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Discovery - Scope of Adverse Examination of Attorney

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Slocum,[23] which was decided after *Clay*,[24] has proscribed all actions in equity or whether *Clay*[25] can be used as authority for the proposition that the district courts still have some original equity jurisdiction under the Act.

The instant case was obviously the ideal opportunity for a decision which would squarely meet the question. This writer feels that by merely citing *Slocum*[26] and arguing that the plaintiff's complaint was covered by the doctrine of that case and was not within the facts of *Moore*[27] the court did not adequately state the grounds for its decision.

The facts as well as the cause of action herein are clearly different from those in *Slocum*.[28] If the court intended to apply *Slocum* to proscribe all actions in equity in this area from the jurisdiction of the district courts, it would seem it should have said so instead of merely straddling between *Moore*[29] and *Slocum*.[30] The bench and bar would then have been better able to chart its future course in this area.

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Discovery—Scope of Adverse Examination of Attorney—Plaintiff commenced an action to recover for injuries sustained as a result of the alleged negligent operation of a bus in which she was a passenger. The defendant insurance company answered separately and set up a defense based on a condition of the insurance policy requiring notice of the accident within a reasonable time, and denied liability, alleging prejudice or damage as a result of the tardy notice. Two attorneys had been retained by the insurance company to conduct an investigation of the circumstances attending the accident. After the issue was joined, proceedings were taken by the plaintiff for an adverse examination of the two attorneys. At the same time, subpoenas were served upon them requiring them to bring enumerated reports and documents concerning their investigation. The trial court granted the motion of the defendant insurance company to suppress the adverse examinations upon the ground that the information sought to be elicited was within the attorney-client privilege. *Held*: Reversed. Where the fact of investigation conducted by an attorney for his client is a relevant issue raised by the pleadings, the attorney may be adversely examined before trial as the agent of his client at the time of

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[22] *Supra*, n. 19.
[23] *Supra*, n. 8.
[24] *Supra*, n. 19.
[25] *Ibid.*
[26] *Supra*, n. 8.
[27] *Supra*, n. 4.
[28] *Supra*, n. 8.
[29] *Supra*, n. 4.
[30] *Supra*, n. 8.

the occurrence made the subject of the examination, since the attorney-client privilege only applies to communications made to the attorney by the client which are of a confidential nature, and the legal advice given to the client in response to such communications. *Tomek v. Farmers Mutual Automobile Insurance Co., 268 Wis. 566, 68 N.W. 2d 573 (1955).*

Under sec. 325.22 which defines the attorney-client privilege, an attorney may not disclose communications made to him by his client or the legal advice which he gave to that client.[1] The obvious purpose of this privilege is to permit persons freely to consult attorneys without fear of disclosure of information which ordinarily such persons would reveal to no one.[2] It follows from this that the privilege is a privilege of the client and may be waived by him.[3] The veil of secrecy, however, does not extend to all communications; there are well recognized exceptions, some of which are found in sec. 325.22, and others of which exist independent of the statute, it being non-exclusive.[4] In an early Wisconsin decision, *Dudley v. Beck,*[5] the court indicated that the common law privilege extended beyond the comunications between the attorney and client:

> We think the cases in this country and in England, taken together, establish the doctrine that an attorney cannot be compelled to disclose, at the instance of a third person, any matter which comes to his knowledge, in consequence of his employment, even though such business had no reference to legal proceedings begun, or apprehended.[6]

This rule has not been followed in subsequent Wisconsin decisions. Indeed, in *Herman v. Schlesinger*[7] the court specifically declared that the statute is merely declaratory of the common law, and that:

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[1] WIS. STATS. (1953) §325.22. "Communications to attorneys. 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. This prohibition may be waived by the client, and does not include communications which the attorney needs to divulge for his own protection, or the protection of those with whom he deals, or which were made to him for the purpose of being communicated to another, or being made public."

[2] Allen v. Ross, 199 Wis. 162, 225 N.W. 831, 64 A.L.R. 180 (1929); *In re* Klemann, 132 Ohio St. 187, 5 N.E.2d 492, 108 A.L.R. 505 (1936); and see Note, 67 L.R.A. 923 (1903).

[3] Hunt v. Blackburn, 128 U.S. 464, 32 L.Ed. 488, 9 S.Ct. 125 (1888); and see annotations, 6 L.R.A. 481 (1890); 66 Am. St. Rep. 241 (1897); 20 Ann. Cas. 1285 (1911); Ann. Cas. 1913A 31 (1913).

[4] *Supra,* n. 1. Communications made by a client before the commission of a crime, or proposed infraction of the law, for the purpose of being guided or helped in its commission, are not privileged. Clark v. United States, 289 U.S. 1, 77 L.Ed. 993, 53 S.Ct. 465 (1933); and cases cited in 125 A.L.R. 508, 509 (1940). There is no privilege where to allow privilege would constitute a fraud. Dudley v. Beck, 3 Wis. *274 (1854); Dunn v. Amos, 14 Wis. 106 (1861); and cases cited in 125 A.L.R. 508, 512 (1940).

[5] 3 Wis. *274 (1854).

[6] *Ibid.,* at p. *284. Accord: August v. Burns, 255 P. 737 (Mont. 1927).

[7] 114 Wis. 382, 90 N.W. 460 (1902).

> We are unable to see how communications between an attorney and a person not his client, while conducting a business matter with such person for his client, whether he is acting professionally at the time or not, can be classed with those named in the statute.[8]

Unfortunately, in *Estate of Briese*,[9] the broad statement was made by the court that "as to matters happening since his retainer his privilege as an attorney would prevent disclosure." It seems clear that the court meant to say that matters within the privilege since his retainer as an attorney could not be disclosed. The *Tomek* case, the subject of this note, dispels all doubt, and reiterates the principle contained in *Herman v. Schlesinger*[10] that information received by an attorney from third persons in pursuance of his client's business is not within the purview of the attorney-client privilege. However, before an attorney can be compelled to disclose such information at an adverse examination before trial, the rules governing that discovery device must be satisfied.

No discussion of a discovery device on the state level would be complete without some reference to the practice in the federal area. There are well marked distinctions, for example, between the operation of sec. 326.12[11] and its complement in the federal sphere, Rule 26.[12] It must be borne in mind that the object of a discovery device in the federal practice is in fact discovery, whereas in the state practice the end is the production of evidence.[13] This basic difference is more readily apparent when we contrast the persons subject to discovery and the matters which may be discovered in the two areas.

Under sec. 326.12(1),[14] the persons who may be examined adversely are the parties themselves or their agents, officers, or employes who were such at the time of the occurrence of the subject matter of the

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[8] 114 Wis. at p. 393.
[9] 238 Wis. 516, 300 N.W. 235, 136 A.L.R. 1499 (1941).
[10] *Supra*, n. 7.
[11] WIS. STATS. (1953) §326.12. "Discovery examination before trials. (1) PERSONS SUBJECT THERETO. The adverse examination of a party, or any person for whose immediate benefit any civil action or proceeding is prosecuted or defended, or his or its assignor, officer, agent or employe, or of the person who was such officer, agent or employe at the time of the occurrence made the subject of the examination, may be taken by deposition at the instance of any adverse party upon oral or written interrogatories in any civil action or proceeding at any time before final determination thereof, but the deponent shall not be compelled to disclose anything not relevant to the controversy. Each of said persons may be so examined once and no more, except when examined before issue joined, in which case he may be again examined after issue joined, upon all the issues. If the examination is taken after the complaint is served, but before issue is joined, it may extend to all the allegations of the complaint."
[12] Fed. R. Civ. P. 26.
[13] Hon. Irving R. Kaufman, Judge, *Some Observations on Pre-Trial Examinations in Federal and State Courts*, 12 F.R.D. 363 (1952). See also, Lay, *Discovery Practice in Wisconsin*, 54 WIS. L. REV. 428 (1954).
[14] *Supra*, n. 11.

examination. Rule 26(a)[15] contains no such limitation, and allows an examination of any person. Respecting the matters which may be discovered, the phrase "relevant to the controversy" contained in sec. 326.12 delineates the restricted scope of the examination. In effect, that which may be discovered by the examining party is that which would be evidence at the trial.[16] On the other hand, Rule 26(b)[17] declares that discovery may be had of anything which is reasonably calculated to produce evidence. Although the comparison yields the conclusion that discovery in the state practice is confined to narrower limits than that under the liberal federal rules, Wisconsin has declared that since the statute is remedial in nature, it should be liberally construed.[18] Be this as it may, the question of whether an attorney is the agent of his client within the meaning of that term in sec. 326.12 has seldom been presented for judicial consideration. As the court phrased it in *Estate of Briese*:[19]

> Counsel on neither side were able to cite any cases bearing upon this question, but we attribute the scarcity of cases to the fact that the foregoing analysis has never been questioned on the part of the bar generally.

Estate of Briese,[20] the first case in Wisconsin dealing with the issue of whether an attorney may be adversely examined as the agent of his client, was decided in 1941. The court there held that an attorney whose agency is predicated upon his retainer for the very litigation in which discovery is sought is not an agent of a party as that term is used in sec. 326.12; the court said:

> We cannot believe that the legislature intended to render attorneys of the various litigants subject to examination under sec. 326.12 merely because they were retained in the litigation. What the statute intends is that those who acted for or on behalf of the party in the transaction which is the subject of the examination may be examined under this section.[21]

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[15] Fed. R. Civ. P. 26(a).

[16] Rohleder v. Wright, 162 Wis. 580, 156 N.W. 955 (1916). "The party is permitted to be examined in order that his conscience may be probed; that he may give some evidence relative to the matter in issue that may be favorable or useful to the examining party and that may be used against the party examined, on the trial."

[17] Fed. R. Civ. P. 26(b).

[18] Cleveland v. Burnham, 60 Wis. 16, 17 N.W. 126, 18 N.W. 190 (1884); Kelly v. Chicago & N. W. Ry. Co., 60 Wis. 480, 19 N.W. 521 (1884); Frawley v. Cosgrove, 83 Wis. 441, 53 N.W. 689 (1892); Sullivan v. Ashland Light, Power & Street Ry. Co., 152 Wis. 574, 140 N.W. 316 (1913); Rohleder v. Wright, 162 Wis. 580, 156 N.W. 955 (1916); Singer Sewing Machine Co. v. Lang, 186 Wis. 530, 203 N.W. 399 (1925); Plankington Bldg. Co. v. Laikin's, Inc., 226 Wis. 72, 276 N.W. 129 (1937).

[19] *Supra*, n. 9; 238 Wis. at p. 519.

[20] *Supra*, n. 9.

[21] *Supra*, n. 9; 238 Wis. at p. 518.

It is worthy of note that the court did not intend this rule to be inflexible. Later in the opinion the statement is made that there are circumstances under which an attorney would be an ordinary agent subject to examination under sec. 326.12, but the court refrained from giving any illustrative examples. The natural inquiry consequent upon such a declaration is, "What information can be obtained upon the examination of an agent of a party litigant?"

It is quite clear that the object of the adverse examination is to elicit information relevant to the issue made by the pleadings, or if the issue has not been joined, to the subjects authorized by the court, as to which the party or his agent might be questioned if he were a witness at the trial.[22] It should be noted that a document of the client or of his agent which has come into existence to serve as a medium of communication to the client's attorney is a privileged communication which is not subject to discovery after it has been communicated to the attorney, whereas documents already in existence and not created as a communication from client to attorney fall outside the scope of the privilege.[23] The courts in state practice have consistently refused to compel the person being examined from producing written statements taken from third party witnesses or from repeating the contents of those statements.[24] Upon analysis of the various authorities dealing with this problem,[25] it is apparent that there is some confusion as to specifically why such information cannot be obtained. The courts have given four principal grounds, the use of each varying from one jurisdiction to another—(1) privilege,[26] (2) relevancy,[27] (3) hearsay,[28] and (4) public policy.[29] In Wisconsin at least one case, *Estate of Briese*,[30] dealing with the subject of adverse examinations, has indicated that the hearsay objection is available. In *Lehan v. Chicago & Northwestern Railway Co.*[31] the court held that the statements of wit-

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[22] Kelly v. Chicago & N. W. Ry. Co., 60 Wis. 480, 19 N.W. 521 (1884).
[23] *In re* Klemann, 132 Ohio St. 187, 5 N.E.2d 492, 108 A.L.R. 505 (1936); Holm v. Superior Court, 267 P.2d 1025 (Calif. 1954); Stokoe v. St. Paul, M. & M. Ry. Co., 40 Minn. 454, 42 N.W. 482 (1889).
[24] See Note, 166 A.L.R. 1429 (1947).
[25] *Ibid.*
[26] Cully v. Northern P. R. Co., 35 Wash. 241, 77 P. 202 (1904); *Ex Parte* Schoepf, 74 Ohio St. 1, 77 N.E. 276, 6 L.R.A.(NS) 325 (1906); *overruled* on another point in *Re* Martin, 141 Ohio St. 87, 47 N.E.2d 388 (1943).
[27] Ehrlich v. New York C. R. Co., 251 App. Div. 721, 295 N.Y. Supp. 181 (1937); Babcock v. Northern New York Utilities, 134 Misc. 71, 234 N.Y. Supp. 552 (1929); Armstrong v. Portland R. Co., 52 Ore. 437, 97 P. 715 (1908).
[28] Warren v. De Coste, 269 Mass. 415, 169 N.E. 505 (1929); *Ex Parte* Pollard, 233 Ala. 335, 171 So. 628 (1936); Falco v. New York, N. H. & H. R. Co., 161 App. Div. 735, 146 N.Y. Supp. 1024 (1914).
[29] McNamara v. New York State R. Co., 129 Misc. 130, 220 N.Y. Supp. 522 (1927); Rodriguez v. Pennsylvania R. Co., 11 N.J. Misc. 375, 166 A. 169 (1933).
[30] *Supra*, n. 9.
[31] 169 Wis. 327, 172 N.W. 787 (1919). "It is as legitimate and proper for a defendant to interview persons who may be acquainted with the facts and cir-

nesses to an accident may not be ordered for production under sec. 269.57[32] since they themselves were held not to constitute or contain evidence relating to the transaction. Be this as it may, there can be no objection, other than relevancy, when that which is being sought is an *observed fact.* For example, when an insurance investigator or a private detective pursues an investigation and observes facts which are relevant to the controversy, it is difficult to perceive of any evidentiary or policy objection to discovery of those facts.

At first glance, the *Tomek* case might seem to indicate that as a general proposition an attorney is the agent of his client within sec. 326.12 and is subject to examination. But this principle must be limited to the unique facts of the case. As the concurring opinion states, the phrase "agent at the time of the occurence made the subject of the examination" in the ordinary case prevents an attorney who was retained for litigation from being adversely examined before trial as to occurrences which took place before his retainer. In the *Tomek* case, this restriction is overcome because *the fact of investigation itself,* that is, whether there was prejudice or damage to the insurance company as a result of the tardy notice, was made an issue by the pleadings. What was sought to be discovered was that which the attorneys themselves observed in conducting their investigations, and this information bore unmistakably upon the question whether or not the tardy notice prevented the insurer from carrying out as efficient an investigation as could have been conducted had the notice been prompt. Equally worthy of note is the fact that the party seeking the

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cumstances surrounding the subject matter of a litigation as it is for a plaintiff to pursue the same method. Statements and information of the nature of the ones before us in this case, when obtained by either party to an occurrence which may result in lawsuit, are not proper or legitimate evidence for the other party as to the facts therein recited, and an opposing party has no right to compel the production of such statements nor to question the person who may have obtained them as to the contents of such statements. They are no more subject to compulsory production at the demand of the opposite party on the trial, than would be such statements made by persons not called as witnesses. Such persistent attempts as were made in this case to drag in such matters before the jury are more than likely to have a prejudicial effect and to result in a miscarriage of justice." In this connection, see Horlick's Malted Milk Co. v. A. Spiegel Co., 155 Wis. 201, 144 N.W. 272 (1913) where it was held that in an examination of the plaintiff after service of the complaint, the plaintiff may be required to give names and addresses of persons from whom he had received reports upon which the allegations in the complaint were based.

[32] WIS. STATS. (1953) §269.57. "Inspection of documents and property . . . (1) The court, or a judge thereof, may, upon due notice and cause shown, order either party to give to the other, within a specified time, an inspection of property or inspection and copy or permission to take a copy of any books and documents in his possession or under his control containing evidence relating to the action or special proceeding or may require the deposit of the books or documents with the clerk and may require their production at the trial. If compliance with the order be refused, the court may exclude the paper from being given in evidence or punish the party refusing, or both."
Note that §269.57 and §326.12 both had their origin in the prior Wisconsin Statute, §4096.

examination and production of documents painstakingly limited the scope of the adverse examination in that he did not seek to inquire as to the contents of the documents, but only wanted such documents to be present at the examination so that the person being examined could refresh his memory; nor did he seek any matters within the attorney-client privilege.

In the opinion of the writer, the *Tomek* case is one of those situations which the court, in *Estate of Briese,*[33] had in mind when it declared that there were instances in which the attorney may be the agent of his client within sec. 326.12. The case rests on the sound, logical foundation that an attorney who was acting on behalf of his client at the time of the occurence made the subject matter of the examination, and himself observes relevant facts, may be compelled to disclose such facts on an adverse examination before trial. As long as the inquiry is confined to observed facts, this principle applies with equal force to an insurance investigator or a private detective without in any way violating the policy so firmly outlined in *Hickman v. Taylor.*[34] The net effect, then, of the *Tomek* case is to further refine the line between discovery and its undesirable counterparts, secrecy, surprise, and violation of the essence of the adversary system.

RICHARD J. ASH

Wills—Lapse in the Residuary Clause—The residuary clause in testator's will provided:

> . . . It is my will and I do direct that all the residue of my estate be distributed as follows: One Tenth of such residue shall be paid, in equal parts, to my brothers and sisters who, at the time this Will is executed, were residing in Solvakia as follows:
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> To my brothers:
> Chill Majerovics
> Herman Majerovics
> To my sisters:
> Mollie Teichman
> Sarah Reidman
>
> Should either of my said brothers or sisters be dead at the time of my death, then the share of such brother or sister shall go to the surviving child or children of such brother or sister living at the time of my death. Should either of my brothers or sisters have died before my death and have left no children, then the share of such deceased brother or sister shall go to the surviving brothers or sisters in equal parts.

Sarah Reidman and her son, Henry Reidman, were deceased at the time of testator's death; but Sylvia Reidman, daughter of Henry

[33] *Supra,* n. 9.
[34] 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).