Evidence--Privileged Confidential Communications--Who May Assert and Who May Waive the Privilege

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Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol34/iss3/5
EVIDENCE—PRIVILEGED CONFIDENTIAL COMMUNICATIONS—WHO MAY ASSERT AND WHO MAY WAIVE THE PRIVILEGE

There are certain relationships in which communications, given in confidence because of the relationship between the parties, are generally considered to be conditionally qualified or privileged.\(^1\) The relationships in which confidential communications are most usually accepted as privileged are: communications between attorney and client, communications between husband and wife, communications between physician and patient, and to a lesser extent, priest (or minister) and penitent.\(^2\)

Although a given communication may be privileged, the question as to who may assert the privilege often arises. The answer is loosely stated that the privilege belongs to the communicant\(^3\) but that rule cannot control all situations in which the question is met.

The issue is frequently confused by the power to waive the privilege which belongs to the person for whose benefit the privilege is permitted.\(^4\) The power of waiver is so much a part of the privilege that it must, of necessity, be considered in any discussion of the right to assert the privilege.

In the case of a communication between attorney and client it is sometimes said that the privilege may be urged by the attorney or his client.\(^5\) But if the client substantially divulges the confidential information the attorney will not be permitted to assert the privilege and may be compelled to testify.\(^6\) In such a case the client is said to have waived the privilege.\(^7\)

Likewise, in the case of physician and patient the privilege

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\(^1\) Wigmore, Evidence (3d ed. 1940) Sec. 2285.
\(^2\) Ibid.
\(^4\) Cabe v. State, 182 Ark. 49, 30 S. W. (2d) 855 (1930); Harvey v. Silber et al., 300 Mich. 510, 2 N. W. (2d) 483 (1942); Wells v. City of Jefferson et al., 345 Mo. 239, 132 S. W. (2d) 1006 (1939); In re Fisher, 51 F. (2d) 424 (S. D. N. Y. 1931).
\(^5\) Baldwin v. Commissioner of Internal Revenue, 125 F. (2d) 312 (1942); See State v. Dunkley, 85 Utah 546, 39 P. (2d) 1097 (1935).
\(^7\) Ibid.
belongs to the patient. If the patient sees fit to waive the privilege it cannot be asserted by the physician. However, in the case of physician and patient, as well as that of attorney and client, the rule that the privilege belongs to the communicant fails. In both instances the communications of attorney to client or physician to patient on the matter confided to them, by client or patient, are given the same protection that communications from client or patient to attorney or physician are given. They are, in fact, treated as part of the same communications and may be waived by the client or patient.

If the privilege is waived by the person for whose benefit it is created it ceases to exist and can be asserted by no other person. It may, to that extent, be said that the privilege belongs to the person intended to be protected. But, in the absence of a waiver, it does not follow that no other person may assert the privilege. At the death of the person holding the privilege it passes to his representatives and may be waived or asserted by them. In this case, however, the privilege is not available to persons antagonistic to the interests of the deceased.

Communications between husband and wife raise a peculiar problem. In the case of attorney and client or physician and patient a relationship is fostered for the protection of an individual. That does not seem to be true of communications

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9 Wells v. City of Jefferson et al., 345 Mo. 239, 132 S. W. (2d) 1006 (1939).

10 8 WIGMORE, EVIDENCE (3d ed. 1940) Sec. 2320.


13 Fitzgerald v. Metropolitan Life Insurance Co., 149 S. W. (2d) 389 (Mo. 1941). ("Representative" as used by the courts in this connection does not carry the technical meaning of that word. It includes not only the personal representative of the deceased but also his heirs, or even the beneficiary under the life insurance policy).


between husband and wife. Here it is the very relationship itself that is being protected. Who then should be allowed to control the privilege? May one spouse assert the privilege even though the other waives, or offers to waive, the privilege? May one waive in the absence of the other? Numerous results appear to have been obtained. Some jurisdictions hold that the privilege belongs to the communicant and can be asserted by no other person.\footnote{Sommerfeld v. Griffith et al., 173 Minn. 51, 216 N. W. 311 (1927); Coles v. Harsch, 129 Ore. 11, 276 Pac. 248 (1929).} Other jurisdictions permit either spouse to waive the privilege,\footnote{People v. Rosa et al., 268 Mich. 462, 256 N. W. 483 (1934).} while some courts look at the communications as excluded rather than privileged.\footnote{Sommerfeld v. Griffith et al., 173 Minn. 51, 216 N. W. 311 (1927); Coles v. Harsch, 129 Ore. 11, 276 Pac. 248 (1929).}

The privilege for communications between priest and penitent is purely statutory and has been accepted in only a limited number of jurisdictions.\footnote{WIGMORE, EVIDENCE (3d ed. 1940) Sec. 2285.}

The most difficult problem arises when the person in whose favor the privilege operates is not a party to the action. It may arise in either of two cases:

1. The owner of the privilege is present at the trial, but not a party, and asserts the privilege; or

2. The owner of the privilege is not present, and a party to the action attempts to assert the privilege.

In the first case the privilege is protected and the privileged information will be excluded from the evidence.\footnote{WIGMORE, EVIDENCE (3d ed. 1940) Sec. 2334.} This is true whether the owner of the privilege or the person to whom he communicated the information is on the stand.\footnote{WIGMORE, EVIDENCE (3d ed. 1940) Sec. 2285.}

In the second case there is a split in the authorities. Those jurisdictions holding that the privilege can be asserted only by the owner of the privilege\footnote{Southern Indiana Gas & Electric Co. v. Vaughn, 88 Ind. App. 561, 163 N. E. 107 (1928); see Murray v. Physical Culture Hotel, Inc., 17 N. Y. S. (2d) 862 (1939).} would be inconsistent if they permitted the assertion of the privilege to prevail here. Some jurisdictions hold that the privilege should be upheld but that the erroneous admission of the privileged testimony is not ground for reversal.\footnote{In re Turner, 51 F. Supp. 740 (W. D. Ky. 1943).} Others hold that the party or the witness may as-
sert the privilege and that it is reversible error to admit the privileged information in evidence.\textsuperscript{25}

It seems that so long as the benefit which society derives from a given relationship warrants the encouragement it receives from privileged communications the preferable rule would be to reverse the decision when the privilege is erroneously denied even though the privilege did not belong to the party asserting it. While it is true that the owner of the privilege will not have his wrong corrected by the reversal, such a stand does, however, provide an effective brake for those who would destroy the value of the privilege by introducing the confidential information. To recognize the privilege is to concede that it is worthy of protection.

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\textsuperscript{25} Hines et al. v. Howell, 15 S. W. (2d) 1060 (Tex. 1929).