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Familial Privilege in Minnesota

by Darwin S. Williams

Most people are familiar with the concept of the "marital privilege" as it relates to criminal proceedings, where a person cannot be compelled to testify against their spouse. Most people do not know that the marital privilege is not asserted by the testifying spouse, but by the spouse who may be adversely affected by the testimony. Most are also unaware that there is a similar privilege protecting communications between a parent and a minor child and that these privileges are not limited to the criminal courts; they can be asserted in civil cases as well.

Exclusionary rules and evidentiary privileges are generally disfavored by the law because they contravene the fundamental principal that "the public...has a right to every man's evidence." *See United States v. Bryan*, 339 U.S. 323, 331 (1950). The United States Supreme Court has warned that such rules and privileges must be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *See United States v. Nixon*, 418 U.S. 683, 710, (1974) (citing the dissent of Justice Frankfurter in *Elkins v. United States*, 364 U.S. 206, 234, (1960)).

Marital Privilege

Despite a general erosion of support for the marital privilege in other jurisdictions, Minnesota is recognized as one of the states that has steadfastly retained the privilege against adverse spousal testimony. *See State v. Gianakos*, 644 N.W.2d 409, 415 (Minn. 2002) (citing *Trammel v. United States*, 445 U.S. 40, 49 (1980)). Minnesota Statute § 595.02 subd. 1(a) (2008) sets out two distinct marital privileges: (1) the privilege to prevent a spouse from testifying at any time concerning confidential inter-spousal communications made during the marriage; and (2) the privilege to prevent a spouse from testifying against the other during the marriage. *See State v. Palubicki*, 700 N.W.2d 476, 483 (Minn. 2005). Minnesota Statute § 595.02 subd. 1(a) carves out certain logical and specific exceptions based primarily on the nature of the action involved, for instance, cases where one spouse is accused of committing a wrong against the other spouse (i.e. family law issues such as non-support or child neglect).

The "confidential inter-spousal communications" privilege protects against the disclosure of any private communications between spouses made during the marriage. This privilege is similar to the attorney-client privilege in that it is a protection of communications that are expected by society to be private and confidential. A legal spouse is seen by the law as a confidant, and the law protects confidential communications that occur during the marriage.

The "marital testimony privilege" permits a party to prevent any and all adverse testimony by the party's current legal spouse. This is the broader of the two privileges because it would include knowledge of any adverse information regarding the spouse, including communications that occurred prior to the marriage, as long as the couple is still married at the time the testimony is being sought. The marital testimony privilege has the effect of preventing all adverse testimony by a spouse without the privilege holder's consent. The privilege exists as long as the witness and party are legally married at the time of the testimony. *See* Minnesota Statute § 517.01 (2008); *Baker v. Baker*, 222 Minn. 169, 171, 23 N.W.2d 582, 583 (Minn. 1946). The subject matter of the proposed testimony is inconsequential as long as the party

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Comments or inquiries may be directed to Shannon Banaszewski.

Recorded Statements
by Jason A. Koch

Discoverability

In Minnesota, parties to a lawsuit may generally obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense of any party. Frequently, the issue arises as to whether a recorded statement taken by an insurance adjuster prior to commencement of a lawsuit may ultimately be discoverable.

The Minnesota Rules of Civil Procedure define a statement as "(1) A written statement signed or otherwise adopted or approved by the person making it, or (2) A stenographic, mechanical, electrical, or other recording, or a transcription thereof that is a substantial verbatim recital of an oral statement by the person making it and contemporaneously recorded." Minn. R. Civ. P. 26.02(d).

Minn. R. Civ. P. 26.02 provides that a party may obtain discovery of documents and tangible things, otherwise discoverable, and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative (including insurer) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. The Rule is clear that a party may obtain, without the required showing, a statement concerning the lawsuit which was previously made by that party. A party is also entitled, without the required showing, to obtain statements related to the lawsuit previously made by any non-party witness. Therefore, any time an insurer takes a recorded statement of a non-party witness or of the future plaintiff, those statements will be discoverable in a subsequent lawsuit.

Minn. Rule Civ. P. 26.02 does not allow discovery of a statement from an adverse party without first establishing that the party has substantial need and is unable to obtain the substantial equivalent of the materials by other means. *See Ossenfort v. Associated Milk Producers, Inc.*, 254 N.W.2d 672, 681 (Minn. 1977). At issue in *Ossenfort*, were statements made by a party. *Id.* The Court noted that if the statements were not protected by the attorney-client privilege, they would still not be discoverable unless the plaintiff made the required showing set forth in Minn. R. Civ. P. 26.02(d). In analyzing the issue, the Court noted "Federal Courts applying identical Rule 26(b) have held that 'mere surmise' that a statement might include impeachment material does not constitute substantial need." *Id.* The Court also noted that the requesting party ultimately served interrogatories on and deposed the party witness. *Id.* at 682. The Court further noted that the requesting party made no claim that the party witness was hostile or his memory faulty. *Id.* Absent a showing of substantial need and the inability to obtain the substantial equivalent, the Court held that the statements of the party were not discoverable.

Courts have made an interesting distinction when the party is a business, rather than an individual. Courts have held that statements of non-party witnesses who were employees of a party were discoverable. *See Wiggin v. Apple Valley Medical Clinic, Ltd.*, 459 N.W.2d 918, 920 (Minn. 1990). In *Wiggin*, the defendant was a medical clinic. The statement at issue was that of a doctor employed by the clinic. Despite the fact that plaintiff was seeking to impute the doctor's negligence to the clinic, the court held that the statement of the doctor was discoverable and noted that the corporate employee who was not a named party to the litigation was not a "party" within the meaning of Minn. R. Civ. P. 26.02. Similarly, in *Leer v. Chicago, Milwaukee, St. Paul and Pac. Ry. Co.*, 308 N.W.2d 305 (Minn. 1981), a plaintiff sued a railroad, in part, for negligence in executing a railroad car switching movement. The plaintiff did not bring an action against members of the switching crew, but sought to discover their statements pursuant to the Rule allowing discovery of non-party statements. *Id.* at 306. The court held the statements discoverable despite defendant's argument that the plaintiff sought to impute to the railroad the negligence of the witnesses and that the employee's could be named as parties at any time. *Id.* at 307.

Therefore, caution must be exercised when taking recorded statements of employees of an insured business. As was discussed above, recorded statements of employees have typically been held to be discoverable, while statements of the insured party are discoverable only upon making the required showing set forth in Minn. R. Civ. P. 26.02.

Use at Trial

Generally, an out of court statement is inadmissible hearsay. But the statement may be admitted if it is a non-hearsay statement against interest or subject to an exception to the hearsay rule. Even if not admissible to prove the fact of the matter asserted, a statement may be used at trial for the limited purpose of impeaching a witness if he/she gives trial testimony which is inconsistent with his/her previous statement.

The use of statements at trial is further restricted by Minn. Stat. § 602.01, which provides: *Any statement secured from an injured person at any time within 30 days after such injuries were sustained shall be presumably fraudulent in the trial of any action for damages for injuries sustained by such person or for the death of such person as the result of such injuries. No statement can be used as evidence in any court unless the party so obtaining the statement shall give to such injured person a copy thereof within 30 days after the same was made.*

The purpose of Minn. Stat. § 602.01 is to prevent unfair practices in the procurement of statements from injured parties. *See Yeager v. Chapman*, 233 Minn. 1, 10, 45 N.W.2d 776, 782 (1951). The exclusionary clause of the statute, like the presumption of fraudulence, only applies to statements given by an injured person who seeks to recover in an action for injuries sustained. *See Hillesheim v. Stippel*, 283 Minn. 59, 65, 166 N.W.2d 325, 330 (1969). The statute does not bar the admission of statements in other types of actions, even if closely related to a personal injury action. *See, e.g., Dike v. American Family Mut. Ins. Co.*, 284 Minn. 412, 420, 170 N.W.2d 563, 567 (1969) (holding no statutory protection existed for statement made by injured insured in his declaratory judgment action against insurer to determine coverage for motor vehicle accident); *Hillesheim*, 283 Minn. at 64-65, 166 N.W.2d at 329 (concluding statute did not apply to statement given by injured defendant in personal injury case).

Therefore, when taking the statement of an injured person, it is important to provide him/her with a copy of the statement within 30 days, to ensure that it may be used at a later trial. •

NOTICE

Communicable Diseases in the Workplace - Last year it was TB (tuberculosis). This year it's the flu. Communicable diseases in the workplace are a concern and employers are feeling the impact. Employer policies seeking to contain the spread of disease in the office are smart, but they also trigger the application of state and federal laws. For a detailed Fact Sheet addressing communicable disease in the workplace, please see our publications tab on our website at www.jlolaw.com. You may also call Jessica Schwie, at 651-290-6591, with any questions you may have. •

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spouse objects and the testimony would be adverse to the privilege holder. Common law marriage was abolished by the Minnesota legislature in 1941.

The social policy underlying the privilege against adverse spousal testimony is to preserve marital harmony. *See State v. Fest*, 285 N.W.2d 85, 86 (Minn. 1939). According to the Minnesota Supreme Court, placing a spouse under oath to testify adverse to the spouse's claim would "weaken the entire social structure" by causing "strife between the parties to a marriage contract" and thus undermining the institution of marriage.

In most states that recognize a marital privilege, the privilege can be overcome if the party seeking the testimony of the spouse can show that the marriage was really just a sham. In Minnesota, however, there is a very strong presumption that the marriage is genuine. This presumption is so strong, in fact, that the Minnesota Supreme Court recently noted that they have never ruled that a marriage was unworthy of protection by the marital privilege. *See State v. Gianakos*. 644 NW.2d 409, 418 (Minn. 2002) (noting that the Court had never ruled that a marriage was unworthy of protection by the marital privilege and declining to conclude that the marriage at issue—which was admittedly motivated by a desire to shield the couple from adverse testimony—was so clearly a sham that the privilege should be denied).

Parent-Child Privilege

Minnesota Statute § 595.02, subd. 1(j) recognizes a privilege for certain communications between a parent and child. The statute provides that "a parent or the parent's minor child may not be examined as to any communication made in confidence by the minor to the minor's parent." A communication between the parent and the minor child is considered confidential only if it is made "out of the presence of persons not members of the child's immediate family living in the same household." This is a shared privilege that "may be waived by express consent to disclosure by a parent entitled to claim the privilege or by the child who made the communication or by failure of the child or parent to object when the contents of a communication are demanded."

Like the exceptions to spousal privilege, the parent-child privilege has logical exceptions for civil actions between family members (such as divorce proceedings, commitment proceedings, terminations of parental rights, or in criminal proceedings in which the parent is charged with a crime against the communicating child). *Id.*

The social policy behind the parent-child privilege is to "encourage children to confide in their parents and seek their advice in times of trouble." *See State v. Stephens*, 580 N.W.2d 75, 79 (Minn. Ct. App. 1998). This privilege is not as strongly protected by Minnesota's appellate courts. The key Minnesota case addressing this privilege involves an attempt by a teen to pass a handwritten note through two other people to his sequestered mother in an attempt to have her corroborate his testimony. *Id.* The court held that "the public policy preserving confidentiality does not permit [a child] to coach his mother's testimony or circumvent the trial court's order [that she be sequestered]." *Id.*

Minnesota law continues to recognize and protect both the marital and the parent-child relationship with exclusionary evidentiary privileges. However, these protections are limited and often times they are not even asserted. •

Special thanks to former JLO law clerk Esteban Trevino for doing the preliminary research on the topic of marital privilege.

FIRM NEWS

The Firm welcomes **Daniel J. Stahley** as the most recent addition to our team of associates. Mr Stahley's practice focuses on litigation and insurance coverage. Prior to joining Jardine, Logan & O'Brien, Mr. Stahley practiced personal injury law in the Chicago area. •

Congratulations to **Gerald M. Linnihan** and **Alan R. Vanasek (Of Counsel)** who have again been named to the list of the Top 40 ADR Professionals in a poll of ADR Professionals conducted by *Minnesota Law & Politics*.•

JLO applauds **Matthew P. Bandt** for being included on the *Minnesota Law & Politics* SuperLawyers 2009 Minnesota Rising Star list. •

Congratulations to the following JLO attorneys who were named to this year's *Minnesota Law & Politics* SuperLawyers list: **Gerald M. Linnihan, Eugene J. Flick, Pierre N. Regnier, Lawrence M. Rocheford, Joseph E. Flynn, Leonard J. Schweich, and Alan R. Vanasek, Of Counsel.** •

Congratulations to **James G. Golembeck** and **Elisa M. Hatlevig** on their recent Court of Appeals victory in *City of Owatonna v. Rare Aircraft, Ltd.*, 2009 WL 1684479 (Minn. Ct. App. June 16, 2009). The Court of Appeals reversed the trial court's ruling in favor of Rare Aircraft and remanded for entry of judgment in favor of the City. The Supreme Court denied Rare Aircraft's petition for further review. •

Congratulations to **James G. Golembeck** and **Mark K. Hellie** on their recent Court of Appeals victory in *Nelson v. City of Birchwood*, 2009 WL 3426792 (Minn. Ct. App. October 27, 2009). The Court of Appeals affirmed the district court's grant of summary judgment to the City, affirming that the City had the municipal authority to regulate docking on public land. •

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If you have any questions about the subject matter of the articles in this newsletter, please feel free to contact the authors.

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