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Purpose and Extent of the Attorney-Client Privilege in Louisiana

The rules which require the exclusion of evidence are generally designed to promote the finding of truth by shielding the trier of fact from unreliable information and from testimony which could arouse unwarranted prejudice.¹ However, when a privilege is asserted, valuable information may be withheld from the trier of fact and the discovery of truth may therefore be impaired.² The attorney-client privilege allows a client to exclude from evidence professional communications which are confidential between himself and his attorney.³ By invoking the privilege, a client may refuse to disclose and may prevent his attorney from disclosing communications which are essential to the maintenance of their relationship. The purpose of this Comment is to examine the policy considerations which motivate the recognition of the attorney-client privilege and to investigate the form it has taken under Louisiana law.⁴

Nature and Purpose of the Privilege

Since a privilege operates as a limitation on the truth-finding ability of the trier of fact, sufficient justification must be found for the impediment before a privilege deserves recognition.⁵ The justification for a privilege lies in a desire to foster a confiden-

1. Such rules are often referred to as rules of exclusion, and include inadmissible hearsay, incompetency, irrelevancy, opinions of non-experts, evidence which is extremely prejudicial and without great weight, and evidence which is deemed to be self serving.

2. MCCORMICK, EVIDENCE § 72 (1954).

3. 8 WIGMORE, EVIDENCE § 2292 (3d ed. 1940).

4. A great deal has been written on the subject of the attorney-client privilege and it is the purpose of this Comment to consider only the position taken by Louisiana in regard to the privilege. Unless there is a Louisiana case or statute in point, some of the rules applicable to the privilege will be omitted from this discussion. For a complete statement of the privilege, the reader is advised to consult one of the standard works on evidence.

5. According to Wigmore, four fundamental conditions must be met before a privilege deserves recognition. They are:

(1) The communications must originate in the *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*.

(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* to be gained for the correct disposal of litigation.

See 8 WIGMORE, EVIDENCE § 2285 (3d ed. 1940).

tial relationship between certain parties so as to encourage the communication of any information essential to their relationship.⁶ A relationship which is granted the protection of a privilege should be one which society desires to promote and one which requires an element of confidence for its maintenance and success.⁷ It should also appear that the limitation imposed upon the discovery of the truth does not overshadow the benefits which accrue to the relationship because of the existence of the privilege.⁸ Today, legislatures have granted privileges to many relationships which were not protected by the common law.⁹

In order to give a client competent legal protection and advice, an attorney must have a thorough knowledge of the circumstances surrounding his client's problem. To encourage the disclosure of all of the facts involved, it is necessary for the client to feel that the information which he relates to the attorney will not be used as evidence against him.¹⁰ The desire to promote this confidential relationship between the client and his attorney is the motivation behind this privilege.

The Attorney-Client Privilege in Louisiana

At common law the attorney-client privilege in criminal cases is identical to the privilege in civil cases.¹¹ However,

6. See items (1) and (2) in note 5 *supra*.

7. See items (2) and (3) in note 5 *supra*. See also *State v. Guagliardo*, 146 La. 949, 84 So. 216 (1920). The court used Wigmore's criteria in finding that there was no privilege which would protect the statement of the prosecution's key witness and failure of the district attorney to make this statement available to the defendant was reversible error.

On the point of a privilege for the district attorney, see WHARTON, CRIMINAL EVIDENCE § 799 (12th ed. 1954). For a statement of the Louisiana Supreme Court on the privilege of a police officer to withhold the names of his informers, see *In re Kohn*, 227 La. 245, 79 So.2d 81 (1955).

8. See item (4) in note 5 *supra*.

9. Other relationships which have been awarded the protection of a privilege in Louisiana are: husband-wife, LA. CODE OF CRIM. PROC. art. 461 (1928); doctor-patient, LA. CODE OF CRIM. PROC. art. 476 (1928); priest-penitent, LA. CODE OF CRIM. PROC. art. 477 (1928); accountant-client, LA. R.S. 37:85 (1950); insurer-secretary of state, LA. R.S. 22:1120 (1950).

10. MCCORMICK, EVIDENCE § 91 (1954); 8 WIGMORE, EVIDENCE § 2291 (3d ed. 1940). See *State v. Johns*, 209 La. 244, 249, 24 So.2d 462, 464 (1945) ("This article [speaking of the privilege granted by Article 475 of the Code of Criminal Procedure], according to its terms, was written for the protection of the client to shield him against a disclosure of any confession or admission that he might see fit to make to his attorney in any consultation had between them."); *Morris v. Cain*, 39 La. Ann. 712, 726, 1 So. 797, 808 (1887) ("The privilege . . . is indispensable for the purposes of private justice."). It is generally conceded that the value of the privilege is difficult to show abstractly. 8 WIGMORE, EVIDENCE 557, § 2291 (3d ed. 1940): "Its benefits are all indirect and speculative; its obstruction is plain and concrete."

11. A search of the common law authorities did not reveal any jurisdiction

Louisiana provides different attorney-client privileges for civil and criminal actions.¹² The privilege extended in civil cases first appeared in the Civil Code of 1825¹³ and now may be found in Article 2283 of the Louisiana Civil Code. It provides:

"No attorney or counsellor at law shall give evidence of anything that has been confided in him by his client. . . ."

The Crimes Act of 1804 authorized the use of the common law rules of evidence in criminal cases arising in Louisiana¹⁴ and the courts have followed the common law in recognizing the attorney-client privilege. In 1928, an attorney-client privilege for criminal cases was included in the Louisiana Code of Criminal Procedure as Article 475, which states:

"No legal adviser is permitted, whether during or after the termination of his employment as such, unless with his client's express consent, to disclose any communication made to him as such legal adviser by or on behalf of his client, or any advice given by him to his client, or any information that he may have gotten by reason of his being such legal adviser."

It would thus appear that the privilege authorized in criminal cases is broader than the privilege provided in civil cases, for the criminal privilege specifically protects information which the attorney receives from sources other than his client. In administering the general principles of both of these articles, the Louisiana courts have looked to the common law in order to establish particular rules necessary in the application of the privileges.¹⁵

Principles of the Attorney-Client Privilege Which Apply in Both Criminal and Civil Cases in Louisiana

Under both the criminal and civil statutes, it is clear that communications from a client to his attorney are privileged.¹⁶

which drew any distinction between the privileges applied in civil and criminal cases.

12. Compare LA. CIVIL CODE art. 2283 (1870) with LA. CODE OF CRIM. PROC. art. 475 (1928).

13. LA. CIVIL CODE art. 2262 (1825).

14. La. Acts 1804, c. 50, § 33, p. 440: ". . . the rules of evidence and all other proceedings whatsoever . . . changing what ought to be changed, shall be except as is by this act otherwise provided for, according to the said common law." (Emphasis added.)

15. In every case that could be found dealing with the attorney-client privilege in Louisiana, the court has made reference to Corpus Juris, Wigmore, Greenleaf, or some other common law authority. See LA. CODE OF CRIM. PROC. art. 0.2 (1928), which authorizes the use of the common law when the Code is silent on a particular point.

16. See note 11 *supra*.

However, only Article 475 of the Code of Criminal Procedure specifically protects communications from an attorney to his client. Since the common law privilege covers the communications from the attorney as well as from the client, it is probable that the communications from the attorney to the client would be privileged in civil cases arising in Louisiana.¹⁷ This seems wise because the trier of fact could often infer the nature of the client's disclosures from the advice and suggestions given by the attorney to the client. Thus it would normally render the privilege useless if the attorney could be compelled to testify as to his responses and thereby impliedly reveal the same communications which are directly protected by the privilege. The Code of Criminal Procedure also specifically protects the communications made by an agent or other person acting on the behalf of the client.¹⁸ Although the attorney-client privilege sanctioned by the Civil Code is silent on this point, it is believed that the Louisiana courts will follow the common law which treats the agent's communications as if they had been made by the client himself.¹⁹

The privilege attaches only to communications which are made during the existence of the attorney-client relationship.²⁰ Such a relationship develops whenever an attorney receives information in his professional character from one who is seeking legal advice.²¹ The test for determining the existence of such a relationship is not based on contract or even a definite understanding as to fee or employment.²² Therefore, it would seem that communications made to an attorney in an attempt to procure his services are privileged. However, in a 1939 case, the Louisiana Supreme Court bolstered a decision denying the protection of the privilege to a defendant's communications by adding: "Furthermore, [the attorney] stated that he refused to accept employment . . . and, therefore, the relation between client and attorney did not come into existence."²³ It is believed that this statement is unfortunate and would not be followed in a case

17. UNIFORM RULES OF EVIDENCE, Rule 26(3)(b). See also *Shanghnessey v. Fogg*, 15 La. Ann. 330 (1860) (dictum).

18. LA. CODE OF CRIM. PROC. art. 475 (1928).

19. 8 WIGMORE, EVIDENCE, § 2317 (3d ed. 1940).

20. It is evident that any information received before the attorney-client relationship arose would not be privileged because such information would not have been confided in him as the attorney.

21. *Bailly v. Robles*, 4 Mart. (N.S.) 361, 362 (La. 1826): "The facts communicated to obtain this advice cannot be related by the attorney; nor does it at all alter the case that she did not afterwards employ him." *Cf. Succession of Bonner*, 192 La. 299, 187 So. 801 (1939).

22. See note 21 *supra*.

23. *Succession of Bonner*, 192 La. 299, 314, 187 So. 801, 805 (1939).

in which a prospective client makes communications to an attorney acting in his professional character who later declines to accept the case.²⁴ If an attorney receives communications from a prospective client, he should be bound by the privilege regardless of his actual intention.²⁵ Although communications made to the attorney after the relationship has ended are not privileged,²⁶ the fact that an attorney-client relationship comes to an end will not affect the privileged status of communications made during the existence of the relationship.²⁷ Under the language of the jurisprudence and that of Article 478 of the Code of Criminal Procedure, once the privilege attaches to a professional communication, it may be withheld from the trier of fact until the client himself consents to the disclosure.²⁸ Since the attorney-client privilege is designed for the benefit of the client, he may waive its protection at any time.²⁹ The attorney has no interest in the privilege other than the protection of his client, and, therefore, has no right to invoke the privilege for his own protection after the client has consented to the disclosure.³⁰

Not all communications between the client and his attorney are given the protection of the privilege. While there is a desire to encourage a client to confide all pertinent information to the attorney so that the attorney will be in a position to give the best

24. Such a result would clearly be in line with the UNIFORM CODE OF EVIDENCE Rule 26(3) (a), which defines "client" as one who consults a lawyer for the purpose of retaining the lawyer.

25. *Bailly v. Robles*, 4 Mart. (N.S.) 361 (1826).

26. *Williams, Phillips & Co. v. Benton*, 12 La. Ann. 91 (1857), which denied the privilege to information which the attorney received *after* the attorney-client relationship had ended.

27. *State v. Hazleton*, 51 La. Ann. 72 (1860).

28. *Succession of Harkins*, 2 La. Ann. 923, 926 (1847): "[T]he seal of law once fixed upon them remains forever, unless removed by the party himself." See also *Hart v. Thompson's Executor*, 15 La. 88 (1840), where the court said that death of the client did not release the privilege and that it was not necessary that the client be a party to the suit at bar. Again see *Hart v. Thompson's Executor*, *supra* at 93, where the court said in response to a plea by counsel that the court "consent" to the disclosure in place of the deceased client, "nor do we understand why the courts should feel themselves authorized to supply the consent of a client who has died without giving it." It should be noted in the *Hart* case that disclosure was sought in order to invalidate a will left by the deceased. A different result might have been reached if the testimony of the attorney was needed to uphold the apparent intention of the deceased. See 8 WIGMORE, EVIDENCE § 2329 (3d ed. 1940).

29. LA. CODE OF CRIM. PROC. art. 478 (1928). The question of waiver will not be considered in detail in this paper.

30. *State v. Jones*, 209 La. 394, 24 So.2d 627 (1945), in which the attorney was attempting to invoke the attorney-client privilege to withstand a prosecution for perjury in obtaining witnesses to testify to false information in a divorce case. The court found that the attorney had no right to rely on the privilege after the client had consented to the disclosure.

possible advice,³¹ there is no basis for protecting public disclosures. Therefore, it is required that the communications be confidential between the attorney and the client.³² It has been held that statements made to an attorney in the presence of opposing litigants were not privileged because they were not confidential between the attorney and his client.³³ The name of the client and the date and nature of the attorney's employment are not considered confidential communications which deserve the protection of the privilege.³⁴ Nor can the attorney-client privilege be used to shield documents or possessions which could be obtained from the client if he had not placed them in the attorney's possession.³⁵ Another qualification upon the use of the privilege is that it is not available to protect communications made to an attorney in an attempt to secure illegal services or to procure advice for the perpetration of crimes, tortious conduct, and fraudulent schemes.³⁶ While there is a desire to protect disclosures which are made to secure a proper defense for past transactions or misconduct, there is no desire to aid persons who seek to break the law.³⁷ When an attorney represents two or more parties collectively, there is no privilege to withhold communications made by any of the clients in an action which later arises among themselves.³⁸

Difference Between the Privilege in Civil and Criminal Cases in Louisiana

While there appears to be no distinction between the privilege extended by the common law in civil and criminal cases, it has

31. See note 10 *supra*.

32. 8 WIGMORE, EVIDENCE §§ 2285(1), 2311 (3d ed. 1940).

33. *Rester v. Powell*, 120 La. 406, 45 So. 372 (1907). Although the Louisiana courts have not been presented with the problem, the common law courts have had much difficulty in determining if the communications lacked the required degree of confidentiality because of the presence of third parties such as relatives and agents. See 8 WIGMORE, EVIDENCE § 2311 (3d ed. 1940).

34. *Shanghnessey v. Fogg*, 15 La. Ann. 330 (1860), where the attorney was forced to answer interrogatories propounded to him which concerned the name of his client and the nature and date of his employment, but was relieved from answering the other interrogatories because they involved privileged material.

35. *White v. Bird*, 20 La. Ann. 188 (1868), where the attorney was cited as garnishee by judgment creditor of his client and was compelled to answer.

36. *State v. Johns*, 209 La. 394, 24 So.2d 627 (1945) (obtaining perjured witnesses in divorce case); *State v. Childers*, 196 La. 554, 199 So. 640 (1940) (an attempt to have the attorney probate an illegal will); *Succession of Bonner*, 192 La. 299, 187 So. 801 (1939).

37. *Succession of Bonner*, 192 La. 299, 314, 187 So. 801, 805 (1939), where the court said: "The law is clear that a person attempting to engage a lawyer for an illegal purpose is not entitled to the privilege of having the matter kept confidential."

38. *Algiers Mfg. Co. v. Steen*, 4 Orl. App. 129 (La. App. 1906); *Marcuse v. Kramer*, 5 Orl. App. 247 (La. App. 1908).

been seen that a statutory difference exists between the two privileges in Louisiana. Under Article 2283 of the Louisiana Civil Code, as well as under the common law, no privilege is provided to protect the information and communications which the attorney receives from third persons not acting as agents for the client.³⁹ A somewhat different approach is taken under Article 475 of the Code of Criminal Procedure. That article adopts the general common law principles of the privilege but, in addition, protects information which the attorney receives from other sources as a result of his employment as the attorney.⁴⁰ Although the Louisiana Supreme Court has not had an opportunity to comment upon this extension, it would appear that a client can prevent the disclosure of any information that the attorney acquires as a result of his investigation and handling of his client's defense in a criminal case.

It is possible that the Louisiana courts will apply the privilege as extended by the Code of Criminal Procedure in civil cases and thus protect all information which an attorney receives as a result of his employment. It could be argued that since the courts themselves have turned to the common law in working out the rules for applying the general privilege authorized by the Civil Code, they would be free to depart from those rules whenever they see fit to do so.⁴¹ Under this approach the common law rule which denies the privilege to communications coming to the attorney from persons other than his client or his agents could be departed from. The courts then might apply the attorney-client privilege of the Code of Criminal Procedure in civil cases on the theory that the privilege extended by the Code of Criminal Procedure represents the latest expression of the Louisiana Legislature. However, since no amendment to the Civil Code was made when the privilege was enlarged in the Code of Criminal Procedure, it is probable that the court will find that there was no intention to modify the privilege in civil cases. Such a result was reached by a federal court in interpreting another Louisiana privilege where it was said that "it was not the function of the court . . . to transpose the privi-

39. LA. CIVIL CODE art. 2283 (1870). The privilege is limited to things confided in the attorney by the client. See dictum in *State v. Hazleton*, 15 La. Ann. 72 (1860): "It is true that the counsel may be permitted to give evidence of such matters, connected with the transaction, when his knowledge is derived aliunde." See also McCORMICK, EVIDENCE § 93 (1954).

40. LA. CODE OF CRIM. PROC. art. 475 (1928).

41. For a comment exploring the effect of the Code of Criminal Procedure on the existing rules of evidence in Louisiana see Comment, 14 LOUISIANA LAW REVIEW 568 (1954).

lege allowed by one code into another code without express legislative intent."⁴²

Evaluation of the Attorney-Client Privilege in Louisiana

The Louisiana State Law Institute has recently been commissioned by the Legislature to prepare a Code of Evidence for the State of Louisiana.⁴³ In drafting an attorney-client privilege for the proposed code, the members of the Institute will be confronted with two major questions. First, can the extension of the privilege in criminal cases be justified? Second, if the extension is believed justified, should it be made to apply in civil as well as criminal cases?

The extension of the attorney-client privilege in criminal cases to protect information and communications which the attorney receives from sources other than his client has been criticized on the grounds that no additional burden should be imposed upon the court's inquiry into the truth.⁴⁴ It is submitted, however, that any impediment caused by the extension is justified by the increased encouragement offered to a person accused of a crime to make a complete disclosure to his attorney. The privilege in its common law form encourages a client to consult an attorney and discuss his case freely because the client knows that his communications are protected from disclosure.⁴⁵ However, since the investigation of the facts of the case by the attorney himself is essential in the preparation of a proper defense, the client should also be assured that incriminating evidence discovered by the attorney will not be subject to disclosure. Unless the client feels that the attorney cannot be forced to reveal the evidence uncovered in his investigation, the client may withhold some essential information from the attorney, fearing that such information could lead to the discovery of some incriminating evidence. When provided with a privilege to prevent the disclosure of any information acquired by the attorney during his employment, the client has additional incentive to make a full disclosure of his case. From these communications, the attorney may be able to uncover evidence which is in fact favorable to his client's

42. *Rhodes v. Metropolitan Life Insurance Co.*, 172 F.2d 183, 184 (5th Cir. 1949), where the court refused to apply the doctor-patient privilege provided by the Code of Criminal Procedure in a civil case.

43. La. Acts 1956, No. 87, p. 259.

44. McCORMICK, EVIDENCE § 93 (1954).

45. See note 10 *supra*.

case or, at least, would apprise him of facts which might be employed by the prosecution. Thus, the attorney-client privilege in its extended form in criminal cases seems justified by the greater legal protection which will result from the client's more complete disclosure to his attorney. It must be remembered that the enlarged privilege only protects information that comes to the attorney "by reason of his being such legal adviser."⁴⁶ Therefore, an attorney who witnesses a crime and later takes up the defense of the accused can still be forced to testify as to what he saw or heard since this information did not come to him while acting as the attorney. Since most of an attorney's testimony in criminal cases may be excluded under the hearsay rule, the additional limitation placed upon the discovery of the truth is greatly overshadowed by the benefits derived from the increased encouragement offered to the client to confide everything in the attorney.

Should the Louisiana Law Institute find that the extension of the attorney-client privilege in criminal cases is desirable as a matter of policy, the possibility of allowing the extended privilege in civil cases will present itself. However, it is believed that a greater burden upon the discovery of truth would be involved by the extension of the privilege in civil cases. The extension of the privilege would protect any information which the attorney receives "by reason of his being such legal adviser."⁴⁷ Of course, the mere fact that the attorney was employed regularly on a retainer basis would not prevent him from being compelled to testify on matters of which he had first-hand knowledge. In such a case the knowledge and information would not necessarily be acquired as a result of his employment even though it was received during his employment. However, it often appears in civil cases that the attorney has participated in the negotiations between the parties before the controversy arose and has acquired valuable information which would be helpful to the court in correctly disposing of the litigation. Since such information comes to the attorney as a result of his being employed as attorney, his testimony would be unavailable if the broad privilege of the Code of Criminal Procedure were adopted for civil cases. In criminal cases the attorney is usually not involved until after the act is completed and there-

46. LA. CODE OF CRIM. PROC. art. 475 (1928).

47. *Ibid.*

fore he acquires very little first-hand information which would be protected from disclosure by the extended privilege.

Also, such an extension in civil cases would conflict with one of the purposes of the Discovery Statute adopted in Louisiana in 1952.⁴⁸ The Discovery Statute generally allows each party in a civil action to obtain any information which is actually needed in the preparation of his case, with the restriction that privileged matters are not subject to discovery.⁴⁹ Any enlargement of the attorney-client privilege in civil cases would restrict the usefulness of the Discovery Statute.⁵⁰ Thus the Law Institute will be faced with the problem of determining whether or not the policy of wide discovery should be limited in preference to a policy designed to encourage a complete disclosure between a client and his attorney. It is submitted that the additional burden placed upon the finding of the truth in civil cases cannot be justified by the value to be gained by the extension of the privilege.

Because the law values a man's liberty more than his property, the recognition of more protection in criminal cases than in civil cases is not uncommon. This is illustrated by the fact that in a civil action a man may be subjected to liability if his wrong is proved by a preponderance of evidence,⁵¹ while in criminal prosecutions a man's guilt must be proved beyond a reasonable doubt.⁵² Then, too, the accused in a criminal case may protect himself against self incrimination by refusing to take the stand,⁵³ while a party involved in a civil action can be compelled to testify and to answer questions which may expose him to civil liability.⁵⁴

48. LA. R.S. 13:3741-3794 (1950).

49. LA. R.S. 13:3782 (1950).

50. If the privilege were enlarged, so as to include all information coming to an attorney as a result of his employment, some information which now may be obtained upon the showing of proper cause would be beyond the range of discovery. Statements of witnesses who are no longer available, taken by opposing counsel, could not be reached through discovery. See *Hickman v. Taylor*, 329 U.S. 495 (1947), where the court indicated that written reports of witnesses, taken by counsel, could be obtained by the opposing counsel upon the showing of good cause because this information was not protected under the attorney-client privilege. See LA. R.S. 13:3782 (1950), which adopts the *Hickman v. Taylor* rule.

51. *Perez v. Meraux*, 201 La. 498, 9 So.2d 662 (1942); *Adams v. Germain & Boyd Lumber Co.*, 130 La. 920, 58 So. 815 (1912).

52. *State v. Kelley*, 225 La. 495, 73 So.2d 437 (1954); *State v. Mizell*, 208 La. 66, 22 So.2d 827 (1945); *State v. Elby*, 145 La. 1019, 83 So. 227 (1919).

53. LA. CODE CRIM. PROC. art. 641 (3) (1928).

54. LA. CODE OF PRACTICE art. 349 (1870); LA. R.S. 13:3662-3664 (1950).

Conclusion

In general, Louisiana statutes and cases involving the attorney-client privilege parallel the privilege recognized by the common law. However, Louisiana has enlarged the privilege in criminal cases by protecting all information which the attorney receives as a result of his employment. It is submitted that the difference in scope between the privilege in civil and criminal cases is justified and that this distinction should be retained in the proposed Code of Evidence.

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