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State v. White

July 2001

§ 835. Confidentiality of communications with social workers; exceptions

No licensed social worker may disclose any information acquired from persons consulting the social worker in a professional capacity except:

(a) with the written consent of the person or, in the case of death or disability, of the person's own personal representative, other person authorized to sue, or the beneficiary of an insurance policy on the person's life, health, or physical condition;

(b) that a social worker shall not be required to treat as confidential a communication that reveals the contemplation or commission of a crime or a harmful act;

(c) that communications and records may be disclosed when a social worker determines that there is a substantial risk of imminent physical injury by the person to the person or others, and the person refuses explicitly to voluntarily accept further appropriate treatment;

(d) when the person waives the privilege by bringing charges against the social worker; or

(e) in any child custody case in which, upon a hearing in chambers, the judge, in the exercise of the judge's discretion, determines that the social worker has evidence bearing significantly on the person's ability to provide suitable custody and that it is more important to the welfare of the child that the information be disclosed than that the relationship between the person and social worker be protected.

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§ 952. Confidential communication between client and lawyer

As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and the client's lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted. "Confidential communication between client and

lawyer" also includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

§ 953. Lawyer-client privilege

The client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer. A lawyer cannot, without the consent of the client, be examined as to any communication made by the client to the lawyer, or the lawyer's advice given in the course of professional employment; nor can a lawyer's secretary, stenographer, or clerk be examined, without the consent of the lawyer, concerning any fact the knowledge of which has been acquired in such capacity.

§ 954. When lawyer required to claim privilege

The lawyer who received or made a communication subject to the privilege under this article shall claim the privilege whenever the communication is sought to be disclosed.

§ 955. Crime or fraud

There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.

§ 956. Disclosure necessary to prevent criminal act likely to result in death or bodily harm

There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

State v. Guthrie

Franklin Supreme Court (1988)

The defendant is charged with murder in the second degree. At a pretrial hearing, the State moved to compel a licensed social worker to disclose communications made to her in her professional capacity by the defendant and other persons. The social worker asserted a social worker's privilege pursuant to Franklin Evidence Code § 835. The judge ordered the social worker to disclose "all of the alleged communications" to the judge and to the prosecutor at a pretrial *in camera* hearing. The order also provided that, following this disclosure, the prosecutor was to "inform the judge as to the necessity for the disclosure of any or all of the communications in the case to be tried; that thereafter the judge shall rule as to which of the communications he shall order the social worker to disclose at the trial." The judge subsequently amended his order to permit the defense attorney to be present at the *in camera* hearing. We granted the social worker's application for direct appellate review.

The social worker's brief additionally raises the issue of whether the *in camera* hearing violated Evidence Code § 835.

Betsy Diznoff, the social worker involved in this case, is employed by a hospital. The victim, a seven-month-old child, was brought to the hospital on July 9, 1981. She died one week later from her injuries. Shortly after the child was admitted to the hospital, Diznoff was assigned to treat the victim's family. She interviewed the victim's mother as well as the defendant, who was the mother's boyfriend. At the pretrial hearing, the State moved that Diznoff be required to disclose various communications the defendant made to her in which he admitted hitting the child. The State also seeks certain statements made by the defendant allegedly denying any wrongdoing.

Evidence Code § 835 prohibits disclosure by a licensed social worker of information acquired from persons consulting the social worker in a professional capacity. This case is concerned with the exception embodied in subsection (b), which states that "a social worker shall not be required to treat as confidential a communication that reveals the contemplation or commission of a crime or a harmful act."

1. *Statutory purpose.* The privilege established by § 835 is a legislative recognition that the confidentiality of a person's communications to a social worker is a necessity for successful social work intervention. Whether the protected relationship involves physicians, psychologists, or certified social workers, all share the common purpose of encouraging patients or clients to disclose fully the nature and details of their illnesses or their emotions without fear of later revelation by one in whom they placed their trust and confidence. The purpose of enacting a social worker-client privilege is to prevent the chilling effect that routine disclosures may have in preventing those in need of help from seeking that help.

The Legislature has determined that, while the preservation of the confidential relationship is an important objective, under certain circumstances this goal must give way in favor of other societal interests. Therefore, the Legislature has carved out exceptions to the statutory privilege.

2. *Scope of exception.* The pertinent language of the exception embodied in subsection (b) provides that a social worker shall not be required to treat as confidential a communication that reveals the contemplation or commission of a crime or a harmful act.

The social worker has testified before the grand jury concerning statements made by the defendant that fall into this category and is prepared to do so at trial. The social worker testified that, during her interview with the defendant, he admitted that he hit the victim on the night she went to the hospital and also had hit her in the past. It is clear that these statements reveal the commission of a crime or harmful act and are not privileged. The State contends that exception (b) not only encompasses admissions of guilt but also extends to communications that are evidence of consciousness of guilt, such as denials or false statements, and in addition any information that has any bearing upon criminal activity. Diznoff contends that the exception must be construed much more narrowly and that the State's interpretation of the exception would effectively nullify the statute.

The intended scope of the phrase "communication that reveals the contemplation or commission of a crime or a harmful act" is not readily ascertainable from the language used. While it is clear that admissions of a crime or harmful act are intended to be covered by this phrase, it is not clear whether the additional communications that the State seeks are intended to fall within the statutory exception.

The State's reading of subsection (b) is too broad. It would require social workers to disclose all of the information they receive in a professional capacity whenever a crime is involved. It would negate the privilege under this circumstance. We think that the Legislature evidenced two aims by the enactment of the statute and exception (b). The first objective is to encourage individuals in need of help from a social worker to seek that help by ensuring the confidentiality of their communications. The second objective, embodied in subsection (b), is to serve the interests of society in prosecuting those who are guilty of criminal conduct. In enacting subsection (b), the Legislature attempted to balance these two objectives. Exception (b) should be narrowly construed to require disclosure by a social worker of subpoenaed communications that relate directly to the fact or immediate circumstances of a crime. The exception does not extend to all information that might be relevant in the prosecution of a person for a crime. The exception is not intended to allow the State a "fishing expedition" or a convenient discovery device.

In the case before us, the court may compel the social worker to reveal the defendant's

admissions of criminal activity. However, the defendant's alleged denials of wrongdoing and false statements to the social worker do not reveal the commission of a crime. While such denials may show a "consciousness of guilt," they do not "reveal" the commission of a crime.

3. *In camera hearing.* The statute does not set forth any procedure by which the trial judge can determine whether communications fall within exception (b). The *in camera* hearing is the proper procedure to allow the judge to determine whether or not the privilege applies to communications made to the social worker.

The State argues that the parties should exchange briefs and that the prosecutor and defense counsel should be present at the *in camera* hearing because the judge may require their assistance in determining the relevance of the communications. The defendant argues that the prosecutor should not receive the defendant's brief in support of his motion nor be present because the disclosure in the presence of the prosecutor is a violation of the client's confidentiality. He argues also that even if the judge rules that certain testimony may not be used at trial, the prosecutor may indirectly use such evidence against the defendant.

We agree that disclosure of the confidential information to the prosecutor or the defense attorney in the *in camera* hearing would frustrate the purpose of the statute unless it falls within one of the statutory exceptions. In most cases, the judge will be able to make the decision whether or not the information is privileged without the parties' assistance. However, if questions arise, the judge may require the assistance of the parties, but must do so without revealing the content of the confidential communications.

Remanded for further proceedings.

Shea Cargo Company v. Wilson

Franklin Court of Appeal (1951)

James Wilson brought an action for personal injuries against Shea Cargo Company. He alleged that he suffered a brain concussion and nervous shock. At the request of Wilson's attorneys, a physician specializing in nervous and mental diseases, Dr. Joseph Chavkin, twice gave Wilson a neurological and psychiatric examination. In his deposition, Dr. Chavkin testified that there was no physician-patient relationship between him and Wilson; that he did not advise or treat Wilson; that the sole purpose of the examination was to aid Wilson's attorneys in the preparation of a lawsuit for Wilson; and that he was the agent of the attorneys. He refused to answer questions regarding Wilson's condition on the ground that the information sought was privileged under Franklin Evidence Code § 952, et seq., Lawyer-Client Privilege. Wilson's counsel also claimed that the information was privileged.

The Superior Court granted Wilson's motion for a protective order and now defendant filed this interlocutory appeal.

The Physician-Patient Privilege

Dr. Chavkin testified that "there was no physician-patient relationship in the sense that I was examining him for the purpose of giving him advice or treatment . . . nor did I at any time give him any such advice or treatment; so that there wasn't that usual physician-patient relationship." He also filed an affidavit in which he averred that he "has not at any time prescribed for or treated the said James Wilson as a patient or otherwise." Under such circumstances there is no physician-patient privilege under Evidence Code § 920.[1] That privilege cannot be invoked when no treatment is contemplated or given. The confidence that is protected is only that which is given to a professional physician during a consultation with a view to curative treatment; for it is that relation only which the law desires to facilitate.

Even if there had been a physician-patient relationship, the privilege would be waived under § 920 by Wilson's bringing the action for personal injuries.

The purpose of the privilege is to preclude the humiliation of the patient that might follow disclosure of his ailments. When the patient himself discloses those ailments by bringing an action in which they are in issue, there is no longer any reason for the privilege.

The Lawyer-Client Privilege

[1] § 920 says, *"Physician and patient.* A licensed physician cannot, without the consent of his patient, be examined in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient;... provided further, that where any person brings an action to recover damages for personal injuries, such action shall be deemed to constitute a consent by the person bringing such action that any physician who has prescribed for or treated said person and whose testimony is material in said action shall testify...."

Although Dr. Chavkin can invoke no privilege of his own and there was no physician- patient privilege in this case, we have concluded that Dr. Chavkin was an intermediate agent for communication between Wilson and his lawyers and that Wilson may therefore invoke the lawyer-client privilege under § 953 of the Evidence Code.[2] This privilege is strictly construed, since it suppresses relevant facts that may be necessary for a just decision. It cannot be invoked unless the client intended the communication to be confidential, and only communications made to a lawyer in the course of professional employment are privileged.

The privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence. Adequate legal representation in the ascertainment and enforcement of rights or the prosecution or defense of litigation compels a full disclosure of the facts by the client to his lawyer. Unless the client makes known to the lawyer all the facts, the advice that follows will be useless, if not misleading, and much useless litigation may result. Given the privilege, a client can disclose unfavorable facts without fear that the lawyer may be forced to reveal the information confided to the lawyer. The absence of the privilege would convert the lawyer into a mere informer for the benefit of the opponent.

Petitioner contends that under the express terms of § 953 only the lawyer and the lawyer's secretary, stenographer, or clerk cannot be examined and that, since Dr. Chavkin was not engaged in any of these capacities, he cannot withhold the information requested.

The statute specifically extends the client's privilege to preclude examination of the lawyer's secretary, stenographer, or clerk regarding communications between lawyer and client to rule out the possibility of their coming within the general rule that the privilege does not preclude the examination of a third person who overhears communications between a client and the client's lawyer. It does not follow, however, that intermediate agents of the lawyer and client may be freely examined. Had Wilson himself described his condition to his lawyers there could be no doubt that the communication would be privileged. It is no less the client's communication to the lawyer when it is given by the client to an agent for transmission to the lawyer. A communication, then, by any form of agency employed or set in motion either by the client or the lawyer is within the privilege.

This, of course, includes communications through an interpreter, through a messenger or any other agent of transmission, as well as communications originating with the client's agent and made to the lawyer. It follows, too, that the communications of the lawyer's agent to the lawyer are within the

[2] § 953 reads, *Lawyer-client privilege* "...A lawyer cannot, without the consent of the client, be examined as to any communication made by the client to the lawyer or the lawyer's advice given in the course of professional employment; nor can a lawyer's secretary, stenographer, or clerk be examined, without the consent of the lawyer, concerning any fact the knowledge of which has been acquired in such capacity."

privilege because the lawyer's agent is also the client's sub-agent and is acting as such for the client. Thus, when communication by a client to the client's lawyer regarding the client's physical or mental condition requires the assistance of a physician to interpret the client's condition to the lawyer, the client may submit to an examination by the physician without fear that the latter will be compelled to reveal the information disclosed.

Affirmed.