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## 1995 Supreme Court of Rhode Island Survey: Attorney-Client

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**Attorney-Client.** *Rosati v. Kuzman*, 660 A.2d 263 (R.I. 1995). The attorney-client and work-product privileges apply to an attorney's subordinate and are not per se waived by the presence of a third party during privileged communications.<sup>1</sup>

In *Rosati v. Kuzman*,<sup>2</sup> the Rhode Island Supreme Court stated that if a person can be categorized as an agent, or "subordinate" of an attorney, and if the attorney-client privilege is not waived, the subordinate cannot divulge any information deemed privileged by the attorney-client and work-product doctrines.<sup>3</sup>

#### FACTS AND TRAVEL

Rosati, a criminal suspect in Florida,<sup>4</sup> retained the services of Rhode Island lawyer John F. Cicilline (Cicilline).<sup>5</sup> Prior to hiring Cicilline, Kenneth Kuzman (Kuzman), a former high school wrestling coach of Rosati, offered his services to Rosati's parents and was subsequently introduced to Cicilline.<sup>6</sup> Rosati's parents played an integral role in Rosati's defense and were present in meetings

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1. The attorney-client privilege protects the communications between an attorney and client. *Upjohn Company v. United States*, 449 U.S. 383, 390 (1981). An attorney should have all the facts in order to give the client sound advice. *Id.* at 391. Keeping communications confidential between attorney and client advances full disclosure of facts in order to give this sound advice. *Id.* "It is well established that 'the attorney-client privilege protects from disclosure only the confidential communications between a client and his or her attorney.'" *Callahan v. Nystedt*, 641 A.2d 58, 61 (R.I. 1994) (quoting *State v. von Bulow*, 475 A.2d 995, 1004 (R.I. 1984)). "The general rule is that communications made by a client to his attorney for the purpose of seeking professional advice, as well as the responses by the attorney to such inquiries, are privileged communications not subject to disclosure.'" *Id.* (quoting *von Bulow*, 475 A.2d at 1004). However, the rule must be narrowly construed and a relationship between an attorney and a client does not give rise to the privilege. *Id.* The court should, nonetheless, presume the relationship was for obtaining legal advice. *Williams v. Rhode Island Hosp. Trust Co.*, 143 A.2d 324, 337 (R.I. 1958). See, also, Rhode Island Supreme Court Rules, Art. V. § 1.6 (1995); Model Rules of Professional Conduct Rule 1.6 (1983); Model Code of Professional Responsibility, Canon 4 (1969).

2. 660 A.2d 263 (R.I. 1995).

3. *Id.* at 264-69.

4. Rosati was indicted by a Broward County, Florida grand jury on September 12, 1990 for murder and armed robbery stemming from Rosati's activities in Florida. *Id.* at 264.

5. *Id.*

6. *Id.* at 264-269.

between Rosati and Cicilline.<sup>7</sup> Eventually, Cicilline asked Kuzman to perform certain jobs in connection with the investigation.<sup>8</sup>

Subsequent to Kuzman's connection with the case, the Florida indictments against Rosati were dismissed and indictments were returned against two other individuals for the same crimes.<sup>9</sup> When Kuzman was notified to appear for a deposition in connection with one of the new indictments, Rosati was concerned that Kuzman might divulge privileged information during this deposition.<sup>10</sup> Subsequently, Rosati filed a complaint and a request for declaratory and injunctive relief in Rhode Island Superior Court.<sup>11</sup>

The superior court granted the injunction requested.<sup>12</sup> On appeal to the Rhode Island Supreme Court, Kuzman contended that the trial justice erred by, (1) finding that Kuzman was an agent of Cicilline, (2) failing to find that the attorney-client relationship was destroyed by the presence of Rosati's parents during attorney-client conferences, (3) failing to find that the attorney-client privilege was waived by the disclosure of confidential information to a third party, and (4) issuing an overbroad order.<sup>13</sup>

#### BACKGROUND

In *State v. von Bulow*,<sup>14</sup> the Rhode Island Supreme Court held that the burden of establishing the attorney-client privilege is on the party seeking to protect the confidential information.<sup>15</sup> Under

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7. *Id.* at 267. Rosati's parents retained Cicilline and accepted Kuzman's assistance, and were Rosati's confidants. *Id.*

8. Kuzman interviewed witnesses, assisted private investigators, and made trips to Florida in connection with Rosati's case. *Id.* at 264. He was also authorized by Cicilline to divulge certain information to F.B.I. agents and Florida authorities and was authorized by Rosati to contact literary agents. *Id.*

9. *Id.*

10. *Rosati*, 660 A.2d at 264.

11. Rosati sought an injunction prohibiting Kuzman from disclosing any information that was privileged under the attorney-client and work-product doctrines. *Id.* at 265.

12. *Id.* The trial justice found Kuzman to be an agent of Cicilline and enjoined Kuzman from disclosing any information that was protected by the attorney-client privilege and the work-product doctrine. *Id.*

13. *Id.*

14. 475 A.2d 995 (R.I. 1984).

15. The court in *von Bulow* held that in order to establish the attorney-client privilege, the party seeking to invoke the privilege must satisfy the following elements:

*von Bulow*, the attorney-client privilege applies to an attorney's subordinates.<sup>16</sup> In order to be classified as an attorney's subordinate, an agency relationship between the subordinate and the attorney must be demonstrated.<sup>17</sup>

Once the attorney-client privilege is established, it is not per se waived by the disclosure of confidential communications to a third party.<sup>18</sup> However, the attorney-client privilege may be waived by selectively choosing what to divulge.<sup>19</sup>

#### ANALYSIS AND HOLDING

The court first held that an agency relationship existed between Cicilline and Kuzman.<sup>20</sup> The facts established that Rosati had fulfilled his burden of proving that an attorney-client relationship existed between Rosati and Kuzman.<sup>21</sup> It was clear that Cicilline at all times directed Kuzman in his duties and was in

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"(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is [a] member of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." *Id.* at 1004-05.

16. *Id.* at 1005.

17. *Rosati*, 660 A.2d at 265. The court has held that the agent/subordinate relationship is established by the existence of "(1) a manifestation by the principal that the agent will act for him, (2) acceptance by the agent of the undertaking, and (3) an agreement between the parties that the principal will be in control of the undertaking." *Lawrence v. Anheuser-Busch, Inc.*, 523 A.2d 864, 867 (R.I. 1987); *See also Jameson v. Hawthorne*, 635 A.2d 1167, 1171 (R.I. 1994); *Narragansett Wire Co. v. Norberg*, 376 A.2d 1, 5 (R.I. 1977). *See also* Restatement (Second) of Agency § 14 (1958) ("A principle has the right to control the conduct of the agent with respect to matters entrusted to him.").

18. *Kevlik v. Goldstein*, 724 F.2d 844, 849 (1st Cir. 1984) (if a third party is present at a privileged communication, the issue is "whether the client reasonably understood the conference to be confidential."); *von Bulow*, 475 A.2d at 1007 (in order for the attorney-client privilege to be waived when information is divulged to some third-party by assent of the parties, there must be evidence that the information is privileged). *Cf. State v. Driscoll*, 360 A.2d 857, 861 (R.I. 1976) (if the third party is not an agent of either the attorney or the client the communication is not confidential).

19. *von Bulow*, 475 A.2d at 1007 (one cannot only claim the privilege for information damaging to that party's side while divulging what is helpful to its case).

20. *Rosati*, 660 A.2d at 265.

21. *Id.*

control.<sup>22</sup> Further, Kuzman's testimony demonstrated that he accepted his role of an assistant to Cicilline.<sup>23</sup> Lastly, the court noted evidence of an implicit agreement that Cicilline was in control of Kuzman by Cicilline's own testimony.<sup>24</sup>

Next, the court held that the presence of Rosati's parents during communications between Cicilline and Rosati did not waive the attorney-client privilege.<sup>25</sup> The court explained that the intention of the client is the proper focus, and that the identities of third parties are irrelevant to the analysis.<sup>26</sup> Further, Cicilline's authorization of Kuzman to communicate with the F.B.I. and Florida authorities, as well as Rosati's authorization of Kuzman to contact literary agents, did not mean the attorney-client privilege had been waived since the record was void of any evidence that any of the authorized disclosures were of confidential material.<sup>27</sup> The record was further void of any evidence that the privilege was selectively invoked by Cicilline or Rosati.<sup>28</sup> Lastly, the court held that the order issued by the superior court was not impermissibly vague, since expanding the scope of the superior court's order would risk divulging the very information it sought to protect.<sup>29</sup>

#### CONCLUSION

The most important result of *Rosati* is its synthesis of the law of agency and the attorney-client privilege. The court makes it quite clear that an agent of a retained lawyer will be bound by the attorney-client privilege just as the retained lawyer is. Additionally, waiver of the attorney-client privilege is to be determined by

22. *Id.* at 266.

23. *Id.* Kuzman testified " . . . I have assisted Jack [Cicilline] in putting this case together." *Id.*

24. *Id.* Kuzman, representing himself at the hearing, asked Cicilline if Cicilline "ever authorize[d]" Kuzman to speak with the F.B.I. about the case, to which Cicilline answered, " . . . I did say its okay to go to talk to the F.B.I. about it." *Id.*

25. *Rosati*, 660 A.2d at 266.

26. *Id.* at 266-67 (The fact that his parents played a vital role in the defense of the case and were confidants to Rosati showed that Rosati intended for the communications to remain confidential). See *State v. Juarez*, 570 A.2d 1118, 1120.

27. *Rosati*, 660 A.2d at 267-68.

28. *Id.* at 268.

29. *Id.* at 269. The order stated that Kuzman could not discuss anything that had not already been disclosed by Rosati and that the attorney-client privilege protected anything that Kuzman had learned while acting as an agent of Cicilline. *Id.* at 267-68.

the client's reasonable belief about the nature of the communication sought to be protected.

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