

# Attorney and Client--Privileged Communication-- Recorded Conversation Held Not Privileged (Lanza v. New York State Joint Legis. Comm., 3 N.Y.2d 92 (1957))

St. John's Law Review

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### Recommended Citation

St. John's Law Review (1957) "Attorney and Client--Privileged Communication--Recorded Conversation Held Not Privileged (Lanza v. New York State Joint Legis. Comm., 3 N.Y.2d 92 (1957))," *St. John's Law Review*: Vol. 32 : No. 1 , Article 12.  
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol32/iss1/12>

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Cases in this latter area present no problem as to reviewability of the final orders of the full boards or commissions, such orders being subject to review in Article 78 proceedings.<sup>12</sup> However, a definite problem exists where an intermediary is given power to either dismiss petitions, or forward them for full hearings. A question naturally arises as to the finality (for purposes of Section 298) of such a dismissal order by this intermediary, insofar as *final* orders have been deemed the only ones subject to judicial review.

The decision in the instant case must turn on whether the dismissal of the petition as affirmed by the commission chairman was a final determination<sup>13</sup> by the Commission for the purposes of Section 298. Petitioner filed his verified complaint pursuant to Section 297 with the *Commission* and not with an individual commissioner. Thus it would seem any determination given him is in effect a determination of the Commission, despite the fact that an individual commissioner personally dismissed the complaint by letter. Petitioner pursued all the remedies available to him under the internal procedures adopted by the Commission.<sup>14</sup> As far as the agency was concerned, it terminated the matter. Nevertheless, it has been held, that absent express legislative prohibition, there is inherent power in the courts to review the exercise of discretion or the abuse thereof by an administrative agency performing a quasi-judicial function.<sup>15</sup> Under the strict construction of the Court, it would seem that the action of a single commissioner, regardless of how arbitrarily rendered, would not be subject to appeal, since it would not be a final order.



ATTORNEY AND CLIENT — PRIVILEGED COMMUNICATION — RECORDED CONVERSATION HELD NOT PRIVILEGED. — An action was brought to restrain a New York Legislative Committee from divulging publicly the contents of a secretly recorded, private conversation between an attorney and his client. The plaintiffs claim that under

<sup>12</sup> N.Y. CIV. PRAC. ACT § 1285(3) provides that review is unavailable of those determinations which do not finally determine the rights of the parties.

<sup>13</sup> Such dismissal as affirmed by the commission chairman is, as to the petitioner, a final determination within the spirit of Article 78 of the New York Civil Practice Act though not, as the Court ruled, within the strict construction of Section 298.

<sup>14</sup> Rules Governing Practice and Procedure before the State Commission Against Discrimination, 4 N.Y. CONSOLIDATED LAWS SERVICE (Supp. 1957, p. 60).

<sup>15</sup> See, e.g., *Marburg v. Cole*, 286 N.Y. 202, 36 N.E.2d 113 (1941); *Markowitz v. Moss*, 29 N.Y.S.2d 709 (Sup. Ct. 1941).

Section 353 of the New York Civil Practice Act this consultation was privileged and therefore could not be disclosed. The Court of Appeals held that Section 353 is applicable only when the attorney or client is called to testify as a witness and not when disclosure is effected through an outside agency. *Lanza v. New York State Joint Legis. Comm.*, 3 N.Y.2d 92, 143 N.E.2d 772 (1957).

It is a basic rule of evidence that evidence of whatever facts are logically relevant to the issue is legally admissible and must be brought forth,<sup>1</sup> except as it may be excluded by some specific rule or principle of law.<sup>2</sup> One such exception is the ancient common-law rule<sup>3</sup> which forbids an attorney from disclosing confidential communications made to him by his client.<sup>4</sup> Section 353 of the Civil Practice Act<sup>5</sup> is a codification of that common-law rule.<sup>6</sup>

The privilege of non-disclosure is limited "to any examination of a person as a witness unless the provisions thereof are expressly waived upon the trial or examination by the . . . client."<sup>7</sup> In *Matter of Cunnion*,<sup>8</sup> the testimony of an attorney was properly rejected pursuant to Section 835 of the Code of Civil Procedure (predecessor of

<sup>1</sup> *Bird v. United States*, 180 U.S. 350 (1901); *Torrey v. Congress Square Hotel Co.*, 145 Me. 234, 75 A.2d 451 (1950); *Miller v. Trans Oil Co.*, 18 N.J. 407, 113 A.2d 777 (1955).

<sup>2</sup> *E.g.*, N.Y. CIV. PRAC. ACT §§ 349 (husband-wife), 351 (clergyman-penitent), 352 (patient-physician); *In re Ryman*, 139 Pa. Super. 212, 11 A.2d 677 (1940) (hearsay rule).

<sup>3</sup> See 8 WIGMORE, EVIDENCE § 2290 (3d ed. 1940) for a history of the privilege. See also Opinion 150, OPINIONS OF THE A.B.A. COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 313, 315 (1956), which states that the privilege was first applied in *Berd v. Lovelace*, Cary (Eng.) 88 (1577); *Louisell, The Psychologist in Today's Legal World, Part II*, 41 MINN. L. REV. 731, 737-38 (1957).

<sup>4</sup> See *Bank of Utica v. Mersereau*, 3 Barb. Ch. (N.Y.) 528, 596 (1848); RICHARDSON, EVIDENCE § 426 (8th ed. 1955); 8 WIGMORE, EVIDENCE § 2290 (3d ed. 1940); *Radin, The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487 (1928). The foundation for the rule is the "orderly administration of justice by insuring frank revelation by the client to the attorney without fear of a forced disclosure; in other words, to promote freedom of consultation." *People ex rel. Vogelstein v. Warden of County Jail*, 150 Misc. 714, 717, 270 N.Y. Supp. 362, 367 (Sup. Ct.), *aff'd without opinion*, 242 App. Div. 611, 271 N.Y. Supp. 1059 (1st Dep't 1934); *cf. Morgan, Suggested Remedy For Obstructions To Expert Testimony By Rules Of Evidence*, 10 U. CHI. L. REV. 285, 288-90 (1943).

<sup>5</sup> "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, nor shall any clerk, stenographer, or other person employed by such attorney or counselor be allowed to disclose any such communication or advice given thereon." N.Y. CIV. PRAC. ACT § 353. See 8 WIGMORE, EVIDENCE § 2292 n.2 (3d ed. 1940) for a compilation of states which have adopted similar statutes.

<sup>6</sup> *King v. Ashley*, 179 N.Y. 281, 72 N.E. 106 (1904) (per curiam); *Hurlburt v. Hurlburt*, 128 N.Y. 420, 28 N.E. 651 (1891); *Matter of Austin*, 42 N.Y. 516 (1886); RICHARDSON, EVIDENCE § 426 (8th ed. 1955).

<sup>7</sup> N.Y. CIV. PRAC. ACT § 354 (emphasis added).

<sup>8</sup> 201 N.Y. 123, 94 N.E. 648 (1911).

Section 354).<sup>9</sup> Similarly, the production of confidential medical records relating to the diagnosis and treatment of patients could not be required of a physician,<sup>10</sup> who is accorded the same statutory recognition as an attorney.<sup>11</sup>

Since the prohibition regarding a confidential communication is not directed against the testimony of a third person, there is no reason for excluding the testimony of such persons. The doctrine is well settled that a person who overhears a conversation between an attorney and his client, whether by design or accident, and with or without their knowledge, may testify as to what he has heard, although the communication may be, as between the parties themselves, one of a confidential nature.<sup>12</sup> In *Hurlburt v. Hurlburt*,<sup>13</sup> for example, it was held that the prohibition does not apply to a case where two or more persons consult an attorney for their mutual benefit in any litigation which may thereafter arise among them, but that it does apply in a litigation between them and strangers.<sup>14</sup> In *People v. Buchanan*,<sup>15</sup> the presence of a third party, who was not the agent of the attorney or client, completely destroyed the confidential nature of the communication.<sup>16</sup>

A federal court likewise recognized this third party rule where an accountant was present at a consultation between an attorney and his client.<sup>17</sup> The communication was not deemed privileged because his presence was not indispensable in order for the communiqué to be made to the attorney, in the sense that the presence of a counsel's secretary might be.<sup>18</sup>

If privileged communications are not protected from deliberate attempts to intercept them, the immunity conferred on them will be readily circumvented. A premium would be set upon theft, trickery or other artifice to gain knowledge of an attorney's communication to his client. It seems that the Court unnecessarily resorted to, and extended, the third party rule to include a concealed electric device. When Sections 353 and 354 of the Civil Practice Act are properly

<sup>9</sup> *Matter of Cunnion*, 201 N.Y. 123, 129, 94 N.E. 648, 650 (1911) (emphasis added).

<sup>10</sup> *New York City Council v. Goldwater*, 284 N.Y. 296, 31 N.E.2d 31 (1940). See also *Buffalo Loan, Trust and Safe Co. v. Knights Templar and Masonic Mut. Aid Ass'n*, 126 N.Y. 450, 27 N.E. 942 (1891).

<sup>11</sup> *New York City Council v. Goldwater*, *supra* note 10.

<sup>12</sup> See *Cary v. White*, 59 N.Y. 336 (1874); *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26 (1889); *Hoy v. Morris*, 79 Mass. (13 Gray) 519 (1859); *Clark v. State*, 159 Tex. 187, 261 S.W.2d 339 (1953); 8 WIGMORE, EVIDENCE § 2326 (3d ed. 1940) for rationale of the rule.

<sup>13</sup> 128 N.Y. 420, 28 N.E. 651 (1891).

<sup>14</sup> *Hurlburt v. Hurlburt*, 128 N.Y. 420, 28 N.E. 651 (1891).

<sup>15</sup> 145 N.Y. 1, 39 N.E. 846 (1895).

<sup>16</sup> *People v. Buchanan*, 145 N.Y. 1, 39 N.E. 846 (1895).

<sup>17</sup> *Himmelfarb v. United States*, 175 F.2d 924 (9th Cir.), *cert. denied*, 338 U.S. 860 (1949).

<sup>18</sup> *Ibid.* See also *Livezey v. United States*, 279 Fed. 496 (5th Cir.), *cert. denied*, 260 U.S. 721 (1922).

read conjointly, it appears that the instant case is not one of testimonial compulsion and should have been decided on that ground.

It is submitted that legislation should be enacted to bring the testimony of any witness disclosing a communication between a lawyer and his client within the sweep of the attorney-client privilege, if it came to the knowledge of such witness in a manner not reasonably to be anticipated by the client.



CITIZENS AND CITIZENSHIP — NATURALIZATION — EXEMPTION FROM MILITARY SERVICE OATH ON BASIS OF RELIGIOUS BELIEF UPHOLD.—An alien seeking naturalization petitioned to be exempted from taking the military service oath. He claimed to fulfill the statutory requirement of being opposed to service by reason of “religious training and belief.” Although it was found that his belief was not based on any “religious training,” the District Court granted the petition *holding* that petitioner need show only that his beliefs are in relation to a Supreme Being. *In re Hansen*, 148 F. Supp. 187 (D. Minn. 1957).

Before being admitted to citizenship, an alien is required by the Immigration and Nationality Act<sup>1</sup> to take an oath in open court. Petitioner seeks the conscientious objector exemption provided by the Act which would excuse him from swearing to perform military service and would require him to swear only “to perform work of national importance under civilian direction when required by law.”<sup>2</sup> Conscientious objection is now recognized under both the Universal Military Training and Service Act and the Immigration and Nationality Act.<sup>3</sup> The definition of a conscientious objector is the same in both: a person who by reason of “religious training and belief” is opposed to any type of service in the armed forces. Further, the term

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<sup>1</sup> Immigration and Nationality Act § 337(a), 66 STAT. 258, 8 U.S.C. § 1448(a) (1952).

<sup>2</sup> *Ibid.*

<sup>3</sup> Prior to 1946, conscientious objectors could not become naturalized citizens since it was held that the oath of allegiance required, as a prerequisite to naturalization, that petitioner promise to bear arms in defense of the United States. *United States v. Bland*, 283 U.S. 636 (1931); *United States v. Macintosh*, 283 U.S. 605 (1931); *United States v. Schwimmer*, 279 U.S. 644 (1929). At that time the oath read: “. . . that he will support and defend the Constitution and Laws of the United States against all enemies, foreign and domestic and bear true faith and allegiance to the same.” 34 STAT. 598 (1906). These cases were overruled by *United States v. Girouard*, 328 U.S. 61 (1946), which changed the accepted meaning of the oath so as to exclude the promise to bear arms in defense of this country. The act was amended in 1950 to read substantially as it does today. See note 1 *supra*.