CONFIDENTIAL AND OTHER PRIVILEGED COMMUNICATION

By

ROY D. WEINBERG

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INTRODUCTION

The expression "privileged communications" appears in many contexts, most notably in connection with the rules of evidence and the law of defamation. This publication is addressed primarily to the former, but a brief outline of the general rules relating to the latter is included.

The concept of privileged communications, as applied in the rules of evidence, is derived from considerations of public policy rather than any "right" vested in confidentiality itself. No pledge of secrecy nor professional ethic can prevail against the general principle of full testimonial disclosure, unless it issues from a relationship regarded by the law as worthy of encouragement and maintenance even at the cost of occasional suppression of testimony.

The expeditious administration of justice demands full and free disclosure of all evidence that is competent, relevant, and material in the cause under consideration, unless principles of public policy require recognition of specified exceptions. Accordingly, such exceptions are commonly regarded with extreme caution, and, in fact, viewed with disfavor by many outstanding legal authorities. Some commentators are critical of the concept of privilege in general, while others at least deplore its extension to ever widening areas.

In addition to testimonial privileges and those related to the law of defamation, some subjects are privileged in the sense that any disclosure would constitute an invasion of privacy. Frequently the enforcement of such privileges involves nothing more than the exaction of a penalty of some sort from the offending party, although occasionally the prohibition of such disclosures also entails a testimonial

privilege. This aspect of confidential communications will also be considered briefly in the ensuing text.

While some discussion of the various theories underlying the concept of privilege is included, the primary purpose of this study is to examine the immediate status of the law respecting privileged communications.

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Chapter 1

THE GENERAL NATURE OF PRIVILEGE

General Rules of Exclusion

Exclusionary rules of evidence take many forms. The basic objective of testimony and other forms of evidence is, of course, the ultimate discovery of facts which will assist the court or jury in the resolution of the controversy under litigation. Some types of testimony and other evidential items must, in the interests of due process and fair determination of the conflict, be excluded. In the main, these fall under the headings of evidence which is, for one reason or another, "irrelevant," "incompetent," or "immaterial." Such varieties of evidence are excluded because of their lack of probative value, prejudicial nature, or basic unreliability. Included among such matters are hearsay evidence, evidence coming from irresponsible and unauthentic sources, or from witnesses unqualified, for various reasons, to give testimony in a court of law, or in the particular litigation. There is, however, still another category of exclusion, designed not to eliminate evidence because of its possible disservice to the ascertainment of truth, but rather because of considerations of policy purporting to protect the basic rights inherent in certain social relationships. This, in essence, is the domain of privilege. Exclusionary rules related to privileged communications, unlike those previously mentioned, do not facilitate the discovery of truth, but, in fact, frequently impede it. They are, nevertheless, regarded as worthy of recognition because of their value, on balance, to the overall maintenance of free and desirable social relationships.

Rules Relating to Privilege

Testimonial privileges are largely the creatures of statute, although some are founded on the common law or achieve recognition through judicial pronouncement. Aside from the privilege against self-incrimination, the "attorney-client" privilege, and the rule of testimonial incompetence (which is actually a distinct concept), the principle of privileged communications is not basically a common law doctrine. Historically, however, the concept of privilege issues from a variety of fictions, many of which serve no useful modern purpose. On the other hand, the emergence of complex social interrelations has given impetus to extensions of privilege to situations in which originally it had no valid application. Still, the propriety of the principle, both in its original and current contexts, has been the subject of much controversy on the part of the bench, the bar, and legal commentators in general.

The most commonly advanced argument in support of privilege is that it encourages vital interpersonal relationships which might be seriously prejudiced by the prospect of breached confidentiality. The incisive analysis of many outstanding authorities, however, has cast much doubt on the basic validity of the principle of privilege, except, perhaps, in the case of the legal and penitential privileges, and especially on the desirability of its extension to still other categories. Nevertheless, the legislative tendency to broaden the domain of privilege continues.

The law of privilege varies widely among the several jurisdictions, not only with respect to statute, but also judicial construction. It is therefore imperative to become acquainted with the rules obtaining in the individual jurisdiction involved in the particular litigation. Although general principles may usefully be explored, it is hazardous to generalize either with respect to any particular principle of privilege or its application to a given state of facts. This results in part from the considerable conflict of authority on many issues, but also from an ambiguity in construction and frequent failure to distinguish the principle of privilege from that of testimonial

incompetence. The difficulty is further complicated by diverging views as to what matters are privileged, how and by whom a privilege may be asserted, whether nondisclosure is compulsory or merely permissive, and the innumerable problems relating to waiver.

Although there is some conflict on the question, the more logical and prevalent view is that testimonial privileges are procedural, not substantive. The validity of this view varies, of course, with the particular privilege involved, and in some instances, it is most tenuous, but in any event, for all practical purposes, the problem is largely academic. The usual treatment of privilege as procedural is, however, evidenced by the generally prevailing policy of strict statutory construction. There is some authority—notably in New York—favoring a liberal construction, on the theory that this best serves the purpose of privilege, namely encouraging full and free communication between the parties protected.

PREREQUISITES OF PRIVILEGE: According to Wigmore, generally regarded as the outstanding authority on evidence, the prerequisites to a valid claim of privilege are the following:

1. The allegedly privileged communication must have originated in a confidence that it would not be disclosed.
2. The asserted confidentiality must be essential to the satisfactory maintenance of the relationship between the parties.
3. This relationship must be one that—in the opinion of the community—ought to be seduously fostered.
4. The damage resulting from disclosure must exceed the benefit which would ensue from a more expeditious disposition of the cause.

Privilege and Incompetency

Testimony may be inadmissible either as "privileged" or because of some exclusionary rule. Although theoretically distinct, these principles tend to overlap and it is often difficult to define the exact line of demarcation.

The tacit assumption that exclusionary rules are self-enforcing, while privileges, unless timely asserted, are waived,

is frequently unfounded. Although a few exclusionary rules are so fundamental as to demand application even in the absence of appropriate objection, most such rules, like most privileges, are in fact waived unless properly invoked and also cannot be raised on an appeal unless asserted in the first instance on the trial of the cause.

There are other significant distinctions between the principle of incompetency and the concept of privilege. Incompetent testimony is objectionable only at the option of the opposing party, or—in some instances—of the court, but a privilege belongs exclusively to the protected communicant. Nevertheless, a **claim** of privilege may, in appropriate circumstances, be made **on behalf of the possessor of the privilege** by the adverse party, the court, and even other persons present at the trial. The erroneous **exclusion** of privileged testimony may be urged on appeal by the party who sought its introduction. Although in certain respects distinct in principle, the erroneous **admission** of privileged testimony is nevertheless held by most courts to constitute a valid objection on appeal. On the other hand, when a **party** appeals on the basis of an infringed privilege of a **non-party witness,** a number of courts have rejected this objection as a basis for reversal. This is especially true of the more recent decisions and almost uniformly in cases involving issues of self-incrimination and unlawful search and seizure. Consequently, the erroneous introduction of incriminating evidence illegally seized by law enforcement officers affords no sustainable basis for appeal unless the articles taken or premises invaded were owned by, or in the possession of, the appellant.

Privileged Testimony

As already observed, no communication is deemed to be privileged solely because of a pledge or intent that it remain confidential, unless the communicants occupy a relationship recognized at common law, or specified by statute, as entitled to such protection. Hence, confidential exchanges between individuals who are not members of such classes

are regarded as unprivileged in administrative, legislative, and judicial proceedings. This principle applies to such communications as those between members of a family (other than spouses), bankers, brokers, and their clients, business associates and employees (except for the limited privilege relating to so-called "trade secrets"), social workers, and the like.

A number of professional classes, other than those accorded the protection of privilege at common law or long-standing statute, have exerted persistent pressure on legislative bodies to extend the domain of privilege to their particular specialities. Notwithstanding the almost uniform opposition of the bench, bar, and most commentators, such efforts have met with considerable success. Outstanding examples are the relatively recent "journalist-informant" and "accountant-client" privileges which have achieved statutory recognition in approximately one-fourth of the states. Thus, while the legislative trend appears to be clearly in the direction of an extension of privilege, the judicial tendency has been toward an increasingly strict construction of all rules of privilege.

It is also important to distinguish statutes conferring testimonial privileges from statutes prohibiting or penalizing certain unauthorized disclosures (as by telegraph or telephone operators, trust companies, and detective agencies) but not extending such prohibitions to testimony in judicial proceedings.

Right to Comment or Draw Inference from Assertion of Privilege

The authorities are conflicting as to whether any unfavorable inference by the trier of fact, or comment by counsel, based on the assertion of a privilege, is permissible. Clearly where a claim of privilege is made by a **non-party witness,** any such reference or inference is improper because the assertion of such a privilege is obviously beyond the control of the **party.** It is also clear that the exclusion of **incompetent** testimony is immune from all adverse comment or inference. A situation presenting more difficulty appears when

a **party** withholds competent, relevant, and material testimoney under a **personal** claim of privilege. Some courts holds that even in this situation, any adverse comment or inference would, in effect, defeat the very purpose of the privilege, while others view such an assertion of privilege as the proper basis for an inference that the information withheld would be prejudicial to the privileged party.

Law Governing Issues of Privilege

In general, problems of privilege and the competency of witnesses are governed by the law of the state of the forum. In the case of privilege, however, in actions involving contracts, the law of the state where the contract was completed and consummated controls.

In the federal courts, special rules apply to varying situations. In civil suits, the general rule is that the statute of the state where the court sits, considered in the light of its construction by the courts of that state, governs the issue of admissibility. In diversity cases, the more prevailing, although not uniform, federal practice is to follow the rules relating to privilege prevailing in the forum state, but where a **federal** question forms the basis of the litigation, a number of cases have held that the court may ignore the forum state rule and resolve the question of privilege under the law most favorable to admissibility. In criminal proceedings, the common law rules respecting privileges are followed unless the matter is covered by an Act of Congress or the Federal Rules of Criminal Procedure.

Fiduciary Relationships

As mentioned briefly early in the chapter, "confidentiality," in itself, is insufficient to establish a testimonial privilege, unless the parties belong to a class specifically recognized, either judicially or by statute, as entitled to such protection. This principle obtains irrespective of the fact that the parties may occupy a fiduciary relationship which may or may not enjoy some other form of legal protection. Hence, in the absence of statute, there is no testimonial privilege as to communications between partners, bankers and de-

positors, brokers and customers, trustees and beneficiaries, social workers and clients, news media representatives and their informants, accountants and clients, etc. As to some of these, as will be observed in subsequent chapters, "privilege" statutes have been enacted in some jurisdictions.

The absence of a testimonial privilege does not mean, of course, that a fiduciary confidence may be disregarded with impunity, but only that it is important to distinguish statutes that only prohibit or penalize such infractions from statutes conferring an evidentiary privilege.

A fiduciary duty binds a real estate broker who obtains information regarding property in connection with an application for a mortgage loan, for example, as well as a surveyor employed to survey property, as to information respecting a prospective purchaser. A similar duty binds bankers, investment brokers, and many other professional classes.

It is the duty of any fiduciary not to employ information received by him in such capacity for his own benefit or in competition with, or in any manner to the injury of, his client. Even where the information is unrelated to the immediate transaction, this duty precludes its employment by the fiduciary unless it be a matter of common knowledge. The obligation to respect the client's confidence continues after termination of the relationship between the parties.

Not only the fiduciary, but also any other person receiving such information, with knowledge of its confidential character, is bound if it was disclosed to him in violation of the trust. Improper disclosure or employment of confidential information issuing from a fiduciary relationship makes the party so acting liable for all gain resulting therefrom and appropriate restraint by a court of law.

Information acquired on behalf of a client, or other person to whom a fiduciary duty is owed, is invested with the same degree of protection as information issuing directly from such beneficiary.

Chapter 2

THE ATTORNEY-CLIENT PRIVILEGE

Aside from the privilege against self-incrimination and total testimonial disqualification (which is actually a separate principle), the only privileged communication recognized at common law appears to be that of attorney-client. The remaining currently recognized privileges are either statutory or, in a few instances, the result of judicial pronouncement.

The attorney-client privilege, while founded upon the common law, has been codified in 38 states. Its derivation, however, is distinct from the rationale supporting its present recognition. It issued originally from the inviolability of the attorney's oath of honor. The privilege, therefore, as originally recognized, belonged to the attorney, not the client. This conception of the privilege, however, was repudiated at an early date and superseded by the modern doctrine that the privilege belongs to the client and may be waived by him alone, or, in some instances, by his legal representative following his decease.

The most commonly asserted justification of the attorney-client privilege is that it encourages free and full consultation by the parties to this relationship, unfettered by the client's apprehension of compulsory disclosure.

The Canons of Professional Ethics, of course, prohibit unauthorized disclosure by an attorney of communications with his client, but this does not entail any testimonial privilege. In other words, when a legal and ethical duty conflict, the latter must yield. The attorney, in effect, has no privilege, but only a duty to preserve his client's confidence, and this duty must give way when the court directs the attorney to testify, unless the privilege is asserted by, or at least on behalf of, the client.

Prerequisites to Attorney-Client Privilege

A valid invocation of the attorney-client privilege depends upon the existence of certain specified preconditions:

1. The attorney must have been consulted in his professional capacity—not merely as a friend, business advisor, or in some other non-professional connection.

2. The attorney must be a duly licensed practitioner or, according to most authorities, at least bona fidely believed to be such by the client. Practitioners authorized to serve before special agencies, even though invested with the privileges belonging to attorneys performing similar functions—as, for example, patent agents who are not also attorneys—do not come within the scope of the privileged relationship.

3. The attorney-client consultations must relate to matters concerning legal advice or services. These must involve more than services which may be performed by laymen or other classes of professionals. The communications need not, however, contemplate actual litigation (as, in fact, most legal consultations do not).

4. I order to come within the scope of the privilege, the communication must concern the matters upon which the service or advice is solicited. However, considerable latitude is permitted in this connection. Whether a communication relates to the matter regarding which legal services or advice is sought is a question attended by much difficulty. References are frequently made to the "necessity," "relevance" or "materiality" of the communication, but these attempts at definition are hardly helpful, because clients are rarely conscious of the legal significance of their remarks. The most coherent statement of the rule, perhaps, is that of Wigmore, namely, that the communication must be made as part of the purpose of the client in soliciting advice on the matter in question. As a practical matter, most courts reject a claim of privilege with respect to completely extraneous disclosures, but some recognize it so long as the communication is made to the attorney in his professional capacity, even though it does not bear directly on the

subject of the consultation.

5. In order for a claim of privilege to be sustained, there must have been either an express or implied intent of confidentiality. The mere fact of retainer does not, in itself, confer confidentiality upon all details of consultation. The problem of intent frequently calls for a resolution of extremely complex questions of fact. In any case, an intent that the substance of the communication be conveyed to others negates the element of confidentiality. The permissive presence of unnecessary third persons during the course of consultation likewise abrogates the privilege. Purely incidental items, such as the fact or date of retainer, are ordinarily unprivileged, since the element of confidentiality is lacking. The same principle applies, in most instances, to the question of identity. In some circumstances, however, the client's identity may be withheld, as, for example, where legitimate apprehensions of "reprisal" or possible self-incrimination are present. There is, of course, no blanket privilege of anonymity. Any attempt to conceal the identity of the real party in interest contravenes both public and judicial policy, and consequently affords no basis for a claim of privilege.

The presence of third persons during attorney-client consultations does not necessarily defeat the privilege. Where such individuals are necessary agents or intermediaries, such as secretaries, stenographers, or clerks, they as well as the attorney are required to respect the privilege.

Cases involving the issue of confidentiality are far from harmonious and it is difficult to generalize beyond the relatively uniform rules just stated. Ordinarily, information acquired by an attorney from sources outside the attorney-client relation is deemed to be unprivileged, but some statutes, at least literally, seem to recognize the privilege without reference to the source.

It is important to bear in mind that the expression "communication to an attorney in his professional capacity" may be somewhat misleading if taken too literally. A more apt phrase is that which appears in a number of statutes, namely a "communication to an attorney by his client in that