

Recent Decisions: Evidence: Attorney-Client Privilege: Communications with Insurance Agent

Michael D. Baudhuin

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

Michael D. Baudhuin, *Recent Decisions: Evidence: Attorney-Client Privilege: Communications with Insurance Agent*, 48 Marq. L. Rev. (1964).

Available at: <http://scholarship.law.marquette.edu/mulr/vol48/iss2/11>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

distinct from its members. This is especially true considering that neither theory was mentioned in the opinion. The court has, however, been urged to adopt the entity approach to partnership law,²⁰ and the language of this case could be used to argue that the court is leaning in the direction of the entity theory. The court's statement that "*the* partnership . . . continued to exist"²¹ (emphasis added) could be construed to mean that the old partnership "entity" survived the withdrawal of a member. It is more reasonable to assume, however, that the court still regards the partnership as an aggregate of individuals having no recognized separate existence except for certain procedural matters. It would follow, then, that the Adams-Jarvis partnership dissolved, wound up in accordance with the contract, and at least technically terminated,²² and that a new partnership sprang up in its place consisting of the two remaining members. This new partnership is governed by the old agreement. Any change in membership, as by the admission of a new member, will send the partnership through its technical evolution, and a new, legally distinct partnership will result.²³

The "continuing partnership" is a useful form of business organization, especially for firms whose membership is constantly changing.²⁴ It would be impractical, indeed, for a firm to be forced to liquidate its assets each time a member leaves the firm and each time a new partner is admitted. The "continuing partnership" provides a means whereby a firm may continue its day to day business without the impediment of a statutory settlement of accounts. A specific contractual provision will eliminate the necessity of dividing the accounts receivable each time a new member is admitted or an old member withdraws.²⁵ It is essential, however, that careful consideration be given to the drafting of the agreement, in order that it be kept consistent with the theory of partnership law.

THOMAS A. PLEIN

Evidence: Attorney-Client Privilege: Communications with Insurance Agent— In *Jacobi v. Podevels*,¹ an automobile negligence case, both drivers testified during the trial that they were traveling at a rate of speed below the legal limit of twenty-five miles per hour. In a statement given to his insurance company's agent, however, respondent admitted that he was traveling at a speed of thirty miles per hour, and also included damaging remarks concerning his lookout at the time of the accident.

²⁰ 37 MARQ. L. REV. 66 (1953).

²¹ 23 Wis. 2d at 459, 127 N.W. 2d at 404.

²² *Egner v. States Realty Co.*, note 10 *supra*; 40 AM. JUR. *Partnership* §197 (1942).

²³ Annot., 45 A.L.R. 1240 (1926); 40 AM. JUR. *Partnership* §233 (1942).

²⁴ Millikan, *The Continuing Partnership Whether and When*, 28 LOS ANGELES B. BULL. 123 (1953).

²⁵ Hirsh, *The Medical Partnership*, 13 DE PAUL L. REV. 28 (1963).

¹ 23 Wis. 2d 152, 127 N.W. 2d 73 (1964).

Upon cross examination, respondent admitted that he had made the written statement indicated, and that he had used it to refresh his recollection. Appellants' counsel requested that the statement be produced, and over objection based on privilege it was turned over and made the basis for further cross examination. It was later shown to the court's satisfaction that respondent's assertion of use for refreshing his memory was incorrect; and the jury was thereupon instructed to disregard all references to that written statement, with further cross examination thereon being barred.

In raising the objection of privileged communication, respondent was resting upon apparently solid legal footing. The leading case in the area, *Wojciechowski v. Baron*,² struck an admirable parallel. There, the defendant testified over objection that he had made a written statement, in the form of an accident report, to his insurance company. His attorney was then required to produce the statement, timely objection having been made. The statement was not only used for cross examination purposes, but was read into the record and was itself received into evidence. Upon appeal, however, the Wisconsin Supreme Court reversed the ruling of the trial court, and decided to adopt the *American Law Reports* rule:

According to the weight of authority, a report or other communication made by an insured to his liability insurance company, concerning an event which may be made the basis of a claim against him covered by the policy, is a privileged communication, as being between attorney and client, if the policy requires the company to defend him through its attorney, and the communication is intended for the information or assistance of the attorney in so defending him.³

This rule originated principally with Ohio case law, where the insurance company is regarded solely as an agent to communicate information to its attorneys in the claim department, or eventually to their trial attorney,⁴ and pertains even if no claim is actually ever filed against the insured.⁵ *Jacobi*, however, explicitly overrules the *Wojciechowski* decision, and with it, apparently, Wisconsin's adoption of the rule. Justice Fairchild, in writing the decision, stated: "Recognizing that a policy choice must be made with respect to confidentiality of statements by an insured to the insurer, some of the members of the court, including the writer of this opinion, would adhere to *Wojciechowski v. Baron*, . . . wherein the choice has previously been made by this court."⁶ The decision, then, was based upon a divisive policy considera-

² 274 Wis. 364, 80 N.W. 2d 434 (1956).

³ 22 A.L.R. 2d 660 §2.

⁴ *Travelers Indem. Co. v. Cochrane*, 155 Ohio St. 305, 98 N.E. 2d 840 (1951).

⁵ *Re Heile*, 65 Ohio App. 45, 29 N.E. 2d 175 (1939).

⁶ 23 Wis. 2d at 157, 127 N.W. 2d at 76.

tion, which stems from Dean Wigmore's statement that "the privilege [attorney-client] remains an exception to the general duty to disclose. . . . It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle."⁷

This limitation is not aimed directly at the attorney-client privilege, however, since it is statutorily established.⁸ It is directed, rather, at restricting agencies through which an attorney may operate. In commenting on communications to an agent of the attorney, Dean Wigmore himself states:

It has never been questioned that the privilege protects communications to the *attorney's clerks* and his other agents (including stenographers) for rendering his services. The assistance of these agents being indispensable to his work and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents.⁹ (Footnotes omitted.)

The original purpose of the attorney-client privilege, of course, was to foster free disclosure in order to protect the client. It is his privilege and is the oldest of all forms of privileged communication. The employment of agents, on the other hand, seems to be the prerogative of the attorney. To reach the conclusion of *Jacobi*, it would seem to be necessary to find either that the insurance company is exclusively the agent of the client, or that the legal department is not actually employed by the insured until an action is actually instigated. The argument in either instance seems to be circuitous, since either would of necessity alter the status quo. If the company were solely the agent of the client, it would disregard the terms of employment of the legal staff, which delegates the responsibility of fact finding to the insurance company; whereas if the legal staff were not considered as employed until litigation, it would disregard the contractual clause binding the company to furnish proper defense for the policy holder.

The *Jacobi* reasoning was initially established in New York, where dicta indicated that there could be no privilege if only an insurer-insured relationship existed at the time the statement was made, even if it were to come into the hands of an attorney at a later date.¹⁰ This position was definitely refuted, however, in the case of *Hollien v. Kaye*¹¹

⁷ 8 WIGMORE, EVIDENCE §2291, at 545 (McNaughton rev. 1961).

⁸ WIS. STAT. §325.22 (1961): "An attorney or counselor at law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon in the course of his professional employment."

⁹ WIGMORE, *op. cit. supra* note 7, §2301, at 583.

¹⁰ *Cote v. Knickerbocker*, 160 Misc. 658, 290 N.Y.S. 483 (1936).

¹¹ 194 Misc. 821, 87 N.Y.S. 2d 782 (1949).

where it was decided that the privilege obtained even before an attorney was appointed, as being ultimately intended for the attorney. "[T]hat defendants did not select their own counsel is of no moment. . . . The carrier stood in the position of an agent of these defendants to select and retain their attorney for them."¹² It then seems most apparent that the insurance company is not only the agent of the insured, but also of the attorney, especially when his employment is immediate rather than prospective.

The Uniform Rules of Evidence treating privileged communications between an attorney and his client define "communication" as including advice given by the lawyer in the course of representing his client, and also "disclosures of the client to a representative, associate or employee of the lawyer incidental to the professional relationship."¹³ If the "carrier stood in the position of an agent of these defendants to select and retain their attorney for them,"¹⁴ it would seem that any disclosures made to them would be "incidental to the professional relationship" with the attorney.

The liberal attitude in the area of admissibility, originally stated in 1858 by Justice Best,¹⁵ espoused by Dean Wigmore,¹⁶ and now adopted by the Wisconsin Supreme Court, seems to be a carryback to this state's original judicial holding on the subject of privileged communications, wherein it was stated that "in order to give that character [privilege] to a communication, it must be made to the counsel, attorney or solicitor, acting for the time being in the character of legal advisor."¹⁷ Although this drift runs contrary to the trend of modern legal thinking,¹⁸ it is greatly akin to the prevalent English rule with regards to statements made to agents of attorneys.

In England, the concept of privilege includes all documents made by or for counsel with a view toward litigation.

Reports by a company's servant, if made in the ordinary course of routine, are not privileged, even though it is desirable that the solicitor should have them and they are subsequently sent to him; but if the solicitor has requested that such documents shall always be prepared for his use and this was one of the reasons why they were prepared, they need not be disclosed.¹⁹

If it is possible to conclude from the instant decision that an insurance company's agent *may* still be retained as an agent of an attorney, the answer to the problem becomes quite clear. The individual

¹² *Id.*, 87 N.Y.S. 2d at 785.

¹³ UNIFORM RULE OF EVIDENCE 26 (3) (b).

¹⁴ *Hollien v. Kaye*, 87 N.Y.S. 2d at 785.

¹⁵ *Broad v. Pitt*, 1 Mood & Malk 233, 234, 173 Eng. Rep. 1142, 1143 (C.P. 1828): "The privilege is an anomaly, and ought not to be extended."

¹⁶ See WIGMORE, *op. cit. supra* note 7.

¹⁷ *Brayton v. Chase*, 3 Wis. 406, 409 (1854).

¹⁸ See authorities cited notes 3, 4, 5, and 11 *supra*.

¹⁹ ODGERS, PLEADING AND PRACTICE 264 (12th ed. 1939).

insured may consult his own attorney before filing the required statement with his insurer. The attorney, in turn, could then notify the insurance company and request that they collect information for him from his client concerning his part in the questioned transaction. This would seem to satisfy the requirement of actual employment of the attorney by the client and of the agent by the attorney. If, in fact, the Wisconsin decision will make demands similar to those of England, their satisfaction would require only a blanket request from the attorney for the client as soon as the client purchases his policy. This may place the additional requirement upon the parties, however, that the client's personal attorney represent him in any ensuing action, lest the transaction be labelled a sham, designed solely to circumvent the law.

A second and simpler solution seems more apparent, and should be popular with both insurance companies and practitioners. It would allow the insurance company to simply name an attorney on its own staff to the case as soon as it arises, instead of waiting until litigation is imminent. Any statements then made would be privileged as having been made to an agent of the attorney. This would not seem to be as satisfactory legally, however, in view of the circular agency problem discussed earlier; *viz.*, that the company may be considered solely as the agent of the client rather than as the agent of the attorney.

The seed of veracity, at any rate, is a mandatory inference from the language of the court: "At any rate, no counsel had been assigned to advise and defend Jacobi. If the latter were the case, a claim of privilege could even more reasonably be made, or a claim that the work product of an attorney was involved."²⁰ (Footnote omitted.)

In the strictest terms, however, the court would still be reluctant to find that the insurer's agent is necessarily the insured's agent. This conclusion is based primarily upon the contention that if the statement is false, it can be considered as a foundation for a claim of noncooperation by the company against the insured. If, on the other hand, any facts included in the disclosure can be used as a defense against the insurer's liability to the insured, such facts may be used by the company itself against its own customer. It would not, then, be the agent of the client at this stage of development. The argument then could be maintained that although the insurance agent is the attorney's agent as well, at that point of the proceedings the attorney is not the client's, but only the company's attorney. To say he was the attorney of both would place him in a position of conflicting interests in light of the cited arguments. The legality of either possible solution to the new problem remains to be judicially determined.

MICHAEL D. BAUDHUIN

²⁰ 23 Wis. 2d at 155, 127 N.W. 2d at 75.