Buffalo Law Review

Volume 10 | Number 2 Article 6

1-1-1961

The Identity of the Client—A Privileged Communication?

William Schulz

maker's duty to use due care has been extended beyond the consumer to anyone who may reasonably be expected to be in the vicinity of the chattel's probable use and to be endangered if it is defective. This was not to be the end, however. The manufacturer's responsibility, at least as to certain product areas, has been extended beyond using due care and the courts have recognized this principle and have given legal enforcement to it by imposing strict liability upon the manufacturer by use of the device or implied warranty. The trend cannot be missed nor ignored. The by-word of the marketplace is becoming that of *caveat venditor*. It is also to be recognized however that such a drastic legal change as that imposed by a theory of strict liability cannot come overnight. It will take time before it is as much entrenched in our legal system as the maker's liability in negligence is today.

The growth of the manufacturer's responsibility to the consumer is warranted by the difference in their social positions. Marketing conditions have changed such that the consumer is becoming more remote from the manufacturer. Manufacturing processes are either incomprehensible to the consumer, or, which is more likely, are undiscoverable. The only contact the consumer has with the maker is usually through high-pressured advertising and the communication media, which advertising is a promise to the consumer, not only that due care has been used, but that the product is fit for the use for which it is intended by both parties. Public policy demands that if the manufacturer fails to carry out these promises, with subsequent injury to the consumer, that the latter, who has come to depend upon the efficiency of the maker and the accuracy of his advertisement and trademark, should be compensated.

It is hoped that other courts will soon follow the example of New Jersey, which only recently held the manufacturer of an automobile liable to the wife of the purchaser who was injured while driving the allegedly defective car. The court there held that where the products sold are such that they will be dangerous if defectively manufactured, then "society's interests can only be protected by eliminating the requirement of privity between the maker and his dealer and the reasonably expected consumer."[40]

ANTHONY POLITO

THE IDENTITY OF THE CLIENT—A PRIVILEGED COMMUNICATION?

Does the protection of the attorney-client privilege extend to the identity of the client? The decisional law furnishes no precise answer. In 1721, the Court of King's Bench ordered an attorney to produce his client before the court in order to rebut opposing counsel's charge that the client was fictitious.[1] That this doubtless was the proper disposition of the matter is suggested by the

40. Henningsen v. Bloomfield Motor, Inc., supra note 24 at 379, 161 A.2d 81 (1960).

1. Gynn v. Kirby, 1 Stra. 402 (1721).

attorney's subsequent failure to comply with the order.[2] In 1960, however, the proposition that under some circumstances the identity of the client may properly fall within the area of a privileged communication became firmly established.[3]

The issue was by no means settled prior to 1960 for, although the weight of authority was decidedly opposed to extending the scope of the privilege to such cases,[4] there persisted a minority view which could not be overlooked.[5] The chief objection to holding the identity of the client privileged was well stated in *People ex rel. Vogelstein v. Warden of County Jail of N.Y. Co.*[6] The court held that the fact of the client's existence was the basic element giving rise to the privilege. Consequently, the privilege could not be asserted until that fact had been fully ascertained. Otherwise, the court reasoned, no lawyer could ever be questioned as to any fact since he might always claim that he had learned it from a client whose very existence he need not show.[7]

The contrary view was expressed in *Ex parte McDonough*[8] where, under comparable circumstances, the identity of the client was held to be a privileged communication. There the court looked to the purpose of the privilege, to secure the client's freedom of mind by enabling him to commit his affairs fully to his attorney's knowledge without fear that matters communicated in confidence would be subsequently revealed to his detriment. Consequently, whatever information was conveyed to the attorney, by actions as well as words, from his clients in the ordinary course of his professional employment must be considered to fall within the privilege.[9]

The *Vogelstein* case, holding that the attorney-client privilege could not be asserted until the identity of the client was established, and the *McDonough* case, holding that all information conveyed by the client in the course of the attorney's employment is within the privilege, represent the two conflicting poles about which the law on this question has developed. Between these two extremes there have also developed a number of other possible lines of reasoning which bear little relation to the above positions. The dominant theory in this middle ground asserts that "Every litigant is in justice entitled to know the identity of his opponents. He cannot be obliged to struggle in the dark against unknown forces." [10] This is based on the proposition that a party who

2. Ibid.

3. Ex parte Enzor, 270 Ala. 254, 117 So.2d 361 (1960); In re Kaplan, 8 N.Y.2d 214, 203 N.Y.S.2d 836 (1960); Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960).

4. U.S. v. Pape, 144 F.2d 778 (2d Cir. 1944); People ex rel. Vogelstein v. Warden of County Jail, 150 Misc. 714, 270 N.Y. Supp. 362 (Sup. Ct. 1934) and cases cited therein.

5. Ex parte McDonough, 170 Cal. 230, 149 P. 566 (1915).

6. Supra note 4.

7. People ex rel. Vogelstein v. Warden of County Jail, 150 Misc. 714, 718, 270 N.Y. Supp. 362, 368 (Sup. Ct. 1934).

8. Supra note 5.

9. Under this reasoning, the California courts have held that the attorney-client privilege protects communications by the client prior to the employment of the attorney. People v. Abair, 102 Cal. App.2d 765, 228 P.2d 336 (1951).

10. VIII Wigmore, Evidence § 2313 (3d Ed. 1940).

makes use of the legal process for his own benefit should not be allowed to evade his responsibility for doing so.[11] Thus, when matters are in actual litigation and the motion is made in the course of the proceedings, if disclosure is necessary for the orderly administration of justice, the action can be stayed or the answer stricken pending compliance.[12] The motion must be timely, however. A motion for disclosure has been denied when made after trial on the theory that the above means of enforcement are no longer available.[13] Similarly, the motion has been disallowed when the undisclosed client was not made a party to the suit[14] or when the effect of the motion would be to compel an attorney to aid in the execution of judgment against his client.[15]

Another basis for denying the protection of the privilege occurs when the question directed to counsel does not probe a communication but, rather, inquires into a matter within his own knowledge. Such a situation arose in a contempt proceeding for violation of a permanent injunction in which case an attorney was required to identify the defendant as the same individual whom he had defended in the original injunction suit.[16]

A third line of reasoning upholds the privilege when the question of the client's identity necessarily involves other matters which in themselves would be classified as confidential communications.[17] This reasoning furnished the basis for a dissent by J. Learned Hand in a case where the defendant, charged with transporting his co-defendant across state lines for an immoral purpose, retained the same attorney to represent them both. While J. Hand agreed with the majority of the court that ordinarily the identity of the person retaining counsel is not privileged, he argued that, under such circumstances, the question of who retained counsel for the woman inquired into a step in the male defendant's defense which was as privileged as any direction given to his attorney in the course of preparation for trial.[18]

In addition to such more or less definable lines of reasoning, the development of the law on this point has been marked by cases which, because the facts virtually dictate the disposition, shed little light on the basic issue involved. For example, an attorney charged with income tax fraud for failure to report $20,000 deposited in his bank accounts was not allowed to withhold the source of the funds on the grounds that they were clients whose identity was privileged.[19] Similarly, in a disbarment proceeding where the evidence showed that the aunt of the defendant's wife, in whose name he had conducted

11. Ibid.
12. Ninety-nine Plaintiffs v. Vanderbilt, 1 Abb. Pr.(N.Y.) 193, 4 Duer. 632 (Sup. Ct. 1855).
13. In re Malcom, 129 App. Div. 226, 113 N.Y. Supp. 666 (1st Dep't 1908).
14. Neugass v. Terminal Cab Corp., 139 Misc. 699, 249 N.Y. Supp. 631 (Sup. Ct. 1931).
15. Walton v. Fairchild, 1 Con.(N.Y.) 496, 4 N.Y. Supp. 552 (City Ct. 1889).
16. Rand v. Ladd, 238 Iowa 380, 26 N.W.2d 107 (1947).
17. Chirac v. Reinicker, 24 U.S. 280 (1826).
18. U.S. v. Pape, supra note 4.
19. Mauch v. Commissioner of Internal Revenue, 113 F.2d 555 (3d Cir. 1940).

various transactions, had died nine years earlier, it was held that the attorney could be required to establish the identity of his alleged client without violating the privilege.[20]

Thus the efforts to formulate a workable rule of law for determining whether or not the identity of the client is within the attorney-client privilege would seem to have resulted more in a fragmentation of the law than in the evolution of a single governing legal principle. While the decisions appear to be premised on independent legal theories having little in common and even conflicting at points, they nevertheless suggest the ultimate resolution of the question.

The basic problem involved is that of determining the outer limits of the attorney-client privilege. This requires reconciling the interest in affording an individual the opportunity to fully and freely confide in his attorney with that great purpose of the law, the ascertainment of truth.[21] This purpose is usually best served by the fullest possible disclosure of the facts in question.[22] To be effective, however, the attorney-client privilege necessarily results in the exclusion of evidence to the extent required to permit the client to commit his affairs to his attorney's knowledge completely.[23] The policy favoring full disclosure of the facts of the particular case is generally conceded to be the more fundamental.[24] Therefore, the privilege must be strictly limited to the purposes for which it exists and the factual disclosures restricted only to the extent necessary to uphold the privilege.[25] This calls for an *ad hoc* decision, according to the circumstances of the particular case, as to whether or not the identity of the client is protected by the privilege.[26]

Professor Wigmore has set forth the relevant considerations for determining whether or not the privilege should be granted.

> ". . . four conditions may be predicated as necessary to the establishment of a privilege against the disclosure of communications between persons standing in a given relation:
>
> (1) The communications must originate in a *confidence* that they will not be disclosed;
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered;* and
>
> (4) The *injury* that would inure to the relation by the disclosure of

20. In re Illidge, 162 Or. 393, 91 P.2d 1100 (1939). Also included in this category are those cases where the person employing the attorney is actually a third party. While the decisions generally follow the lines of reasoning discussed above, this factor appears to be a significant consideration in denying the privilege. U.S. v. Pape, supra note 4; U.S. v. Lee, 107 Fed. 702 (E.D.N.Y. 1901); contra Ex parte McDonough, supra note 5.
21. Baird v. Koerner, supra note 3.
22. In re Selser, 15 N.J. 393, 105 A.2d 395 (1954).
23. Wigmore, supra note 10, § 2306.
24. Id. at § 2291; In re Richardson, 31 N.J. 391, 157 A.2d 695 (1960).
25. In re Richardson, supra note 24.
26. In re Selser, supra note 22.

> the communications must be *greater than the* benefit to be gained for the correct disposal of litigation.
> These four conditions being present, a privilege should be recognized; and not otherwise."[27]

Under the reasoning of the *Vogelstein* case, an analysis of the question in these terms would be absolutely barred inasmuch as these considerations could not even come into play until the identity of the client had been determined. The *McDonough* case, on the other hand, assumed that these conditions had already been satisfied. Between these two extremes lie the cases denying the privilege when the question arose in the course of actual litigation, those upholding it when the result would be disclosure of other matters ordinarily within the privilege, and those in which the facts clearly required that the privilege be denied. The disposition of the cases in this middle area required the courts at some point to make a conscious attempt to determine the proper scope of the attorney-client privilege. It is submitted that the resulting rules of law indicate that this determination was based on considerations essentially the same as those stated by Wigmore above. This determination was made in the most general of terms, however, inasmuch as the tendency of the courts was to seek rules of general applicability. There is little suggestion in the cases that the question was one which could be more appropriately analyzed in terms of the particular fact situation in which it arose.

The issue came to a head in 1960. In *Ex parte Enzor*[28] the trial court found that the attorney-client privilege did exist but ruled that the identity of the client was not privileged. The Supreme Court of Alabama reversed and thus adopted the minority view upholding the privilege. It based its decision on the established rule that although the client's identity is not ordinarily privileged, it may become so by reason of its necessary effect or tendency to reveal previous connections, conduct or transactions of the client which are themselves within the privilege.

Four days later, the Supreme Court of New Jersey, in *In re Richardson*,[29] held directly to the contrary relying strictly on the *Vogelstein* case. The facts of the case were that an attorney had successfully represented a public employee in hearings before the Civil Service Commission on charges of unfitness for public service because of gratuities which he allegedly accepted from persons with whom he dealt in an official capacity. When asked who paid the fees for these legal services, the attorney asserted the attorney-client privilege. Clearly, disclosure of the client's identity, if he was a contractor or supplier who dealt with the defendant, would furnish the evidence necessary to substantiate the charge against him. In this situation, the trial court upheld the privilege. Under these circumstances, the client's interest in protecting the key fact of his

27. Wigmore, supra note 10, § 2285.
28. Supra note 3.
29. Supra note 24.

identity was pitted against a public interest in full factual disclosure of corresponding magnitude. The appellate court, however, ruled in favor of disclosure holding that since the privilege runs counter to the fundamental policy of the law favoring disclosure, it must be construed as narrowly as possible without subverting the purposes for which it exists. It then looked to the Rule of the *Vogelstein* decision, that the privilege does not permit concealment of the client's identity, and determined that an exception to this rule was not required in order to preserve the essential purpose of the privilege.

Arguable as the actual disposition of the case may be, it being questionable justice to use the attorney-client relationship itself to furnish the key fact needed to convict, the significance of the case lies in the court's approach to the question. While applying the *Vogelstein* rule strictly, it did not merely parrot that statement of the law but called for a weighing of the public interest in disclosure against the countervailing interest in upholding the privilege and recognized that some circumstances might justify an exception to that rule. This is a major departure from the *Vogelstein* requirement that the client be identified before these interests could be considered.

Shortly thereafter, the *Vogelstein* case was construed by the New York Court of Appeals in *In re Kaplan*,[30] a case holding the identity of the client privileged. There an attorney who had transmitted certain information to the New York City Commissioner of Investigations was adjudged in contempt for his refusal to identify his informant. The contempt conviction was based squarely on the *Vogelstein* precedent. In reversing, the Court of Appeals stated that the *Vogelstein* case did not hold that the privilege *never* extends to the identity of the client. When divulging the client's name would serve no necessary purpose but on the contrary would make public the very fact as to which the client desired and was entitled to secrecy, it held that the name was properly within the scope of the privilege. The court stressed that here the communication itself had already been disclosed and that the only protection remaining to the client was concealment of his identity. Also, it was apparent from the record that the lawyer-client relationship did in fact exist in this situation and there was no need to investigate further to establish it. Finally, the communication was made in aid of a public purpose to expose rather than conceal wrongdoing and thus merited protection. Thus the court clearly called forth the process used in the *Richardson* case of weighing the interests involved in terms of the circumstances of the particular case.

The language of the opinion, however, took a curious turn. In the very jurisdiction which produced the *Vogelstein* case, the court followed an analytical approach which was on all fours with that of *Ex parte McDonough*, the leading case to the contrary. The court referred to section 353 of the New York Civil Practice Act which provides "An attorney or counselor at law shall not disclose or be allowed to disclose a communication made by his client to him

30. Supra note 3.

. . . in the course of his professional employment." This, it held, laid down a general rule of confidentiality protecting *all* communications made by the client in the course of the attorney's professional employment. Cases requiring disclosure are exceptions to this general rule of confidentiality. The implication of this analysis of the question is that the *Vogelstein* rule has now been restricted far more than the actual decision of the *Kaplan* case indicates.

The important feature of both the *Richardson* case and the *Kaplan* case is the recognition that there is no absolute rule of law governing the question of whether or not the client's identity is privileged. The cases stand for the proposition that the interest in upholding the privilege must be compared to the interest in the fullest possible factual disclosure with reference to the circumstances of the particular case. This approach to the question was followed again by the final 1960 case in which the question arose, *Baird v. Koerner*.[31] There an attorney was retained to transmit a cashier's check to the Internal Revenue Service for one or more anonymous taxpayers. There was no investigation of their returns in progress, and no reason to expect one, but the taxpayers were advised by their lawyer that additional sums were due. In the hope of placing themselves in the most favorable position possible in the event charges were brought against them in the future, the taxpayers decided to pay the amount due into the "conscience fund" anonymously. Under questioning, the petitioner declined to name the lawyer who had retained him and the taxpayers whose identity in fact he did not himself know. Under these circumstances, the Ninth Circuit Court of Appeals upheld the privilege.

At the outset, the court determined that there was no federal common law rule which was applicable to the question. Although the question of privilege in this context is not one of substantive law under the rule of *Erie R.R. v. Tompkins*,[32] inasmuch as the status of attorney is determined by state law, the court determined that it should refer to the law of the forum state. In the Ninth Circuit, the law of the forum meant *Ex parte McDonough*. The court, applying California law by reference only, however, was bound by no precedent and followed the same general process seen in the *Kaplan* case and the *Richardson* case of considering the countervailing interests involved in the light of the circumstances of the specific case.

The court was influenced by the fact that while this was a contempt proceeding against the attorney to compel disclosure, the matter was not otherwise in actual litigation. Thus, it was not a case of a party attempting to use the courts for his own benefit without revealing his identity to his opponent. Also, it does not appear that the actual existence of the client was questioned. Therefore, the two most compelling reasons for disclosure of the client's identity were absent. On the other hand, the information which was the whole purpose for engaging the attorney had already been substantially communicated to the

31. Ibid.
32. 304 U.S. 64 (1938).

Commissioner and, as in the *Kaplan* case, the only protection remaining to the clients was concealment of their identity. One element stressed in the *Kaplan* case is completely lacking in this case, however. The motive of the communication was not to aid a public purpose but was undeniably to conceal wrongdoing. The courts have repeatedly held that the attorney-client privilege is not a shield for a fraudulent or illegal act and that when the relationship giving rise to it is abused by the client, the privilege vanishes regardless of how injurious the evidence revealed may be to the client.[33] This consideration tends to restore the balance to a state of relative equilibrium. The factor tending to tip the scales in favor of upholding the privilege, although unarticulated by the court, may well have been, as noted above in another case by Judge Hand,[34] that this was actually a step in the clients' defense in the event criminal charges should be lodged against them in the future.

The net effect of these four 1960 decisions has been to establish that there is no single, all-encompassing rule of law governing the question whether the attorney-client privilege protects the identity of the client, as the earlier decisions seem to have assumed. Rather, the court must determine, in terms of the circumstances of the specific case, whether the purposes of the attorney-client privilege necessitate protection of the client's identity and, if so, whether the injury to the attorney-client relation which would result from disclosure outweighs the more fundamental public interest to be served by the fullest possible disclosure of the facts.

It is important to note that in none of the 1960 decisions was there any question as to the actual existence of the client. Either the facts made it clear that there was in fact a client[35] or there was a trial court finding to that effect.[36] Therefore, in those situations where the fact of the client's existence cannot be established from the circumstances of the case, it is conceded by all of the decisions that the general rule, that the client's identity is not privileged, applies. When this factor is not present, the client's identity may warrant protection if no necessary purpose would be served by disclosure[37] and if identification would convey information which itself would ordinarily be within the privilege.[38] Disclosure may still be required, however, if the client has voluntarily subjected himself to the jurisdiction of the court by commencing or defending litigation,[39] if the person employing the attorney is actually a third

33. People ex rel. Vogelstein v. Warden of County Jail, supra note 4; U.S. v. Lee, supra note 20.

34. Supra note 18.

35. In re Kaplan, supra note 3; Baird v. Koerner, supra note 3; In re Richardson, supra note 24.

36. Ex parte Enzor, supra note 3.

37. In re Kaplan, supra note 3; In re Richardson, supra note 24.

38. In re Kaplan, supra note 3; Baird v. Koerner, supra note 3.

39. Ninety-nine Plaintiffs v. Vanderbilt, supra note 12; Baird v. Koerner, supra note 3.

party,[40] if the attorney-client relation is abused by the client,[41] or if the attorney himself is the defendant.[42] Inasmuch as the ultimate test in each case remains the application of Wigmore's four basic conditions for granting the privilege, this breakdown is not all-inclusive. It is demonstrative, nonetheless, of the manner in which to date the courts have translated this analytical tool into a cognizable body of law.

WILLIAM SCHULZ

PUBLIC OFFICE, RELIGION, AND THE CONSTITUTION

May a state, without transgressing the United States Constitution, require a declaration of belief in the existence of God as a prerequisite for holding public office?

Roy R. Torcaso, the plaintiff in *Torcaso v. Watkins*,[1] applied for a commission as a notary public in Montgomery County of Maryland. The Governor duly appointed Torcaso, who then went to the clerk of the Circuit Court for the county to obtain the commission. The clerk, the defendant in the present action, requested Torcaso to take the standard oath of allegiance required of all persons elected or appointed to any state office of profit or trust.[2] He was entirely willing to take the prescribed oath, but the clerk, relying on Article 37 of the Declaration of Rights in the State Constitution,[3] also requested the plaintiff to declare his belief in the existence of God. The plaintiff refused to do so, and the defendant, therefore, denied him the notary public commission. Torcaso then filed a petition for a writ of mandamus directed at the defendant. The Circuit Court for Montgomery County upheld a demurrer to plaintiff's petition, and the Maryland Court of Appeals affirmed.[4]

Public officers and employees are generally required to take an oath in which they affirm their loyalty to the government and agree to discharge their obligations faithfully and conscientiously. Such an oath has a somber effect on most men, and an even more somber effect on those believing that they must account for their actions to a Supreme Being. A constitutional provision requiring an applicant for state public office to declare his belief in God in addition to the standard oath is not peculiar to the state of Maryland, for similar provisions may be found in the constitutions of seven other states.[5]

40. In re Richardson, supra note 24; U.S. v. Pape, supra note 4.
41. People ex rel. Vogelstein v. Warden of County Jail, supra note 4.
42. Mauch v. Commissioner of Internal Revenue, supra note 19.

1. 223 Md. 49, 162 A.2d 438 (1960), prob. jurs. noted, 81 S. Ct. 171 (1960).
2. Md. Const. art. I, § 6.
3. Article 37 of the Declaration of Rights provides:
That no religious test ought ever be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God, nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution.
4. Torcaso v. Watkins, supra note 1.
5. Ark. Const. art. XIX, § 1 (1874) (No person who denies the being of a God