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DISCOVERY-ATTORNEY-CLIENT PRIVILEGE-STATEMENTS BY CLIENT TO INSURER BEFORE ATTORNEY EMPLOYED

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DISCOVERY—ATTORNEY-CLIENT PRIVILEGE—STATEMENTS BY CLIENT TO INSURER BEFORE ATTORNEY EMPLOYED—Plaintiff, suing for personal injuries suffered in an automobile collision, sought discovery of statements made by defendant to his insurer, both before and after an attorney had been employed by the insurer pursuant to its contract with defendant. Defendant contended that such statements were within the attorney-client privilege. On appeal from an order denying discovery, *held,* affirmed. The statements were intended as a communication by defendant to the attorney ultimately to be retained for him by his insurer, and the insurer was the agent of defendant to transmit the statements to the attorney when selected. *Hollien v. Kaye,* 194 Misc. 821, 87 N.Y.S. (2d) 782 (1949).

Since a party called to make discovery is a witness, the attorney-client privilege relates to pre-trial discovery as well as to trial testimony.[1] To fall within the scope of the privilege the communication must be made confidentially while seeking legal advice from an attorney.[2] Because the privilege ordinarily presupposes the existence of the attorney-client relationship, as a general rule a client's communication in existence before it was communicated to the attorney is not privileged, while one which has come into existence as a communication to the attorney is within the privilege.[3] However, because the privilege extends to a communication by any form of agency employed or set in motion by the client[4] there is some confusion in the cases where the communication is initially to a third party who later transmits it to an attorney. In such a case, if the communication has been made in the ordinary course of business and not in view of any existing or prospective litigation it is not privileged;[5] but if it has been obtained for the bona fide purpose of being later transmitted to an attorney for advice or use in litigation so that the third party is actually an agent for transmission, the privilege exists.[6] The objective fact of whether or not litigation has begun or whether the commu-

[1] Neugass v. Terminal Cab Corp., 139 Misc. 699, 249 N.Y.S. 631 (1931); 27 C.J.S., Discovery, §35 (1941); RAGLAND, DISCOVERY BEFORE TRIAL 146-9 (1932).

[2] Bacon v. Frisbie, 80 N.Y. 394 (1880); State v. Snowden, 23 Utah 318, 65 P. 479 (1901). For a list of the statutes, see 8 WIGMORE, EVIDENCE, 3d ed., §2292 (1940).

[3] 8 WIGMORE, EVIDENCE, 3d ed., §§2307, 2318 (1940); 28 R.C.L., Witnesses, §166 (1921).

[4] "Where a document is prepared by an agent or employe by direction of the employer for the purpose of obtaining the advice of the attorney or for use in prospective or pending litigation, such document is in effect a communication between attorney and client." Schmitt v. Emery, 211 Minn. 547 at 552, 2 N.W. (2d) 413 (1942). See also, 139 A.L.R. 1250 (1942); 70 C.J., Witnesses, §581 (1935); Bowers v. State, 29 Ohio St. 542 (1876); Leyner v. Leyner, 123 Iowa 185, 98 N.W. 628 (1904).

[5] "A statement made by an employee to his employer, in the course of his ordinary duty, concerning a recent accident, and before litigation has been brought or threatened, is not privileged either in the hands of the employer or in the hands of the latter's attorney to whom it has been transmitted." Robertson v. Commonwealth, 181 Va. 520 at 539, 25 S.E. (2d) 352 (1943). See also, 146 A.L.R. 980 (1943); Hurley v. Connecticut Co., 118 Conn. 276, 172 A. 86 (1934). Cf. Ex parte Schoepf, 74 Ohio St. 1, 77 N.E. 276 (1906).

[6] "A statement concerning an accident which is obtained by the employer from his servant for the *bona fide* purpose of being later transmitted to the employer's attorney for advice, or to be used by the attorney in connection with pending or threatened litigation is privileged. . . . This is so because such a statement is itself a part of the communication from

nication was made at the instance of an attorney is often important in determining the purpose for which the communication was made.[7] Thus, where an employee gives his employer an accident report in the course of his duty and before litigation develops, there is no privilege although litigation does subsequently develop and the communication is transmitted to an attorney.[8] However, a contrary result is reached where the reports are made in anticipation of litigation and delivered to an attorney.[9] Moreover, as the privilege tends to keep out the truth, it should be narrowly construed to permit a liberal application of the rules of discovery.[10] In light of these principles it is apparent that the principal case has erroneously applied the attorney-client privilege to the statements made in the ordinary course of business, before litigation had developed, and before an attorney had been employed.[11] The present decision was influenced by the belief that the client would not "unbosom" himself to his insurer through fear that his statement could be reached by others; but the policy is to promote freedom of consultation between clients and legal advisers, not insurers.[12] Furthermore, the application of the privilege in the principal case merely promulgates the "sporting theory" of litigation, defeating the policy behind the modern rules of discovery.[13]

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the client to his counsel." Robertson v. Commonwealth, supra, note 5, at 539. See also, In re Klemann, 132 Ohio St. 187, 5 N.E. (2d) 492 (1936); cases collected 108 A.L.R. 510 (1937); 146 A.L.R. 987 (1943).

[7] ". . . there is a distinction, often difficult to make in practice, between documents prepared as records by an employe pursuant to the employer's direction in the regular course of business and those prepared under the direction and advice of the attorney as a communication for use in connection with his rendition of professional service. The one is a business record without privilege of any sort; the other a communication between attorney and client." Schmitt v. Emery, supra, note 4, at 553. Of course, the existence of the privilege does not depend on the actual existence of litigation; it is enough that legal advice is sought. 8 WIGMORE, EVIDENCE, 3d ed., §2294 (1940).

[8] Watson v. Detroit Free Press, 248 Mich. 237, 226 N.W. 854 (1929). Contra: In re Hyde, 149 Ohio St. 407, 79 N.E. (2d) 224 (1948), noted in 47 MICH. L. REV. 416 (1949).

[9] "Reports, statements and affidavits taken by the company before the matter is submitted to its attorney can properly be examined but statements . . . taken by the attorney for the Insurance Company, in preparation for trial, are privileged." Matthies v. Connolly Co., 2 F.R.D. 277 (1941). See Meadows v. Metropolitan Life Ins. Co. (Mo. App., 1937) 104 S.W. (2d) 788.

[10] "The policy of the law is to require the disclosure of all information by witnesses in order that justice may prevail. The granting of a privilege from such disclosure constitutes an exception to that general rule. . . . The tendency is not to extend the classes to whom the privilege from disclosure is granted, but to restrict that privilege." People ex rel. Mooney v. Sheriff of N. Y. Co., 269 N.Y. 291 at 295, 199 N.E. 415 (1936).

[11] The report does not give the nature of the statements, so as to ascertain whether or not they fulfill the statutory requisite of "relating to the merits of the action, or of the defenses therein" for discovery. N.Y. Civ. Prac. Act. (Clevenger, 1947) §324.

[12] "There would be no privilege if the relation between the person delivering the statement and the recipient thereof was that merely of insured and insurer. . . . Nor would the privilege exist, even if the statement came into the hands of an attorney, if at the time of the delivery of the statement the relation of attorney and client did not exist. . . ." Cote v. Knickerbocker Ice Co., 160 Misc. 658 at 660, 290 N.Y.S. 483 (1936).

[13] See Holtzoff, "Instruments of Discovery under Federal Rules of Civil Procedure," 41 MICH. L. REV. 205 (1942).