Nebraska Law Review

Volume 37 | Issue 2 Article 10

1958

Attorney-Client Privilege—Admission in Legislative Hears

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Attorney-client Privilege— Admission in Legislative Hearings

Joseph Lanza, while in the Westchester County New York jail, had an interview in the counsel room with his attorney. This interview was secretly "bugged" by state officers and a tape recording of the communication was made. A New York State Joint Legislative Committee, with a view towards investigating the operation of state government, investigated the parole violation of Lanza. The Committee announced that it was planning to make public the recording of the interview between Lanza and his at-

[19] The Nebraska Department of Insurance has stated that they would look with disfavor upon an attempt by any insurance company to contract around the *Naphtali* rule, should that rule be adopted in Nebraska. Conversation with Mr. Douce, December 27, 1957.

torney. Lanza and the attorney brought suit to enjoin the disclosure. The Supreme Court at Special Term denied a motion to dismiss the complaint and granted a temporary injunction. The Appellate Division reversed the temporary injunction and dismissed the complaint. Appellants appealed to the Court of Appeals of New York. Under these facts the only issue was whether the complaint stated sufficient grounds for relief. The Court of Appeals held that there was no violation of the attorney-client privilege in the proposed use of the recording and found no grounds to enjoin the Committee action.[1]

Appellants claimed that the use and divulgence of the recording would violate the attorney-client privilege under the New York Civil Practice Act, sections 353 and 354.

> §353 **Attorneys and their employees not to disclose communications.** An attorney or counselor at law shall not be allowed to disclose a communication, made by his client to him, or his advice given thereon, in the course of his professional employment, nor shall any clerk, stenographer or other person employed by such attorney or counselor be allowed to disclose any such communication or advice given thereon.
>
> §354 The last three sections apply to any examination of a person as a witness unless the provisions thereof are expressly waived. . . .

In finding that there were no grounds for enjoining the Legislature, the court said (1) the statute did not inhibit disclosures by other persons who overheard the conversation between an attorney and his client; (2) the statute seals only the lips of the attorney against testimonial compulsion and neither attorney nor client will be examined as a witness; and (3) the right to a fair trial is not impaired since there is no trial, present or prospective.

According to Wigmore the common law elements of the attorney-client privilege are as follows:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.[2]

The New York statute merely adopted the common law rule of the attorney-client privilege.

[1] Lanza v. New York State Joint Legislative Committee on Government Operations, 164 N.Y.S.2d 9, 143 N.E.2d 772 (Ct. of App. May 24, 1957), *cert. denied*, 78 S. Ct. 85 (Oct. 21, 1957).

[2] 8 Wigmore, Evidence § 2292 (3d ed. 1940).

> This section is a mere re-enactment of the common law rule and it cannot be supposed from the general language used that it was intended to change or enlarge that rule as it had been expounded by the courts.[3]

In comparing the elements of the privilege to the facts of this case it is difficult to justify the result reached by the majority.

The court relies first on the rule that the attorney-client privilege does not inhibit disclosures by other persons who have overheard the conversation. The court seems to be considering the tapped conversation as a witness who overheard the confidential communication. The reason for this rule follows from the basic concept that the privilege is that of the client. And because it depends on the client, it is up to him to take the necessary precautions to assure that the communication is not overheard.[4] However, Lanza had no choice in the facilities available; he made use of the only place possible to secure professional advice, the counsel room of the jail. "And the law does not regard it as necessary for the protection of the client, that his communications should be made to his attorney under any particular circumstances of injunctions of secrecy."[5]

A comparable situation occurred in *Coplon v. United States*.[6] There a telephone conversation between an attorney and client was tapped by federal agents. The court said that this was a denial of the effective aid of counsel. Although the court based this holding on the Fifth, Sixth, and Fourteenth Amendments, they recognized the principle underlying the attorney-client privilege.

> It is well established that an accused does not enjoy the effective aid of counsel if he is denied the right of private consultation with him.[7]

However, there is a New York case which holds that such intercepted communications are admissible as evidence.[8] At any rate, the telephone cases can be distinguished on the ground that the client

[3] Hurlburt v. Hurlburt, 128 N.Y. 420, 424, 28 N.E. 651, 652 (1891); Kent Jewelry Corp. v. Kiefer, 202 Misc. 778, 113 N.Y.S.2d 12 (Sup. Ct. 1952); Matter of Williams, 179 Misc. 805, 39 N.Y.S.2d 741 (Surr. Ct. 1942).

[4] Cary v. White, 59 N.Y. 336 (1906); 8 Wigmore, Evidence § 2326 (3d ed. 1940).

[5] Wheeler v. Hill, 16 Me. 329, 333 (1839).

[6] 191 F.2d 749 (D.C. Cir. 1951).

[7] Id. at 757.

[8] Erlich v. Erlich, 278 App. Div. 244, 104 N.Y.S. 2d 531 (1951). The court said telephone conversations are not within the privilege, but here the communication was not in good faith but in furtherance of a false reconciliation in regard to a divorce proceeding.

could have talked to his attorney face to face if he had wanted to assure that he was not being overheard, and therefore, the rule governing overheard communications would cover the situation. But where the client has done all that is possible to preserve the confidential communication and it is secretly tape recorded by the state, the reason for the exception should not apply.

A closer analogy arises when a client delivers a confidential communication to his attorney by means of a document and that document is subsequently stolen from the attorney. There is some authority to the effect that this situation is similar to the case where a party overhears the conversation and in both cases the burden is upon the client to see that the disclosure does not occur. However, the better view seems to be that the information does not lose its confidential nature.

> The principle forbidding its use is not adopted as a mere rule of professional conduct on the part of the attorney. It confers a right upon the client for his protection and advantage and which he alone is authorized to waive. It would not do to hold that the communication loses its confidential and privileged character if knowledge thereof can be obtained by means which do not involve the counsel in a breach of professional duty. [9]

This result is justified by analyzing the policy behind the attorney-client privilege.

> It is absolutely necessary that one seeking to prosecute his rights or to defend himself from an improper claim have recourse to the assistance of professional lawyers, and it its equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim or substantiating his defense against the claim of others. He should be able to place unrestricted and unbounded confidence in the professional agent and the communications he so makes should be kept secret, unless with his consent; for it is his privilege, and not the privilege of the confidential agent. [10]

The same principles are applicable to the case under discussion. The court, it seems, should have applied the privilege instead of the rule of the overheard conversation.

Secondly, the court relies on the fact that neither Lanza nor his attorney are witnesses and that they are not being compelled to give privileged testimony. However, to have a breach of the privilege there need be no trial against the client, present or pros-

[9] Liggett v. Glen, 51 Fed. 381, 396 (8th Cir. 1892).

[10] 5 Jones, Evidence § 2156 (2d ed. 1926).

pective.[11] It likewise follows that the attorney is not allowed to divulge the communication in a different action not directed against the client, without the consent of the client.[12] To further show the importance of this principle, there is the rule that the attorney may not divulge this information even after the client's death without the consent of the client's representatives.[13] The reason behind these rules is that "there is no limit of time beyond which the disclosures might not be used to the detriment of the client or his estate."[14] In light of these long standing rules it seems that the court has lost sight of the fundamentals of this privilege.

Furthermore, this reasoning does not follow the comparison which the Court used in the argument pertaining to a third person overhearing the communication. There the court was willing to compare the tape to a witness who overheard the conversation. It would seem only a slight extension of their prior reasoning to say that the tape stands in somewhat the same position as Lanza if he were a witness before the Committee and asked to repeat what he had told his attorney. Would Lanza be compelled by the courts to disclose this information? The case of *New York City Council v. Goldwater*[15] illustrates this problem. Certain confidential medical records were subpoenaed by a New York City investigating committee. Section 354 of the New York Civil Practice Act specifies that the privilege of clergy, physicians and attorneys applies to "any examination." In this case it was held that the privilege extended to a legislative hearing when the witness is under subpoena properly issued. This holding sustains the principle as developed by law that any disclosure of the confidence without consent is a violation of the privilege. The court said that the law is to be given a liberal construction, even though the normal application would be judicial proceedings. The court also said, "The Legislature which has conferred the privilege may, if it chooses, limit its application."[16] Unless the legislative action of this Committee in the Lanza case is interpreted as a legislative act limiting its prior act which granted the privilege, it does not appear that Lanza would be compelled to testify. There is no indication that the committee intended to limit its prior act. It therefore seems reasonable that the court in the

[11] Bank of Utica v. Mersereau, 3 Barb. Ch. 528 (N.Y. 1848).

[12] Whiting v. Barney, 30 N.Y. 330 (1862).

[13] Anderson v. Searles, 93 N.J.L. 227, 107 Atl. 429 (1919); 3 Jones, Evidence § 750 (4th ed. 1938).

[14] 8 Wigmore, Evidence § 2323 (3d ed. 1940).

[15] 284 N.Y. 296, 31 N.E.2d 31 (1940).

[16] Id. at 302, 31 N.E.2d at 33.

Lanza case should have held that the use of the recording would be a violation of the privilege.

The court remarked that it had no power to enjoin the Legislature because it was about a legitimate legislative function. The question then arises as to just how far a legislature, within a legitimate function, can infringe upon and possibly damage a time honored rule developed by the courts. When the privilege is claimed by an attorney or client in court and the privilege is made out, the court actually stops itself from using the evidence. In some instances the trial judge has enforced the privilege upon his own motion.[17] If this is the case why can the Legislature damage this court developed privilege without interference? *Opinion of The Justices* in the Supreme Court of New Hampshire gives some insight into this problem.[18] The court was considering the ability of the state legislature to make grand jurors disclose proceedings before them during their regular session. The court said,

> It has long been the policy of the law in furtherance of justice, that the investigations and deliberations of a grand jury should be conducted in secret, and for most intents and purposes, all its proceedings should be legally sealed against divulgence.[19]
>
> It is not considered necessary in aid of the investigatory power that grand jurors should violate their oath of secrecy.[20]

In other words, exercise of the Legislature's investigatory power in this instance would have destroyed a traditional and vital element of the judicial process. The same reasoning should apply to the attorney-client privilege. Although legislative investigations rarely follow any strict procedure,[21] it does seem that the informing actions of committees can fulfill their purposes without going to the point of breaking traditional and necessary judicial privileges.

The organization of our government is founded upon the theory of a separation of powers between the three branches. No one branch is to usurp the functions of the other.

> . . . the doctrine of separation of powers was adopted by the convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary authority.[22]

[17] People v. Atchinson, 40 Cal. 284 (1870); Beilfuss v. Dinnauer, 174 Wis. 507, 183 N.W. 700 (1921).

[18] 96 N.H. 530, 73 A.2d 433 (1950).

[19] Id. at 531, 73 A.2d at 435.

[20] Ibid.

[21] Glassie and Cooley, Congressional Investigations-Salvation in Self Regulation, 38 Geo. L. Rev. 343 (1950).

[22] Myers v. United States, 272 U.S. 52, 293 (1926) (dissent).

This system is one of checks and balances so that no branch will become dominant and each has certain powers it can exert over the other. But where the system of checks and balances ends and obstruction or plain interference begins is difficult to ascertain. On the federal level the Supreme Court has adopted several self-regulating rules to regulate its power of judicial review.[23] The executive branch has not allowed Congress, in its investigations, to violate their rules concerning non-disclosure. On May 17, 1954, the President sent a letter to a counselor of the Department of the Army through the Secretary of Defense telling the counselor not to relate certain facts to the Senate Government Operations Committee. The President stated in the letter that he had done this to maintain the proper separation of power between the two branches. The Committee did not pursue the matter further than to accept the refusal of the counselor to answer under the authority of the letter. In view of the established doctrine of separation of powers, the court should have enjoined this disclosure.

CONCLUSIONS

1. The court put too narrow a construction on the statute in deciding this case.

2. The court takes no notice of the policy considerations behind the privilege and the result is that the holding abrogates these considerations.

3. The court is allowing the Legislature to obstruct and damage a court developed rule of law, which violates the doctrine of separation of powers.

If the courts will not protect this privilege in such a situation as this, the decision must be left to the discretion of the Legislature. The Committee must balance the interests affected by its action. It must determine whether it is better to do damage to a sacred privilege established by the courts or to secure the information sought to further the legislative purpose. Since the contents of the communication are not known, perhaps the Legislature has already determined this fact and the legislative purpose is the end to be achieved in this particular situation. But on the other hand, it is equally important that the court, in allowing such legislative action, does not open the door with a decision which will weaken the privilege and destroy its purpose.

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[23] Ribble, Separation of Powers, 6 Va. L. Weekly DICTA Comp. 1 (1955).