NOTES: EVIDENCE

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EVIDENCE—LEGAL ETHICS—FEE ARRANGEMENTS BETWEEN ATTORNEY AND CLIENT NOT PRIVILEGED.—The Supreme Court of Minnesota, affirming the judgment of the trial court, has held that fee arrangements made between attorney and client are collateral to the relationship and not a part of any confidential communication to which any claim of privilege may attach.[1]

During the trial of an action for an absolute divorce and for the custody of minor children, in which defendant wife filed a cross complaint, questions were put to her concerning the fee arrangements she had with her attorneys. The questioning revealed that the defendant had employed one of her attorneys on a contingent fee basis, whereby he was to receive fifteen per cent of any and all alimony and property awarded to her, and that the other attorneys appearing in her behalf were employed by the first attorney as his assistants.

Objections to the questions on the ground of privilege were overruled by the trial court. The court observed that not only was the fee arrangement not privileged, but testimony with respect thereto was both relevant and material to a proper determination of the issues.

It is the function of a court in a matrimonial case to make a proper support award, and to make an allowance for attorney's fees. The court must consider the wife's ability to live in the manner to which she has become accustomed. It follows that the court may deem it necessary to consider what amount the wife has agreed to pay for legal services to prevent alimony awards from being rendered nugatory in substantial part. The trial court noted that this was strikingly true in the case of a contingent fee contract dependent upon the amount of alimony and support money awarded to the wife, because a contingent fee is deducted from the amount awarded to her and therefore tends to frustrate and defeat the court's effort to make accurate and suitable provision for the wife.

Testimony as to the fee arrangement was further regarded by the court as relevant and material from the viewpoint of public policy. In a divorce suit, the state occupies the position of a third party charged with the duty of protecting the public welfare. The continuance of the marriage relation is deemed to be in the interest of the public welfare, and no obstacle should be placed in the way of reconciliation when differences arise between parties to a marriage. "Consequently," the court stated, "it is not fitting that it should be for the interest of an attorney that there should be no reconciliation. If compensation for an attorney's services is contingent on the securing of a divorce, or if the amount paid for his services is proportional to the amount of alimony to be received, the attorney is in such a position that his interest would be against a reconciliation of the parties."

The court pointed out that it had earlier held[2] that a letter requesting an attorney to appear in an action on behalf of the writer was not a privileged communication, as only those communications were privileged which were made because of, and in the course of, the confidential relation of client and attorney.

In another case in the same court, it had been held that it was not an error for the court to receive in evidence letters from a defendant to his attorney showing a request to and employment of the attorney to foreclose certain chattel mortgages.[3]

In upholding the trial court's ruling in the instant case, the Minnesota Supreme Court cited *Strickland* v. *Capital City Mills*,[4] in which the Supreme Court of South

[1] Baskerville v. Baskerville, —— Minn. ——, 75 N. W. 2d 762 (1956).
[2] Eickman & Meyer v. Troll, 29 Minn. 124, 12 N. W. 347 (1882).
[3] Henderson v. Eckern, 115 Minn. 410, 132 N. W. 715 (1911).
[4] 74 S. C. 16, 21, 54 S. E. 220, 222 (1906).

Carolina had held that an agreement between an attorney and his client assigning to the attorney an interest in the judgment in payment for services was not a privileged communication. In that case the court had observed that information relating to such a fee arrangement was not in the nature of a revelation of any secret on the part of the client, but was rather knowledge that the attorney derived from his own act in creating the fact sought to be disclosed.

". . . The fee contract, whether regarded as made preliminary to the relation of attorney and client, or at the close of such relation in compensation for services rendered, or whether made during the existence of such relation, is really collateral to the professional relation, is not strictly a part of it, and has no bearing upon the merits of the matter upon which professional aid was invoked."[5]

The basic reason behind the attorney-client privilege is that it promotes freedom of consultation of legal advisers by clients and removes apprehension of compulsory disclosures by such advisers.[6] It encourages the client to set out fully the circumstances of his case to his attorney without fear that either will be compelled to testify as to such communications. The holding in the case at bar, that fee arrangements between attorney and client are not privileged, is not inconsistent with the basic reason behind the privilege.

In New York, statements and advice of an attorney, as well as the client's communications to his attorney, are privileged. Such privileged information may be conveyed by a client to his attorney orally, in writing, or by papers of the client which he has shown to his attorney. It does not necessarily follow that merely because the relationship of attorney and client exists, every communication made between them is privileged. To be within the rule, the communication must be of a professional nature as well as confidential.[7] It is, of course, within the province of the court to determine whether or not a particular communication is privileged.[8]

The precise point as to the privileged nature of fee arrangements, as it was in issue in the instant Minnesota case, does not appear to have yet been decided in New York. The New York courts have held, however, that agreements as to counsel fees based upon the amount of alimony obtained are contrary to public policy. One court has stated the general view as follows: "An agreement between client and counsel to share the alimony money to be obtained from a husband has been declared by the courts of this state to be against public policy because of the tendency of such an agreement to deprive the wife of the provision for maintenance which the court has been careful to award to her. Furthermore, such agreements tend to encourage the continuance of litigation and to prevent the reconciliation of the parties."[9]

EVIDENCE—FEDERAL INJUNCTION PROHIBITING FEDERAL OFFICER FROM TESTIFYING IN STATE COURT WHERE EVIDENCE WAS INADMISSIBLE IN FEDERAL COURT UPHELD 5-4 BY SUPREME COURT.—In reversing federal court decisions below, the Supreme Court in a recent five-to-four decision held that a United States District Court may enjoin a federal officer from testifying in a state court as to information which he had obtained

[5] 58 AM. JUR., *Witnesses* § 510; MCCORMICK, EVIDENCE § 94 (St. Paul 1948), see also In re Martin, 141 Ohio St. 87, 47 N. E. 2d 388 (1943).

[6] WIGMORE, EVIDENCE § 2291 (3d ed., Boston 1942); for a broad statement of the policy concerning the privilege, see Hatton v. Robinson, 14 Pick. 416, 422 (Mass. 1833).

[7] RICHARDSON, EVIDENCE §§ 481, 485, 487 (7th ed., Brooklyn 1948).

[8] People v. Hess, 8 App. Div. 143, 40 N. Y. Supp. 486 (3rd Dept. 1896).

[9] Dougherty v. Burger, 234 N. Y. Supp. 274, 133 Misc. 807 (Sup. Ct. 1929).

under a federal search warrant, void because of expiration, notwithstanding the fact that the state in which the trial was to be held allows the introduction of illegally obtained evidence.[1]

Rea was charged in a federal indictment with unlawfully acquiring marihuana in violation of § 2593 of Title 26, United States Code. The case against him was predicated on the testimony of a federal narcotics agent, who had obtained the evidence as a result of a search, pursuant to a warrant which had expired. After entering a plea of not guilty, Rea moved that the search warrant and all the property seized pursuant thereto be suppressed as evidence against him in any criminal proceeding, including that action.[2] The trial court granted the motion, with the result that the federal District Attorney, deprived of the evidence, consented to a dismissal of the action.

Soon after, the federal agent swore to a criminal complaint in a New Mexico state court, which charged Rea with possession of marihuana, in violation of a New Mexico statute. Upon being arrested, Rea moved in the federal court to enjoin the federal agent from testifying in the state court action with respect to the narcotics obtained by him as a result of his illegal search. The district court entered an order denying the relief sought, stating that suppression of evidence under Rule 41 of the Federal Rules of Criminal Procedure and the fourth amendment to the Constitution is properly ordered only in proceedings in United States courts, and therefore does not apply to proceedings in state courts. Rea appealed, and the Court of Appeals for the Tenth Circuit affirmed, agreeing with the lower court. Certiorari was granted.[3]

In reversing, the majority of the Supreme Court expressly stated that its decision was not based on rights defined by the fourth and fourteenth amendments, but rather on the Federal Government's policies with regard to the requirements it imposes on its agents in their relationships with the general public. The Court disavowed any intention of imposing federal rules of evidence and procedure on the state court, but maintained that evidence which is unacceptable in a federal court must be considered closed to use by federal agents. The injunction sought was not intended to deprive the state court of evidence, but rather to suppress contraband information and its unlawful use by a federal officer, the jurisdiction over the evidence having originally attached in the first federal prosecution.

In delivering the opinion, Mr. Justice Douglas referred to the several constitutional questions which might possibly arise from such a situation, but held that the case had to be determined on other grounds. Many states, including New York, allow the introduction of illegally obtained evidence. In a leading case on this point, Judge Cardozo went forward to assert that the fourteenth amendment does not confer immunity from the subsequent use of such evidence.[4]

The federal courts have traditionally taken another view. In *Weeks* v. *United States*,[5] the defendant was arrested by a state police officer without a warrant, and other state officers searched his room, taking possession of papers and property found there. These were turned over to a United States Marshal. Later, the Marshal, looklooking for further evidence, searched the defendant's room and carried away some papers found in a drawer. None of the officers involved had a search warrant. It was held that the letters taken by the Marshal while he was acting for the United States, without a search warrant, could not be used against the defendant because it would be in violation of his constitutional rights, under the fourth amendment.

[1] Rea v. United States, 350 U. S. 214, 76 S. Ct. 292, 99 L. Ed. 748 (1955).
[2] FED. R. CRIM. PROC. 41(c).
[3] 28 U. S. C. § 2463 (1952).
[4] People v. Defore, 242 N. Y. 13, 150 N. E. 585 (1926).
[5] 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914).

The Court, in the *Weeks* case, did not pass on the state court's right to receive the evidence. This issue was decided later in *Wolf* v. *Colorado*,[6] where it was held that a state court could admit illegal evidence. Applying that decision to the instant case, New Mexico would have been allowed to use the evidence in its prosecution of Rea, so long as the federal agent was not involved.

Cases subsequently arose in which the courts seemed to extend this rule. In *Burdeau* v. *McDowell*[7] it was held that evidence secured by private persons and given to federal authorities would be admissible in a federal court. Later, state officers who furnished federal officers with illegally seized evidence were classified as "private citizens" under Federal Rules, although if in making such a search and seizure the state officers were acting solely on behalf of the United States, such evidence was held inadmissible in the Federal Courts.[8]

It is interesting to speculate as to what might happen if, on the facts in the instant case, a federal officer on the witness stand in the state court should invoke the federal injunction as the reason for not answering questions, and the state court compelled him, under threat of contempt, to give testimony. To say the least, the federal agent would find himself in a legally uncomfortable position. Moreover, because the injunction is directed toward the person, and not toward the state court, a conviction based on the officer's testimony would have to be upheld.

The majority of the Supreme Court, however, did not allow academic pursuit of such possible ramifications to affect what the court viewed as the only logical conclusion under existing law. The property seized was contraband which Congress has made "subject only to the orders and decrees of the Courts of the United States."[9] Consequently, the court felt bound to follow the rule established by the case of *McNabb* v. *United States*.[10] In that case, federal officers, by not allowing persons arrested to appear before a United States Commissioner within a reasonable time after arrest, and by questioning them intemperately, violated the Federal Rules of Criminal Procedure in procuring a confession. The circumstances under which the incriminating statements were obtained showed such a flagrant disregard for the acts of Congress in establishing such rules that the evidence thus obtained was held inadmissible in a criminal prosecution in a federal court, and convictions resting upon such evidence had to be set aside.

The four-justice minority in the instant case, joining in a vigorous dissent by Mr. Justice Harlan, denied the Court's authority to govern state and federal relationships in the area of law enforcement if, as in this case, the Federal rule is by any method imposed on state courts. The ends did not justify the means. The minority did not deny the power of the court to issue such a decree, but questioned the wisdom of such a decision. "The court also had the discretion to withhold equitable relief when, on the balance, the power should not be exercised."[11] It was observed that the State's case against Rea appeared to depend wholly upon the evidence in question, and therefore the injunction operated quite effectively to impose the Rules of Federal Procedure on a state court. This, it was felt, should not be allowed either in theory or in practice.

The dissent also cited the *McNabb* case, but viewed the instant case as not having

[6] Wolf v. Colorado, 338 U. S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1948).
[7] 256 U. S. 465, 41 S. Ct. 574, 65 L. Ed. 1048 (1921).
[8] Gambino v. United States, 275 U. S. 310, 48 S. Ct. 137, 72 L. Ed. 293 (1927).
[9] See note 3, *supra*.
[10] 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819 (1943).
[11] Stefanelli v. Minard, 342 U. S. 117, 72 S. Ct. 118, 96 L. Ed. 138 (1951).

been brought within the rule as defined in that case merely because the evidence seized was under an invalid court process. The question was posed as to what the court's decision would have been had there been no search warrant issued at all?

The sharp and close cleavage in the Supreme Court on this point, emphasizes the powers of the federal court to restrict use of evidence obtained under its process, despite the side effects which such restrictions have on state court rules of evidence.