Grassinger v. Trudel, Discovery Commissioner Opinion #2 (August, 1988)

CORPORATE ATTORNEY/CLIENT PRIVILEGE AND THE WITNESS STATEMENT OF AN EMPLOYEE WHO IS ALSO A PARTY

FACTS

The instant case arises out of an incident involving two taxi cabs on the property of the Stardust Hotel in Las Vegas. Plaintiff was a passenger in a Star Cab, driven by Defendant, Giron, when the taxi was rearended by a Checker Cab, driven by Defendant, Trudel. Both cabs were owned by corporations doing business as Yellow Checker-Star, "The" Cab Companies. The Plaintiff named both cab drivers and the cab companies as Defendants.

Shortly after the incident in May of 1986, an investigator was retained by "The" Cab Companies through its in-house counsel to assist in the investigation of the incident. The investigator took statements from 4 witnesses, two of which were the Defendant drivers. Defendants have refused to produce the statements taken from the two drivers, claiming protection through the attorney/client privilege.

While the commissioner has previously ruled the attorney/client privilege was not applicable in discussing the production of a witness statement, [see Moyns v. Creviston, Discovery Commissioner's Opinion # 1 at p. 2 (June, 1988)] the opinion primarily addressed the problem of work product immunity for witness statements. Additionally, the witness

statements in Moyns were taken by an insurance adjuster at the direction of Defendant's Insurance Company, [see companion opinion, Dillon v. Brown, Discovery Commissioner's opinion #3 (August, 1988)] but in the instant case the adjuster was taking the Defendant cab drivers' statements at the direction of house counsel for the cab companies. The statements were taken approximately a year and ten months prior to the institution of litigation.

ATTORNEY/CLIENT PRIVILEGE OF DRIVERS

The attorney/client privilege allows a client to refuse to disclose and prevent others from disclosing confidential communications between the client or his representative and his attorney or his attorney's representative, which communications were made for the purpose of facilitating the rendition of legal services to the client. NRS 49.095.

The attorney/client privilege rests on the theory that encouraging clients to make full disclosure to their attorneys enables the latter to act more effectively, justly and expeditiously, a benefit outweighing the risks opposed to truth finding. Haynes v. State, 103 Nev. Adv. Op. 69, 739 P.2d 497 (1987). Communications within the scope of the attorney/client privilege should be zealously guarded, but it must always be kept in mind that the privilege works to suppress otherwise relevant evidence and forestalls the search for truth and the limitations which restrict the scope of its operation must be

assiduously heeded. DiCenzo v. Izawa, 723 P.2d 171 (Hawaii 1986). Construing the attorney/client privilege involves balancing the public interest in the search for truth against the client's expecta- tions of privacy in consulting his legal advisers.

In order for the attorney/client privilege to be raised, a lawyer/client relationship must be established. NRS 49.045 defines a client as a person, corporation or other entity "who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him." NRS 49.065 defines a lawyer as, "a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation." NRS 49.085 defines a representative of the lawyer as, "a person employed by the lawyer to assist in the rendition of professional legal services." In this case there is no evidence to demonstrate that either cab driver, when giving his statement to the investigator, thought he was consulting with a lawyer or his representative with a view to obtaining professional legal services. Neither driver was a named defendant at the time of the statement, and it is clear from the facts of the accident that if either cab driver were thinking of consulting a lawyer, each would seek a different one. It is concluded there is no attorney/client privilege for either driver in regard to his statement, as no attorney/client

relationship existed between the drivers and house counsel for the cab companies. If either driver had given a confidential statement to his own attorney for use in representation of the driver in this case, either before or after the lawsuit was filed, such communication would be privileged, even though the underlying facts of the communication could still be discovered.

ATTORNEY/CLIENT PRIVILEGE OF CORPORATION

The only client left to assert the privilege would be the corporate client, "The" Cab Companies. The question then becomes, is a communication from such a corporate employee to counsel within the attorney/client privilege of the corporation, when the employee is not in a position to take part in a decision about any action which the corporation may take upon the advice of the attorney? To put the question another way, are the cab drivers representatives of the corporate client, as defined in NRS 49.075, which says:

> "Representative of the client" means a person having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.

Nevada statutory provisions on attorney/client privilege were taken, with minor amendments, from the preliminary draft of the Federal Evidence Rules, specifically rule 5-03, which was first promulgated in 1969. The Proposed Federal Evidence

Rule 5-03 was subsequently amended many times and then eliminated completely from the Federal Rules of Evidence which are now in effect. However, the Nevada rules, as adopted in 1971, have not been changed. So, as far as Nevada is concerned, the Advisory Committees notes to the original Proposed Rules of Evidence are very instructive on the interpretation of the rules as adopted in Nevada. The Committee stated as follows:

> "Representative of the client" is limited to one who may properly be said to speak for the client within the spirit and purpose of the privilege, i.e. one having authority to obtain legal services or to act on legal advice for the client. Thus, a driver for a Defendant bus company would not be considered a representative, and the status of communications between him and the company lawyer would be unaffected by the fact of employment. [Proposed Rules of Evidence, 46 FRD 161, at 252 (1969) (emphasis added)]

Clearly, the cab drivers are not "representatives" as thus defined; therefore, there was no attorney/client privilege for the corporation in regard to the employee statements, as the employees were neither clients nor representatives of the clients pursuant to NRS 49.045 and 49.075.

A review of the history of the Nevada attorney/client

privilege is particularly important, as there has been a wide divergence of opinion concerning the meaning and scope of the corporate attorney/client privilege. The Advisory Committee Note cited above made it clear that this evidence rule was intended to adopt the "control group" test for identifying corporate "spokesmen." Wright and Graham, Federal Practice and Procedure: Evidence §5483 (1986). This reasonable and popular test was explained in the case of City of Philadelphia v. Westinghouse Electric, Co., 210 F.Supp. 483 (E.D. Pa. 1962), wherein the Court considered whether the employee at the time of giving a statement was, in contemplation of law, the corporation seeking advice. If not, the Court held the employee was only giving the lawyer information in order that the lawyer could advise a client other than the employee, and therefore the employee was merely a witness. Even the Supreme Court in Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947) found the protective cloak of the attorney/client privilege did not extend to information which an attorney secured from a witness while acting for his client in anticipation of litigation. The Court, in City of Philadelphia, stated the control test as follows:

> [If] the employee making the communication, of whatever rank, is in a position to control or even take a substantial part in the decision about any action which the corporation may take upon the advice

> of the attorney, or if he is an authorized member of a group which has that authority, then he, in effect, is (or personifies) the corporation when he makes his disclosure and the privilege would apply. [City of Philadelphia v. Westinghouse Electric, Co., supra at p. 485]

In many types of cases, especially in the federal court system, the "control group" test does not retain much vitality in light of the U.S. Supreme Court opinion in Upjohn v. United States, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed. 2d 584 (1980), wherein the Court called the test unpredictable and said the narrow "control group" test sanctioned by the lower Court of Appeals should not govern development of the law in this area. However, the opinion also went on to state the Court only decided the case which was pending before them and declined to lay down a broad rule or series of rules to govern all conceivable future questions in the area. Professor Wright indicates the opinion "lapses into a muddled anthropomorphism of the sort that characterizes most privilege analysis," and notes the commentators on the opinion have been as muddled and uncertain as to the interpretation of it, perhaps as Court the itself was in the preparation of the opinion. Wright and Graham, supra, §5483, at 309.

The Defendants in this case have presented yet another approach to the privilege, as illustrated by D.I. Chadbourne,

Inc. v. Superior Court, 388 P.2d 700 (Cal. 1964). The test is a lengthy one and is set forth in the Wright and Graham text, but is criticized as being complex, suffering from internal inconsistency, no better justified in policy than any of the other tests and, finally, it may not still be the law in California. See 2 Jefferson, California Evidence Benchbook, §40.2 (2d ed. 1982); Wright and Graham, supra.

Still other tests have been suggested that have been used and continue to be used by various courts in this difficult area. A full discussion of all of these tests would be beyond the scope of this opinion, but some of the major influences include the following: Harper & Row Publishers, Inc. v. Decker, 423 F.Supp. 487, (7th Cir. 1970); affirmed by an equally divided court at 400 U.S. 348, 91 S.Ct. 479, 27 L.Ed. 2d 433 (1971), the "subject matter" test; Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978), the Weinstein test, modified "subject matter." Many other tests have been proposed by writers in the field, both before and after the Upjohn opinion. See e.g., Note, "Beyond Upjohn; Achieving Certainty by Expanding the Scope of the Corporate Attorney/client Privilege," 50 Fordham L.Rev. 1182 (1982); Sexton, "A Post-Upjohn Consideration of a Corporate "Attorney/client Privilege," 57 N.Y.U. L.Rev. 443 (1982); Note, The Corporate Attorney/client Privilege; Culpable Employees, Attorney Ethics, and the Joint Defense Doctrine," 58 Texas

L.Rev. 809 (1980).

It should also be pointed out that many states have adopted the "control group" test over the competing tests listed above, including Maine in 1977, Oklahoma in 1978, Vermont in 1977 and Alaska. Langdon v. Champion, 752 P.2d 999 (Alaska 1988). In Oregon the Advisory Committee favored a broader test, but the legislature rejected this in favor of the "control group" test in 1980. See Wright and Graham, supra, §5483, at 289.

Once again, this opinion is directed particularly to the circumstances of Nevada, both as to substantive and procedural law. Under our new liberal discovery rules and statutory and case authority such as Haynes v. State, supra, and McKay v. Board of Commissioners of Douglas County, 103 Nevada Advance Opinion 104, 746 P.2d 124 (1987), it is clear the privilege is restricted to allow clients to make full disclosure to their attorneys, to enable the attorney to act more effectively, which in that limited circumstance is a benefit outweighing the risks posed to truth finding. Simply because the client is a corporation, the privilege should not be enlarged to include the work of house counsel in this case, which is primarily detective work, as opposed to a legal consultation. In Re Grand Jury Proceedings of Browning Arms Co., 528 F.2d 1301 (8th Cir. 1976); Osterneck v. E.T. Barwick Industries, 82 F.R.D. 81 (N.D. Ga. 1979). Under the facts of the instant case, wherein

the statements were really not used to advise the corporate client, but were only actions taken by the attorney to provide the client with information, whereby that client would either settle or pass along the information to litigation counsel, would simply not be appropriate for inclusion under the attorney/client privilege protective veil. See, e.g., Diamond v. City of Mobile, 86 F.R.D. 324 (S.D. Ala. 1976).

The heart and soul of the attorney/client privilege is to promote complete freedom of consultation by a person with his legal advisors. The attorney/client privilege relates primarily to protection of the right of the individual not to be a witness against himself, but in modern civil cases there is no such right. "[When] the party knows that he himself can be called as a witness by the adversary, the danger from disclosure to counsel is less important. McCormick on Evidence, sec. 87 at p. 176 (West Publishing Company 1972).

Any extension of the attorney/client privilege inhibits the search for truth, and justice suffers to the extent truth remains obscured by virtue of such a rule. As many Courts have recognized, the search for truth is more important in such cases as these, rather than structuring an inhibition to the search for truth. It is true that those inclined to adjust their version of operative events to their advantage, without regard to what they might have told at their first interview after the accident, will be disappointed in these conclusions,

but to others it cannot possibly make a difference.

IT IS THERFORE RECOMMENDED that Defendants produce the statements of Giron and Trudel on or before September 9, 1988.