1955

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Recommended Citation
Charles J. Burmeister, Evidence—Attorney-Client Privilege as Applied to Advice by an Attorney to His Client, Reflecting on Judicial Integrity, 34 Neb. L. Rev. 538 (1954)
Available at: https://digitalcommons.unl.edu/nlr/vol34/iss3/10

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EVIDENCE—ATTORNEY-CLIENT PRIVILEGE AS APPLIED TO ADVICE BY AN ATTORNEY TO HIS CLIENT, REFLECTING ON JUDICIAL INTEGRITY

A recent case from the Federal District Court for Nevada, In re Bull,\(^1\) raises some interesting problems as to the extent to which an attorney's advice which reflects on judicial integrity is privileged. The attorney who was a defendant in a disbarment

\(^2\) Section 81-319 of the Nebraska Blue-Sky Law imposes a minor exception to this conclusion. The Blue-Sky Law requires corporations which have been in continuous operation less than three years, and those which, having been in continuous operation more than three years, have not met certain minimum earnings requirements to obtain an authorization order from the Department of Banking before issuing or selling securities. Any applicant receiving such an authorization order is prohibited by § 81-319 from declaring or distributing a "... dividend of any kind or in any amount whatsoever until such dividend has been actually earned and received by the applicant through the medium of net profits earned and received by the applicant from its business at the time such dividend is declared."

This restriction, which applies to only a very small fraction of the corporations operating in the state, seems to be grounded on a theory that: (a) at least three years is required for a corporation to become established to the point where it can operate with no further state supervision, and that (b) during this period of incipiency it deceives the shareholders and creditors to pay dividends from a source other than profits actually earned and received.

This exception to § 21-175 supports the general tenor of the policy considerations outlined above, but since it covers such an insignificant portion of the existing corporations, it can hardly be interpreted as conflicting with § 21-175.

proceeding had unsuccessfully represented a client in a previous criminal case, and the client was serving a jail sentence. In a letter\(^2\) to the client on the advisability of appealing the conviction, the attorney stated, among other things, that experience had shown that the records of any trial in that judge's court were emasculated when an appeal was taken; that the judge had a very dear friend on the circuit court; and that the conduct of the judge at trial had been so reprehensible that the attorney was willing to go to great lengths to secure a reversal. The letter was intercepted by the client's jailor and was made the basis for the disbarment action. The court decided that the letter was clearly not a privileged communication and was admissible in evidence. But the court concluded that an attorney's advice to an imprisoned client could not be made the basis for disbarment since the client might thereby be deprived of his constitutional right to effective assistance from counsel.\(^3\)

A slight variation of the *Bull* facts could produce a common, and yet difficult and infrequently litigated situation. Assume that a similar letter had been sent to a client not in prison; or that similar contemptuous remarks had been made in confidence by the attorney to his client in the privacy of the attorney's chambers and in preparation for civil litigation. Assume further that such remarks were made (a) in good faith and with sound justification in fact, or (b) with malicious intentions and without the slightest foundation in fact. In what manner and to what extent are such remarks privileged?

A privilege may be either of two types: (1) an evidentiary privilege, such as an attorney-client privilege or physician-patient privilege, under which the remarks would be completely inadmissible in evidence, or (2) a substantive privilege, such as used in the law of defamation, under which an attorney's advice would be admitted in evidence but would be considered (a) qualifiedly privileged, or (b) absolutely privileged. A qualified substantive privilege remains operative only as long as reasonably and honestly used, while an absolute substantive privilege would protect an attorney's remarks no matter how unreasonable or malicious they might be.

The purpose of this note is (1) to examine the attorney-client evidentiary privilege to determine under what circumstances an attorney's advice, reflecting upon judicial integrity, is privileged

\(^2\) The letter is set forth *in toto* at 390 in the *Bull* case.

from admission in evidence, and (2) to determine the nature of a substantive privilege, if any, that may be extended to such advice.

I. The Attorney-Client Privilege in Evidence

A. Historical and Policy Basis

Historically, the basis of the attorney-client privilege was the theory that the honor of the attorney could not be violated by compelling him to reveal anything conveyed to him in confidence by a client. Therefore, the privilege was originally for the benefit of the attorney and not the client. But under modern theory it is generally agreed that the privilege is exclusively for the benefit of the client. It is felt that in the present complex society, the fullest freedom of communication between a client and his attorney should be encouraged if justice is to be done; and only by granting a privilege to this communication can such a result be achieved. Further, proper presentation of the client's cause is believed to outweigh the possible harm resulting from suppressing such evidence in particular cases.

A necessary corollary of the privilege has been its extension to communications from the attorney to his client as well as from the client to the attorney. Since the privilege was first said to be for the attorney, the early cases assumed that such communications were inadmissible. As a result, the question of whether the lawyer's communications are privileged has seldom been raised. The reason lies generally in the possibility that inferences could be drawn from the attorney's advice, which might tend to disclose the client's original communication. Hence, advice given by an attorney, which might tend, if disclosed, to reveal a previous communication from a client, is universally thought to be privileged from admission in evidence.

4 See S. Wigmore, Evidence §§ 2290, 2291 (3d ed. 1940) for a general review of the history and policy basis of the privilege. See Model Code of Evidence, Rule 210, comment a (1942).


7 S. Wigmore, Evidence § 2320 (3d ed. 1940).

8 Wigmore cites only one case raising the question, and a reasonably exhaustive search by the writer yielded no further cases in which it was contended that communications from attorney to client might not come within the privilege.
NOTES

It is interesting to note, however, that remarks by an attorney questioning judicial integrity, as in the Bull situation, or the hypothetical situations posed above, will often have no direct relation to an earlier communication by the client. That is, their introduction into evidence will not reveal an earlier communication from the client. Case authority for the privilege or non-privilege status of such remarks is practically non-existent. It has been argued, however, that in such situations an attorney should be given complete freedom to express his frank opinions to his client, and the best way to accomplish this purpose is to include such remarks within the attorney-client privilege.

Undoubtedly, under proper circumstances it may be desirable to encourage an attorney to take his client into confidence and comment on deficiencies in the judiciary which he honestly and reasonably believes may have a bearing on the presentation of a client’s cause. If the attorney could not comment on the conduct of the judiciary, he might hesitate to speak when he should, and his client’s cause might thereby suffer. Indeed, Canon 8 of the Canons of Professional Ethics may lend some support to the argument. It states:

A lawyer should endeavor to obtain full knowledge of his client’s cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation.

If Canon 8 is to be complied with, an attorney obviously cannot close his eyes to the possibility of shortcomings in the operation of our judicial system, and if he perceives such shortcomings, it may be his ethical duty to call them to his client’s attention.

The argument, of course, does not suggest that malicious or reckless attacks against the judiciary should be encouraged. But it should be carefully noted that exclusion of an attorney’s advice from evidence might produce that very result since it would prevent a determination of whether advice by an attorney was given in good faith and reasonably. Distinction as to whether the advice was advanced (a) in good faith and with factual justification, or (b) with malicious intention and complete lack of foundation in fact, would become completely irrelevant, and instead the attorney’s statements would be extended protection amounting in effect to an absolute substantive privilege.

9 Ex parte Cole, 6 Fed. Cas. No. 2,973, at 35 (C.C.D. Ia. 1879), cited in the Bull case, is apparently the only reported case squarely on point.
10 Canons of Professional Ethics of the American Bar Association.
There are policy factors militating against such a result. Because the layman is encouraged to, and often does, place supreme confidence in the opinions of his attorney, any statements reflecting on the operation or integrity of the judiciary are apt to be taken at face value. If the court makes rulings adverse to the client, he very likely will spread the attorney’s remarks in rationalization or recrimination. The harmful effect is apparent. If litigants are to be encouraged to bring their disputes into the courts for peaceful and equitable settlement, public opinion of judicial integrity should be maintained at a high level. Exposing the judiciary to reckless or malicious collateral attack by members of the bar could undoubtedly undermine confidence in our system of jurisprudence. In fact, Canon 1 of the Canons of Professional Ethics indicates that a lawyer should not attack the judiciary collaterally. It provides:

It is the duty of the lawyer to maintain towards the courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

Admittedly, bona fide criticism of the judiciary may be necessary for adequate preparation of many cases; but the protection of reckless criticism seems unnecessary if any other means of encouraging free expression by the attorney can be utilized. It would seem, therefore, that the attorney-client privilege in evidence should not be extended to protect legal advice reflecting on judicial integrity, unless it might also tend to disclose a prior communication from the client.

B. WAIVER OF THE PRIVILEGE

It is interesting to note, however, that even if it be assumed that all remarks by an attorney should be inadmissible, hazards arising from the common law doctrine of waiver might deter unrestrained expression by the attorney. Case authority in the

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11 These policy considerations led the court in the Bull case to admit the attorney’s remarks in evidence.
12 Canons of Professional Ethics of the American Bar Association.
13 Emphasis supplied.
14 8 Wigmore, Evidence § 2327 (3d ed. 1940) treats waiver of the privilege in general.
waiver area has arisen almost exclusively in situations where disclosures by the client are sought to be kept from evidence—the resulting secrecy benefiting the client. Hence, waiver of the privilege has properly been based solely upon the conduct of the client. It would seem, therefore, that where statements by the attorney are sought to be kept out of evidence, waiver of its benefit should be based only upon the attorney's subsequent conduct. An attorney might certainly be hesitant to speak if the privilege attached to his remarks might subsequently be waived by the acts of others. But the holding of the Bull case, considered with the historical and policy bases of the privilege, gives reason to believe that when evidence of an attorney's advice is introduced, a court may conclude that the privilege "... is a protective device available only to or on behalf of the client,"15 and therefore hold that waiver of its benefit is to be determined solely from the client's conduct.

Because of this possibility, various waiver situations will be considered to point out the risks to which an attorney would be subject if his privilege is merely evidentiary. The most frequent situations where the attorney's remarks will be submitted in evidence are disciplinary proceedings or tort actions against the attorney. Ordinarily, in such proceedings the attorney's remarks will have reached persons other than the client to whom they were made or the action against the attorney probably would not have been instituted. Where the remarks by the attorney are oral, they may have been passed on to others in one of three ways. They may reach others by some voluntary act of the client independent of the attorney-client relation; for example, the client may voluntarily pass the remarks on to others by word of mouth. If the client fails to assert his privilege when the attorney's remarks are later sought to be introduced into evidence, some courts would probably conclude that the privilege has been waived.16 Of course, if the client chooses to testify, there is no doubt that his waiver of the privilege could not be objected to by his attorney.17

16 Assuming the hearsay problem could be solved.
17 Even if the client is not a party to the action against the attorney, he may properly assert the privilege if called as a witness. The situation causing the trouble is where the client, though not a party to the action, claims the privilege only to have it erroneously denied. There are cases holding that a party to an action cannot take advantage of a witness' privilege. See State v. Madden, 161 Minn. 132, 201 N.W. 297 (1924) and State v. Dunkley, 85 Utah 546, 39 P.2d 1097 (1935). Hence,
Where the attorney's remarks reach third parties as a result of being volunteered by the attorney, such a communication is not made in confidence and the privilege does not apply. And some courts hold that when a communication which would otherwise be protected under the attorney-client privilege is overheard, either inadvertently or by deliberate eavesdropping, the "eavesdropping" party is competent to testify. Wigmore calls this the "eavesdropper" rule. The rationale of the rule is that the law will keep secret that which the attorney and client keep secret; but any third person hearing the remarks will be competent to testify.

If the statements sought to be kept out of evidence are in writing, substantially the same contentions of waiver can be argued. Where the writing reaches third persons by a voluntary act of (a) the attorney, or (b) the client, the privilege cannot be asserted, because in the former case the writing may no longer be confidential, and in the latter case the privilege may have been waived if the client does not assert his privilege at trial.

Where the statements in writing come to the knowledge of others by involuntary disclosure on the part of either attorney or client, as, for example, by loss or theft, the disclosure can be analogized to the "eavesdropper" situation. Following this line of argument, it appears that if it were not for the constitutional point in the Bull case, protection of the letter could have been denied on one of two grounds, depending on whether it was deemed foreseeable by the attorney that the letter would be intercepted and censored. If the censoring was foreseeable, it could be argued that since the attorney should have known his state-

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19 8 Wigmore, Evidence § 2311 (3d ed. 1940).
20 It seems that the "eavesdropper" rule has little to commend it in a situation where (1) the client has not been negligent in allowing the communication to be overheard, and (2) the communication might tend, either directly or by inference, to disclose the nature of an earlier communication from the client. Rule 209(d) of the Model Code of Evidence would modify the rule since it provides that the communication is "confidential" so long as the client is not aware that the means of communication has disclosed the information to third persons other than those to whom the communication was reasonably necessary.
21 See notes 16 and 17 supra.
ments would reach others besides his client, his disclosure was voluntary, and hence his statements were not made in confidence. On the other hand, if disclosure resulting from the prison censorship is deemed involuntary, the censor could be likened to an eavesdropper, and the censor would be competent to testify as to the contents of the letter.

The preceding discussion has suggested that extension of an evidentiary privilege to advice by an attorney questioning judicial integrity might not produce the desired results for two reasons: (1) since no inquiry could be made into the good faith or reasonableness of his remarks, an attorney might be licensed to make reckless and malicious attacks not intended to be encouraged by the privilege, and (2) the risk of disclosure resulting from possible application of the waiver doctrine might discourage uninhibited comment by the attorney.

II. Qualified Substantive Privilege

Application of a qualified substantive privilege to an attorney’s assertions, however, would avoid the problems inherent in the attorney-client evidentiary privilege. Indeed, such a privilege has long been recognized in the law of defamation. An attorney may be privileged to communicate defamatory remarks to his client. Furtherance of the attorney-client relation is felt to outweigh possible damage to third persons. But the privilege is subject to abuse, and the courts usually say that it is lost “if the publication is not made primarily for the purpose of furthering the interest which is entitled to protection.” Such a rule acknowledges a substantive privilege for the attorney to speak freely with his client so long as he has honest and justifiable motives, and yet rather effectively prevents the privilege from shielding reckless and unwarranted attacks upon third persons.

There is ample reason for applying a similar substantive privilege to all remarks made about the judiciary in confidence by an attorney to his client, whether the action against the attorney

22 In Cotton v. State, 87 Ala. 75, 6 So. 396 (1889) an imprisoned client made remarks to his attorney within earshot of the jailor. It was held that the communication was not made in confidence, as both attorney and client should have known that the jailor could overhear the client’s remarks. Also, the client’s constitutional right to counsel was not impaired since private consultation would have been granted had it been requested.

23 Prosser, Torts 827, 834 n. 23 (1941); Kruse v. Rabe, 80 N.J.L. 378, 79 Atl. 316 (1910).

24 Prosser, Torts 850 (1941); Restatement, Torts § 603 (1938).
be in tort, or in some other type of disciplinary proceeding. Of course, the argument may still be raised that existence of the possibility that an attorney's remarks may later be scrutinized by a court or jury to determine his reason or sincerity in making them may unduly restrict communication. But experience with the qualified privilege in the law of defamation tends to contradict that argument. The privilege in that area of the law has long been subject to the qualification that it be reasonably exercised, and there has been no indication that the administration of justice has been unduly hampered by its use.

It has also been suggested that rendering an attorney susceptible to so-called "second-guessing" by a court or jury may in certain instances result in an especially harsh penalty for what may have been merely an ill-considered statement made in the heat of anger, or the bitterness of disappointment. But severe disciplinary actions, such as disbarment, ordinarily are not initiated by the bar for a single, isolated statement by an attorney, unless it is terribly flagrant. Hence, the attorney will usually be given prior warning that his conduct is not measuring up to required ethical standards, and only upon a repeated violation of such standards will disciplinary action be instituted. When this factor is considered with the policy reasons for giving the judiciary at least qualified protection from collateral attack by members of the bar, placing final judgment with the courts as to whether the privilege has been reasonably exercised does not seem to be an undue restriction upon the attorney-client relationship.

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