answer numerous questions because his memory of the accident was not fresh. Plaintiff moved to have the trial court order defendant to produce the statements he had given his insurer, arguing substantial need for the information sought.[2]

When the judge ordered defendant to produce the statements for inspection and copying, defendant filed for a writ of prohibition. Defendant claimed that the statements were protected by the attorney-client privilege and were, therefore, not discoverable.[3] Plaintiff, on the other hand, argued that the statements were subject to discovery as the work product of the insurer's attorney.[4] The Missouri Supreme Court held that the statements were protected by the attorney-client privilege and issued the writ.[5]

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2. The motion was based on MO. R. CIV. P. 56.01(b)(3) which deals with trial preparation materials and which reads in part:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

3. The defendant's petition was based on MO. R. CIV. P. 56.01(b)(3), *see* rule quoted note 1 *supra*, and on MO. R. CIV. P. 56.01(b)(1) which reads in part:

> Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things . . . . (emphasis added).

4. *See* rule quoted in note 2 *supra*.

5. 540 S.W.2d at 53. In holding the statements were privileged, the court determined that it need not address the problem of whether such statements were subject to discovery as work product as had been suggested by the plaintiff. Under the Missouri Rules of Civil Procedure any matter that is privileged is not subject to discovery. *See* rule quoted in note 3 *supra*. However, Chief Judge Seiler, dissenting, rejected the extension of the attorney-client privilege to include statements made by an insured to his insurer. 540 S.W.2d at 58. He urged that the court follow the federal approach in which such statements are not regarded as falling within the attorney-client privilege. Instead such statements are examined in terms of work

The privileged nature of a communication between a client and his attorney is based upon the desirability of encouraging a client's free disclosure to his counsel.[6] Although traditionally a confidential communication from a client directly to his lawyer was required for the privilege,[7] the doctrine has been extended to include communications to the attorney through his intermediate clerks and agents.[8] That extension is based on the practical necessity in most legal offices to rely on clerks, secretaries, and agents in conducting legal business with clients.[9] As part of this extension, most jurisdictions now hold that a statement or report made by an insured to his insurer, dealing with an accident that may be the basis for a claim against him which is covered by the policy, is a privileged communication.[10]

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product for discovery purposes. *See, e.g.*, McDougall v. Dunn, 468 F.2d 468 (4th Cir. 1972); Thomas Organ Co. v. Jadranska Slobodna Plovidba, 54 F.R.D. 367 (N.D. Ill. 1972); Dingler v. Halcyon Lijn N.V., 50 F.R.D. 211 (E.D. Pa. 1970);Tinder v. McGowan, 15 Fed. Rules Serv. 2d 1608 (W.D. Pa. 1970); Whitaker v. Davis, 45 F.R.D. 270 (W.D. Mo. 1968); Burns v. New York Central R.R., 33 F.R.D. 309 (N.D. Ohio 1963); Dennhardt v. Holman, 12 F.R.D. 79 (D. Colo. 1951); Matthies v. Peter F. Connolly Co., 2 F.R.D. 277 (E.D.N.Y. 1941); Colpak v. Hetterick, 40 F. Supp. 350 (E.D.N.Y. 1941); Kulich v. Murray, 28 F. Supp. 675 (S.D.N.Y. 1939).

6. For a general discussion of the history of the attorney-client privilege and the policy behind it, see C. MCCORMICK, EVIDENCE §§ 87, 89 (2d ed. 1972).

7. Professor Wigmore's widely recognized conditions necessary to establish the attorney-client privilege include the conditions that "the communications must originate in a confidence that they will not be disclosed" and that "confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties." 8 J. WIGMORE, EVIDENCE § 2285 (McNaughton rev. 1961).

8. *See* Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792 (D. Del. 1954) (attorney-client privilege is a communication made by the client to a lawyer or his immediate subordinates who habitually report to the attorney); Tyler v. Hall, 106 Mo. 313, 17 S.W. 319 (1891) (privilege is confined to counsel and to clerks who serve as media of communication between client and counsel). *See generally* Annot., 96 A.L.R.2d 125 (1964); Gardner, *Agency Problems in the Law of Attorney-Client Privilege*, 42 U. DET. L.J. 1 (1964). It should be noted that a communication through one who is not the attorney's agent or a communication in the presence of a third party will defeat the attorney-client privilege. *See also* Seeger v. Odell, 64 Cal. App. 2d 397, 148 P.2d 901 (1944); State *ex rel.* Headrick v. Bailey, 278 S.W.2d 737 (Mo. En Banc 1955); Canty v. Halpin, 294 Mo. 96, 242 S.W. 94 (En Banc 1922); *In re* Cunnion's Will, 201 N.Y. 123, 94 N.E. 648 (1911); Minard v. Stillman, 31 Or. 164, 49 P. 976 (1897); Dobbins v. Gardner, 377 S.W.2d 665 (Tex. Ct. App. 1964).

9. *See, e.g.*, Taylor v. Taylor, 179 Ga. 691, 693, 177 S.E. 582, 583 (1934). *See generally* C. MCCORMICK, EVIDENCE § 91 (2d ed. 1972).

10. *See* Gene Compton's Corp. v. Cochrane, 205 Cal. App. 2d 365, 23 Cal. Rptr. 250 (1962); Heffron v. Los Angeles Transit Lines, 170 Cal. App. 2d 709, 339 P.2d 567 (1959); Vann v. State, 85 So. 2d 133 (Fla. 1956); Grand Union Co. v. Patrick, 247 So. 2d 474 (Fla. App. 1971); People v. Ryan, 30 Ill. 2d 456, 197 N.E.2d 15 (1964); Brakhage v. Graff, 190 Neb. 53, 206 N.W.2d 45 (1973); Hollien v. Kaye, 194 Misc. 821, 87 N.Y.S.2d 782 (Sup. Ct. 1949); Westminster Airways Ltd. v. Kuwait Oil Co., [1951] 1 K.B. 134 (C.A.); *cf.* Monier v. Chamberlain, 35 Ill. 2d 351, 221 N.E.2d 410 (1966) (where both parties to the action have the same insurer, statements given to the insurer by one party before he retains independent counsel are not protected because the element of confidentiality is lacking); Brasseaux v.

Prior to the *Cain* decision, Missouri courts had not reached a definitive rule in insurer-insured cases.[11] In *Cain* the supreme court acknowledged that numerous courts in other states had supported the rule extending the privilege.[12] The Missouri court quoted extensively from opinions of courts in Illinois[13] and New York[14] to explain the rationale for the rule and indicated that it adopted those rationales.[15] The Illinois court reasoned that although communications from insured to insurer are normally made to a layman, and in many cases a lawyer is never retained, the terms of most liability insurance policies delegate the selection of an attorney and the conduct of the defense to the insurer. If litigation results, the insurer's attorneys handle the case and proceed on the basis of information furnished them by the insurer.[16] Under these circumstances the insured may assume that any communication to the representative of his insurer is in fact made to the insurer as a potential agent who will transmit it to an attorney for the protection of the insured.[17]

The New York court based its adoption of the insurer-insured privilege on the fact that most automobile insurance contracts call for full and prompt reports of accidents to the insurer. Public policy demands that parties to an agreement perform their contractual promises, and it follows that the rules of discovery should encourage the insured to make a full and prompt report to his insurance carrier.[18] If such statements could be used against the insured in a lawsuit, he would naturally be discouraged from making a prompt and full report of an accident. Thus, in order to effect a

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Girouard, 253 La. 60, 214 So. 2d 401 (1968) (the privilege is not necessarily applicable when the issue is adequate cooperation between insured and insurer's counsel); State v. Kociolek, 23 N.J. 400, 129 A.2d 417 (1957); Kandel v. Tocher, 22 App. Div. 2d 513, 256 N.Y.S.2d 898 (1965); Cote v. Knickerbocker Ice Co., 160 Misc. 658, 290 N.Y.S. 483 (New York Mun. Ct. 1936) (statement transmitted to attorney through insurance representative may be privileged, but failure to object to its admission into evidence waives the privilege); Neugass v. Terminal Cab Corp., 139 Misc. 699, 249 N.Y.S. 631 (Sup. Ct. 1931); Travelers Indemnity Co. v. Cochrane, 155 Ohio St. 305, 98 N.E.2d 840 (1951) (the privileged nature of statements made to insurer, as with other privileges, is lost through voluntary disclosure to others); Lantex Constr. Co. v. Lejsal, 315 S.W.2d 177 (Tex. Ct. App. 1958). *See generally* cases compiled in Annot., 22 A.L.R.2d 659 (1952); 81 AM. JUR. 2d *Witnesses* § 193 (1976). *Contra*, Jacobi v. Podevels, 23 Wis. 2d 152, 127 N.W.2d 73 (1964) (statements made to insurer are not privileged unless an action has already been commenced against the insured).

11. In Hutchinson v. Steinke, 353 S.W.2d 137 (St. L. Mo. App. 1962), the court assumed, without deciding, that such a statement was privileged, finding it did not have to decide the issue because the party seeking its admission into evidence did not dispute its privileged nature.

12. 540 S.W.2d at 50.

13. People v. Ryan, 30 Ill. 2d 456, 197 N.E.2d 15 (1964).

14. Hollien v. Kaye, 194 Misc. 821, 87 N.Y.S.2d 782 (Sup. Ct. 1949).

15. 540 S.W.2d at 54.

16. People v. Ryan, 30 Ill. 2d 456, 461, 197 N.E.2d 15, 17 (1964).

17. *Id.*

18. Hollien v. Kaye, 194 Misc. 821, 825, 87 N.Y.S.2d 782, 786 (Sup. Ct. 1949).

desired public policy, such statements should be exempt from use by the other party.

There are indications that the court in *Cain* limited the insurer-insured doctrine so that not all statements from an insured to his insurer are exempt from discovery. The court expressly stated that the insurer-insured relationship must exist at the time of the statements in order for them to be privileged.[19] The defendant's attorneys claimed their law firm had been selected by the carrier prior to the defendant's initial statements to the insurance company representative.[20] That point was disputed by the plaintiff but the supreme court said that it was unnecessary to decide precisely when the attorneys entered the case.[21] Instead the court stated that regardless of whether an attorney had actually been contacted, if it was clear that an insurer-insured relationship existed at the time of the statements, they fall within the protection of the attorney-client privilege.[22] A rule that did not require the existence of at least the insurer-insured relationship would be inconsistent with the New York policy of encouraging the contractual obligation of full and prompt disclosure[23] which the Missouri Supreme Court adopted. That rationale presupposes the existence of a contractual insurer-insured relationship.

It also appears from *Cain* that the insurance contract may have to contain an obligation on the part of the insurer to defend actions against the insured for the statements to qualify for the insurer-insured privilege. Although the court never specifically articulated this limitation, the court quoted extensively from the Illinois[24] and New York[25] courts which do require the clause containing an obligation to defend.[26] A requirement that the insurance contract have a clause to defend is an outgrowth of justifying the insurer-insured privilege by viewing the insurer as a potential agent for an attorney that the insurer will retain. Unless there is a clause requiring

19. 540 S.W.2d at 53.
20. *Id.*
21. *Id.*
22. *Id.*
23. Hollien v. Kaye, 194 Misc. 821, 825, 87 N.Y.S.2d 782, 786 (Sup. Ct. 1949).
24. People v. Ryan, 30 Ill. 2d 456, 197 N.E.2d 15 (1964).
25. Hollien v. Kaye, 194 Misc. 821, 87 N.Y.S.2d 782 (Sup. Ct. 1949).
26. The court also phrased the rule in question by quoting from 22 A.L.R.2d 659, 660 (1952) and 81 AM. JUR. 2d *Witnesses* § 194, at 228 (1976), both of which included the phrase "if the policy requires the company to defend him." 540 S.W.2d at 54. Additionally, although there is no firm indication either in the majority opinion or in the briefs of the parties that Cain's policy did in fact contain such a clause, Judge Bardgett, concurring, does refer to the specific factual situation presented by the case as involving an obligation to defend the insured. 540 S.W.2d at 58. Although most cases stating the general rule specifically say the contract must contain an obligation to defend, there are a few cases that do not phrase the rule as containing that condition. *See, e.g.*, Phillips v. Delaware Power & Light Co., 56 Del. 533, 194 A.2d 690 (1963); Schmitt v. Emery, 211 Minn. 547, 2 N.W.2d 413 (1942); *In re* Klemann, 132 Ohio St. 187, 5 N.E.2d 492 (1936); *In re* Heile, 65 Ohio App. 45, 29 N.E.2d 175 (1939).

defense by the insurer, the insurer will never hire an attorney and, thus, will never become an attorney's agent.

The Missouri court did not deal with the question of whether the privilege will be limited to cases in which the defendant is the one who is specifically named in the insurance policy. In *Cain*, the defendant was a "named insured." Here again, in discussing the doctrine, the court relied solely upon cases in which the defendant was named in the policy.[27] Thus, it seems possible that the doctrine may not be applied, for example, in a case where the defendant is an employee covered generally by his employer's liability insurance policy but is not specifically named in that policy.[28]

The court in *Cain* indicated in dicta that the insurer-insured privilege can be waived, a further limitation on the doctrine. The plaintiff contended that the defendant had waived the privilege because he had denied liability in his answer, would be expected to testify at trial, and, thus, should have to produce the statements in advance of trial in accord with *State ex rel. McNutt v. Keet*.[29] *McNutt* held that a plaintiff is considered to have waived the physician-patient privilege when his physical condition is at issue under his pleadings.[30] The *McNutt* result is based on the fact that a plaintiff who is pleading personal injuries will have to testify at trial about his injuries and his subsequent treatment for them. Additionally, a plaintiff must ordinarily call his doctor to the stand to testify about the injuries. Either by testifying himself about medical treatment and medical advice or by having his doctor testify, the plaintiff waives the privilege surrounding communications with his physician.[31] Thus, the plaintiff necessarily waives the medical privilege at trial in order to place evidence about his injuries before the court. The *McNutt* court reasoned that if the privilege was not considered waived until trial it would be unfair to the defendant and a continuance would be necessary at that point to allow the defendant to discover matters

27. *See* People v. Ryan, 30 Ill. 2d 456, 197 N.E.2d 15 (1964); Hollien v. Kaye, 194 Misc. 821, 87 N.Y.S.2d 782 (Sup. Ct. 1949).

28. It should be noted that Judges Bardgett and Morgan concurred, provided that the doctrine be limited to the facts of this case. 540 S.W.2d 50 at 58.

29. 432 S.W.2d 597 (Mo. En Banc 1968).

30. For a general discussion of *McNutt*, see Toney, *Waiver of the Physician-Patient Privilege in Missouri*, 34 MO. L. REV. 397 (1969); Comment, *Waiver of the Physician-Patient Privilege in Missouri*, 13 ST. LOUIS U.L.J. 459 (1969).

31. For cases holding there is waiver of the privilege where plaintiff testifies as to treatment, advice, or what the doctor told him, see, *e.g.*, Blankenbaker v. St. Louis & S.F.R., 274 Mo. 686, 187 S.W. 840 (1916); Epstein v. Pennsylvania R.R., 250 Mo. 1, 156 S.W. 699 (En Banc 1913); Highfill v. Missouri Pac. Ry., 93 Mo. App. 219 (K.C. Ct. App. 1902). *See also* Demonbrun v. McHaffie, 348 Mo. 1120, 156 S.W.2d 923 (1941). For cases holding there is waiver when plaintiff calls the treating physician to testify as to the treatment, *see, e.g.*, Demonbrun v. McHaffie, 348 Mo. 1120, 156 S.W.2d 923 (1941); Wells v. City of Jefferson, 345 Mo. 239, 132 S.W.2d 1006 (1939); State v. Long, 257 Mo. 199, 165 S.W. 748 (En Banc 1914); Epstein v. Pennsylvania R.R., 250 Mo. 1, 156 S.W. 699 (En Banc 1913); Carrington v. City of St. Louis, 89 Mo. 208, 1 S.W. 240 (1886); Oliver v. Aylor, 173 Mo. App. 323, 158 S.W. 733 (Spr. Ct. App. 1913).

formerly not discoverable because of the medical privilege.[32] To avoid this undesirable result, the waiver is considered effective whenever a plaintiff pleads personal injuries and those injuries are in dispute.[33] The defendant can, therefore, discover medically privileged matters where personal injuries are pleaded and disputed.[34]

The *Cain* court held that the privilege was not waived in this case because, unlike *McNutt*, the party asserting the privilege here was the defendant. Had the party asserting the privilege been the plaintiff, the court stated, the *McNutt* waiver result would have followed.[35] The court reasoned that *McNutt* was decided as it was because, by his status as plaintiff, a party indicates an intention to waive the privilege. As previously discussed, this is true in the medical privilege case where the plaintiff pleads personal injuries. But it does not logically follow that a plaintiff similarly waives the attorney-client privilege with his pleadings. Unlike the case where the plaintiff pleads his own injuries and must testify to medically privileged information to prove them, it cannot be said with certainty that a plaintiff will be forced at trial to testify as to the substance of his communications with his attorney in order to prove his case.

The attorney-client privilege will be waived under certain circumstances,[36] and it is, of course, waived when the client testifies to the substance of the communication.[37] However, there is no inevitability that he

32. State *ex rel.* McNutt v. State, 432 S.W.2d 597, 601 (Mo. En Banc 1968).

33. *Id.*

34. *Id.* The court in *McNutt* pointed out that the scope of the waiver involved in that case did not automatically extend "to every doctor or hospital record a party has from birth" but is limited to those matters that bear on the issues in the law suit. 432 S.W.2d at 602. However, it has been suggested that once the privilege is waived, other medical evidence can be introduced if it is reasonably connected to the condition in issue. *See* Toney, *supra* note 30, at 406; Peterson, *The Patient-Physician Privilege in Missouri*, 20 K.C.L. REV. 122, 133 (1952).

35. 540 S.W.2d at 57.

36. The privilege may be waived only by the client, either expressly or impliedly. *See, e.g.*, Blackburn v. Crawfords, 70 U.S. 175 (1865); Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960); Schetter v. Schetter, 239 So. 2d 51 (Fla. App. 1970); Passmore v. Passmore's Estate, 50 Mich. 626, 16 N.W. 170 (1883); Riddles v. Aiken, 29 Mo. 453 (1860); *Ex parte* Lipscomb, 111 Tex. 409, 239 S.W. 1101 (1922); State v. Olwell, 64 Wash. 2d 828, 394 P.2d 681 (1964). It may be waived expressly when the client instructs the attorney to reveal the confidential information. *See, e.g.*, Schwimmer v. United States, 232 F.2d 855 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956); Phillips v. Chase, 20 Mass. 444, 87 N.E. 755 (1909); Koeber v. Somers, 108 Wis. 497, 84 N.W. 991 (1901). It may be waived by failure to object. *See, e.g.*, Reagan v. Aiken, 138 U.S. 109 (1891); Hepker v. Schmickle, 209 Iowa 744, 229 N.W. 177 (1930).

37. *See, e.g.*, Hunt v. Blackburn, 128 U.S. 464 (1888); Steen v. First Nat'l Bank, 298 F. 36 (8th Cir. 1924); Tripp v. Chubb, 69 Ariz. 31, 208 P.2d 312 (1949); Toney v. Raines, 224 Ark. 692, 275 S.W.2d 771 (1955); Sholine v. Harris, 22 Colo. App. 63, 123 P. 339 (1912); People v. Gerold, 265 Ill. 448, 107 N.E. 165 (1914); Johnson v. State, 479 S.W.2d 416 (Mo. 1972); Whiteside v. Court of Honor, 231 S.W. 1026 (St. L. Mo. App. 1921); Pinson v. Campbell, 124 Mo. App. 260, 101 S.W. 621 (St. L.

will do so merely on the basis of his pleadings.[38] The overwhelming majority of jurisdictions have held that the client does not waive the privilege merely by bringing an action or by testifying generally in his own behalf.[39] Thus, even had the party in *Cain* been in court as a plaintiff, the attorney-client privilege should not have been waived until he actually took the stand and testified to the substance of the communication with his attorney. The dicta in *Cain* that indicates that a party, by being a plaintiff, waives the

Ct. App. 1907); Kantaris v. Kantaris, 169 N.W.2d 824 (Iowa 1969); Cranston v. Stewart, 184 Kan. 99, 334 P.2d 337 (1959); Janssen v. Kohler, 71 N.D. 247, 299 N.W. 900 (1941).

38. The rare situation in which a client might waive the attorney-client privilege in his pleadings is in cases where the client alleges fraud or other improper or unprofessional conduct on the part of his attorney, stemming from the communication the client later asserts as privileged. Even in these cases, however, courts generally wait until the client testifies to the substance of the statement in his own behalf before finding waiver of the privileged nature of such communications. *See, e.g.*, Fearnley v. Fearnley, 44 Colo. 417, 98 P. 819 (1908) (court found waiver in defendant's answer charging her attorney with fraud but also in her testimony as to the substance of the communication with her attorney); Leverich v. Leverich, 340 Mich. 133, 64 N.W.2d 567 (1954) (where client alleged improper advice from counsel resulted in an unfair property settlement, the court held once she had testified as to the communication with her attorney she had waived the privilege); Chase v. Chase, 78 R.I. 278, 81 A.2d 686 (1951) (court found waiver of the privilege in publication of the communication with counsel in addition to charges of improper conduct); McClure v. Fall, 42 S.W.2d 821 (Tex. Ct. App. 1931) (waiver found in plaintiff's pleadings and testimony sufficient to allow plaintiff's attorney to testify regarding the privileged communication); Smith v. Guerre, 159 S.W. 417 (Tex. Ct. App. 1913) (court found waiver in pleadings and testimony by client alleging improper conduct; however the privilege was not waived as to communications that did not involve the conduct of the attorney that was allegedly improper); Grant v. Harris, 116 Va. 642, 82 S.E. 718 (1914) (client waived the privilege in her pleadings and by her own testimony so that attorneys must be allowed to testify for their own protection).

39. *See, e.g.*, Bigler v. Reyher, 43 Ind. 112 (1873); Barker v. Kuhn, 38 Iowa 392 (1874); State v. Pusch, 77 N.D. 860, 46 N.W.2d 508 (1950); Shelley v. Landry, 97 N.H. 27, 79 A.2d 626 (1951); People v. Lynch, 23 N.Y.2d 262, 296 N.Y.S.2d 327, 244 N.E.2d 29 (1968); *Ex parte* Bryant, 106 Or. 359, 210 P. 454 (1922); Raleigh & C.R.R. v. Jones, 104 S.C. 332, 88 S.E. 896 (1916); *see also* cases compiled in Annot., 51 A.L.R.2d 521 (1952). *But see* Knowlton v. Fourth-Atlantic Nat'l Bank, 264 Mass. 181, 162 N.E. 356 (1928) (where plaintiff apparently did testify to the content of the privileged communication, the court used very broad language to indicate that a voluntary witness waives every privilege). Early Ohio cases interpreting a statutory directive indicated waiver of all privileges by a plaintiff who voluntarily testifies in his own behalf. *See* Spitzer v. Stillings, 109 Ohio St. 297, 142 N.E. 365 (1924). *But see* Foley v. Poschke, 66 Ohio App. 227, 32 N.E.2d 858 (1940), *aff'd*, 137 Ohio St. 593, 31 N.E.2d 845 (1941) (indicating that without directly overruling earlier cases the court would find no waiver unless plaintiff testified to the content of the confidential communication); Mastran Constr. Co. v. Mahoning Express Co., 58 Ohio L. Abs. 196, 96 N.E.2d 30 (1950) (again without directly overruling earlier cases, the court held it would follow the common law rule and settled law that the attorney-client privilege remains intact even when the client is a witness in his own behalf).