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The Attorney-Client Privilege in West Virginia

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STUDENT NOTES

THE ATTORNEY-CLIENT PRIVILEGE IN WEST VIRGINIA.—It is said that in this state the rule of privilege between attorney and client is strict and rigid. As a general rule, where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser. However, the protection may be waived. Although there are few West Virginia cases on the point, the common law principle is applied in courts of record in West Virginia and by statute it applies to justice of the peace courts. The purpose of this article is to review the West Virginia cases on privileged communications and to compare the rules therein with those of other jurisdictions.

In an early case, Parker v. Carter, the Virginia court said that it was settled law that attorneys ought not to be permitted to give evidence of facts imparted to them by their clients. The privilege is that of the client and not the attorney. In a note to the case the court said that the client could also assert the privilege

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2 8 Wigmore, EVIDENCE § 2292 (3d ed. 1940).
4 4 Munf. (18 Va.) 273 (1814).
against interpreters acting as the organ of communication between the client and the attorney. It was further held that whether litigation was actually pending was immaterial for the existence of the privilege. In the light of later West Virginia cases, it is interesting to note that the attorney in the Parker case testified that he expected a fee for drawing a deed of trust but that he had not been paid, but the point was not discussed by the court. As to whether the communication was actually confidential, it appeared that it was made to the attorney in the presence of several persons who might have heard, but there was no evidence to show that they actually did hear the communication. The court said that this only showed an indiscretion on the part of the client and refused to "embark in a field of uncertainty and conjecture" and to decide that it was not made in confidence.

The Parker case is in accord with what appears to be the majority rule, namely, that where the presence of a third person is indispensable, the communication is privileged. Some cases go even further to hold that a communication by any form of agency employed or set in motion by the client is within the privilege. However, the Parker case seems to lay down the rule that, unless there is strong positive evidence to the contrary, the confidentiality will be presumed. It is submitted that the better view is that there is no presumption of confidentiality and the presence of a third person would tend to show that it is not confidential. Furthermore, one standing by and overhearing the conversation would be allowed to testify as to the contents thereof.

In another Virginia case, Lyle v. Higgenbotham, it was held that a letter written by a mortgagee to his attorney telling the latter that the debt was paid and ordering him to dismiss the suit to foreclose is not privileged. The court gave as one reason for saying it was not confidential that the compliance with the order operated as a disclosure since suit could not be dismissed without proper authority. A further reason was given that the defendant's statement in his answer that "if it can be [shown] that this debt was paid before, this respondent will refund the money he has re-

5 Id. at 287.
6 See Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949); 8 Wigmore, Evidence § 2317.
7 See City & County of San Francisco v. Superior Court, 231 P.2d 26 (Cal. 1951).
8 See 8 Wigmore, Evidence § 2311.
9 Id. at § 2326.
10 10 Leigh (37 Va.) 63 (1839).
ceived, with as much pleasure, etc.” operated as a waiver of the privilege since the obvious meaning of the statement is that he will feel pleasure in repaying what justice demands, “even though the fact should be ascertained by a breach of professional confidence.” A dissenting opinion contended that although the order to dismiss may not be such privileged communication, the statement that the debt was paid is still under the seal of professional confidence.

It is submitted that the dissenting opinion in the *Lyle* case was correct. Compliance with the order to dismiss may have disclosed the order. However, it could not disclose the reason since the client could have other reasons for dismissing the suit than merely because the debt had been paid. It is further submitted that the court erroneously interpreted the phrase in the defendant’s answer. To follow such reasoning could lead to the conclusion that wherever a party puts himself “on the country”, he is agreeing to submit all facts to the jury although such facts may be ascertained by a breach of professional confidence. It is doubtful that the court would so hold, and no case has been found to support a proposition of that nature.

*Moats v. Rymer,* the first West Virginia case in point, was an action for malicious prosecution. Plaintiff introduced one of his counsel as a witness. The witness was asked on cross examination how much his fee in the case was, as evidence going to his credibility. He said that there was a written contract and refused to answer. A *subpoena duces tecum* was awarded and a motion to quash it was overruled. The court rejected the contention that it came under the rule of professional communication and confidence and said that when an attorney took the stand he must stand the same test applied to other witnesses. The court cited Wharton on *Evidence* as follows: “Where, however, a party offers himself as a witness, it has been argued, that he may be asked as to his communications to his counsel, if part of the case he undertakes to prove.” The court raised this query: if that were true, why not apply the same rule to attorneys placed on the stand by their clients.

The court’s intimation in the *Moats* case that when a party to the litigation takes the stand he may be questioned concerning his

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11 *18 W. Va. 642 (1801).*
12 The court vigorously condemned this practice in the instant case. See Code of Ethics § 19 at 128 *W. Va. xxvii.*
13 1 WHARTON, LAW OF EVIDENCE 559 (1877).
communications to his attorney appears to be against the weight of authority. A party merely by becoming a witness should not be held to waive his privilege.14 "The client's offer of his own testimony in the cause at large is not a waiver, for the purpose either of cross-examining him as to the communications or of calling the attorney to prove them; otherwise the privilege of consultation would be exercised only at the penalty of closing the client's own mouth on the stand."15 However, a good purpose for holding that the placing of one's own attorney on the stand is a waiver of the privilege is to discourage a client from using his own attorney as a witness.16

In State v. Fisher,17 the most recent West Virginia case in point, testimony by the attorney that the defendant was one of the persons whom he represented at the preliminary hearing was admitted. The court held that although a communication to an attorney by a client or former client is privileged, the testimony as to identity of a former client does not involve nor is it based on a professional communication. This appears to be the generally accepted view.18

Behrens v. Hironimus,19 a federal case, held in accord with the Moats case that the privilege does not pertain to the fact of employment, terms of employment, or the subject matter. The court there cited the West Virginia statute20 on privilege but made no comment on it and the court was evidently under the impression that the statute created a privilege in courts of record.

In State v. Douglass21 a defendant who had been indicted for murder told his attorney where the gun with which the murder was committed could be found. The trial court permitted examination of the attorney as to where the pistol had been concealed and where he had found it from the directions of his client, but forbade asking the attorney what the defendant had told him about the pistol. This was held to be error. The court said that it "would be a slight safeguard indeed, to confidential communications made to counsel, if he was thus compelled substantially, to

14 State v. Pusch, 46 N.W.2d 508 (N. Dak. 1950).
15 8 WIGMORE, EVIDENCE § 2327.
16 Ibid.
18 Rand v. Ladd, 238 Iowa 380, 26 N.W.2d 107 (1947); see 8 WIGMORE, EVIDENCE § 2313.
19 170 F.2d 627 (4th Cir. 1948).
20 W. Va. CODE c. 50, art. 6, § 10 (Michie, 1949).
21 20 W. Va. 770 (1882).
give them to a jury, although he was required not to state them in the words of his client.” The court held that the state could show that the pistol was found in the possession of the attorney and that the pistol could go into evidence, although it was taken improperly from the counsel of the defendant and although the information that he had the pistol was received through a breach of confidence. But the following was refused: (1) evidence of how the pistol came to the possession of the attorney by either direct or indirect breach of confidence between attorney and defendant; (2) evidence that the attorney claimed that he had received the pistol through communications with the prisoner; (3) evidence of what passed between the attorney and the prosecutor when the latter took possession of the pistol or at any other time; (4) testimony by the attorney as to how he had received the pistol as all he knew came by confidential communications; and (5) any statement of the attorney before the jury or to anyone else to show that the defendant knew where the pistol was.

It is submitted that the holding in the Douglass case that the pistol obtained from the attorney is admissible although the attorney received it through his client may stand for the proposition that any real evidence so obtained is admissible. Furthermore, the case follows what appears to be the better view that where an attorney discloses the confidential communications to a third person, it is privileged unless it was authorized. This view is further supported in State v. Dickey. There, in a trial for murder, the prosecutor detailed to the jury information given him by defendant’s attorney in defendant’s presence and without protest from the defendant. The trial court permitted the testimony. A majority of the appellate court held that if counsel for the defendant obtained the facts by consultation with him it would be regarded as a privileged communication, and, even if he obtained the facts from other parties, it would be mere hearsay; in any event the attorney himself would not be allowed to testify to the communications. Furthermore the court said that the silence of the defendant would not constitute an admission. The defendant was under arrest for a grave crime, and counsel on whom he relied for his defense was talking so it would not be reasonable to expect that he would contradict counsel’s statements.

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22 See Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949); 8 Wigmore, Evidence § 2325.
23 46 W. Va. 319, 33 S.E. 231 (1899).
In *Kirchner v. Smith*, an equity suit, the attorneys who prepared a contract between the plaintiff and the defendants testified as to the negotiations. Objection was made that it was a privileged communication. The court held that the attorneys could testify in a suit between the parties for whom they were acting, although not in a suit between the parties, or any of them, and third persons.

The privilege also applies to legislative investigations. In *Sullivan v. Hill* a joint committee of the House and Senate called a witness concerning bribery of members of the legislature. The witness said that he was near the prosecuting attorney of Kanawha county at the time of learning information about the bribery, that the information was a privileged communication between the attorney and the client and that the prosecutor had refused to waive the privilege. The court held that although there may be circumstances where a citizen can close the mouth of a prosecutor on consulting him, no such relation is shown here.

It is to be noted that the contention in the last case was that the prosecutor had not waived the privilege. However, no privilege in the attorney-client relation is shown as such privilege is for the protection of the client and not for the attorney.

The question of payment of a fee as determinative of the privilege is subject to some doubt in West Virginia. In *Donahoe v. Collett*, the court held that action in a professional capacity suffices to make a communication a privileged one and whether the attorney is paid or not is immaterial. There the attorney was frequently consulted but was generally paid by those with whom his client dealt. Therefore, the attorney was actually paid by someone although not the one claiming the privilege.

In *Woodrum v. Price* an attorney was called to the witness stand by parties claiming under one of two deeds which he had prepared. The suit was brought by heirs of the grantor to cancel the deeds. Evidence was excluded by the trial court that the testator took one of the deeds to the attorney and asked him if it was sufficient to convey the land or whether he should make a will. The attorney told him the deed was sufficient. Rejection

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24 61 W. Va. 434, 58 S.E. 670 (1907).
26 See 8 Wigmore, Evidence § 2316.
27 See Parker v. Carter, 4 Munf. (18 Va.) 273 (1814).
29 Id., Transcript of Record p. 80.
30 104 W. Va. 382, 140 S.E. 346 (1927).
was assigned as cross error. It was held that there was no privilege. The court held that the burden is on the objector to show that the relation existed. It was argued that since it was in the power of defendant to show through the attorney that no fee was paid, it must be presumed that a fee was paid. The contention was rejected. On the matter of payment of a fee the court said that merely casual conversations with an attorney and legal advice given in the course thereof are not entitled to the benefit of the privilege, and that this is true although the conversations have reference to matters about which it is probable there will be litigation. To tax a lawyer's courtesy or liberality for advice or services is not to employ him. "It is quite common knowledge that lawyers in this state and especially in the rural communities, are asked their opinions for gratuitous information, and opinion and advice are given without suggestion of employment. Often these opinions, commonly called 'curb-stone' or 'horse back' opinions are worth as much as the inquirer pays (nothing)." The court said that there was no evidence that employment was contemplated.

It is submitted that in this case, contemplation of employment certainly existed. If the attorney had advised the client that a will should have been used instead of the deeds it was likely that the attorney would have been the one to draw the will. Reading the Donahoe case and the Woodrum case together it would appear to be the rule in this state that a fee is necessary for the existence of the privilege although the court says that it is not necessary. In the Donahoe case a fee was actually paid, although the court said that it was unnecessary for the privilege. In the Woodrum case the court says that there must be contemplation of employment although it appears that employment was contemplated but no fee was paid. The better view is that the mere circumstance that advice is given gratuitously does not nullify the privilege.

The Woodrum case involved the drafting of a will, if the deeds proved to be insufficient. "In the United States the drafting of a will has almost always been assumed (and naturally) to bring the testator's communications within the privilege. But for deeds and other instruments the privilege has been strictly construed." However, an agreement to make mutual wills has been held not

31 Id. at 389, 140 S.E. at 349.
32 8 Wigmore, Evidence § 2303.
33 Id. at § 2297; see Brown v. Grove, 80 Fed. 564 (4th Cir. 1897).
to involve a confidential relation. It is also held that communications between an attorney and client in preparation of a will are not privileged but are admissible especially as between parties not strangers to the estate. The majority rule seems to be in accord with the Woodrum case that the death of the client removes any pledge of secrecy.

In Thomas v. Jones it appeared that the plaintiff had consulted two attorneys concerning the instigation of a suit for injuries sustained in an automobile accident. Both attorneys declined to institute a suit. The court held that the relationship existed as to both attorneys. The court further said that if a client seeks aid from an attorney for the purpose of committing a crime or fraud, his communications are not privileged and his attorney may testify. The court refused the testimony because the fraud was not clearly shown.

The Thomas case is in accord with the better view that it is immaterial for the relationship that litigation be actually pending. The case also supports the established view that where the client is seeking to perpetrate a fraud, there is no privilege. The distinction is drawn as to whether the consultation concerns prior wrongdoing or future wrongdoing.

To summarize briefly, although West Virginia follows the rule that communications given for merely curbstone opinions are not included in the privilege, the cases are not clear as to when the relation of attorney and client can be said to exist. In the first place, there must be contemplation of employment at the time of the conference. Furthermore a fee is not necessary, but the court has also strongly suggested that if a fee is not charged, the advice may be considered a curbstone opinion. Furthermore, the communications must be made in confidence, but the rule in this state seems to be that confidentiality will be presumed unless positive evidence proves to the contrary.

Definite limitations appear to the rule: the privilege does not cover real evidence obtained from the attorney; the identity of a

34 Allen v. Ross, 199 Wis. 162, 225 N.W. 831 (1929).
36 See 64 A.L.R. 184 (1929).
37 105 W. Va. 46, 141 S.E. 434 (1928).
38 See 8 Wigmore, Evidence § 2294.
former client is not privileged; the client is not protected in the perpetration of a fraud; an attorney on the stand may be required to show the amount of his fee as a test of his interest in the action. The privilege may be waived by the client if he places his attorney on the stand or if the nature of the communication would cause its own disclosure. However, there is no waiver where the attorney betrays the confidence in the presence of the client and without protest from the client under circumstances where he would not be expected to protest.

C. M. H.

**THE HOPE CASE AND RECENT FEDERAL DECISIONS.—**For nearly a decade, the courts in their review of public utility rate cases have been confronted with the enigma of *Federal Power Comm'n v. Hope Natural Gas Co.*¹ This note, while avoiding a critique² of the Hope case itself, will attempt an analysis of recent federal cases³ in an effort to ascertain how the federal courts have subsequently applied the doctrine of the Hope case in respect to the rate base⁴ and a rate of return thereon.⁵

Judicial determination of public utility rate regulations⁶ was

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¹ 320 U.S. 591 (1944).
⁴ Rate base is the amount on which a return should be earned. The discussion in this note shall be confined to the major component of the rate base, e.g., whether the value of the utility property included in the rate base should be based on the present value of the property or the money originally invested in the utility.
⁵ The Hope case is also salient as approving accounting depreciation method. Besse, *Should Depreciation be Deducted?* 45 P.U. Fort. 822 (1950).