Michigan Law Review

Volume 53 | Issue 3

1955

Evidence - Attorney-Client Privilege - Communications Relating to Future Criminal Transactions

Robert B. Fiske, Jr. S.Ed.
University of Michigan Law School

EVIDENCE—ATTORNEY-CLIENT PRIVILEGE—COMMUNICATIONS RELATING TO FUTURE CRIMINAL TRANSACTIONS—Defendant was subpoenaed in connection with a grand jury investigation of gambling and corruption of public officials.

He had been retained by one "Willie" Moretti as attorney for five of his associates in October, 1950 after a complaint charging a gambling conspiracy had been filed against them. During some two hundred conferences with Moretti in the following year, defendant learned that protection money was being paid to certain high ranking state officials, Moretti at one point complaining of the frequent demands of these officials for more money. Moretti also discussed with defendant a visit he had paid to the home of one Dickerson, a prominent political figure, twelve days after the aforementioned complaint had been filed. With respect to this visit, Dickerson testified that Moretti had complained that people who had paid protection money were being "pushed around," and that he (Moretti) had paid protection money. Dickerson interpreted these remarks as an attempt to pressure him into interceding with the grand jury on Moretti's behalf. Moretti himself was a witness before the Kefauver Committee in 1951, and was indicted after his death in 1951 for conspiracy to obstruct justice.[1] Upon being asked to disclose the names of the people, who, according to Moretti, had received protection money, and to state whether Moretti had told him that he had been to Dickerson's home and had a conversation, defendant claimed the attorney-client privilege and refused to answer. Upon an order to show cause why defendant should not answer the above questions, the trial court sustained the claim of privilege and the appellate division affirmed. On appeal, *held*, reversed, three judges dissenting. The two hundred unexplained conferences within a year, the visit to Dickerson, and Moretti's complaint about the greed of public officials constitute prima facie evidence that Moretti consulted defendant with regard to future criminal transactions, to which the privilege does not attach. *In re Selser*, (N.J. 1954) 105 A. (2d) 395.

As the oldest of the privileged communications,[2] the attorney-client privilege is firmly entrenched in Anglo-American jurisprudence.[3] The privilege originated to protect the oath and honor of the attorney,[4] but since the 1700's it has belonged exclusively to the client[5] to provide him freedom of apprehension in con-

[1] "We refrain from comment here on the practice of indicting dead men." Principal case at 398. Since the crime of conspiracy requires at least two persons [CLARK AND MARSHALL, LAW OF CRIMES, 5th ed., §129 (1952)], one explanation of this unusual indictment might be its value in establishing Moretti as a co-conspirator in a prosecution of one of his colleagues for conspiracy. In this manner, it would serve much the same purpose as an indictment charging a defendant with conspiring with *A*, *B*, "and others to the grand jury unknown."

[2] 8 WIGMORE, EVIDENCE, 3d ed., §2290 (1940).

[3] Id., §2292.

[4] ". . . the first duty of an attorney is to keep the secrets of his client." Taylor v. Blacklow, 3 Bing. N.C. 235 at 249, 132 Eng. Rep. 401 (1836).

[5] A more accurate statement is that the attorney has no privilege at all, but only a duty to refrain from testifying unless the court determines that his client has no privilege. See Canons of Professional Ethics, Canon 37. In asserting the privilege the attorney is thus merely stating a fact rather than claiming a privilege. State v. Toscano, 13 N.J. 418, 100 A. (2d) 170 (1953); MCKELVEY, HANDBOOK OF THE LAW OF EVIDENCE, 5th ed., p. 552 (1944).

sulting a legal adviser.[6] In order for this privilege to exist, the relationship of attorney and client must be established,[7] and the client must seek legal advice[8] from the attorney in his capacity as such.[9] The communications must be made in confidence.[10] Since the privilege belongs solely to the client, only he is entitled to waive it.[11] This privilege represents a balance between the competing policies of fullest disclosure of the truth whenever possible, and protection of the attorney-client relationship deemed essential to society.[12] It is settled that communications made by a client in contemplation of a future wrongful transaction are not privileged,[13] irrespective of the possible innocence of the attorney.[14] To vitiate the privilege on this ground, however, it is necessary to make out a prima facie case of illegality; a mere charge or allegation is not enough.[15] The question of whether this prima facie case has been established is one of fact to be decided by the judge.[16] As evidenced by the majority opinion in the appellate division, and the dissent of three judges in the supreme court, the facts in the principal case seem as consistent with innocence as with guilt in the absence of any concrete proof, especially when it is considered that Moretti had reason to consult the defendant with regard to three distinct matters: his associates' case, his appearance as a witness before the Kefauver Committee, and his own potential indictment. The court stressed the necessity of eliminating a widespread increase of crime, taking judicial notice of bribery of local officials as a major

[6] An excellent statement of the policy behind this privilege is found in Ammesley v. Earl of Anglesea, 17 How St. Tr. 1139 at 1224-25 (1743).

[7] The existence of the relationship was not contested in the principal case. It is interesting to note, however, that the dissent in the appellate division, which brought the case to the supreme court as a matter of right [N.J. Court Rules, Rule 1:2-1(b)], was based solely on this point. In re Selser, 27 N.J. Super. 257 at 267, 99 A. (2d) 313 (1953).

[8] It is not necessary that there be any litigation pending. MCKELVEY, HANDBOOK OF THE LAW OF EVIDENCE, 5th ed., p. 555 (1944).

[9] The following have been held to be without the privilege: drafting a deed, Wilcox v. Coons, 359 Mo. 52, 220 S.W. (2d) 15 (1949); performing accounting services, Olender v. United States, (9th Cir. 1954) 210 F. (2d) 795; acting as agent, Gallagher v. Akoff Realty Corp., 197 Misc. 460, 95 N.Y.S. (2d) 796 (1950).

[10] 8 WIGMORE, EVIDENCE, 3d ed., §2311 (1940). It has been held that the privilege does not include the name of the client, People ex rel. Vogelstein v. Warden of County Jail of New York County, 150 Misc. 714, 270 N.Y.S. 362 (1934), affd. 242 App. Div. 611, 271 N.Y.S. 1059 (1934); the address of the client, Falkenhainer v. Falkenhainer, 198 Misc. 29, 97 N.Y.S. (2d) 467 (1950); the fact of retainer, Magida on Behalf of Vulcan Detinning Co. v. Continental Can Co., (D.C. N.Y. 1951) 12 F.R.D. 74. The last cited case held, however, that the terms of retainer are within the privilege.

[11] State v. Toscano, note 5 supra.

[12] Radin, "The Privilege of Confidential Communication between Lawyer and Client," 16 CALIF. L. REV. 487 (1928). Although the privilege is universally recognized, it has always received a restrictive interpretation as an exception to the general rule favoring fullest disclosure of the truth. 8 WIGMORE, EVIDENCE, 3d ed., §2291 (1940).

[13] Matthews v. Hoagland, 48 N.J. Eq. 455 (1891); 8 WIGMORE, EVIDENCE, 3d ed., §2298 (1940).

[14] Clark v. United States, 289 U.S. 1, 53 S.Ct. 465 (1933).

[15] Ibid.; United States v. Bob, (2d Cir. 1939) 106 F. (2d) 37.

[16] People's Bank of Buffalo v. Brown, (3d Cir. 1902) 112 F. 652; 8 WIGMORE, EVIDENCE, 3d ed., §2323 (1940).

cause of this increase.[17] This factor no doubt played a large part, if only indirectly, in leading the court to call for an increased disclosure of the truth at the expense of the attorney-client relationship. The law enforcement problem in this area is a difficult one, compounded immeasurably when the attorneys themselves spearhead political corruption and then abuse the attorney-client privilege by asserting it for their own protection.[18] While the rights of the individual must yield to the good of society when necessity so demands, and while the spread of crime in the principal case may have warranted a restriction of the privilege, it is unfortunate that the traditional concept of presumption of innocence should have been the victim.[19] It is suggested that the court might have chosen the death of the client Moretti as a preferable basis for disallowing the privilege.[20] While as a general rule the attorney-client privilege does not terminate with the death of the client,[21] it is submitted that where the policy demand for full disclosure of the truth is especially compelling, and the resulting injury to the attorney-client relationship is slight,[22] no substantial injustice would be done by denying the privilege on this basis.

Robert B. Fiske, Jr., S.Ed.

[17] Principal case at 399.

[18] It is in this area that the attorney-client privilege has rightly received its greatest criticism. See 8 WIGMORE, EVIDENCE, 3d ed., §2299 (1940).

[19] "The acceptance of the thesis here tendered will work a radical impairment of a great principle of civil liberty that has stood the test of centuries as founded in natural justice." Principal case at 408, Heher, J., dissenting.

[20] It is submitted that the majority might also have based its denial of the privilege on the lack of any attorney-client relationship in preference to the grounds actually chosen. See note 7 supra.

[21] 8 WIGMORE, EVIDENCE, 3d ed., §2323 (1940). Although general statements may be found to the effect that the "privilege terminates with the death of the client" [In re Conner's Estate, (Iowa 1948) 33 N.W. (2d) 866, revd. on other grounds 240 Iowa 479, 36 N.W. (2d) 833 (1949)], the only exception to the general rule seems to be in cases where all the parties to the litigation are claiming under the client. Hecht's Admr. v. Hecht, 272 Ky. 400, 114 S.W. (2d) 499 (1938); Gaines v. Gaines, 207 Okla. 619, 251 P. (2d) 1044 (1953). Where a stranger is an adverse party to a devisee, heir, or personal representative of the client, the latter may waive the privilege for the client and examine the attorney. Winters v. Winters, 102 Iowa 53, 71 N.W. 184 (1897). If, however, the testimony of the attorney will benefit the executor individually at the expense of the estate, the privilege cannot be waived. Eicholtz v. Grunewald, 313 Mich. 666, 21 N.W. (2d) 914 (1946).

[22] As in the principal case. It is difficult to see how the disclosure of Moretti's communications to defendant could in any way operate to his disadvantage. This is not the type of case where revelation might injure the reputation of the client or cause an economic loss to his estate (as apparently was the case in Eicholtz v. Grunewald, note 21 supra). Nor should it subject Moretti's family to revengeful repercussions on the part of his colleagues when it is the attorney who makes the disclosure, and then only by force of a court order. In short, there is little danger that a disclosure of the truth in this type of case would weaken the attorney-client relationship by causing clients in the future to be more reluctant to make all facts known to their attorneys, for, by hypothesis, if disclosure after death is limited to cases where it will not injure the client in any substantial manner, no undesirable effects should result.