Michigan Law Review

Volume 34 | Issue 6

1936

EVIDENCE-PRIVILEGE-HUSBAND AND WIFE-ATTORNEY AND CLIENT

EVIDENCE—PRIVILEGE—HUSBAND AND WIFE—ATTORNEY AND CLIENT—A husband and wife are involved in marital difficulties. Together they consult an attorney in an effort to compromise their dispute, or failing in that, to arrange a property settlement prior to separation or divorce. Such a joint consultation may be for any one of a variety of purposes. In a later action, for divorce or separate maintenance for example, the question arises whether either the attorney or one of the spouses can disclose words spoken by the other spouse in the consultation. For instance, can the attorney or the husband disclose the wife's admission of adultery?

One would expect such problems of double privilege to be of common occurrence. As a matter of fact they rarely arise if reported decisions are any index. The single privilege is more common. An attorney cannot disclose a confidential communication made to him alone by his client, unless the client waives his privilege.[1] Likewise where the marriage relation exists, neither spouse can disclose a confidential communication received from the other, unless the privilege is waived.[2] The basis of privilege in both cases is the policy of the law to foster confidences free from fear of disclosure wherever either of these relationships is found to exist.[3] It is when a communication is made by one spouse in the presence of the other and an attorney that the problem becomes more difficult. The confusion seems to arise from the presence of the third person. The courts seem to feel that a communication, confidential when made to the attorney by one party, loses its confidential character when any third person is present. As the confidential character of the communication is the basis of the privilege

[1] 5 WIGMORE, EVIDENCE, 2d ed., § 2292 (1923); 5 JONES, COMMENTARIES ON EVIDENCE, 2d ed., § 2155 (1926).

[2] 5 WIGMORE, EVIDENCE, 2d ed., § 2332 (1923); 5 JONES, COMMENTARIES ON EVIDENCE, 2d ed., § 2143 (1926).

[3] 5 WIGMORE, EVIDENCE, 2d ed., §§ 2291, 2332 (1923); 5 JONES, COMMENTARIES ON EVIDENCE, 2d ed., §§ 2143, 2155 (1926).

protecting it, to hold that the presence of the third person automatically negatives the confidential character of the communication is to destroy the privilege. It is the purpose of this comment to point out that in determining whether the confidential character of a communication survives the presence of a third person, we must look beyond the mere presence of the third person to the relationship which he bears to the other parties. If it is such a confidential relationship as to make him also subject to privilege, we have an entirely different problem from the case where he is a stranger.

The few cases dealing with the point under discussion have ignored the double privilege, and have decided the question by analogy to more common cases where the third person present at the communication is not in a privileged relationship to the person making it. A typical instance is that of a stranger present at a communication between husband and wife, or attorney and client.[4] It is generally considered that the presence of the third person is a circumstance sufficient to negative any intent that the communication be confidential. His presence is unnecessary, and as the privilege is a narrow one, it is quickly overthrown by the desire of the courts to obtain the truth. As the third person is subject to no privilege, his testimony as to the communication is freely admissible. There is conflict as to whether the attorney will be allowed to disclose the communication, or whether he remains under privilege.[5] The better view is that the door is opened to the attorney.[6]

Another case to which analogy is made exists when two parties, between whom there is no confidential relationship giving rise to privilege, consult a common attorney for their mutual benefit. Here a partial privilege is recognized. The attorney cannot disclose the communication in a suit between one of the parties and a third person, but he must disclose it in a suit subsequently arising between the parties themselves or their representatives.[7] As there is no privilege preventing disclosure by either of the consulting parties, it is hard to see why the door is not opened to disclosure by the attorney regardless of the identity of the parties to the later suit. Again we have a case in which the circumstances negative any inference that the communication was intended to be confidential.

These cases are to be distinguished from the one under discussion where the third person present at the attorney-client communication is subject to the privilege imposed by the law to protect confidences between husband and wife. Nevertheless the courts adopt the same

[4] 22 GEORGETOWN L. J. 623 (1934); 4 DETROIT L. REV. 116 (1934); 5 WIGMORE, EVIDENCE, 2d ed., § 2311 (1923).

[5] Gonder v. Farmers National Bank, 259 Pa. 197, 102 A. 510 (1917).

[6] 5 WIGMORE, EVIDENCE, 2d ed., § 2311 (1923).

[7] 11 Ann. Cas. 877 (1909); 5 JONES, COMMENTARIES ON EVIDENCE, 2d ed., § 2160 (1926).

approach in this case as in the cases referred to, where the third person is not subject to privilege.[8] In one case the evidence of the attorney was held inadmissible because the suit was against a third party, but the court said that it would have been admissible had the suit been between the husband and wife.[9] It is submitted that in the case where the third party is subject to privilege, there is not the same reason for saying that his presence negatives the confidential character of the communication as there is in the case where he is not subject to privilege. For this reason the approach in the two cases should not be the same. If the communication of the wife would be privileged because confidential when made alone to either the husband or the attorney, there is no reason to say that the privilege is destroyed merely because it is doubled by the presence of both the husband and the attorney. In such a case the confidential character of the communication is not affected by the presence of a third person, and the privilege should remain binding on both the husband and the attorney if the communication is of confidential character as to both.[10] The result is that in cases of double privilege, as in cases of single privilege where there are no strangers present, the only test for the existence of a complete privilege should be whether the communication is of confidential character.[11]

K. K. L.

[8] Wallace v. Wallace, 216 N. Y. 28, 109 N. E. 872 (1915); Scott v. Aultman Co., 211 Ill. 612, 71 N. E. 1112 (1904); Drew v. Drew, 250 Mass. 41, 144 N. E. 763 (1924).

[9] O'Brien v. New England Mutual Life Ins. Co., 109 Kan. 138 at 142, 197 P. 1100 (1921), where the court said: "There is no room for presuming that statements made to his attorney by one party to a divorce action in the presence of the other in the course of a conference looking to an adjustment of the controversy are not intended to be confidential. That situation is peculiarly one in which public policy favors encouraging the fullest freedom of utterance." Upon reading this statement one wonders whether the court really would have admitted the evidence had the suit actually been between husband and wife.

[10] See Dickerson v. Dickerson, 322 Ill. 492, 153 N. E. 740 (1926), where an analogous situation arose in which the third person present was another attorney. The court said that the privilege remained in force.

[11] That the confidential character of the communication is the only basis of decision in cases of double privilege is illustrated by two recent cases. In Matter of Kive, 139 Misc. 273, 248 N. Y. S. 677 (1931), husband and wife consulted an attorney concerning some savings accounts. In a later suit between the husband and the wife's next of kin it was held that the attorney could disclose the communications made at the consultation. Obviously the circumstances indicated that as between the husband and wife the communications were not of confidential character. However, the case was dealt with as one in which the third person present at the consultation was not subject to privilege. But in Harris v. Harris, [1931] Prob. 10, the wife admitted adultery in the presence of the husband and attorney. This was a communication of extremely confidential character, and the court held accordingly in a suit for separate maintenance brought by the wife that the attorney could not disclose it in evidence.