

10-1-1957

Evidence—Attorney-Client Privilege

Robert Lane

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Evidence Commons](#)

Recommended Citation

Robert Lane, *Evidence—Attorney-Client Privilege*, 7 Buff. L. Rev. 148 (1957).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol7/iss1/74>

This The Court of Appeals Term is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

It is universally agreed that full faith and credit need not be accorded if the judgment is penal³¹ or if the jurisdiction of the sister state is faulty.³² But the jurisdictional issue cannot be raised if the defendant, as in the instant case, participated in the original cause of action and there had full opportunity to contest the jurisdiction of the court.³³

If the Court's decision were otherwise it would encourage judgment defendants to forum shop and take up residence in states where the cause of action which their judgment is based upon has been abolished.

EVIDENCE

Attorney-Client Privilege

The Court in *Lanza v. New York State Joint Legislative Committee on Government Operations*¹ held (4-3) that the defendant committee could not be restrained from making public a tape recording and transcript of a consultation between the plaintiff and his attorney, even though it was procured by wiring a room in the county jail where the plaintiff and his attorney believed they could speak freely.

It is well settled that one accused of a crime has a right to counsel and a right to consult privately with such counsel.² Also, unless the client waives the right, his attorney may not be forced to testify as to communications between them.³ If a communication between an attorney and his client is recorded, there has been an unreasonable interference with the client's right to confer privately with such counsel.⁴ And if such a recording was used against a person in a trial, which resulted in his conviction, the conviction would be reversed due to the lack of a fair trial.⁵

Since the tape recording and transcript were not to be used in a prosecution

31. *Huntington v. Attrill*, 146 U. S. 657 (1892).

32. *N.Y. ex rel Halvey v. Halvey*, 330 U.S. 610 (1947); *Millikin v. Meyer*, 311 U. S. 457 (1940).

33. *Sherrer v. Sherrer*, 334 U. S. 343 (1947); *State of Wisconsin v. Pelican Insurance Co.*, 127 U. S. 265 (1888); *Thomas v. Virdin*, 160 Fed. 418 (2d Cir. 1908).

1. 3 N.Y.2d 92, 164 N.Y.S.2d 9 (1957).

2. *People v. Cooper*, 307 N.Y. 253, 120 N.E.2d 813 (1954).

3. N.Y. CIV. PRAC. ACT §§353, 354; See also *New York City Council v. Goldwater*, 284 N.Y. 296, 31 N.E.2d 31 (1940).

4. *United States ex. rel Cooper v. Denno*, 221 F.2d 626 (2nd Cir. 1955), *cert. denied* 349 U.S. 968 (1955); *People v. Cooper*, note 2 *supra*.

5. *Fusco v. Moses*, 304 N.Y. 424, 107 N.E.2d 581 (1952).

6. *Nelson v. United States*, 208 F.2d 505 (D.C. Cir. 1953), *cert. denied* 346 U.S. 827 (1953).

of the plaintiff, the majority did not feel that there was an infringement on his rights. Nor were the legislative hearings being held for the purpose of investigating the plaintiff. Its purpose was to examine and to investigate state agencies so as to recommend legislation to improve the effectiveness and the economy of such agencies and when the legislature is fulfilling its constitutional function, the judiciary should not interfere.⁶

The three dissenting judges wrote separate opinions. Judge Desmond did not believe that any public official or body was free from the power of the court.⁷ He also viewed this situation as a threatened violation of a fundamental constitutional right and not merely an evidenciary question. It was pointed out that there are many instances where the accused can only consult with his attorney in the jail⁸ and if the majority view prevailed, he would never have an opportunity for private consultation.

Judge Dye and Judge Fuld concurred with Judge Desmond in finding that the plaintiff was denied one of his very basic rights. However all three judges spoke in terms of what great harm can result from the failure to restrain the use of such evidence; but they did not specify any disastrous result. As the majority pointed out, the plaintiff was not being prosecuted on the basis of this evidence and they definitely stated that if such was the case, their decision would have been *contra*.

Husband-Wife Privilege

At common law, as a general rule, a husband or wife were forbidden to be witnesses for or against each other.⁹ Although exceptions gradually came to be recognized at common law,¹⁰ it remained for the legislatures of the various jurisdictions to determine what inroads should be made upon the privilege to facilitate the judicial quest for truth.

In *Poppe v. Poppe*,¹¹ the Court of Appeals was called on to interpret section 349 of the Civil Practice Act, which provides, in so far as is pertinent here, ". . . A husband or wife shall not be compelled, or without the consent of the other if living, allowed to disclose a confidential communication made by one to the other during marriage." As can be seen, the *sine qua non* of the privilege is the existence of a "confidential communication." It has been held that for a communication to be "confidential" it must be one emanating by reason of the implicit relationship

7. *Youngstown Sheets & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

8. N.Y. CODE CRIM. PRAC. §552; N.Y. CORRECTION LAW §§216-218.

9. *Davis v. Dinwoody*, 100 Eng. Rep. 1241 (1792).

10. See *e.g.*, 8 WIGMORE, EVIDENCE §2239 (3d ed. 1940).

11. 3 N.Y.2d 312, 165 N.Y.S.2d 99 (1957).