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Recent Developments: Rubin v. State: Protection of Attorney-Client Privilege Does Not Apply to Location and Condition of Tangible Evidence Removed or Altered by Defense Counsel Even if It Implicates the Defendant

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resolve the case at hand. In *Sibbach v. Wilson*, 312 U.S. 1 (1941), the Court "observed that federal courts, in adopting rules were not free to extend or restrict the jurisdiction conferred by a statute." *Willy*, 112 S. Ct. at 1079. Federal courts, therefore, cannot adopt rules which modify the judicial power granted by Article III of the United States Constitution.

Willy argued that the district court had overreached the judicial power granted by Article III by imposing Rule 11 sanctions in a case absent subject matter jurisdiction. "Thus, according to petitioner, even had Congress attempted to grant the courts authority to impose sanctions in a case such as this, the grant would run afoul of Article III." *Willy*, 112 S. Ct. at 1079. Willy conceded that there are circumstances in which federal courts without subject matter jurisdiction may impose sanctions. Nevertheless, he contended that federal courts may not take such action "against a party who has successfully contested jurisdiction." *Id.* at 1079. The Court, however, reasoned that "in acknowledging the many circumstances in which sanctions can be imposed, several which have a statutory basis, petitioner effectively concedes both Congress' general power to regulate the courts and its specific power to authorize the imposition of sanctions." *Id.* at 1080.

The Court stated that a federal court found lacking subject matter jurisdiction would be precluded from further adjudication of the case; "but such a determination does not automatically wipe out all proceedings had in the district court at a time when the district court operated under the misapprehension that it had jurisdiction." *Id.* After reviewing other cases, the Court declared that in the interest of maintaining orderly procedure, sanctions should be upheld despite a later determination that the federal court was without jurisdiction. *Id.* Furthermore, Rule 11 sanctions were of collateral concern and such sanctions were not an assessment of the legal merits of a case. *Id.* Relying on *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990), the Court state that "it is well established that a federal court may consider collateral issues after an action is no longer pending." *Willy*, 112 S. Ct. at 1080 (quoting *Cooter & Gell*, 496 U.S. 384).

Willy supported his claim by citing *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988), in which the Court concluded that if on remand, the district court is found to be deficient in subject matter jurisdiction, the contempt orders enacted by the district court must collapse. *Willy*, 112 S. Ct. at 1089. Based on this decision, Willy asserted that Rule 11 sanctions imposed by a district court without subject matter jurisdiction must fall. The Court rejected Willy's liberal application of *Catholic Conference* the and emphasized the differences in the purpose of a civil contempt order and Rule 11 sanctions.

Since Rule 11 sanctions do not involve the merits of a "case or controversy," a federal court without subject matter jurisdiction over a case may constitutionally impose procedural rules which are collateral to the case at hand. Accordingly, parties must observe procedural rules, such as Rule 11, when practicing before federal courts, whether or not they agree with the jurisdiction of that court.

- Carol Nakhuda Cohen

Rubin v. State: PROTECTION OF ATTORNEY-CLIENT PRIVILEGE DOES NOT APPLY TO LOCATION AND CONDITION OF TANGIBLE EVIDENCE REMOVED OR ALTERED BY DEFENSE COUNSEL EVEN IF IT IMPLICATES THE DEFENDANT.

In a six to one decision, the Court of Appeals of Maryland held that statements made by a defendant in a criminal case to investigators she had hired in a related domestic matter were not protected by attorney-client privilege until her attorney specifically retained the investigators in the criminal matter. In *Rubin v. State*, 602 A.2d 677 (Md. 1992), the court of appeals held a private investigator's testimony about statements made by the defendant before her attorney arrived at the murder scene did not violate attorney-client privilege. However, the court found that the investigator's testimony concerning events occurring later violated her attorney-client privilege, but was harmless error. The court, although not explicitly doing so, appeared to adopt an exception to the attorney-client privilege for evidence removed or altered by defense counsel.

Lisa Rubin and Timothy Warner's 10-year marriage was turbulent. It was marked by numerous affairs and the alleged attempted murder of Rubin's ex-lover. In March 1990, Warner moved out of the couple's home. Several days later, Rubin engaged the services of Prudential Associates, Inc., a private investigating agency, to prove that Warner was committing adultery. During the course of the investigation, Rubin developed a close relationship with Robert Miller, Prudential's president, and told Miller that Warner had admitted to her that he had tried to kill her former lover. Miller recommended that Rubin consult with Prudential's attorney, Darrel Longest, about a possible accessoryship problem. Rubin subsequently met with Longest and retained him to represent her.

On April 23, 1990, Warner telephoned Rubin concerning their dog. They agreed to meet at the veterinarian's office the following evening. After meeting at a parking lot, Rubin and Warner walked down a path through a wooded area. There, Rubin shot Warner nine times with a .38 caliber pistol, reloading twice in the process. Rubin then called Miller and arranged to meet him, without telling him the purpose of the meeting. Miller, along with an associate, Leopold, met Rubin and she subsequently led them to the murder site. Only after talking to Rubin and examining the scene did Miller call attorney

Longest. After Longest arrived, he advised the investigators not to discuss the events because they were working as his agents on this matter. The following day, Leopold made a statement to the police. As a result, a search warrant was issued for the office of Longest. The murder weapon was found in the attorney's office along with an envelope containing six .22 caliber bullets.

Rubin filed a motion to suppress all communications between the investigators, the attorneys and herself on the basis of attorney-client privilege. The Circuit Court for Montgomery County held that the attorney-client relationship did not arise with respect to Warner's murder until Longest arrived at the scene. *Rubin*, 602 A.2d at 683. Later, during the trial, Leopold testified that after meeting with Longest, he had observed some .22 caliber bullets in Rubin's handbag. This testimony discredited Rubin's self-defense theory that Warner had pulled a .22 pistol on her. *Id.* at 690. Rubin was convicted and appealed. The court of appeals issued a writ of certiorari on its own motion prior to consideration by the court of special appeals.

The first issue concerned when the attorney-client privilege arose. The court began by describing privileged communications as those "made during the existence of actual relation of attorney and client, or during interviews directed thereto, and must relate to the subject-matter about which advice is sought." *Id.* at 684 (citing *Harrison v. State*, 345 A.2d 202 (1970)). The court then recognized that the scope of the attorney-client privilege may properly apply to communications between Rubin and the Prudential investigators. *Rubin*, 603 A.2d at 683.

Rubin contended that legal representation by Longest embraced all aspects of the relationship between Rubin and Warner and that she called Miller to "get in touch with Mr. Longest." *Id.* The court held that in applying the existing law to the facts, the circuit court was warranted in finding that Rubin did not have a reasonable expectation that her conversations with the investigators would be protected by attorney-client privilege, since neither an employer-employee relationship, nor an agency relationship existed between Longest and Prudential prior to Longest's arrival at the murder scene. *Id.* at 684.

The court next addressed Rubin's contention that allowing Leopold to testify about the bullets he saw in Rubin's handbag, after the attorney-client relationship attached, was error. The court stated the general rule that when the client is the source of physical evidence delivered by defense counsel to the prosecution, the source will not be disclosed to the jury. *Id.* at 689. In allowing the testimony, the circuit court relied on *People v. Meredith*, 631 P.2d 46 (Cal. 1981). In *Meredith*, the California court held that "whenever defense counsel removes or alters evidence, the [attorney-client] privilege does not bar the revelation of the original location or condition of the evidence in question," *Rubin*, 602 A.2d at 686 (quoting *Meredith*, 631 P.2d at 54), even if the original location implicates the accused as the source.

The *Meredith* exception has been held applicable when the defense moves tangible evidence from a fixed location or alters its condition. The rationale behind the exception is that by removing or altering the evidence, defense counsel "deprives the prosecution of the opportunity to observe that evidence in its original condition or location." *Id.* (citing *Meredith*, 631 P.2d at 53). In analyzing the *Meredith* exception, the court first cited a litany of cases supporting the general rule that a defense attorney must turn over any tangible evidence to the prosecution. *Rubin*, 602 A.2d at 686-87. The court then stated that when the attorney's possession of the evidence was a result of a client's "intentionally communicative act or accompanied by, or resulting from, a confidential communication, the attorney-client privilege is implicated." Id. at 687-88. Thus, at trial, the original location and condition of evidence may be disclosed by the prosecution, but the source of the evidence, the communication from the client, may not.

Previously, the *Meredith* exception had only been applied to removal of tangible evidence from a fixed location by the defense team based on communication from the client. *Id.* at 689. In the case sub judice, the State attempted to classify moving the .22 caliber bullets from Rubin's handbag to the attorney's file cabinet as a *Meredith* alteration. Without specifically adopting or rejecting *Meredith*, the court of appeals explained that the removal of the bullets from the handbag was not an alteration of "location" in the sense of *Meredith*, but a separation of "the link between the physical evidence in the possession of defense counsel and the client source of that evidence," in line with the general rule. *Id.* The court found a violation of attorney-client privilege, but ultimately considered it to be harmless error, because the remaining evidence in the case could not give rise to reasonable doubt.

Although the court of appeals found a violation of the protection of attorney-client privilege, this case is significant for the limitations that the court imposes on that protection. First, the court narrowly interpreted when the attorney-client relation arises. In the future, defendants will have to be more careful in discussing events with non-attorneys. Second, although the court of appeals expanded the scope of attorney-client privilege to evidence obtained from defense counsel, who obtained it based on client information, it also adopted an exception to this protection. Attorneys in Maryland will now have to make a tactical decision whether to remove and examine tangible evidence and risk losing the attorney-client privilege associated with the location and condition of the item or to leave the item in place and protect observations.

- Ken Brown