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Attorney-Client Privilege—Contempt: The Dilemma of Non-Disclosure of Possibly Privileged Information.—Dike v. Dike, 75 Wash. Dec. 2d 1, 448 P.2d 490 (1968)

anon

RECENT DEVELOPMENTS

ATTORNEY-CLIENT PRIVILEGE—CONTEMPT: THE DILEMMA IN NON-DISCLOSURE OF POSSIBLY PRIVILEGED INFORMATION.—*Dike v. Dike*, 75 Wash. Dec. 2d 1, 448 P.2d 490 (1968).*

I. THE ATTORNEY'S DILEMMA

The scope of the privilege protecting confidential communications between an attorney and his client is determined by judicial and legislative balancing of our legal system's fundamental desire to ascertain the truth by consideration of all relevant evidence, and the basic need to foster free disclosure of information between clients and attorneys. Because the scope of this privilege in a particular jurisdiction is not always clearly defined,[1] the privilege is often erroneously asserted by attorneys or improperly denied by judges.

The attorney is both an officer of the court and an advocate sworn to protect his client's confidence,[2] and when he is ordered to disclose information which is arguably privileged, he faces a dilemma. He must either disclose the information, with resultant harm to his client, or withhold it and risk imprisonment or fine for contempt. The Ethics Committee of the American Bar Association has advised that it is not unethical for an attorney to resolve doubts about possibly privileged matter in favor of non-disclosure;[3] the attorney may thus place his

*For a parallel, yet variant, student analysis of this aspect of the attorney-client privilege see Comment, *The Attorney-Client Privilege: The Remedy of Contempt*, 1968 WIS. L. REV. 1192.

[1] Quotation of but one classic statement of the scope of the attorney-client privilege verifies the potentiality for uncertainty:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Wyzanski, J. in United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950). Judge Wyzanski's exposition also makes clear that the attorney-client privilege is a rather narrow and circumscribed concept—although not so narrow as to remove room for legitimate dispute as to its applicability in a particular case.

[2] ABA CANONS OF PROFESSIONAL ETHICS NOS. 1 & 37.

[3] ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 216 (1941).

duty as an advocate before his duty to the bench,[4] even when the court can impose a jail sentence.[5]

The courts, however, apply a different standard.[6] In some jurisdictions refusal to obey a "lawful" order—one issued by a court having jurisdiction over the parties and the subject matter—is punishable as contempt.[7] Any defiance of a "lawful" order to disclose possibly privileged matter is contempt, even if on appeal the order is held to have been erroneous. Other jurisdictions afford the non-complying attorney a "gambling chance" of escaping punishment when the information sought is possibly privileged.[8] If the appellate court rules that the

[4] ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 287 (1953).

[5] ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINION, No. 312 as reported in ABA, OPINIONS ON PROFESSIONAL ETHICS at 171 (1967).

This opinion has been superseded by the American Bar Association's new Code of Professional Responsibility. ABA, SPECIAL COMM. ON EVALUATION OF ETHICAL STANDARDS, CODE OF PROFESSIONAL RESPONSIBILITY (Final Draft, July 1, 1969). Canon 4 provides that: "A lawyer should preserve the confidences and secrets of a client." *Id.* at 51. However, Disciplinary Rule 4-101 (C) states:

A lawyer may reveal:

. . . .

(2) Confidences or secrets when . . . required by law or court order.

Disciplinary Rule 4-101 (A) defines "Confidence" as "information protected by the attorney-client privilege under applicable law . . . ." The new Code thus clearly permits an attorney to disclose under court order information which he believes to be within the ambit of the attorney-client privilege. *See also* Ethical Consideration 4-4.

The Code of Professional Responsibility was approved at the 1969 American Bar Association Convention in Dallas, Texas. Until adopted by a given jurisdiction, however, it is not effective there. As of this time, Washington has not adopted the Code.

[6] The discussion in this note is limited to the area of civil direct contempt, *i.e.*, civil contempts in the "immediate presence of the court," which are punished summarily. In a summary proceeding, the accused is not entitled to such procedural protections as adjudication by an impartial tribunal and a jury trial, even though the defendant may be incarcerated for a period up to six months. *See* In re Michael, 326 U.S. 224, 227 (1945). *See, e.g.*, WASH. REV. CODE §§ 7.20.020-.030 (1956).

The distinction between civil and criminal contempt has never been satisfactorily delineated, particularly in light of the broad statutory definitions the courts must work with. Traditionally, criminal contempt lies for that conduct which affronts the dignity of the court and the legal process, while civil contempt lies for passive non-compliance with a court's orders to the detriment of private parties. The distinction is not in the sanction imposed, but rather in the purpose of the sanction. *See*, R. GOLDFARB, THE CONTEMPT POWER, 47-67 (1963) for a thorough discussion of the fruitless attempts at developing a clear distinction between the two concepts.

See also, Bloom v. Illinois, 391 U.S. 194 (1968) in which the U.S. Supreme Court held that in certain situations the Sixth Amendment guarantees a jury trial to criminal contempt defendants.

[7] *See, e.g.*, Ex Parte Libscomb, 111 Tex. 409, 239 S.W. 1101 (1922). *See also*, 8 J. WIGMORE, EVIDENCE § 2321 (McNaughton rev. 1961).

[8] *See, e.g.*, Ex Parte Enzor, 270 Ala. 254, 117 So. 2d 361 (1960); Robertson v. Commonwealth, 181 Va. 520, 25 S.E.2d 352, 146 A.L.R. 966 (1943); Appeal of United States Sec. & Exch. Comm'n, 226 F.2d 501 (6th Cir. 1955).

This rule was adopted by the Washington court in Dike v. Dike, 75 Wash. Dec. 2d 1, 448 P.2d 490 (1968). *See* note 11 and accompanying text *infra*.

order was erroneous, the contempt conviction is reversed; but if it finds no error, the contempt conviction stands. Such divergent standards among the courts and the bar may place the attorney in a quandry as to the proper response to an order to disclose.

A recent Washington case examines the attorney's dilemma. In *Dike v. Dike*,[9] the Washington Supreme Court reviewed a summary contempt conviction imposed upon an attorney for refusing to reveal the whereabouts of his client, the defendant in a pending divorce action. The client had removed her daughter from the temporary court-awarded custody of a third party, and would not return the child. Having failed to answer a motion to hold his client in contempt for violating the custody order, the attorney was directed to appear, and either produce the defendant or show cause why he could not produce her. The attorney appeared, but refused to divulge his client's whereabouts, contending that the information was privileged and that disclosure would violate the Canons of Professional Ethics. The court then instructed a deputy sheriff to handcuff the attorney and remove him to the county jail. After being fingerprinted, booked and photographed, the attorney was released on $5000 bail.

On appeal the Washington Supreme Court held that the order to disclose was neither unlawful nor erroneous.[10] Ordinarily, such determinations would suffice to uphold the contempt conviction under either of the previously discussed rules for review.[11] The Washington court, however, vacated the contempt order and absolved the attorney from further punishment.

In assessing the wisdom of the attorney's choice, the court expressed

[9] 75 Wash. Dec. 2d 1, 448 P.2d 490 (1968).

[10] The Court held that Washington's statutory privilege and the privilege embodied in Canon 37 are merely a restatement of the common law and under the common law, the court has the right to compel an attorney to disclose the whereabouts of his client when the following conditions have been met: the attorney must have appeared in the action in which the address is sought; the attorney-client relationship must still exist; the attorney's client must have been a party to the action; the action must still be pending; the address must not be sought for the purpose of pursuing the client in subsequent litigation; and the information must be necessary to protect the rights of an innocent third party. This right to compel disclosure is recognized as an exception to the attorney-client privilege, founded on the necessity to protect the public interest, an interest that weighed more heavily in the instant case than the public good gained by preserving the attorney-client privilege. 75 Wash. Dec. 2d 1, 10, 13, 448 P.2d 490, 496, 497-98 (1968).

[11] *See* notes 7 & 8 and accompanying text *supra*. The Washington Court adopted the "gambling chance" rule for review of contempt convictions for asserting a privilege. 75 Wash. Dec. 2d at 7-10, 448 P.2d at 494-96.

empathy for the "damned if you do, damed if you don't" position in which the superior court judge had placed the attorney, and recognized that the dilemma was compounded by the fact that this particular privilege issue had never been decided in Washington. After contrasting these considerations with the severity of the sanction imposed, the supreme court ruled that it was an abuse of discretion to order more than *pro forma* detention of an attorney, acting in good faith with respect to an unsettled privilege issue.

The result in *Dike*—that is, vacation of the conviction as well as absolution from further punishment—may be interpreted in two ways. *Dike* can be read to hold that this attorney's conduct was not contemptuous, and that erroneous defiance of a judicial order to disclose is not contempt when the relevant privilege issue is unsettled. Alternatively, the case might simply mean that sentencing for contempt must not be unreasonable. Under either reading, the court has only fleetingly resolved the ethical dilemma, for it did not establish any guidelines to assist attorneys faced with similar predicaments in the future.

Dike not only leaves the attorney to face without guidance the vexatious ethical dilemma of whether or not to submit to an order to disclose possibly privileged information; it also leaves unalleviated the most serious and fundamental problem arising out of such dilemmas: namely, judicial dilution of the client's right to have confidential disclosures to his attorney withheld from public scrutiny.

II. DILUTION OF THE CLIENT'S PRIVILEGE

In the traditional view, the attorney-client privilege is necessary to enable the attorney to represent his client to the best of his abilities.[12] But in present operation, the effectiveness of the privilege is diluted, directly and indirectly.

Direct dilution results from the common application of a "judicial presumption" against the attorney-client privilege. Courts are in almost unanimous agreement that, since this privilege operates to exclude otherwise relevant and material evidence, it must be strictly construed.[13] In cases for which the applicability of the attorney-client

[12] *See generally* Gardner, *A Re-evaluation of the Attorney-Client Privilege*, 8 VILL. L. REV. 279, 447 (1963); and 8 J. WIGMORE, EVIDENCE § 2291 (McNaughton rev. 1961).
[13] 8 J. WIGMORE, EVIDENCE § 2291 (McNaughton rev. 1961).

privilege is unsettled, the existence of a judicial presumption against the privilege is likely to result in an order to disclose, and the order is likely to induce compliance by the uncertain attorney. Even if the order is appealed, it is apt to be upheld by the application of this rule of strict construction. The consequence in any event is a significant direct dilution of the scope and effectiveness of the client's privilege.

Indirect dilution of the attorney-client privilege is a natural consequence of the *Dike* dilemma. In the *Dike* situation an attorney must consider not only his duty to obey the court and his duty to preserve his client's privilege, but also the relative consequences of failure to fulfill these duties. As a result of the gross disparity between the sanctions available to the court and the remedies available to the client only in rare instances will an attorney defy a court to protect his client's privilege. The court wields the immediate and ignominious sanction of contempt.[14] Aside from the threat of fine and imprisonment,[15] a contempt conviction may also prompt disciplinary action by the local bar association.[16] The client, however, is essentially without remedy. No appellate case has been found in which a client has recovered from his attorney for improper disclosure under judicial order of privileged information. Nor does there appear to be any instance of censure or disbarment for such conduct.[17] If the attorney complies with the court order, he has little to fear in the way of retributive action by

[14] *See* Keller v. Keller, 52 Wn. 2d 84, 86-88, 323 P.2d 231, 232-33 (1958) for a good discussion of the Washington court's statutory and inherent contempt power. *See also* Ex Parte Robinson, 86 U.S. 505, 510 (1873).

[15] *See, e.g.*, WASH. REV. CODE § 7.20.020 (1956) which allows a judge to impose a punishment of imprisonment for up to six months and a fine of up to three hundred dollars; and WASH. REV. CODE § 7.20.110 (1957) which allows a judge to imprison a recalcitrant witness until he discloses the information sought.

[16] Although local bar associations may vary in their treatment of contempt citations, it is this writer's understanding that most such organizations at least review all contempt citations to decide if disciplinary action is warranted. Review and discipline for wilful disobedience of a court order is authorized in Washington. WASH. REV. CODE § 2.48.220(2) (1957); WASH. DISC. R. ATTY. III. B.

[17] The Code of Professional Responsibility recently adopted by the American Bar Association explicitly permits an attorney to disclose possibly privileged matter under court order, apparently removing any possibility of censure or disbarment wherever it is in effect. DR 4-101 (C)(2), ABA, SPECIAL COMM. ON EVALUATION OF ETHICAL STANDARDS, CODE OF PROFESSIONAL RESPONSIBILITY (Final Draft, July 1, 1969) discussed note 5 *supra*. The position of the American Bar Association is understandable given the potentially harsh consequences of a contempt conviction, but query whether the resolution of the attorney's dilemma has not been resolved at the expense of the client now that express sanction has been given to the sacrifice of the client's possible right to non-disclosure under the attorney-client privilege. It must be pointed out, however, that DR 4-101 (C)(2) does not prohibit an attorney from refusing to divulge what he believes to be privileged material.

his client, and, in the absence of such a factor, he cannot help but feel compelled to submit to the order to disclose rather than to face the potentially harsh consequences of being held in contempt.[18] The ultimate result is that the attorney may be inclined to divulge information privileged in fact which his client has communicated to him in reliance on the effectiveness of the privilege.

III. DISCLOSURE AND IRREPARABLE INJURY

The client's privilege is narrowed because of the tendency of attorneys to submit to an order to disclose rather than risk punishment for contempt. Privileged information may be revealed even though the client may have very substantial reasons for desiring that it be kept confidential. The communicated matter may be damaging to his success in the particular action before the court; or it may be collaterally damaging, subjecting him to possible liability in another action or injuring his reputation.[19] The exact nature of the damage, as well as the type of proceeding and the client's relationship to it, has a strong bearing on whether a cure is available for the harm resulting from the disclosure of privileged information.

When the client is a party in a formal trial setting, he has the remedy of an appeal from an adverse judgment. Where the information disclosed is injurious only in the case at hand and has no potential for collateral damage, this remedy will ordinarily be adequate. If the information is in fact privileged, reversal of the order to disclose will cure the harm of an unfavorable lower court outcome—unless the added expense of appeal and retrial outweighs the value of the action, or unless the appellate court applies a rule of harmless error and holds that, although the information was privileged, its disclosure was not

[18] This contention is supported by the scarcity of contempt appeals based on an assertion of the attorney-client privilege amidst an abundance of appeals by clients claiming wrongful denial of the privilege. This writer has found only four cases in which an attorney has appealed a contempt conviction for refusal to disclose privileged communications—Dike v. Dike, 75 Wash. Dec. 2d 1, 448 P.2d 490 (1968); United States v. Kovel, 296 F.2d 918 (2d Cir. 1961); Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960); Appeal of United States Sec. & Exch. Comm'n, 226 F.2d 501 (6th Cir. 1955). *See also* In re Buckey, 395 F.2d 385 (6th Cir. 1968) in which the Sixth Circuit Court of Appeals refused to review a privilege ruling on the grounds that the appeal was interlocutory.

[19] *See* Gardner, *A Re-evaluation of the Attorney-Client Privilege*, 8 VILL. L. REV. 279, 337-38 (1963) for a discussion of what the author terms the "hard core" area of the privilege—those items "which the client would intend that his lawyer should never reveal to anyone."

substantially prejudicial.[20] However, when the improperly disclosed information does have potential for collateral injury to the client, his right to appeal is clearly not an adequate remedy. For example, in a suit on a contract, a court might require the defendant's attorney to reveal certain information about his client's financial records, even though such information might subject the client to liability in a subsequent proceeding for tax evasion. Once such information is disclosed, reversal as to the client's contractual liability would be of no help in avoiding civil and criminal tax liability.

In less formal courtroom settings, such as the judicial hearing in *Dike*, or in a grand jury investigation where the investigating body can utilize direct summary contempt power,[21] the client is without remedy. He is unable to appeal as there is no final adjudication of rights; and even if an appeal procedure were available, any collateral damage caused by the disclosure would not be curable.

Finally, when the client is not a party to the action, and his attorney divulges possibly privileged information, he is again without remedy. A non-party has no right to review and nothing to gain by review; he cannot even obtain a determination of whether or not the disclosed information is privileged.

The net result of the tendency of attorneys to submit to judicial orders to disclose is that in situations where an appeal is unavailable or is an unsatisfactory remedy, privileged communications, which are theoretically "protected by law", are irreparably disclosed without any waiver by the client, and with little regard for the interests of the client, to whom the privilege belongs.[22] Courts occasionally express dissatisfaction with the conventional approach;[23] yet they have been

[20] An erroneous ruling by the trial court on the question of privilege will only result in reversible error if the privileged communication elicited results in substantial harm to the rights of a party. In other words, when the record on appeal will support the judgment without the privileged information, an appellate court will not reverse. It is not difficult to visualize a situation in which the trial court will regard a particular communication as crucial and the appellate court will not reverse because the information, although privileged, was in its view not necessary to support the judgment. *See, e.g.*, In re Quick's Estate, 161 Wash. 537, 297 P. 198 (1931); Conerly v. Lewis, 238 Miss. 68, 117 So. 2d 460 (1960); Food Fair Stores v. Howard, — Del. —, 212 A.2d 405 (1965).

[21] *See, e.g.*, In re Buckey, 395 F.2d 385 (6th Cir. 1968).

[22] *See* 8 J. WIGMORE, EVIDENCE §§ 2321, 2327 (McNaughton rev. 1961).

[23] *See* Appeal of the United States Sec. & Exch. Comm'n, 226 F.2d 501, 507 (6th Cir. 1955) in which a district judge is quoted as saying "They (the attorney-witnesses) were in a difficult situation. They had to choose between two courses of action. They could obey the court and disobey the Commission, which might result in their losing their

deterred from fashioning a solution by a recognition of the dangers in allowing attorneys to decide for themselves even the narrow legal questions in the area of the attorney-client privilege,[24] and also by an awareness of the necessity for efficient and orderly disposition of judicial business.

IV. A POSSIBLE SOLUTION

Any solution must allow the attorney adequate insulation from the stigma of contempt when he asserts the privilege in good faith, at least until there has been a final adjudication of the privilege issue. The most rational protection would be some form of interlocutory appeal, accompanied by an emergency stay of proceedings.[25] Although the Sixth Circuit recently rejected this device,[26] requiring instead that the attorney appeal his contempt conviction, the various states are free to implement such an interlocutory appeal procedure by statute.[27]

The operation of such an interlocutory appeal can be best examined in the formal trial setting. A showing of possible collateral injury for which the normal appeal affords no remedy would be required in order to obtain an emergency stay of the order to disclose. The sole function of the trial judge would be to decide this issue after argument in chambers[28]—the closed hearing being essential to avoid the very

jobs permanently, or they could obey the Commission and disobey the court and thus lose their freedom temporarily. I don't know which course would be the wiser for them to follow. It may be that a temporary loss of freedom would be less of a loss than a permanent loss of a civil service job."

[24] *See* United States v. Reynolds, 345 U.S. 1, 9-10 (1953).

[25] 28 U.S.C. § 1292(b) (1964) allows interlocutory appeals in federal district courts where "controlling questions of law," determination of which may materially advance the ultimate disposition of the litigation, are at stake. Unfortunately, the federal courts have generally held that questions of privilege do not fall within this statute. United States v. Woodbury, 263 F.2d 784 (9th Cir. 1959). *But see* Radiant Burners, Inc. v. Am. Gas Ass'n, 320 F.2d 314 (7th Cir. 1963) in which the district judge allowed a § 1292(b) appeal on the question of whether the attorney-client privilege applied to corporations.

[26] In Re Buckey, 395 F.2d 385 (6th Cir. 1968). In this case, an attorney, faced with an order to disclose in a district court, obtained an emergency stay of proceedings and sought an appeal of that order. The Sixth Circuit Court of Appeals refused to review the order either as an appeal or as a request for a mandatory writ.

[27] Some states have a general interlocutory appeal procedure patterned after 28 U.S.C. § 1292(b) (1964). *See, e.g.*, UTAH R. CIV. P. 72(b). The only major difference is in the fact that the state statutes give the appellate court the discretion to decide whether the appeal should be granted. The federal statute leaves the question of certification to the trial judge.

[28] Although this solution still contemplates some discretion in the trial judge, there is authority for the use of a writ of mandamus to compel a trial judge to certify a

collateral damage which the procedure is designed to prevent. If a showing of potential collateral injury is made, the application for an interlocutory appeal would be required to be heard by an appellate court within a limited time period. The appeal would be discretionary, under certiorari or some similar method, and would only be allowed when, in the opinion of the appellate court, a meritorious privilege question is presented. If the interlocutory appeal is denied, the emergency stay of the trial court proceedings would be dissolved, and the sole remedy for an order to disclose or a contempt conviction would be a normal appeal. If the interlocutory appeal is granted, the emergency stay would be continued, and the privilege issue would be fully briefed, argued, and decided; the appellate opinion would be the law of the case and res judicata so that the appealing attorney could not raise the issue again, either on remand or in a subsequent direct appeal.

The attorney's dilemma would be resolved: if the interlocutory ruling is favorable, disclosure could not be compelled; but, if it is adverse, disclosure would be required. Furthermore, this solution would be attained with a minimum of delay. Privilege issues without merit and those involving no possibility of collateral injury would be rapidly resolved. The only significant delay would occur in the case of a privilege issue both meritorious and with potential for collateral injury; this delay is amply justified by the elimination of the attorney's dilemma when faced with a judicial order to disclose information which he believes to be within the attorney-client privilege.

The interlocutory appeal procedure need not be restricted to the formal trial setting. It could be employed also in the less formal settings such as hearings and grand jury investigations. However, a desire for greater dispatch in those other types of proceedings might militate against the use of the procedure. This special appeal process could even be employed when the client is not a party to the proceeding, although delay of a proceeding by a non-party is subject to question. As to each situation, the advisability of adoption would depend on the balancing of the costs of the attorney's dilemma against the extent and nature of the necessitated delay.

The interlocutory appeal procedure, by eliminating the attorney's

question of law for appeal. *See* Ex Parte Deepwater Exploration Co., 260 F.2d 546 (5th Cir. 1958) in which a writ of mandamus issued to compel a district judge to certify an appeal under 28 U.S.C. § 1292(b) (1964).

dilemma, would also arrest the indirect dilution of the client's privilege. By providing an effective alternative to disclosure, it would permit the attorney to contest a potentially erroneous order to disclose without fear of contempt. No longer would an attorney have to sacrifice his client's privilege in order to avoid a contempt conviction. However, the direct dilution arising out of the judicial presumption against the application of the attorney-client privilege would remain.

All of the principals in an attorney-client privilege controversy would benefit if the attorney, when necessary, could obtain interlocutory relief without having to wait to appeal a contempt conviction. The attorney would be free to assert his client's rights without fear of penalty; the judge would be pleased to have the privilege question answered without having to resort to contempt power; and, most importantly, the client would not only avoid the potentiality of irreparable injury due to unnecessary disclosure of privileged information, but would also profit greatly from a revitalization of the attorney-client privilege.