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Attorney-Client Privilege

Michael D. Marrs

ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is the oldest of the privileged communications. It has been traced to Pre-Elizabethan England and may have its origin in the Roman Civil Law.[1]

During the early stages of development, the rationale for excluding communications between attorney and client was the consideration of the oath and honor of the attorney. The attorney was the keeper of his client's secrets and could not be compelled to reveal them.[2] As the privilege developed the theory of exclusion became more concentrated upon the apprehensions of the client. The client, after all, was the real party in interest since the secrets to be protected were his. Also, the client would be more willing to engage in a free discussion with his legal adviser if he could be sure the communication would not be subject to disclosure. Since the client would be more inclined to communicate with his attorney, it was more likely that justice could be properly administered.

Under the theory that the privilege is that of the client, the attorney-client privilege expanded in scope. It includes not only communications made during litigation, but those made in contemplation of litigation, those made looking to litigation and finally any communication during any consultation for legal advice.[3] The reason for broadening the scope is to encourage complete disclosure regardless of the circumstances surrounding the communication. A client could be expected to be reluctant to communicate freely if he were aware that if unexpected litigation arose his communication would not be privileged because it was not made in contemplation or during the course of litigation.

Presently, in most jurisdictions, the attorney-client privilege has been codified. However, most statutes are merely an embodiment of the common law rule and have not further expanded or limited application of the privilege.[4] The following elements of the attorney-client privilege are those embodied in Illinois law. Since Illinois law is relatively undeveloped in certain areas of the privilege it has been necessary to analyze rules from other jurisdictions in order to determine how other states have handled the problems.

The Relationship

The requisite relationship to create the privilege is that of attorney and client. Although this requirement seems elementary it has become

1 8 Wigmore, Evidence § 2290 (McNaughton rev. 1961), (hereinafter cited as Wigmore); Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 Calif. L. Rev. 487 (1928); Prichard v. United States, 181 F.2d 326 (6th Cir. 1950); Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314 (7th Cir. 1963).

2 Wigmore, *supra* note 1.

3 Wigmore, *supra* note 1.

4 Baird v. Koerner, 279 F.2d 623 (9th Cir. 1964).

rather complicated in certain instances. The general rule is that the person to whom the communication is made must be an attorney at law.[5] It has been emphasized that the attorney must have been formally admitted to the office of attorney or counselor.[6]

There is a problem presented, however, when the client consults a person whom he reasonably believes is an attorney. In such a situation it would seem that the privilege should be in effect to exclude the communication, despite the fact that the individual consulted was not an attorney. The client intended to consult an attorney and reasonably believed that the person consulted held such a position. Therefore, merely because the person consulted posed as an attorney and tricked the client into believing he was an attorney should not operate to abrogate the privilege. Of course in the situation just described there should be a *reasonable belief.*

In the early Michigan case of *People v. Barker,*[7] a detective posed as a famous Chicago attorney in order to obtain a confession from a murder suspect. The court declared the confession inadmissible upon the basis of the attorney-client privilege.[8] Clearly in the *Barker* case there was a reasonable belief that the person consulted was an attorney. However, where the belief is not reasonable then the privilege should not apply. An example of an unreasonable belief occurred in *People v. Wattie,*[9] where the privilege was held not to extend to communications made to a "jail house lawyer". The defendant was well aware that the person he was consulting was not an attorney because the "jail house lawyer" had related this fact to him. In all cases the question of reasonableness will be a question of fact and the burden of proof is upon the party asserting the privilege.[10]

Whether a law student may qualify as an attorney within the sphere of the attorney-client relationship has also arisen in certain cases. Because law students are not attorneys the rule has been that communications to them will not be privileged.[11] If a law student posed as an attorney the privilege may be applied, but only because the client reasonably believed the student to be a bona fide attorney. However, with the advent of modern law school practices and experiments, during which law students take an active part in indigent cases, it would seem that the privilege should

5 United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D.C. Mass. 1950); Baird v. Koerner, *supra* note 4.

6 Wigmore § 2300.

7 60 Mich. 277, 27 N.W. 539 (1886).

8 Confidential communications made in reliance upon the supposed relation of attorney and client, whether the party assuming to act as such is an attorney or not, are excluded upon the plainest principles of justice.
Supra, note 7, at 281, 546.

9 253 Cal. App. 2d 403, 61 Cal. Rptr. 147 (1967).

10 McKnew v. Superior Court, 23 Cal. 2d 58, 142 P.2d 1 (1935); McGrede v. Rembert Nat'l Bank, 147 S.W.2d 580 (Tex. Civ. App. 1941).

11 Prichard v. United States, 181 F.2d 326 (6th Cir. 1950); Schubakagel v. Dierstein, 131 Pa. 46, 18 A. 1059 (1890).

apply.[12] The policy considerations upon which the privilege operates would be the same. There is still a pressing need to maintain the secrecy of the client's disclosures to insure the client's confidence. The mere fact that the student is not an attorney should not be the determining factor in disallowing the privilege. In fact, in Colorado it would be difficult to exclude a law student representing an indigent from the definition of an attorney since law students are designated as attorneys by the statute.[13]

The majority of decisions also hold that communications made to judges are not within the attorney-client privilege since judges are not practicing attorneys.[14] The reason for not extending the privilege to communications between judges and consultants is the absence of any need for full disclosure. The judge does not need a private disclosure before trial to assist him in trying a case. However, there is authority for the proposition that the privilege should apply to a judge, the reason being that the need for confidence is increased because a judge is not only authorized to express an opinion, but to declare law.[15]

The case of *Lindsey v. People*[16] presents the most compelling circumstances for allowing the privilege to exist for disclosures made to a judge. The judge was a juvenile court judge and the point was raised that he was in a special position due to the nature of the persons appearing before him. A boy had disclosed to the judge that the boy's mother had shot his father. The judge had elicited the disclosure in the boy's home and had assured the boy that the disclosure could not be used in a court of law. The Supreme Court of Colorado held that the communication was not privileged under the attorney-client privilege since under Colorado law judges are prohibited from acting as attorneys. The court noted the unique nature of the juvenile court in its position in loco parentis, but refused to allow the claiming of the privilege. If there is an exception to be made to the rule not extending the privilege to communications made to judges, the juvenile court judge should fall within the exception. But in most cases the rule is sound and the attorney-client privilege should not apply to disclosures made to a judge.

12 These practices are generally allowed under a statutory provision sanctioning the practice of law by certain qualified law students. The Colorado statute is typical:

> Students of any law school which has been continuously in existence for at least ten years prior to the passage of this section and which maintains a legal aid dispensary where poor persons receive legal advice and services, shall when representing said dispensary and its clients and then only, be authorized to appear in court as if licensed to practice. Colo. Rev. Stat. § 12-1-19.

The Illinois Supreme Court Rule 711, Ill. Rev. Stat. ch. 110A § 711 (1969), is more detailed and somewhat more restrictive than the Colorado statute.

13 *Ibid.*

14 Prichard v. United States, *supra* note 11; People v. Sharac, 209 Mich. 249, 176 N.W. 431 (1920); Agnew v. Agnew, 52 S.D. 472, 218 N.W. 633 (1928).

15 People v. Pratt, 133 Mich. 125, 94 N.W. 752 (1903).

16 66 Colo. 343, 181 P. 531 (1919).

A statement made to a prosecuting attorney or his assistants in their official capacity will come within the attorney-client privilege.[17] This is true even though the communication has been made for the purpose of discovering whether the facts communicated make out a case for criminal prosecution. The reason for the rule is based upon the ground of public policy. The avenue to the grand jury should be free and unobstructed. If the communication were not privileged a complainant would be reluctant to communicate to the prosecutor for fear that the disclosure would be later used in a tort action against the communicant.[18] Therefore, the reason for excluding the communication is not technically within the area of attorney-client privilege, but is more related to the public official or state privilege. The exclusion is not based upon the consideration of protecting the client, but in preserving the state interests in obtaining criminal prosecutions.[19]

In some jurisdictions communications to prosecuting attorneys are not held privileged and the considerations of state policy are ignored.[20] The refusal is based upon the reasoning that there is no relation of attorney and client between the parties. The prosecutor is an officer of the state and not the adviser of the person consulting him. Typically, the cases which hold that the privilege does not attach to communications made to a prosecutor are malicious prosecution or criminal libel cases. The action has been brought by a wrongly accused party who seeks reparation against his accusor for falsely filing a complaint with the prosecutor. When the plaintiff attempted to introduce the defendant's communications to the prosecutor into evidence, the defendant objected on the basis of attorney-client privilege.[21] The court, in reaching its decision, examined the circumstances under which the communication was made. If it appeared the communication was not made with probable cause and in bad faith, the communication to the prosecutor was not privileged. The justification for not allowing the privilege was that because the defendant acted maliciously the interests of the state ceased. Therefore, it was no longer necessary to protect the communicant from civil liability to the wronged party.

With regard to non-lawyers performing legal functions for a client,

17 Vogel v. Gruaz, 110 U.S. 311, 4 S. Ct. 12 (1884); State v. Houseworth, 91 Iowa 740, 60 N.W. 221 (1884); Oliver v. Pate, 43 Ind. 132 (1873); Bowers v. State, 29 Ohio St. 542 (1876). However, see Cleary, Handbook of Illinois Evidence, § 10.14 (2d Ed. 1963) (hereinafter cited as Cleary).

18 Public policy will protect all such communications, absolutely, and without reference to the motive or intent of the informer or the question of probable cause; the ground being, that greater mischief will probably result from requiring or permitting them to be disclosed than from wholly rejecting them. Vogel v. Gruaz, *supra* note 17, at 316.

19 Bazzell v. Illinois Cent. Ry. Co., 203 Ky. 626, 262 S.W. 966 (1924); State v. Archer, 32 N.M. 319, 255 P. 396 (1927).

20 State v. Wilcox, 90 Kan. 80, 132 P. 982 (1913); Riggins v. State, 125 Md. 165, 93 A. 437 (1915).

21 State v. Wilcox, *supra* note 20.

the courts are in discord concerning whether these non-lawyers should be included within the privilege. Non-lawyers acting as confidential advisers have generally been held to be without the privilege.[22] The courts agree in excluding confidential advisers because the policy reasons for the privilege are not present. In the area of lay practitioners of law the courts are not in agreement. Those states which take a strict view of the privilege refuse to allow other than actual lawyers to claim the privilege.[23] Other courts, more lenient in their application of the privilege, allow non-lawyers to claim the privilege when they are in the business of rendering legal advice and practicing before minor courts.[24] These courts reason that since the lay practitioner is a lawyer-in-fact all policy considerations to be protected by the privilege are present. The more lenient position seems to be the better rule. The policy reasons of the privilege, such as the need for full disclosure, and maintaining the confidence of the client, are certainly present. They are not diminished merely because the person consulted has not been formally admitted to the bar.

A communication, to fall within the attorney-client privilege, must be made to the attorney after he has been employed by the client or with a view toward creating the employment.[25] Mere friendly advice given by an attorney to a person at a cocktail party or while passing on the street will not be protected by the privilege. The relationship of attorney-client has not yet come into being.

If there has been a communication made to an attorney in a sincere attempt to secure his services the courts have held the communication privileged even though the attorney was not retained. An example of this situation was presented in a Florida case.[26] The potential client had written certain letters to the attorney in an attempt to secure his services. The inquiries contained in the letters were held privileged. The court reasoned that because the letters were written in an attempt to engage the attorney's services, the letters would be privileged because the relationship of attorney-client had been created.[27] Where there has not been a sincere attempt to secure the attorney's services, and the consultation took place under informal circumstances, the communication will not be privileged.[28] The

22 State v. Smith, 138 N.C. 700, 50 S.E. 859 (1905); Pierson v. Steortz, 1 Morris 136 (Iowa 1841).

23 Machette v. Wanless, 2 Colo. 169 (1873); McLaughlin v. Gilmore, 1 Ill. App. 563 (2d Dist. 1878); Sample v. Frost, 10 Iowa 266 (1859); Brayton v. Chase, 3 Wis. 456 (1854).

24 Bean v. Quimby, 5 N.H. 94 (1829); Benedict v. State, 44 Ohio St. 679, 11 N.E. 125 (1868).

25 Cleary, § 10.14.

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

27 See Taylor v. Sheldon, 172 Ohio St. 118, 173 N.E.2d 892 (1961), where the court court said that a tentative attorney-client relationship would be enough to foster the privilege.

28 This is not to say that a fee or retainer need be paid to the attorney for the authority is quite clear that a fee is not necessary for the privilege to be created. Robinson

early Illinois case of *Goltra v. Wolcott*[29] is an example of an informal consultation held not to be privileged. The attorney had given a friend advice upon a chance meeting in the street. The court declared that the attorney-client privilege would not exclude the communication because there was not no intent to create the relationship of attorney-client. The court buttressed its reasoning by pointing out the informal circumstances under which the consultation occurred. The reason for excluding the type of communication presented by *Goltra* is that the privilege would become too broad. Anything said to an attorney could be excluded by the privilege. Surely, the policy of the privilege would not be fostered by such an application.[30]

In one instance the attorney-client privilege will not be created due to the actions of the parties. Where a client consults an attorney to obtain advice in regard to the future commission of a crime or tort the communication will not be privileged. The reason for not applying the privilege is the lack of a valid attorney-client relation. The privilege is not a rule which will enable two parties to act together to commit a crime or tort.[31] No communication of this nature could fall within the relationship of attorney-client. One consults an attorney for the purposes of obtaining legitimate legal advice. When the consultation is for the purposes of committing a future crime or tort the relationship is transformed into a conspiracy.

It is well established in the law that attorney-client communications which pertain to the future commission of crimes or civil frauds will not be privileged.[32] But there is some disagreement among jurisdictions whether communications regarding the future commission of torts should fall outside the attorney-client privilege. The American Law Institute Model Code of Evidence[33] provides that the privilege between attorney and client is equally inapplicable to communications respecting both crimes and torts, but this has not been uniformly accepted.[34] The general rationale for not

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v. United States, 144 F.2d 392 (6th Cir. 1944); Dickerson v. Dickerson, 322 Ill. 492, 153 N.E. 740 (1926).

29 14 Ill. 88 (1852).

30 It is sound policy not to apply the privilege to casual consultations where there is no intent to create the relationship. However, it would be unfortunate if the courts were to concentrate upon the physical circumstances under which the communications took place. It is quite logical that consultations under informal conditions, such as a golf outing, or during lunch, should be privileged so long as there was an intent to create the relationship.

31 Cleary § 10.15; Lanum v. Patterson, 51 Ill. App. 36 (1st Dist. 1909).

32 Foster v. Hall, 12 Pick. 89, 22 Am. Dec. 400 (Mass. 1831); Hughes v. Boone, 102 N.C. 137, 9 S.E. 286 (1889). In some instances the rule has been limited to cases involving moral turpitude only. Emerson v. Western Auto Indem. Ass'n, 105 Kan. 242, 182 P. 647 (1919) (privilege held to apply because the attorney merely advised his client on the best way to protect his interests). See also, Supplee v. Hall, 75 Conn. 17, 52 A. 407 (1902).

33 Rule 212.

34 Nowell v. Superior Court of Los Angeles County, 223 Cal. App. 2d 652, 36 Cal.

following the rule is that going beyond the crime or fraud exception would nullify a large area of the privilege. The feeling is that in view of the wide variety and technical character of many torts substantial difficulties would be created for an attorney consulting with his client.[35]

The opposing view, that the privilege will not exclude communications pertaining to future tortious conduct, has not been clearly enunciated by the courts. Generally, the cases have dealt with quasi-criminal conduct and have intimated that the privilege would not exclude communications concerning future torts without a direct holding.[36] It would appear from the cases that the courts are reluctant to allow abuse of the privilege in any regard. Perhaps the best position would be that taken by Wigmore: Where the advice sought is knowingly given for an unlawful end and involves a civil wrong of moral turpitude the privilege would not attach.[37] Such a position would not allow abuse of the privilege or excessively broaden the exception to the point of creating difficulties in attorney-client consultations.[38]

Only recently there has developed some question in the courts regarding the nature of the client in an attorney-client relationship. The question has arisen in regard to whether a corporation can be a client. It had not been doubted that corporations could be clients and thereby claim the privilege until the case of *Radiant Burners, Inc. v. American Gas Association*.[39] In this case the court felt a corporation should be included within the privilege, but found no authority for such a position.[40] The court then ruled, because there was no authority, that corporations should not be allowed to claim the attorney-client privilege.[41] The Court of Appeals reversed the lower court, holding the privilege does extend to corporations.[42]

Rptr. 21 (1963); McLellan v. Longfellow, 32 Me. 494 (1851); McNeill v. Thomas, 203 N.C. 219, 165 S.E. 712 (1932).

35 Nowell v. Superior Court of Los Angeles County, *supra* note 33.

36 See Annot. 2 A.L.R.3d 861 (1965).

37 Wigmore § 2298.

38 Admittedly, this rule would give rise to further difficulties in regard to what constitutes *knowingly* given advice or *moral turpitude*, but it would seem these problems could be resolved on the facts of each case.

39 207 F. Supp. 771 (N.D. Ill. 1962).

40 However, see A.B. Dick Co. v. Marr, 95 F. Supp. 83 (N.D.N.Y. 1950), app. dismissed 197 F.2d 498 (2nd Cir. 1950), cert. den. 344 U.S. 878, 73 S. Ct. 169, reh. den. 344 U.S. 905, 73 S. Ct. 282; Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792 (D. Del. 1954); and Stewart Equipment Co. v. Gallo, 32 N.J. Super. 15, 107 A.2d 527 (1954), where the privilege was applied to corporate clients.

41 . . . . (I)t being my own considered judgment that due to the large and complex nature of modern corporate business transactions, corporations should in fact be entitled to the attorney-client privilege. However, I am not a court of sufficient importance or authority to create such a position by judicial ordination. Radiant Burners, Inc. v. American Gas Association, 209 F. Supp. 330, 335 (N.D. Ill. 1962).

42 A corporation is entitled to the same treatment as any other client—no more no less. If it seeks legal advice from an attorney, and in that relationship con

The Court of Appeals in *Radiant Burners* was somewhat guarded in allowing corporations to claim the privilege. It stated that the privilege ought to be strictly confined within the narrowest possible limits consistent with the logic of the principle upon which the privilege operates.[43] Therefore, the fact that corporations are entitled to claim the privilege still does not solve the problem pertaining to which persons within the corporate structure are qualified to claim the privilege as actual "clients". One test formulated by the courts is membership in the "control group". The "control group" is a group of persons authorized to make decisions for the corporation with respect to the legal problem upon which the attorney has been consulted.[44] To be within the "control group" the person must be in a position to control or take a substantial part in the decision to take legal action, or he must be an authorized member of a group which had such authority. The person must have actual and not apparent authority.[45] The "control group" test has found acceptance, with little variation.[46]

The "control group" doctrine, however, has been severely criticized by members of the bar.[47] The criticism evolves from a fear that the privilege has been overly restricted by the "control group" test. The argument is that since the purpose of the privilege is to enable full disclosure by the client and facilitate the workings of justice by protecting the rights of the client, then the privilege should extend to the full range of corporate activities. Therefore, all communications by agents engaged in corporation activities to an attorney retained by the corporation should be privileged.[48] The problem with the "control group" test is that it is based upon the concept that the client is an individual. The corporate client consists of numerous individuals acting for the corporation. These persons may be directly concerned with litigation, but still not within the "control group".[49]

The argument against the "control group" test has validity because the test does substantial harm to the policy of the privilege. Agents who have an important role in litigation, due to their position as witnesses or participants in the litigated controversy, may not have their communica-

fidentially communicates information relating to advice sought, it may protect itself from disclosure absent its waiver thereof.

Radiant Burners, Inc. v. American Gas Association, 320 F.2d 314, 324 (7th Cir. 1963). This view is in accord with the American Law Institute Model Code of Evidence Rule 209 and the Uniform Rules of Evidence, Rule 26 (3)(a).

43 Radiant Burners, Inc. v. American Gas Association, *supra* note 41, at 323, citing Wigmore § 2291.

44 Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483 (E.D. Pa. 1962).

45 *Supra* note 43.

46 Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968); Garrison v. General Motors Corp., 213 F. Supp. 515 (N.D. Cal. 1963); Day v. Illinois Power Co., 50 Ill. App. 2d 52, 199 N.E.2d 802 (5th Dist. 1964).

47 Burnham, *Confidentiality and the Corporate Lawyer*, 56 Ill. Bar. J. 542 (1968).

48 Burnham, *supra* note 47, at 545.

49 Burnham, *supra* note 47, at 547.

tions to counsel protected by the privilege. They may not be in the "control group". By restricting the privilege to apply to only those in the "control group" full disclosure can be obtained only at great risk and in all probability will not be obtained at all. If disclosure is made by an agent of the corporation to an attorney, it is likely he will be "briefed" before consultation to avoid disclosing material believed harmful to the corporation. Justice is certainly not effectuated by anything less than full disclosure. Therefore, the "control group" test recreates the evils sought to be eliminated by the attorney-client privilege.

On the other hand, as pointed out in *Radiant Burners*,[50] the privilege should not be available to allow a corporation to evade disclosure of those items clearly not privileged. The courts should not allow the privilege to be blanket in its coverage. The limitation surrounding information must be determined for each document on a case-by-case basis.[51] Courts should avoid trying to formulate a rule of thumb. Unless the line is carefully drawn, separating those items which are privileged from those which are not, substantial harm will be done to the corporate client and the policy upon which the privilege is based.

The Communication

In order for a communication to be privileged it must relate to professional matters, and be made because of the relationship of attorney-client.[52] Wigmore states that the test is whether the client made the statement as part of his purpose to obtain advice on the subject.[53] This test places emphasis upon what the client believes to be relevant during his consultations with counsel. If a disclosure is made which is thought by the client to be relevant, but which happens to be irrelevant, the privilege should attach. If, however, the matter disclosed is known to be irrelevant then there should be no privilege.[54]

50 320 F.2d 314 (7th Cir. 1963).

51 *Id.* at 324.

52 Pollack v. United States, 202 F.2d 281 (5th Cir. 1953); United States v. United Shoe Machinery Corp., 89 F. Supp. 367 (D. Mass. 1950); Champion v. McCarthy, 228 Ill. 87, 81 N.E. 808 (1907).

53 Wigmore § 2310.

54 Wigmore, *supra*, note 53. In Illinois, the general rule is that the communication must relate to the business and interest of the client, and the privilege extends only to communications connected with the purpose for which the attorney has been consulted. Cleary § 10.14. In *Re* Estate of Busse, 332 Ill. App. 258, 75 N.E.2d 36 (2d Dist. 1947), the attorney had been consulted by the deceased in regard to the sale of her property for the purpose of settling a debt. The action was brought by the claimant against the decedent's estate. Decedent's attorney was called to testify concerning the purposes for which the property was to be sold. The communications were held to be privileged despite the fact that, technically, the purpose for selling the property was not related to the task the attorney was performing. The court said because the communication related to the business and interest of the client that was sufficient.

When the communication is made to an attorney who is performing mere clerical acts for the client involving no legal advice, the communication will not be privileged. Where the attorney is acting only as a scrivener in preparing a deed he is not precluded from testifying concerning communications made to him by the client.[55] The same rule applies to communications made to an attorney retained to draft a contract[56] or mortgage.[57] The rationale for not allowing the privilege to exclude this type of communication is that the client's comments could not be related to the task being performed by the attorney. However, where the communication relates to the clerical task and the attorney is acting in a capacity other than as a mere scrivener, the communications made to him by the client will be privileged. In the Illinois decision, *Dickerson v. Dickerson*,[58] the attorney drafted a deed for the client, but was asked whether the client could make the conveyances without joining his wife. The court said the attorney was performing more than a clerical function and therefore the client's communication to the attorney was privileged.[59] It would seem, under the rule of *Dickerson*, that if the attorney were acting as a legal adviser in any manner, a communication to him would be privileged. It is difficult to imagine a situation under modern complex legal practices where an attorney would be performing a purely clerical function without rendering legal advice.

However, when an attorney is merely attesting a will the courts consider the task a purely clerical function and any comments made to the attorney will not be privileged.[60] The same is true when the attorney is drafting a will.[61] When the attorney acts as legal adviser in preparing the will the courts have varied in applying the privilege to communications made by the testator to the attorney. Most courts are in agreement that the

55 Cleary § 10.15; Pickering v. Hollabaugh, 194 Kan. 804, 401 P.2d 897 (1965) (the attorney was allowed to testify that the parties told him they could not exactly set the number of acres covered by the deed). See also Short v. Kleppinger, 163 Neb. 729, 81 N.W.2d 182 (1957) where the attorney drafted, executed and signed a deed. The objection to the attorney's testimony was overruled because the testimony did not relate to communications which were privileged. Directions given by a grantor to an attorney preparing a deed were not considered to come within the preview of attorney-client privilege.

56 Funk v. Mohr, 185 Ill. 395, 57 N.E. 2 (1900).

57 DeWolf v. Strader, 26 Ill. 225 (1861).

58 322 Ill. 492, 153 N.E. 740 (1926).

59 See Miller v. Pierce, 361 S.W.2d 623 (Tex. Civ. App. 1962), where the attorney prepared a deed for the client and gave her substantial legal advice. The court held the communication privileged. In accord is Hollenback v. Todd, 119 Ill. 543, 8 N.E. 829 (1886), where the attorney drew an assignment for his client and the court held privileged any communication by the client to the attorney concerning the purposes for making the assignment.

60 Cleary §10.16; Jackson v. Pillsbury, 340 Ill. 554, 44 N.E.2d 537 (1942); Auerbach v. Continental Illinois Nat. Bank and Trust Co. of Chicago, 340 Ill. App. 64, 91 N.E.2d 144 (1st Dist. 1950); *In re* Karras' Estate, 109 Ohio App. 403, 166 N.E.2d 781 (1959).

61 *Re* Olson's Estate, 239 Iowa 1149, 34 N.W.2d 207 (1948), where attorney drew will and mailed it to testator. In accord, *Re* Downing, 118 Wis. 581, 95 N.W. 876 (1903).

privilege will be applied to any communications made by the testator to his attorney while the testator is alive.[62] They also agree, generally, that once the testator has died the privilege will not operate to exclude the communications made by the testator.[63] The reason for allowing the privilege to operate before the testator's death and not afterward hinges on the implication that a testator wishes secrecy of the contents and execution of his will while he is alive.[64] Once the testator is deceased the motivation for secrecy is no longer present and the privilege will not be invoked.

However, merely because the testator is deceased does not mean automatic abrogation of the privilege. The privilege will still be operative to exclude communications when the claimant is claiming adversely to the testator or his estate.[65] The reason for excluding communications made to the attorney by the testator when the claimant is adverse to the testator or his estate, is that the testator would impliedly not want the attorney to defeat the will. When the claimant is claiming under the will or testator as an heir, devisee, or other party, the privilege will not be applied to communications made by the testator to the attorney.[66] When the claimants are not claiming adversely to the will or testator it is not deemed for the best interest of the testator to have communications excluded which promote a proper fulfillment of the testator's intent. In this situation, the courts relax the rule and the testator's communications made to the attorney will be admissable.

In order for a communication to be privileged, it must originate with the client or his agent.[67] Generally, the privilege protects any fact committed to the attorney by a voluntary act of disclosure, whether oral or

62 DeLoach v. Meyers, 215 Ga. 255, 109 S.E.2d 777 (1959); Scott v. Harris, 113 Ill. 447 (1885); Mason v. Willis, 326 Ill. App. 513, 62 N.E.2d 135 (4th Dist. 1945); Kern v. Kern, 154 Ind. 29, 55 N.E. 1004 (1900); *Re* William's Will, 256 Wis. 338, 41 N.W.2d 191 (1950).

63 Denver National Bank v. McLogan, 133 Colo. 487, 298 P.2d 386 (1956); Seeba v. Bowden, 86 So. 2d 432 (Fla. 1956); Mason v. Willis, *supra* note 62; Grand Rapids Trust Co. v. Bellows, 224 Mich. 504, 195 N.W. 66 (1923) (dictum); Booker v. Brown, 173 Ore. 464, 146 P.2d 71 (1944).

64 Wigmore § 2314; Scott v. Harris, *supra* note 62; Wilkinson v. Service, 294 Ill. 146, 94 N.E. 50 (1911).

65 Glover v. Patten, 165 U.S. 394, 17 S. Ct. 411 (1897); Scott v. Harris, *supra* note 61; Wilkinson v. Service, *supra* note 64 (dictum); Chew v. Farmer's Bank, 2 Md. Ch. 231 (1848); Coates v. Semper, 82 Minn. 460, 85 N.W. 217 (1901); *Re* Smith's Estate, 263 Wis. 441, 57 N.W.2d 727 (1953).

66 Paley v. Superior Court, 137 Cal. App. 2d 450, 290 P.2d 617 (1955); Schutz v. Leary, 123 Ind. App. 100, 106 N.E.2d 705 (1952); Eichholtz v. Grunewold, 313 Mich. 666, 21 N.W.2d 914 (1946); Hanefeld v. Fairbrother, 191 Minn. 547, 254 N.W. 821 (1934); *Re* Smith's Estate, *supra* note 65; *In re* Everett's Will, 105 Vt. 291, 166 A. 827 (1933).

67 The privilege of confidence would be a vain one unless it could be delegated. A communication then by any form of agency employed or set in motion by the client is within the privilege.
Wigmore § 2317.

written.[68] The privilege also extends to the responses made by an attorney to questions of a client. The reason the privilege extends to statements made by the lawyer is because it is necessary to prevent the lawyer's responses from being used as admissions of the client.[69]

Under the common law all documents which were not communications, but came into the hands of the attorney pursuant to the attorney-client relation, were privileged.[70] With the advent of modern discovery statutes the common law rule was abolished. However, the fact that these assorted documents are subject to disclosure is not a true invasion of the privilege because they are not actual communications to the attorney and technically not within the privilege in the first place. Any privileged material which the attorney holds will not be subject to discovery under the statutes.[71] Also, those documents and articles which are part of the work product of the attorney are not subject to discovery; however, the work product doctrine is not to be confused with attorney-client privilege because they are separate and distinct areas.[72]

Since the attorney-client privilege is that of the client, the communications are at his instance permanently protected.[73] The privilege extends to all communications passing between an attorney and client whether litigation is pending or not.[74] Therefore, if a client is called as a witness in a proceeding he need not be a party to the proceeding in order to claim the privilege.

Wigmore voices the opinion that since the privilege is not the attorney's, an attorney would not be justified in refusing to obey an erroneous ruling compelling disclosure even where the client was a party to the proceeding. The client must protect himself through appellate procedure.[75] Despite this pronouncement by Wigmore, the better rule is to allow the attorney to refuse and be cited for contempt. The policy of the privilege is to promote freedom of consultation between legal adviser and client.[76]

68 Wigmore § 2306. However, certain documents will not be covered which the client himself could be compelled to produce. See Symposium, *Privileged Communications*, 56 Nw. U. L. Rev. 236 (1962).

69 Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968).

70 Wigmore § 2318.

71 The Illinois discovery statute is typical in not allowing the attorney-client privilege to be infringed upon;

> All matters which are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party are privileged against disclosure through and discovery procedure.

Ill. Rev. Stat. ch. 110 A., § 201 (6)(2) (1967).

72 See Radiant Burners, Inc. v. American Gas Association, 320 F.2d 314 (7th Cir. 1963).

73 Wigmore § 2321; Clearly § 10.18; People *ex rel.* Schufeldt v. Barker, 56 Ill. 299 (1870); State v. Loponio, 85 N.J.L. 357, 88 A. 1045 (1913).

74 People *ex rel.* Schufeldt v. Barker, *supra* note 73.

75 Wigmore, *supra* note 73.

76 It has been found necessary to the protection of persons surrounded and embarrassed by difficulty, to the end that they may have the advice and counsel of

The privilege is intended to afford protection of the client and not the attorney.[77] If the attorney could be compelled to testify upon threat of contempt the policy of the privilege would be destroyed. It is true that the communication could be protected upon appeal, but there has been a disclosure of material likely to be against the client's interest. The great value that such a statement may hold for discovery purposes, despite being inadmissible in evidence, is only too obvious. Even if a statement had no value for legal purposes, it may cause extra-legal damage to the client.[78]

The better rule is to allow complete protection of the client by permitting the attorney, after being cited for contempt, to appeal on the basis of the attorney-client privilege. The canons of the American Bar Association impliedly would allow this procedure since by canon 37 an attorney is to preserve the confidence of his client and by canon 15 an attorney must give his client the benefit of every legal remedy.[79]

The policy of the privilege is to promote the subjective freedom of the client. Therefore, it logically follows that the privilege does not end with the termination of the attorney-client relationship as long as the communication was made before termination.[80]

CONFIDENTIALITY

For a communication to be within the attorney-client privilege it must be confidential. There is no presumption of confidentiality raised by the mere relationship of attorney-client. In most instances, the attorney and client must be the only parties present and the client must consider the communication confidential.[81]

The presence of third parties during the course of an attorney-client consultation may or may not result in destruction of the attorney-client privilege. Generally, whether the confidential character will be destroyed depends upon the function of the third party. Where the third party is an agent of the attorney or client the privilege will render the agent in-

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persons skilled in the law, upon a complete disclosure of all that pertains to the transaction that affects their interest, property or liberty, with full assurance that the communications thus made are safe with their legal adviser as wihin their own breasts.

People *ex rel.* Schufeldt v. Barker, *supra* note 73, at 300.

77 Prichard v. United States, 181 F.2d 326 (6th Cir. 1950); Republic Gear Co. v. Borg Warner Corp., 381 F.2d 551 (2d Cir. 1967).

78 See 1968 Wis. L. Rev. 1192, 1199 (1968).

79 A.B.A. Canons of Professional Ethics.

80 United States v. Foster, 309 F.2d 8 (4th Cir. 1962); People v. Linden, 52 Cal. 2d 1, 338 P.2d 397 (1959); Dunn v. Commonwealth, 350 S.W.2d 709 (Ky. 1961); Hart v. State, 303 P.2d 476 (Okla. 1956).

81 Wigmore § 2311; Cleary § 10.17; U.S. v. McDonald, 313 F.2d 832 (2d Cir. 1963); Scott v. Aultman Co., 211 Ill. 612, 71 N.E. 1112 (1904); Dunn v. Bloom, 15 A.D. 687, 223 N.Y.S.2d 709 (1962).

competent to testify.[82] However, when the third party is a mere bystander or a client's companion, the privilege will not operate to exclude his testimony.[83] The decisions not allowing the privilege when a bystander is present are based upon two reasons—a layman cannot be within the attorney-client privilege unless he is the client and the confidentiality of the relationship has been destroyed by the presence of the third party.

When the third party is an intermediary between the attorney and client most courts agree that the intermediary falls within the privilege.[84] A prime example of a necessary intermediary would be an interpreter. Most jurisdictions are in accord that an interpreter for an attorney-client communication will not be allowed to testify.[85] A messenger would also be an intermediary when he delivers a communication from client to attorney and will also be within the privilege.[86]

A relatively recent rule promulgated by the Illinois decision of *People v. Ryan*[87] states that an insurance company will also be within the attorney-client privilege as an intermediary.[88] The insured was required to make out an accident report to an insurance agent. The insured was later prosecuted for a criminal offense growing out of the accident. In the meantime the insured's attorney acquired the report from the insurance company. The state sought to subpoena the report and the attorney refused to obey on the ground of attorney-client privilege. The court said the report was privileged in the hands of the insurer as an intermediary between the insured and her lawyer. The privilege did not cease upon transmission of the report to the insured's private counsel. The court carefully pointed

82 The privilege excludes communications overheard by the attorney's clerk, Southwest Metals Co. v. Gomez, 4 F.2d 215 (9th Cir. 1925); Taylor v. Taylor, 179 Ga. 691, 177 S.E. 582 (1934); State v. Sterret, 68 Iowa 76, 25 N.W. 936 (1885); Wartell v. Novogard, 48 R.I. 296, 137 A. 776 (1927), also his secretary or stenographer, Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949); Cold Metal Process Co. v. Aluminum Co. of America, 7 F.R.D. 684 (D. Mass. 1947); State v. Krich, 123 N.J.L. 519, 9 A.2d 803 (1939); or by an agent of the client, Foley v. Poschke, 139 Ohio St. 593, 131 N.E. 2d 845 (1963).

83 People v. Castiel, 153 Cal. App. 2d 653, 315 P.2d 79 (1957); Gronewold v. Gronewold, 304 Ill. 11, 136 N.E. 489 (1922) (dictum); Vanhorn v. Commonwealth, 239 Ky. 833, 40 S.W.2d 372 (1931); Lanza v. New York State Joint Legislative Committee on Government Operations, 3 N.Y.2d 92, 164 N.Y.S.2d 9 (1957); State v. Sullivan, 60 Wash. 2d 214, 373 P.2d 474 (1962).

84 The general rule is that a communication by a client to an attorney by any form of agency employed or set in motion by the client is within the privilege. Wigmore § 2317, City and County of San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951).

85 United States v. Kovel, 296 F.2d 918 (2d Cir. 1961) (dictum); Hawes v. State, 88 Ala. 37, 7 So. 302 (1889); City and County of San Francisco v. Superior Court, *supra* note 84 (dictum); Mileski v. Locker, 14 Misc. 2d 252, 178 N.Y.S.2d 911 (1958) (dictum).

86 Blankenship v. Rountree, 219 F.2d 597 (10th Cir. 1955); People *ex rel.* Dept. of Public Works v. Donovan, 57 Cal. 2d 346, 369 P.2d 1 (1962); Brown v. St. Paul City Ry. Co., 241 Minn. 15, 62 N.W.2d 688 (1967).

87 30 Ill. 2d 456, 197 N.E.2d 15 (1964).

88 See also D.I. Chadbourne, Inc. v. Superior Court, 60 Cal. 2d 723, 388 P.2d 700 (1964); *Re* Heile, 65 Ohio App. 45, 29 N.E.2d 175 (1939).

out that while the insurance company was not an attorney, one could assume that the report was taken for the purpose of transmitting it to an attorney to protect the interests of the insured.[89]

Of course, when a communication takes place between attorney and client in the presence of opposing parties or opposing counsel the communication will not be privileged.[90] The privilege will also be invalid when adverse parties consult the same attorney.[91] The reason for not applying the privilege in these two situations is that confidence could not exist under the circumstances. But, what is the result when adverse clients give statements to the same intermediary? In the celebrated Illinois discovery case of *Monier v. Chamberlain*,[92] the court stated that there would be no privilege. Both parties to the litigation were insured with the same insurance company and each submitted an accident report. Looking to the fact that both parties knew the other was insured by the same company and the insurer was bound to defend both, the court felt this was scarcely the type of confidentiality contemplated by the privilege. However, as the court pointed out, an insured party is ordinarily bound to make reports to the insurance company by a cooperation clause. The only manner in which an insured could be protected by the privilege would be to refrain from making a report. But, this action would surely result in cancellation of the insurance policy and possible personal liability of the insured.[93] Perhaps an exception should be made for the situation where adverse parties make statements to the common insurance company, because since a party is compelled to make a report he is denied the possibility of confidential communications to his attorney. The insurance company would certainly not be harmed by an exception because the client would be inclined to fully disclose all material since he would be protected by the attorney-client privilege.

WAIVER

Waiver of the attorney-client privilege may be accomplished in several ways. The general rule is that only the client may waive;[94] however, this

89 People v. Ryan, 30 Ill. 2d 456, 458, 197 N.E.2d 15, 17 (1964).

90 Scott v. Aultman Co., 211 Ill. 612, 71 N.E. 1112 (1904); Galvin v. O'Neill, 393 Ill. 475, 66 N.E.2d 403 (1946); Tracy v. Tracy 377 Pa. 420, 105 A.2d 122 (1954).

91 Pick v. Diecks, 218 Ill. App. 295 (1st Dist. 1920); Stewart v. Todd, 190 Iowa 283, 173 N.W. 619 (1919); Tracy v. Tracy, 377 Pa. 420, 105 A.2d 122 (1954); Cummings v. Sherman, 16 Wash. 2d 88, 132 P.2d 998 (1943).

92 35 Ill. 2d 351, 221 N.E.2d 410 (1966).

93 There is a duty upon the insured to freely and fully disclose all facts which will aid in the insurer's defense of any suit. Prudence Mutual Casualty Co. v. Dunn, 30 Ill. App. 2d 469, 175 N.E.2d 286 (1st Dist. 1961).

94 Cleary §10.18; Hunt v. Blackburn, 128 U.S. 464, 9 S. Ct. 125 (1888); Turner v. Black, 19 Ill. 2d 296, 166 N.E.2d 588 (1961); Passmore v. Passmore, 50 Mich. 626, 16 N.W. 170 (1883); State *ex rel.* Sowers v. Olwell, 64 Wash. 2d 828, 394 P.2d 681 (1964). In one instance where the privilege had been altered by statute, the court held that the client could not waive the privilege. O'Brien v. Spaulding, 102 Ga. 490, 31 S.E. 100 (1897).

is not a rigid criterion. A client may expressly waive the privilege when he testifies in regard to the privileged matter, whether or not he is a party to the cause.[95] This is not to say the client waives the privilege by merely taking the witness stand. His testimony must significantly touch upon the privileged matter before there will be a waiver.[96] For instance, a client could be called to testify in his own behalf and be examined generally without waiving the privilege. If the question approaches privileged material the client may still refuse to answer on the basis of the privilege.

A waiver will also occur if a client offers his attorney's testimony in the cause where the testimony relates to privileged communications.[97] This is considered to be a direct waiver of the privilege as though the client himself volunteered to divulge the information. To the same effect is the rule that when a client makes his attorney a subscribing witness to a writing, a waiver of the privilege has occurred. The client is said to have expressly waived the privilege by making his attorney a witness.[98] Perhaps this result is too harsh for a waiver of the attorney-client privilege probably was not even considered, let alone intended.

The privilege may also be waived by implication. An implied waiver will occur if the client repeats a confidential communication to a third party.[99] It is implied by the court that the client no longer regards the communication as confidential. Implied waiver will also be effectuated for a later trial if the client discloses the confidential communication at an earlier proceeding.[100] Waiver occurs only once to be effective for all time.

A person other than the client may waive the attorney-client privilege under certain circumstances. When the client is deceased or an incompetent, a waiver may be made by third parties, such as heirs, executors, administrators or guardians. Heirs or personal representative of a decedent's estate will usually be allowed to waive the attorney-client privilege as to any matter affecting the estate. It is implied by the courts that the client would want every fact to be considered so that his estate may be properly dis-

95 Hunt v. Blackburn, *ibid;* Eldridge v. State, 126 Ala. 63, 28 So. 580 (1900); Knight v. People, 191 Ill. 170, 61 N.E. 371 (1901); Pinson v. Campbell, 124 Mo. App. 260, 101 S.W. 621 (1907); Yardley v. State, 50 Tex. Crim. 644, 100 S.W. 399 (1907).

96 Tillotson v. Boughner, 350 F.2d 663 (7th Cir. 1967); Montgomery v. Pickering, 116 Mass. 227 (1874); Jones v. State, 65 Miss. 179, 3 So. 379 (1888). There is authority for the contrary proposition, however, see Woburn v. Henshaw, 101 Mass. 193, 3 Am. Rep. 333 (1869).

97 Wigmore § 2327; Blount v. Klimpton, 155 Mass. 378, 29 N.E. 590 (1892).

98 O'Brien v. Spaulding, 102 Ga. 490, 31 S.E. 100 (1897) (dictum); Larson v. Dahlstrom, 214 Minn. 304, 8 N.W.2d 48 (1943); *In re* Karras' Estate, 109 Ohio App. 403, 166 N.E.2d 781 (1959). The privilege is also impliedly waived when a client's will has been attested to by his attorney. *Re* Putnam, 257 N.Y. 140, 177 N.E. 399 (1931); Collins v. Collins, 110 Ohio St. 105, 143 N.E. 561 (1924); McMaster v. Scriven, 85 Wis. 162, 55 N.W. 149 (1893).

99 Radio Corporation of America v. Rauland Corporation, 18 F.R.D. 440 (1956); Scott v. Harris, 113 Ill. 447 (1885); People v. Ryan, 30 Ill. 2d 456, 197 N.E.2d 15 (1964).

100 Equally, a waiver at one stage of a trial will be a waiver for all further stages, Wigmore § 2328.

tributed.[101] However, where the privilege has been codified and the statute provides that *the client* must expressly waive the privilege, an heir or personal representative will not be allowed to waive.[102] Where the client is an incompetent, his guardian will be permitted to waive the privilege. A reason for allowing waiver by the guardian is that, by implication, proper management of the incompetent's interests require waiver to occur.[103] The court would probably be very careful under these circumstances in order to properly protect the incompetent client. The necessity of disclosure must be great before waiver will be allowed.

Conclusion

In conclusion:
(1) Where legal advice of any kind is sought,
(2) from a professional legal adviser, in his capacity as such,
(3) the communication relating to that purpose,
(4) made in confidence,
(5) by the client,
(6) is, at his instance, permanently protected,
(7) from disclosure by himself or by the legal adviser,
(8) unless the privilege is waived.[104]

These elements are those developed by the common law and embodied in modern legal practice with little variation.

Michael D. Marrs

101 See Annot., 67 A.L.R.2d 1275 (1959).
102 *Re* Coon's Estate, 154 Neb. 690, 48 N.W.2d 778 (1951).
103 Lietz v. Primock, 84 Ariz. 273, 327 P.2d 288 (1958).
104 Wigmore § 2292.