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Privileged Communications

Robert P. Coward

COMMENTS

PRIVILEGED COMMUNICATIONS

By ROBERT P. COWARD

ATTORNEY-CLIENT

The Code of Civil Procedure, section 1881, provides:

> "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore a person cannot be examined as a witness in the following cases: . . . (2) An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given thereon in the course of professional employment, nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity."

Construction of the Section

In 1869 in the case of *Satterlee* v. *Bliss,* 36 Cal. 489, the court laid down the rule that since the attorney-client privilege has a tendency to prevent full disclosure of the truth it should be strictly construed.

The courts have been emphatic in stating that the privilege when it exists is the client's and not the attorney's. (*In re Mullins* (1895), 110 Cal. 252; *Abbott* v. *Superior Court* (1947), 78 Cal. 2d 19.) In spite of the view taken by the courts the language in the code seems to indicate that in some instances the right to prevent testimony is in the attorney. For example, if a secretary of an attorney should wish to testify against her employer concerning facts which were obtained in the course of employment, the attorney would be likely to object and point to Code of Civil Procedure 1881-2, which seems on its face to establish a privilege in the attorney to prevent the testimony. The meaning of the provision concerning testimony by an attorney's employee does not seem to have ever been clearly defined by the courts. In one California case, *McIntosh* v. *State Bar Association* (1930), 211 Cal. 261, the problem was presented to the court, but it was able to sidestep any clarification of the section's meaning by finding that the facts to which the secretary testified were not acquired in the course of employment by the attorney.

Existence of the Relationship

The general rule is that the information to be privileged must have been received by the attorney while acting as counsel or legal advisor for the party asserting the privilege (*George* v. *Silva* (1885), 68 Cal. 272; *Sharon* v. *Sharon* (1889), 79 Cal. 633). However, it is established that facts which become known to an attorney as a result of preliminary negotiations looking towards employment are also privileged even if the attorney refuses to accept the employment (*People* v. *Singh* (1932), 123 Cal. App. 365). In *Estate of*

Dupont (1943), 60 Cal. App. 2d 276, the court, in commenting on privilege for preliminary statements said, "[that not to allow the privilege] would unduly restrict its scope and largely destroy the protection to persons consulting lawyers which is its [Code Civil Procedure 1881-2] policy and purpose." The American Law Institute's Model Code of Evidence Rule 210 recognizes that the privilege extends to preliminary statements.

The attorney must be acting in the capacity of an attorney in order that the privilege will be recognized. Thus where an attorney was acting as a scrivener the privilege was not recognized. (*Ferguson* v. *Ash* (1915), 27 Cal. App. 375.) Nor was the privilege allowed where the attorney was acting as witness to a bank deposit. (*McKnew* v. *Superior Court* (1943), 23 Cal. 2d 58.) The prevailing view in the United States was set out in *Hatton* v. *Robinson* (Mass.), 14 Pick 416, where the court stated that the privilege extends only to communications made by the client to his attorney for the purpose of obtaining legal advice. The California cases cite the language in *Hatton* v. *Robinson, supra,* with approval. In 17 Southern California Law Review 410-412, it was pointed out that the words of the statute seem to allow a broader privilege than that recognized by the general rule as set forth in the Hatton case but it is doubtful that the California decisions will deviate far from the general rule in view of past decisions and the rule of strict construction. The Model Code of Evidence Rule 210b limits the privilege to communications which the parties reasonably believed to be relevant to the seeking or rendering of the lawyer's *legal advice* in his professional capacity.

Extent of the Privilege

The privilege extends to *communications* both oral and written, but only if the communication was intended to be confidential. (*Sharon* v. *Sharon* (1889), 79 Cal. 633; *People* v. *Hall* (1942), 55 Cal. App. 2d 130.) Thus if the client intends that the communication should be disclosed no privilege exists. (*Estate of Nelson* (1901), 132 Cal. 182.)

The general rule is that the attorney has no privilege to withhold the identity of his client. (*Satterlee* v. *Bliss* (1869), 36 Cal. 489.) In *Ex Parte McDonough* (1915), 170 Cal. 230, existence of the general rule was acknowledged, but under the special facts of the case an exception was recognized. The facts were that A had been arrested for alleged frauds against the election laws. B and C, who were suspected of being implicated, retained X to represent A. It was held that X was privileged to refuse to disclose the identity of those who had retained him since to identify B and C would tend to incriminate them. (3 Cal. Law Review 497 commented upon the case favorably.)

Communications having to do with contemplated criminal acts or in

aid or furtherance of crimes are not privileged. (*Abbott* v. *Superior Court* (1947), 78 Cal. App. 2d 19.) In respect to crimes and torts the Model Code of Evidence provides in Rule 212 that there is no privilege if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal advice was sought or obtained in order to enable or aid the client to commit or plan to commit a crime or tort.

The rule as to privileged communications does not exclude evidence as to instructions or authority given by the client to his attorney when the acts to which the authority or instructions pertain can be performed by a layman as well as an attorney. (*Henshall* v. *Colburn* (1917), 177 Cal. 50.) Thus when a client instructs an attorney to perform an act on behalf of the client in a certain manner, the communication giving such instructions is not privileged and the attorney may testify as to the content of the instructions. (*Collette* v. *Sarrasin* (1920), 184 Cal. 283.)

Independent Knowledge

While the attorney is not permitted to disclose the confidential communications of his client, if he acquires information apart from any such communication he is not protected from disclosing it. Therefore a privilege was denied where the attorney received information from a third party concerning his client's affairs. (*Hunter* v. *Watson* (1869), 36 Cal. 363.) In *Oliver* v. *Warren* (1911), 16 Cal. App. 164, an attorney was permitted to testify as to the mental condition of a deceased client at the time the client had executed a deed since the knowledge was not derived from a confidential communication.

Effect of the Presence of Third Parties

The general rule is that voluntary communications in the presence of third parties are not privileged since it cannot be said that, as between the attorney and client, there was an intent to keep such communications confidential. (*Ver Bryck* v. *Luby* (1945), 67 Cal. App. 2d 843; *Sharon* v. *Sharon* (1889), 79 Cal. 633.) In *People* v. *Rittenhouse* (1922), 56 Cal. App. 541, the question before the court was the effect of the communication unintentionally finding its way into the hands of a third party. A paper with notes on it was found by a sheriff in the defendant's cell. The notes were intended for the defendant's attorney and were conclusive of the defendant's guilt. In his decision Langdon, Justice, holding the notes admissible, said:

> "But we find no authority for the extension of the privilege to communications or letters which are intended by the party to be later delivered or communicated to his attorney. We think such an extension of the rule would be against public policy. . . . This situation comes rather within the rule that when a third person, not within the confidential relation, overhears the communications between attorney and client, he may disclose what he hears."

Query: What would the result be if the attorney intentionally disclosed privileged information to a third person? The question doesn't seem to have been decided in California. The Model Code of Evidence Rule 210 allows the client to prevent the third person from testifying to information obtained by a breach of the attorney's duty of non-disclosure.

If the communication is made in the presence of a necessary employee of the attorney the privilege is not waived. However the employee must be present in his "official" capacity. In *Mitchell* v. *Towne* (1939), 31 Cal. App. 2d 259, the attorney's clerk was called to witness a will. Under those circumstances no privilege could be claimed.

A communication between the attorney and the client's agent is treated as if the communication was directly between the attorney and client and therefore is privileged. (*Webb* v. *Lewald Coal Co.* (1913), 214 Cal. 182.)

If an attorney is the mutual attorney of two or more clients and communications are made to the attorney in the presence of one another the rule is that there is no privilege as to those communications. (*Clyne* v. *Brock* (1947), 82 Cal. App. 2d 958.) While the California cases deciding on the mutual attorney question all seem to involve communications made to the attorney in the presence of one another, it seems clear that to require the clients to communicate in the presence of one another before the privilege is waived would result in it being unethical for an attorney to represent two clients in the same transaction. He could not properly advise either client if he could not discuss freely all matters pertinent to their problem. Although there does not seem to be a California decision deciding the point, it was stated in *Leitch* v. *Gay* (1944), 64 Cal. App. 2d 16, that an attorney who represented two clients in the same matter should have been called to testify concerning papers written by both clients. There is no indication that the clients wrote the papers in the presence of one another. There is no limitation that the communications by the clients must be made in the presence of one another in the Model Code of Evidence Rule 211 which provides:

> "When two or more persons acting together become clients of the same lawyer as to a matter of common interest, none of them has as against another of them any privilege under Rule 210 with respect to that matter."

The California decisions make it clear that while the privilege is lost between the clients it is still in force as to strangers. (*In re Bauer* (1899), 79 Cal. 304; *De Olazabal* v. *Mix* (1937), 24 Cal. App. 2d 258.)

Communications Relating to Wills

Estate of Nelson (1902), 132 Cal. 182, held that conversations between attorney and client concerning drawing a will or codicil are not privileged. The rationale is that consent to disclose confidential communications may be implied, as well as expressed, and by requesting the attorney to draw his

will the client impliedly asks him to do and say whatever may be necessary for the purpose of establishing the validity of the will. The courts hold that by requesting his attorney to be an attesting witness to a will the client impliedly consents to the attorney testifying to establish its validity. (*In re Wax* (1895), 106 Cal. 343.)

Waiver of the Privilege

The client may consent to any communication being given in evidence. (*Wood* v. *Elwanda Water Co.* (1908), 147 Cal. 234.) The privilege is waived if a client fails to object to testimony by his attorney. (*People* v. *Corsalini* (1941), 46 Cal. App. 2d 705.) Once the client testifies as a witness to confidential communications made by him to his attorney, he waives the privileged character of such communications and both he and his attorney may be fully examined in relation to such communications. (*Rose* v. *Crawford* (1918), 37 Cal. App. 664.)

Before any communication will be excluded on grounds that it is privileged, the party claiming the privilege must prove the existence of the attorney-client relationship. Whether or not such a relationship exists is a question of fact to be decided by the trial court. (*McKnew* v. *Superior Court* (1943), 23 Cal. 2d 58; *People* v. *Corbin* (1931), 118 Cal. App. 392.)

The purpose of the above material was to state briefly the position taken by the California code and California decisions in respect to the attorney-client privilege. In addition to the "law" on the subject it is well worthwhile to consider the policy which supports the privilege and to determine whether the policy is of sufficient importance to withhold from the court facts which are vital to the just disposition of the litigation. This problem is discussed in 16 California Law Review 489, 490, where Professor Max Radin presented the pro and con arguments:

> "The best (basis for the privilege) is the frequently asserted theory that public policy is involved. All persons ought to be able to fully and freely tell their lawyers all the facts, however remote, which surrounds the case, without fear that the lawyer's knowledge of these facts may be used to establish claims against them or subject them to penalties.
>
> The worst that can be said of the privilege is that it seriously impedes the discovery of truth by withdrawing from possible testimony one who has had the best opportunity for learning the truth. Public policy is equally concerned here since there can be no more unquestioned public policy than that which seeks to settle disputed claims as they properly should be and to prevent violation of penal laws."

Dean Hale also has discussed the problem. In "Codification of the Law of Evidence," by William G. Hale, Dean Hale wrote (pages 114, 115, 116:)

> "The sacrifice of social interest in the due administration of justice is obvious and eminent where the privilege is recognized. It is apparent that

those who would maintain a rule which has this effect must carry the burden of presenting a fully compensating gain to be conserved by its retention or a greater loss by its abolition . . ."

"Tersely put the reasoning in support of it is as follows: The lawyer both as an advocate in court and as an advisor is an essential part of our system of administering justice. If confidences between client and attorney were not protected it would obstruct the administration of justice either by deterring clients from resorting to attorneys or by inducing clients to withhold essential facts from attorneys.

"Thus the issue is drawn on lines of social policy. But it should be noted that that policy is the same both pro and con on the issue—viz., the attainment of a just administration of the law. Thus more narrowly stated the issue is, which will more seriously interfere with the attainment of this socially desirable end,—the retention of the privilege, or its abolition. A sound decision rests upon this determination. The point of difficulty in our problem is that there is no way in which to make an accurate and fully demonstrable determination of this issue."

"Either way it is largely a matter of speculative judgment. However it is believed that the speculative features weigh more heavily against the rule than in its favor. The loss in the administration of justice is obvious when an avenue to material facts is closed. This is not speculative. The extent of the loss and its ultimate effect on the pending case is or may be uncertain. On the other hand whether clients would actually be prevented from consulting attorneys, and whether if they did they would withhold important information is highly speculative."

PHYSICIAN - PATIENT

Section 1881, subdivision 4 of the Code of Civil Procedure provides:

"A licensed physician or surgeon can not, without the consent of his patient, be examined in a civil action, as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient."

Following the establishment of the privilege its practical value in most cases, except divorce and insurance, is destroyed by a list of exceptions:

(a) After the death of the patient if there is a contest over the patient's will or an action involving the validity of any instrument executed by the deceased patient transferring real or personal property the physician may testify to the mental condition of the plaintiff;
(b) The physician may testify when an action is brought under the death statute to recover damages for the death of the patient;
(c) The patient, by bringing an action for personal injuries, consents that any physician who has prescribed for or treated the patient may testify;
(d) The privilege is confined to civil cases and is not applicable in a criminal proceeding.

The policy behind the statute was set forth in *In re Flint* (1894), 100 Cal. 391, where the court said:

"This provision of law rests upon a sound public policy. Its object and purpose is to enable the patient to make a full statement of his physical

> infirmities to his physician with the knowledge that the law recognizes it as confidential, and guards against the possibility of his feelings being shocked or his reputation tarnished by their subsequent disclosure."

Unlike the rule of strict construction applied to the attorney-client privilege, the courts have announced a rule of liberal construction to the physician-patient privilege. (*McRae* v. *Erickson* (1905), 1 Cal. App. 391; *Kramer* v. *Policy Holders Life Insurance Assn.* (1935), 5 Cal. App. 2d 380.)

Like all privileged communications there is no privilege if the communication is made to or in the presence of third parties. (*Horowitz* v. *Sacks* (1928), 89 Cal. App. 336.) Of course, the capacity in which the third party is present is determinative of whether or not the privilege is waived. The California decisions do not seem to settle the question in a very decisive manner. In *Kramer* v. *Policy Holders Insurance Assn.* (1935), 5 Cal. App. 2d 380, a nurse who also served as the doctor's stenographer was present when the doctor examined the patient. It was the patient's first visit to a free cancer clinic and the nurse-stenographer took down the patient's medical history and memoranda which the doctor dictated to her as he examined the patient. The court held that the information was privileged and the presence of the nurse-stenographer did not affect the privilege as to the physician. The court expressly refused to decide whether or not the nurse-stenographer could testify.

In contrast with the Kramer case, in *Fredericks* v. *Federal Life Insurance Co.* (1936), 13 Cal. App. 2d 380, two internes took the patient's medical history when he was admitted to the hospital. The court held that there was no privilege since the internes were employed by the hospital and not the patient's physician and therefore were not "attending" the patient. Dean Hale discussed this case in an article entitled "Hospital Records as Evidence." (14 Southern Cal. Law Review 99.) In the article Dean Hale approves of a helpful formula:

> "This privilege applies to physician-patient and does not include a third person who might be present, unless such third person is aiding the physician, or is necessary as a means of communication between physician and patient."

It is difficult to determine the exact scope of the privilege since the courts have established no clear rule as to what constitutes "information" . . . necessary to enable him (the physician) to prescribe or act for the patient." The California decisions have indicated that the word "act" in the statute has a much broader meaning than the word "treat." (*Kramer* v. *Policy Holders Life Insurance Assn., supra.*) As a result, a rather interesting decision was reached in *Webb* v. *Lewald Coal Co.* (1931), 214 Cal. 182. The patient was preparing to bring suit for personal injuries and was examined by a physician who prepared a written report for her attorney. He did not "prescribe for" or "treat" the patient within the meaning of the statute. On

these facts the court held that the service rendered by the physician came within the broad meaning of the word "act," thus making the communication privileged, but did not come within the meaning of "prescribe for" or "treat" in the exception to the privilege when the patient brings suit for personal injuries. The result was that the physician could not testify.

Waiver

The privilege may be waived either expressly or impliedly, but the view of the California courts seems to be that the intention to waive must be clear. (*Kramer* v. *Policy Holders Life Insurance Assn., supra.*) This view plus the rule of liberal construction applied to the physician-patient privilege resulted in the holding that the expressed written waiver of the privilege in an application for insurance only extended to communications prior to the date the policy was executed and did not waive the privilege as to subsequent communications. (*Turner* v. *Redwood Mutual Life Assn.* (1936), 13 Cal. App. 2d 573.)

The fact that there is an objection to the introduction of this type of evidence should not prejudice the plaintiff. Thus in *Cook* v. *Los Angeles Ry. Co.* (1915), 169 Cal. 113, it was held an error for the court to instruct the jury that if the patient failed to call the physician and showed no reason for such failure, the law presumes that the testimony would have been adverse. The holding is approved in 20 California Law Review 302, where the writer pointed out that to allow the jury to draw such an inference would be to destroy the privilege.

In about one-half the states and England, the privilege is not recognized. The Model Code of Evidence grants a physician-patient privilege but limits it by such broad exceptions that it has very little practical significance.

It is sometimes suggested that the better rule is to allow the presiding judge to compel otherwise privileged information to be disclosed if in his opinion the same is necessary to the proper administration of justice.

The privilege is often the subject of adverse criticism. The most common criticism, after stating that the purpose of the privilege is to conform with the physician's ethical canon of secrecy and to protect the personal privacy of the patient, submits that in actual practice the bodily condition of the patient is usually discussed with friends and neighbors and only a court of justice is not allowed to learn of the condition which is the subject of litigation. To a large degree this type of criticism has no application to California since the exceptions in the code can be applied to most situations to which this criticism is directed. However, there remains in California at least one type of situation in which some type of reform is needed and that is litigation to recover under an insurance policy.

A vivid example is the case of *Kramer* v. *Policy Holders Life Insurance*

Assn., supra. In that case the insured applied for insurance in February, 1930, and in answer to a question on the application stated that she had consulted a doctor within the past three years for a minor operation on her breast but had fully recovered and that her present state of health was good. Relying on these statements the company issued a policy. She died in 1931. In July, 1930, a doctor had examined her and was told by her that in December, 1929 her right breast had been removed for cancer and also that a doctor had told her she had a tumor in her left breast. The physical examination revealed that the insured had an extensive spread of cancer which, in the doctor's opinion, had been in existence in her system for over two years. Suit was brought to collect on the policy. The insurance company claimed that it was under no obligation to pay since false statements had been made in the application. The court held testimony by the physician who examined her in July, 1930, inadmissible on the ground that it was a privileged communication. This case is commented on in 9 Southern California Law Review 149 and 25 California Law Review 108. Both writers suggest either a complete abolition of the privilege or at least a further statutory exception to allow testimony in insurance cases.

Dean Hale in urging the abolition of the privilege said:

> "Since truth is the very *sine qua non* of justice and since there is no justification for litigation other than the attainment of justice, any rule designed to close the door on truth is entitled to recognition only if it can carry the burden of showing a countervailing social policy which is at least of equal worth and which can be realized only by establishing a cloak of secrecy. The question of balancing interests therefore reduces itself to this: Is it reasonably demonstrable that patients would refuse to consult physicians, or in consulting them conceal material facts essential to proper treatment to any apreciable degree if the physician in the event of litigation, might be called upon to reveal the facts gleaned from the professional service rendered? It is submitted that the physician-patient privilege cannot maintain this burden." (Hale, William G.: "*Codification of the Law of Evidence,*" 1937, page 111.)