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Abolition of the Eavesdropping Exception to the Attorney-Client Privilege

COMMENTS

ABOLITION OF THE EAVESDROPPING EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE

Chapter 851 of the Session Laws of 1958 amends the New York Civil Practice Act by extending the attorney-client privilege to include *any* person who obtains without the knowledge of the client evidence of such communication.[1] In addition, this rule is now expressly made applicable to state, municipal or local governmental administrative actions or hearings, whether executive or legislative.[2]

BACKGROUND OF THE PRIVILEGE

The attorney-client privilege, now codified by statute in most jurisdictions,[3] has been firmly established in the common law since the sixteenth century.[4] Unless waived by the client,[5] the privilege prevents disclosure of any confidential communications or advice given while securing legal guidance from a licensed attorney.[6] This protection continues even though the attorney-client

1. N.Y. Civ. Prac. Act § 353. "An attorney or counselor at law shall not disclose . . . or any person who obtains without the knowledge of the client evidence of such communica- not be made "in any disciplinary trial or hearing or in any administrative action, proceeding

2. N.Y. Civ. Prac. Act § 353-a. Disclosure by such persons as specified in § 353 shall not be made "in any disciplinary trial or hearing or in any administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof. . . ." Both §§ 353 and 353-a must be read in conjunction with § 354 which provides that "the last three sections [i.e., § 351, priest-penitent privilege; § 352, physician-patient; § 353, attorney-client] apply to any examination of a person as a witness unless the provisions thereof are expressly waived. . . ." However, since § 353-a is an independent section one may technically argue that "the last three sections" no longer embrace § 351.

3. With the exception of the recent amendment, the New York privilege, supra note 1, is considered a codification of the common law. See King v. Ashley, 179 N.Y. 281, 72 N.E. 106 (1904). For a compilation of statutes, see 8 Wigmore, Evidence § 2292 (3d ed. 1940). Many states retain the privilege only as part of the common law. See, e.g., Shelly v. Landry, 97 N.H. 27, 79 A.2d 626 (1951).

4. It existed at first only on the honor of the attorney not to disclose. 8 Wigmore, op. cit. supra note 3, § 2290.

5. Both the privilege and the waiver belong solely to the client and not to the attorney, Hunt v. Blackburn, 128 U.S. 464 (1888), except in actions between them. Richardson, Evidence § 439 (8th ed. 1955). The waiver "must be made in open court, on the trial of the action or proceeding. . . . [Or] the attorneys . . . prior to the trial, may stipulate for such waiver. . . ." N.Y. Civ. Prac. Act § 354.

6. Kent Jewelry Corp. v. Kiefer, 202 Misc. 778, 113 N.Y.S.2d 12 (Sup. Ct. 1952) (the person consulted must be duly licensed by the state to practice law). But see People v. Barker, 60 Mich. 277, 27 N.W. 539 (1886), where the privilege was allowed because the client reasonably believed that the one consulted was a lawyer. 8 Wigmore, op. cit. supra note 3, § 2302.

relationship has terminated[7] and even after the death of the client.[8] It extends not only to confidences exchanged in securing legal advice for contemplated or pending litigation,[9] but to legal advice given under almost any circumstances.[10] However where the attorney is acting merely as a business agent[11] or where the advice given is for an unlawful purpose[12] the privilege will not attach. Although application of the privilege results in suppression of relevant evidence,[13] litigation can be more expeditiously and justly administered when attorneys are fully advised of all the facts in issue.[14] Full and unencumbered consultation is encouraged by assuring the client that his communications will not be disclosed.[15]

For the privilege to operate the communications must be made under confidential circumstances.[16] Therefore, if made in the presence of a third party who is not reasonably necessary,[17] or if the client intends that the communication be made public, or communicated to a third party, the confidential element is lacking.[18] Acts,[19] as well as words,[20] may be the subject of the communica-

7. Foster v. Buchele, 213 S.W.2d 738 (Tex. Civ. App. 1948).

8. Matter of Cunnion, 201 N.Y. 123, 94 N.E. 648 (1911). See Richardson, op. cit. supra note 5, § 437 for the statutory exception in proceedings to probate a will.

9. Under the old theory, it was limited to the very litigation in which they were given. 8 Wigmore, op. cit. supra note 3, § 2294.

10. Alexander v. United States, 138 U.S. 353, 358 (1891); Prichard v. United States, 181 F.2d 326 (6th Cir. 1950); Bacon v. Frisbie, 80 N.Y. 394 (1880).

11. There must be a true attorney-client relationship. Rosseau v. Bleau, 131 N.Y. 177, 30 N.E. 52 (1892). United States v. Vehicular Parking, Ltd., 52 F. Supp. 751 (D. Del. 1943) (no privilege for communications on matters of business).

12. State v. Johns, 209 La. 244, 24 So. 2d 462 (1945). It is necessary to distinguish between advice given for unlawful acts already committed (privileged) and advice for unlawful acts to be committed (not privileged).

13. City & County of San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951). See also, 8 Wigmore, op. cit. supra note 3, § 2291; Radin, The Privilege of Confidential Communication Between Lawyer and Client, 16 Calif. L. Rev. 487 (1928).

14. Hunt v. Blackburn, 128 U.S. 464 (1888); Modern Woodmen of America v. Watkins, 132 F.2d 352 (5th Cir. 1942).

15. In re Selser, 15 N.J. 393, 105 A.2d 395 (1954); 8 Wigmore, op. cit. supra note 3, § 2291. "In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; and hence the law must prohibit such disclosure except on the client's consent."

16. Baumann v. Steingester, 213 N.Y. 328, 107 N.E. 578 (1915).

17. State v. Loponio, 85 N.J.L. 357, 88 Atl. 1045 (Ct. Err. & App. 1913) (the necessity to employ an amanuensis did not destroy the privilege). Where two or more jointly consult an attorney, there will be no privilege in any action between them or their representatives. Hurlburt v. Hurlburt, 128 N.Y. 420, 28 N.E. 651 (1891). But the privilege will attach in a suit between them and a stranger. Root v. Wright, 84 N.Y. 72 (1881).

18. Hill v. Hill, 106 Colo. 492, 107 P.2d 597 (1940) (letters given to attorney by wife were to be conveyed to husband); Clayton v. Canida, 223 S.W.2d 264 (Tex. Civ. App. 1949) (information used for preparing income tax returns to be relayed to the United States Revenue Department).

19. One must distinguish between those acts which the attorney could always observe and those which are performed only as part of a confidential communication. Chapman

tion if they are intended to be confidential, but an attorney may be compelled to disclose the address[21] and identity of his client.[22]

THE LANZA CASE AND THE EAVESDROPPER EXCEPTION

Prior to the current amendment to the New York Civil Practice Act[23] the law prevailed in New York that an eavesdropper who overhears a confidential communication, whether by accident or design, may be compelled to testify.[24] This limitation on the privilege was justified on the theory that it was not the communication which is inadmissible, but merely the attorney who is incompetent.[25] Professor Wigmore would agree, reasoning that "since the means of preserving secrecy of communication are entirely in the client's hands,[26] and since the privilege is a derogation from the general testimonial duty and should be strictly construed, it would be improper to extend its prohibition to third persons who obtain knowledge of the communications."[27]

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v. Peebles, 84 Ala. 283, 4 So. 273 (1888) (act of execution of a document in lawyer's presence is not ordinarily intended as a confidential communication); Turner v. Warren, 160 Pa. 336, 28 Atl. 781 (1894) (no professional confidence violated in testifying to delivery of papers). But see City & County of San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951), where an examination of the client by a physician as agent for an attorney was privileged.

20. The communication may be oral or written. LeLong v. Siebrecht, 196 App. Div. 74, 187 N.Y. Supp. 150 (2d Dep't 1921) (letter to attorney held privileged). However, an attorney may be compelled to produce any documents entrusted to him which his client could also be compelled to produce. Jones v. Reilly, 174 N.Y. 97, 66 N.E. 649 (1903).

21. United States v. Lee, 107 Fed. 702 (4th Cir. 1901); Falkenhainer v. Falkenhainer, 198 Misc. 29, 97 N.Y.S.2d 467 (Sup. Ct. 1950). But in New York the power to compel disclosure of the client's address is limited to the action in which the attorney appears for the client. See, e.g., Hyman v. Corgil Realty Co., 164 App. Div. 140, 149 N.Y. Supp. 493 (1st Dep't 1914).

22. In New York it is uncertain whether this pertains only to the action in which the attorney appears for the client. Vogelstein v. Warden of County Jail, 150 Misc. 714, 270 N.Y. Supp. 362 (Sup. Ct.), aff'd, 242 App. Div. 611, 271 N.Y. Supp. 1059 (1st Dep't 1934) (attorney called before grand jury and compelled to disclose employer). Neugass v. Terminal Cab Corp., 139 Misc. 699, 249 N.Y. Supp. 631 (Sup. Ct. 1931) (attorney not compelled to disclose identity of client).

23. See notes 1 and 2 supra.

24. Erlich v. Erlich, 278 App. Div. 244, 104 N.Y.S.2d 531 (1st Dep't 1951). This is still the law in other jurisdictions. Clark v. State, 159 Tex. Crim. 187, 261 S.W.2d 339 (1953); State v. Falsetta, 43 Wash. 159, 86 Pac. 168 (1906); 8 Wigmore, op. cit. supra note 3, § 2326.

25. Richardson, op. cit. supra note 5, § 438.

26. Professor Wigmore fails to take into consideration the fact that one may not be in complete control of the situation. See, e.g., Lanza v. New York Joint Legis. Comm., 3 N.Y.2d 92, 143 N.E.2d 772, 164 N.Y.S.2d 9, cert. denied, 355 U.S. 856 (1957) where the client could consult counsel nowhere but in prison. Compare Wigmore's view with that of the Uniform Rule of Evidence 26, which would exclude such evidence "if it came to the knowledge of such witness . . . in a manner not reasonably to be anticipated by the client. . . ."

27. 8 Wigmore, op. cit. supra note 3, § 2326. See also text accompanying note 13 supra.

This theory was carried to its logical extreme in *Lanza v. New York Joint Legislative Comm.*[28] wherein a state legislative committee, investigating parole violations, received a recording of a confidential communication surreptitiously obtained by an electronic device while the client consulted with his attorney in the prison counsel room. The client brought an action to enjoin the use of the recording at a public hearing. The New York Court of Appeals held, with three judges dissenting, that since use of this recording came within the eavesdropping exception to the privilege,[29] and since the subject matter was within the purview of the committee's inquiry, it had no power to issue an injunction.[30] The majority argued that the statute affords merely a privilege against testimonial compulsion of the attorney when appearing as a witness.[31] Since the committee wished to compel neither the attorney nor his client, an injunction to prevent the use of the recording would be an unconstitutional restraint on a legislative function.[32]

The dissent considered it no ordinary case of a third party eavesdropping,

28. 3 N.Y.2d 92, 143 N.E.2d 772, 164 N.Y.S.2d 9, cert. denied, 355 U.S. 856 (1957).

29. The court also discussed whether or not the use of this recording would violate the client's constitutional right to counsel. While agreeing that the recording was an "unreasonable interference with Lanza's right to confer privately with counsel," it concluded that the "use" of the recording did not violate his constitutional right since it was not to be used in any proceeding "against" him. Id. at 98, 143 N.E.2d at 775, 164 N.Y.S.2d at 13. For other leading cases discussing this subject see Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951), cert. denied, 342 U.S. 926 (1952) (interception of telephone messages before and during trial violated constitutional right); People v. Cooper, 307 N.Y. 253, 120 N.E.2d 813 (1954) (defendants failed to prove that officer was stationed in court to eavesdrop); People v. McLaughlin, 291 N.Y. 480, 53 N.E.2d 356 (1944) (defendant denied reasonable opportunity to secure counsel of his own choosing).

30. Recognition of the applicability of the privilege in legislative hearings has long had the approval of both the judiciary and the authorities. In New York City Council v. Goldwater, 284 N.Y. 296, 31 N.E.2d 31 (1940) the court stated that all three sections (i.e., N.Y. Civ. Prac. Act § 351, priest-penitent; § 352, physician-patient; § 353, attorney-client) apply to any examination of a person as a witness (N.Y. Civ. Prac. Act § 354); and since nothing in the statute limits its provisions to judicial proceedings, such limitation may not be read into the statute by implication. See also 1 Wigmore, op. cit. supra note 3, § 4c at 94; Comment, 45 Calif. L. Rev. 347 (1957). In the Lanza case the court merely found the common-law eavesdropping exception to be equally applicable.

31. N.Y. Civ. Prac. Act § 354. See note 30 supra.

32. The majority relied on Hearst v. Black, 87 F.2d 68, 71 (D.C. Cir. 1936), where the court said "that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference." See also Nelson v. United States, 208 F.2d 505 (D.C. Cir.), cert. denied, 346 U.S. 827 (1953); Barksy v. United States, 167 F.2d 241 (D.C. Cir.), cert. denied, 334 U.S. 843 (1948). But see Watkins v. United States, 354 U.S. 178, 198-99 (1957) where the Court stated "we cannot simply assume, however, that every congressional investigation is justified by a public need that overbalances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly." For an excellent discussion of this problem, see Comment, 45 Calif. L. Rev. 347 (1957).

because it was the state who invited the attorney into the privacy of the counsel room. The state then proceeded to record this conversation without regard for the sanctity of the attorney-client relationship.[33] This practice, it was feared, would destroy confidence in the fairness and justice of public tribunals and agencies.[34]

Whether or not the court was in error, one unsatisfactory consequence of the *Lanza* decision was inevitable. Because of the apprehension of a "recorded" disclosure, prisoners were reluctant to consult freely with their attorneys. One New York judge found it advisable to release a prisoner held without bail so that he would have an opportunity to consult with his attorney.[35] Proposed specifically to escape the *Lanza* decision,[36] the current amendment abolishes the archaic common-law eavesdropping exception to the attorney-client privilege and further provides that evidence of such a communication shall not be disclosed in any judicial or administrative proceeding. It, therefore, not only prevents testimonial compulsion of witnesses, but, in effect, renders the conversation inadmissible when offered in any other form, such as a recording or stenographic notes. It should be noted, however, that a third party overhearing the conversation with the knowledge of the client could be compelled to testify since the confidential element would then be lacking.[37] The amendment makes this clear by using the term "without the knowledge of the client."[38]

Conclusion

In New York there are four confidential relationships which are furnished statutory protection for privileged communications.[39] In addition to the at-

33. 3 N.Y.2d at 107, 143 N.E.2d at 781, 164 N.Y.S.2d at 21. At the time of the surreptitious recording this practice was not illegal. Since then, however, amendments to N.Y. Pen. Law §§ 738, 740 have made unofficial eavesdropping by means of any instrument a felony. In addition, any evidence obtained through illegal eavesdropping was declared inadmissible in "civil" actions. N.Y. Civ. Prac. Act § 345-a. However, this amendment expressly declared such evidence to be admissible in administrative actions or proceedings. These amendments only half solved the problem because the supposedly inviolate attorney-client relationship was still attractive to both "official" and unofficial eavesdroppers, since the evidence obtained was admissible in both criminal and administrative actions and proceedings. See Report of the New York State Joint Legislative Committee to Study Illegal Interception of Communications (1957); Comment, 26 Fordham L. Rev. 540 (1957).

34. Id. at 102, 143 N.E.2d at 778, 164 N.Y.S.2d at 17. See notes 14 and 15 supra and accompanying text.

35. Because of the recent problem of secret detection in the Tombs, the court was convinced by counsel that it was quite possible that all of these places were tape recorded, and therefore permitted the defendant to be bailed. N.Y. Times, June 26, 1957, p. 64, col. 1.

36. See memorandum by Governor Averell Harriman appearing in McKinney's Sess. Laws of N.Y. at 1842 (1958).

37. See notes 16-18 supra and accompanying text.

38. See note 1 supra.

39. It is not within the scope of this comment to investigate the over-all application of these privileges, notes 1 supra and 40-42 infra, but merely to evaluate the application of the eavesdropper exception in light of the reason for the amendment to the N.Y. Civ. Prac. Act, notes 1 and 2 supra. For the over-all application, see Richardson, op. cit. supra note

torney-client relationship discussed above, the New York Civil Practice Act affords a privilege for communications between husband and wife,[40] physician and patient,[41] and clergyman and penitent.[42] Basically, this immunity is granted because it is deemed essential to the preservation of the confidence which these relationships require.[43] Indeed, it is deemed so essential as to take precedence over the obvious disadvantage to the administration of justice.[44] Although the physician-patient and clergyman-penitent privileges are not derived from common law, they, as well as the husband-wife privilege, are subject to the common-law eavesdropping exception.[45] It is true that they are a derogation from the general testimonial duty; however, it seems quite inconsistent to grant immunity for reasons of public policy and then seek means of destroying it. Prior to the *Lanza* decision it was the pronounced policy of the court to accord "broad and liberal construction" to the statutes in order to protect and encourage these confidential relationships.[46] However, it now seems possible and perhaps probable that the strict reasoning in that decision will be carried over and applied to the other privileges. The fact that the legislature failed to amend the other privileges would make such an extension feasible.

Technological advancements in electronics have made it rather an easy matter to violate these confidences. For this reason and by reason of judicial reluctance to make exception for this means of secret detection,[47] it seems both necessary and just that the other communicants be afforded the same protection as that granted the attorney and client.[48] In a Massachusetts case, *Commonwealth v. Wakelin*,[49] a dictograph was installed in a cell prior to the confinement of

5, §§ 440-41 (clergyman and penitent), §§ 442-56 (physician and patient), §§ 457-67 (husband and wife).

40. N.Y. Civ. Prac. Act § 349.

41. N.Y. Civ. Prac. Act § 352.

42. N.Y. Civ. Prac. Act § 351.

43. People v. Shapiro, 308 N.Y. 453, 458, 126 N.E.2d 559, 561-62 (1955); McCormick, Evidence § 72 (1954).

44. McCormick, op. cit. supra note 43, § 72; see also, e.g., note 13 supra.

45. "[W]here a privileged communication is overheard, whether by accident or design, by some person not a member of the privileged relation and not a necessary intermediary, such person may testify as to the communication. . . ." 97 C.J.S. Witnesses § 252 at 740 (1955).

46. People v. Shapiro, 308 N.Y. 453, 458, 126 N.E.2d 559, 562 (1955); New York City Council v. Goldwater, 284 N.Y. 296, 301, 31 N.E.2d 31, 33 (1940).

47. See notes 28 and 44 supra and accompanying text; Erlich v. Erlich, 278 App. Div. 244, 104 N.Y.S.2d 531 (1st Dep't 1951) (intercepted telephone conversations between attorney and client); Clark v. State, 159 Tex. Crim. 187, 261 S.W.2d 339, cert. denied, 346 U.S. 855 (1953) (telephone operator overheard conversation between attorney and client). But see Hunter v. Hunter, 169 Pa. Super. 498, 83 A.2d 401 (1951) where the court refused to admit a recording of a privileged communication between husband and wife because it was made with the "connivance" of the husband.

48. See New York City Council v. Goldwater, 284 N.Y. 296, 31 N.E.2d 31 (1940). The eavesdropping statutes, while affording some protection, do not go far enough. See note 33 supra.

49. 230 Mass. 567, 120 N.E. 209 (1918).