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EVIDENCE-PRIVILEGED COMMUNICATION-EXTENSION OF THE PRIVILEGE TO COMMUNICATION INVOLVING AGENTS

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EVIDENCE—PRIVILEGED COMMUNICATION—EXTENSION OF THE PRIVILEGE TO COMMUNICATION INVOLVING AGENTS—Suppose that *X* sends his accountant to consult with his attorney regarding *X's* income tax liability. Suppose the wife of *X*, at his request, consults a physician concerning *X's* physical condition. Next, suppose that *X* dictates to his stenographer a letter to his wife. On the other hand, suppose that *X* enters his attorney's office, and, on finding no one there but the attorney's secretary, gives her information for the drafting of certain papers. Suppose also that *X* calls at his doctor's office, and, finding only the doctor's nurse there, tells her his symptoms, which she reduces to a memo for her employer. And, finally, suppose that *X* attempts to reach his wife by telephone, but upon learning that she is out, gives his wife's personal maid a message to be passed on to the wife.

Within certain limitations, the law immunizes confidential communications made to an attorney, spouse or physician[1] from compulsory disclosure at subsequent judicial proceedings. Frequently, as in the above hypothetical situations, the subject matter of a communication is voluntarily disclosed to a third person for transmittal to the ultimately intended recipient. The third person may be the agent of either of the primary parties. Does this disclosure remove it from the privileged classification, notwithstanding the fact that the parties may still have intended the information to be confidential? It is the purpose of this comment, first, to examine the extent to which the three common privileges have been extended to communications through, by, or in the presence of agents, and, second, to identify some of the probable factors motivating such extension. For the most part, the decisions have taken a rational and practical approach, but seldom indulge in any extended discussion of the reasoning behind them.

[1] The physician-patient privilege is entirely statutory, the other two being recognized at common law.

An examination of the cases can perhaps best be accomplished by giving separate treatment to the three basic fact situations, viz., the situation in which the agent is a mere intermediary or conduit between the parties, in which he is a managing agent with rather broad powers, and lastly, in which he is a person necessarily present at the time of a confidential conversation between the primary parties.

I. *The Intermediary*

If a letter is sent by a communicant to the party on the receiving end of a privilege, no one seeing the letter except the person to whom it is addressed, the letter is of course protected from compulsory disclosure. If someone learns of the contents of the letter by surreptitious means, or overhears a privileged conversation, the knowledge so gained may be disclosed.[2] But what if it is sought to question the telegraph operator, the employee, friend, or other person who has in confidence been permitted by the communicant to learn the contents of the communication in order to deliver it to the other party? With respect to the attorney-client privilege, it is quite clear that communication through an intermediary is protected. Theoretically, the fact that the client has undertaken to use an indirect means of communication should be one of the factors involved in determining whether the communication was really intended to be confidential.[3] But as a practical matter, the courts have been quite free in sanctioning this mode of communication, regardless of whether the intermediary happens to be the agent of the client[4] or a clerk of the attorney.[5] There are few cases relative to

[2] Whether knowledge gained through connivance of a spouse may be divulged is not clear. McNeill v. State, 117 Ark. 8, 173 S.W. 826 (1915) (not privileged); Scott v. Commonwealth, 94 Ky. 511, 23 S.W. 219 (1893) (privileged); People v. Hayes, 140 N.Y. 484, 35 N.E. 951 (1894) (not privileged). See also 10 IND. L.J. 182 (1934).

[3] ". . . certainly a client who adopts the indirect instead of the direct method [of communication] without good reason or reasonable necessity for so doing comes perilously near the one who makes his verbal communication to his attorney in the presence of a third person. In that case the verbal communication is not privileged, because it is presumed that it was not intended to be confidential. . . . The question probably comes down after all to one of whether or not the method employed was intended and understood to be confidential, and in deciding that question, the presence or absence of reasonable necessity would doubtless be an important element." State v. Loponio, 85 N.J.L. 357 at 361, 88 A. 1045 (1913).

[4] State v. Loponio, 85 N.J.L. 357, 88 A. 1045 (1913); Scales v. Kelley, 2 Lea (70 Tenn.) 706 (1879); Fire Association of Philadelphia v. Fleming, 78 Ga. 733, 3 S.E. 420 (1887); In re Heile, 65 Ohio App. 45, 29 N.E. (2d) 175 (1939).

[5] Sibley v. Waffle, 16 N.Y. 180 (1857); Landsberger v. Gorham, 5 Cal. 450 (1855). See also Hilary v. Minneapolis Street Ry. Co., 104 Minn. 432, 116 N.W. 933 (1908) and Taylor v. Taylor, 179 Ga. 691, 177 S.E. 582 (1934). The authority for this statement is old, no doubt because it has long been accepted.

the intermediary in the physician-patient field. But when actual necessity arises, as when it is essential that a third person go to a physician for help because of the inability of the patient, then the privilege will probably be recognized.[6] However, the privilege has not been extended to the use of intermediaries between spouses, even when such method is reasonably necessary. Thus a husband while in jail may not communicate with his spouse through a fellow prisoner without destroying the privilege,[7] although an opposite result is reached on similar facts in an attorney-client communication.[8]

II. *The Managing Agent*

Frequently a client will give his employee or other agent a good measure of responsibility in carrying on negotiations with the attorney.[9] Once the agency is established,[10] information is protected whether it originates with the client or the agent,[11] and whether or not it is ultimately communicated directly to the attorney by the client.[12] Generally, however, documents or information so protected from compulsory disclosure must originate as communications to the attorney, and not as pre-existing intra-office memoranda or business records.[13] It would also seem that the privilege is that of the client and not of the agent.[14]

[6] People v. Brower, 53 Hun. (60 N.Y.) 217, 6 N.Y.S. 730 (1889). See also North American Union v. Oleske, 64 Ind. App. 435, 116 N.E. 68 (1917).

[7] State v. Young, 97 N.J.L. 501, 117 A. 713 (1922). See also Commonwealth v. Fisher, 221 Pa. 538, 70 A. 865 (1908) involving, in part, the privilege of spouse against adverse testimony of other spouse.

[8] State v. Loponio, 85 N.J.L. 357, 88 A. 1045 (1913).

[9] Lalance & Grosjean Mfg. Co. v. Haberman Mfg. Co., (C.C. N.Y. 1898) 87 F. 563.

[10] LeLong v. Siebrecht, 196 App. Div. 74, 187 N.Y.S. 150 (1921).

[11] Schmitt v. Emery, 211 Minn. 547, 2 N.W. (2d) 413 (1942); Webb v. Francis J. Lewald Coal Co., 214 Cal. 182, 4 P. (2d) 532 (1931).

[12] "Because it is so often necessary for clients to communicate with their attorneys with the assistance or through the agency of others, as well as by their own personal action, the privilege extends to a communication prepared by an agent or employe, *whether it is transmitted directly to the attorney by the client or his agent or employe.* Of course the privilege is limited to the necessities of the situation. 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. The client is entitled to the same privilege with respect to such communication as one prepared by himself." Schmitt v. Emery, 211 Minn. 547 at 552, 2 N.W. (2d) 413 (1942). Italics supplied.

[13] See 26 MINN. L. REV. 744 (1942); 88 UNIV. PA. L. REV. 467 (1940); and 28 VA. L. REV. 1133 (1942). It is here, however, that we run into difficult problems of discovery which would require an extended discussion beyond the scope of this paper. For full treatment of the inter-relation of problems of discovery of pre-existing documents, the attorney-client privilege, the use of agents by the client, and information coming to the attorney from third persons generally, see 8 WIGMORE, EVIDENCE §§2294, 2307-8, 2317-19 (1940).

[14] Bingham v. Walk, 128 Ind. 164, 27 N.E. 483 (1890); Leyner v. Leyner, 123 Iowa 185, 98 N.W. 628 (1904).

Occasionally the managing agent will be acting as sub-agent for the attorney or physician. The attorney's clerk who types up information supplied by the attorney, who in turn got it from the client, is silenced just as is the attorney himself.[15] Similarly, it has been held that reports to the attorney from agents sent to gather information at his behest are privileged,[16] although information coming to him from third parties generally is not.[17] Considerably more reluctance is shown toward extending the privilege to information coming to nurses while acting under the general direction of a physician, but not actually assisting him.[18] Except in so far as the nurse is acting as an intermediary, extension of the privilege to testimony by nurses does not seem justified. Because of this inherent nature of the privilege, similar circumstances do not arise in the case of husband and wife transactions.

III. *Agent Necessarily Present*

Contrary to the usual rule that presence of a third party at a conversation, otherwise privileged, negatives its confidentiality so that it is no longer privileged,[19] if that person is necessarily present as an agent or assistant of either of the primary parties, the privilege is not destroyed. The inquiry turns upon the question of how necessary is the presence of the third party to the basic transaction. The easiest case is that of the interpreter who is needed to breach a language gap between the primary parties.[20] This situation is very similar to that of the pure intermediary previously considered, except that in the latter, one of the primary parties is absent. The presence of the attorney's secretary at a consultation with the client does not defeat the privilege,[21] and the same is generally true as regards the presence of a nurse assisting a physician in an examination of the patient.[22] The presence

[15] Wartell v. Novograd, 48 R.I. 296, 137 A. 776 (1927); Taylor v. Taylor, 179 Ga. 691, 177 S.E. 582 (1934).

[16] Steele v. Stewart, 1 Ph. 471, 41 Eng. Rep. 711 (1843).

[17] United States v. United Shoe Machinery Corp., (D.C. Mass. 1950) 89 F. Supp. 357; Ford v. Tennant, 32 Beav. 162, 55 Eng. Rep. 63 (1863); 8 WIGMORE, EVIDENCE §2317 (1940).

[18] Prudential Insurance Co. of America v. Kozlowski, 226 Wis. 641, 276 N.W. 300 (1937); See First Trust Co. of St. Paul v. Kansas City Life Insurance Co., (8th Cir. 1935) 79 F. (2d) 48, and Culver v. Union Pacific Ry. Co., 112 Neb. 441, 199 N.W. 794 (1924).

[19] See 15 BOST. UNIV. L. REV. 846 (1935); 15 UNIV. CHI. L. REV. 989 (1948); 63 A.L.R. 114 (1929); 96 A.L.R. 1419 (1935).

[20] Maas v. Bloch, 7 Ind. 202 (1885).

[21] Wartell v. Novograd, 48 R.I. 296, 137 A. 776 (1927); Taylor v. Taylor, 179 Ga. 691, 177 S.E. 582 (1934); 8 WIGMORE, EVIDENCE §2311 (1940).

[22] Culver v. Union Pacific Ry., 112 Neb. 441, 199 N.W. 794 (1924); Meyer v. Russell, 55 N.D. 546, 214 N.W. 857 (1927); Mississippi Power & Light Co. v. Jordan,

of a mother at a consultation between an attorney and her young daughter, a prosecutrix in a seduction case, has been held not to negative the privilege.[23] A similar result was reached when one spouse accompanied the other to the physician when the purpose of the visit involved the marital relationship,[24] but not otherwise.[25]

IV. *Factors Behind the Extension*

In summary, it can be said that the decisions extend the privilege rather liberally in the case of attorney-client communication, to a less extent for physician-patient communication, and hardly at all for marital communication. For the most part, this can be explained as a result of four factors.[26]

1. *The language of particular statutes.* The patient's privilege is strictly statutory. The other two exist at common law, but are frequently found to be codified.[27] It goes without saying that some regard must be had for the particular statutory language in explaining particular decisions or groups of decisions. Not infrequently a statute provides that the privilege is to extend to communications to attorney's clerks, etc. Obviously such language makes it easy for an extension of the privilege. But more important, the absence of such language in the codification of one of the other privileges gives the court a peg upon which to hang its hat in denying the extension of that privilege to agents.[28]

2. *Strength of the policy behind the privilege.* Although the attorney-client privilege has in the past been vehemently attacked by Jeremy

164 Miss. 174 (1932). *Contra,* Southwest Metals Co. v. Gomez, (9th Cir. 1925) 4 F. (2d) 215.

[23] "It is well established that the privilege extends as well to communications to or through an agent, as to those made directly to the attorney by the client in person, and we think it is only a dictate of decency and propriety to regard the mother . . . as being present and acting in the character of confidential agent of her daughter. The daughter's youth and supposed modesty would render the presence and participation of her mother appropriate and necessary." Bowers v. State, 29 Ohio St. 542 at 546 (1876).

[24] Bassil v. Ford Motor Co., 278 Mich. 173, 270 N.W. 258 (1936).

[25] Mullin-Johnson Co. v. Penn. Mutual Life Insurance Co. of Phila., (D.C. Cal. 1933) 2 F. Supp. 203.

[26] These factors, relevant in discussing the extension of the privilege, are classifications of the writer, being distinct from and not to be confused with Professor Wigmore's well-known four prerequisites to the establishment of the basic privilege. See 8 WIGMORE, EVIDENCE §2285 (1940).

[27] 8 WIGMORE, EVIDENCE §2292 (1940).

[28] See, for example, Southwest Metals Co. v. Gomez, (9th Cir. 1915) 4 F. (2d) 215; First Trust Co. of St. Paul v. Kansas City Life Ins. Co., (8th Cir. 1935) 79 F. (2d) 48; and Hilary v. Minneapolis Street Ry. Co., 104 Minn. 432, 116 N.W. 933 (1908).

Bentham[29] and others, the average court now is well satisfied with the merits of the privilege. The same is true of the husband-wife privilege. But there is no such unanimity of opinion as regards an immunity for physician-patient transactions. It is still attacked[30] and has been recognized by statutes in only about half of the states. To the extent that the basis of the privilege is meritorious in the eyes of the court, to that extent it would seem that the court should be more willing to extend it to cover communications involving agents.

3. *Necessity of an extension of the privilege to the relationship sought to be fostered.* Whether or not there is complete justification, there are basic reasons for allowing each of the three common privileges. The attorney-client and physician-patient immunities have been established to encourage freedom of subjective thought so that the client or patient will freely disclose all information at his command, thereby enabling the attorney or physician to give maximum service and protection to the communicant.[31] On the other hand, the husband-wife privilege is given to promote mutual trust between the spouses, thereby increasing the likelihood of a stable marriage. At first glance, the reasons behind the privileges appear to be the same. But the husband-wife privilege may be distinguished in that the relationship sought to be fostered is a continuing one.[32] The carving out of a segment, viz., communication through agents, from all communications sheltered from compulsory disclosure, will not break down the whole marital relationship so long as day to day protection is given to the greater portion of marital confidences. On the other hand, with respect to the attorney-client and physician-patient privileges, the importance of each transaction looms large, and its denial for any particular class of communications destroys its whole foundation. Herein lies one of the probable reasons why courts have been willing to extend the privilege to communications involving agents in the attorney-client and physician-patient fields, but hardly at all as to communications between spouses.

[29] BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, bk. IX, pt. IV, c. 5, §2 (Bowring's ed. 1843, Vol. VII, pp. 474 ff.).

[30] 8 WIGMORE, EVIDENCE §2380 (1940).

[31] Not every communication made to an attorney or physician is privileged. However, it is outside the scope of this paper to discuss the general limitations on the scope of the subject matter of privileged communications.

[32] Compare, however, the privilege formerly given, but now in disfavor, to protect one spouse from testifying for or against the other, one of the reasons for which was to preserve the marital status at the time of suit. 8 WIGMORE, EVIDENCE §§2228, 2237 (1940).

4. *Necessity for the use of agents in effecting the communication.*[33] To a large degree, the subject matter of an attorney-client communication is concerned with business matters. Doing business involves the use of agents. It cannot be expected that the proprietor of a large business, let alone a corporation (which can act only through agents), can attend to all legal matters personally. As has been seen, a practical approach is taken by the courts, and free use of agents is permitted without destruction of the privilege on grounds of "necessity," that word being taken in the sense of business convenience rather than impossibility of performing the task in another manner. The opposite is true in regard to communications between husband and wife, which communications are inherently personal.[34] This is not to say that a case may not arise where it is essential for one spouse to communicate with the other through an intermediary, but seldom is it even reasonably necessary.[35] In *Wolfle v. United States*,[36] a leading case in the field, wherein a husband dictated to his stenographer a letter to his wife, Justice Stone said, "But we do not think the question which we have to determine is one of fact whether the petitioner's letter to his wife was intended to be confidential. . . . Accordingly the question with which we are now concerned is the extent to which the privilege which the law concedes to communications made confidentially between the husband and wife embraces the transmission of them, likewise in confidence, through a third party intermediary, communications with whom are not themselves protected by any privilege. . . . The privilege suppresses relevant testimony and should be allowed only when it is plain that marital confidence can not otherwise reasonably be preserved. Nothing in this case suggests any such necessity." From the context it is apparent that the Court was speaking of reasonable necessity to the communication rather than to the relationship. The physician-patient privilege lies somewhere in between. With respect to this relationship there may be occasions when actual necessity demands that the request for medical help be made through a third person. Furthermore, from the standpoint of both the attorney and physician, it may be impractical for their work to be carried on without the aid of assistants. Disclosure to

[33] Note that necessity may be a factor in determining whether the communication was intended to be confidential. See State v. Loponio, 85 N.J.L. 357, 88 A. 1045 (1913).

[34] Indeed it has been held that the husband-wife privilege does not extend to communications involving business matters because they are not confidential. Grossman v. Lindemann, 67 Misc. 437, 123 N.Y.S. 108 (1910); Gifford v. Gifford, 58 Ind. App. 665, 107 N.E. 308 (1914).

[35] Wolfle v. United States, 291 U.S. 7, 54 S.Ct. 279 (1933).

[36] 291 U.S. 7 at 15, 17, 54 S.Ct. 279 (1933).

these assistants prior to, in the course of, or subsequent to the communication occurs in the normal course of events. It must be recognized, however, that the necessity of business confidence alone has not been considered a valid basis for a privilege or an extension thereof.[87]

Summary

The fact situations involving communication through, by, or in the presence of agents are too numerous to permit any generalizations of the law, except to say that the courts take a practical business-like approach, extending the privileges only when it is reasonably necessary to maintain the relationship and to effect the communication. Since neither type necessity is present with respect to marital communications, extension in this area has not been sanctioned.

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[87] See note by Professor Wigmore criticizing Oregon code provision establishing a new privilege for communications between an employer and his stenographer. 12 ORE. L. REV. 216 (1933).