is insured.[14] These doubts might well be resolved by questions relating to insurance connections.

Narrowly restricting the voir dire inquiry, as did the *Wheeler* case, does not adequately solve the problem. While there remains a possibility that one of the jurors may be biased in favor of the defendant, the plaintiff's right to a fair trial is, to that extent, imperiled. The solution offered by the *Wheeler* case may, in addition, lead to other undesirable consequences. It may induce plaintiffs to approach prospective jurors before the voir dire in order to gain information that will bring them within the "good faith" requirement suggested in the case; it may also unduly prolong the voir dire examination.

A more satisfactory solution would be found in legislation authorizing the addition of a question on the form questionnaire which jurors are at present required to answer, concerning their relationships, direct and indirect, with insurance companies.[15] Such legislation might also permit counsel to challenge jurors for cause on the basis of information disclosed in the questionnaire.[16]

THE ATTORNEY-CLIENT PRIVILEGE AS AFFECTED BY THIRD PARTY'S PRESENCE

The only evidence offered in support of a claim against a decedent's estate was the testimony of an attorney who had represented the decedent for eleven years prior to her death. Over objection, he was permitted to testify that the decedent had said to the claimant in his presence, "You are going to get your $5,000, don't worry about it, . . . it will be paid as soon as 'The Elms' [a part of the decedent's husband's estate] are sold," and also that the decedent had

[14] The Chicago Motor Club estimates that 75 to 80 per cent of the motorists in the state of Illinois carry liability insurance. Private communication from Mr. A. Ulrich, Jr., Underwriter, The Inter-Insurance Exchange of the Chicago Motor Club (February 4, 1948).

[15] Compare 43 Mich. L. Rev. 621 (1944), noting Moore v. Edmonds, 384 Ill. 535, 52 N.E. 2d 216 (1943). Individuals eligible for jury service are required to answer the questionnaire at the time they are placed on the jury list. Its contents are governed by statute. Ill. Rev. Stat. (1947) c. 78, § 25. Since there may be a considerable lapse of time between the date when the questionnaire is answered and the date when jury service begins, it would be advisable for the legislation to provide for additional questioning at the commencement of the juror's service as to changes in his interests.

[16] While each counsel is now permitted five peremptory challenges where there are only two record parties to the litigation, Ill. Rev. Stat. (1947) c. 110, § 190, the plaintiff will be afforded much greater protection if, in addition, he can automatically exclude from jury service those who might be biased in favor of the insurance company. A New York statute makes an interest in any liability insurance company a ground for challenge in personal injury suits. N.Y. Civ. Prac. Ann. (Cahill-Parsons, 1946) § 452. In Illinois a juror's connection with the defendant's insurer is probably a ground for challenge for cause. See Smithers v. Henriquez, 287 Ill. App. 95, 4 N.E. 2d 793 (1936). In other jurisdictions it has been held that a direct connection with an insurance company other than the one in suit is not a ground for challenge for cause. Anderson v. Todd Shipyard Corp., 63 F. Supp. 229 (N.Y., 1945); see Vega v. Evans, 128 Ohio 535, 191 N.E. 757 (1934); Mortrude v. Martin, 185 Iowa 1319, 172 N.W. 17 (1919). This question has not arisen in Illinois.

said to him that she wanted to sell "The Elms" as soon as possible in order to pay off the claimant. These admissions were made in the attorney's office during a conference relating to the administration of the estate of the decedent's husband. At the time of the conference the claimant was the business agent and personal servant of the decedent. A decision by the trial court disallowing the claim was reversed by the circuit court. Upon appeal by the administrator to the appellate court, the circuit court was reversed on two grounds: 1) The statements of the decedent, although made in the presence of a third party—the claimant—were privileged, since the claimant was decedent's agent at the time of the communication. 2) Even if the testimony was competent, it was insufficient to establish the claim. *In re Busse's Estate.*[1]

Availability of an alternative ground for reversal, namely, the insufficiency of the attorney's testimony to discharge the claimant's burden of persuasion,[2] made the court's reliance on the attorney-client privilege unnecessary. More important, this reliance was unjustified because the communication was not made under such circumstances as to bring it within the usual scope of the privilege. Generally, the privilege is said to embrace communications made in confidence by the client to the attorney in connection with the solicitation of legal advice.[3] In the present case there was no showing that the client's admission of indebtedness was relevant to any professional advice being sought.[4] On the contrary, it appeared from the testimony that the attorney first learned of the claim as a result of the incidental disclosure made by the decedent to the claimant and that the attorney was asked for no legal advice in relation thereto. Clearly such statements, irrelevant to any legal business, are not within the scope of the privilege. A few courts have gone so far as to hold that the privilege

[1] 332 Ill. App. 285, 75 N.E. 2d 36 (1947).

[2] The court held that the claimant had the burden of supporting her claim with clear and convincing evidence. This burden of persuasion appears extremely severe in light of the fact that the claimant herself was incompetent to testify because of the Illinois "deadman's statute," which excludes any testimony for or against a deceased person by an "interested party," i.e., one who would stand to gain or lose by the direct operation of the legal judgment. Ill. Rev. Stat. (1947) c. 51, § 2. Compare Johnson v. Matthews, 301 Ill. App. 295, 22 N.E. 2d 772 (1939). Nevertheless, the Illinois courts have required "clear and convincing" evidence in claims against deceased persons. Compare Doll v. Continental Illinois National Bank & Trust Co. of Chicago, 326 Ill. App. 264, 61 N.E. 2d 875 (1945); In re Estate of Teehan, 287 Ill. App. 58, 4 N.E. 2d 513 (1936). Most jurisdictions merely require a preponderence of the evidence to support a claim against an estate. Compare In re Tyler, 127 Neb. 681, 256 N.W. 518 (1934); In re Grismer's Will, 225 App. Div. 804, 232 N.Y. Supp. 440 (1929); In re Dolmage's Estate, 204 Iowa 231, 213 N.W. 380 (1927).

[3] 8 Wigmore, Evidence § 2292 (3d ed., 1940). For a critical analysis of the rationale behind the attorney-client privilege see Radin, The Privilege of Confidential Communications between Lawyer and Client, 16 Calif. L. Rev. 486 (1928).

[4] Faced with a somewhat similar situation an Oklahoma court admitted the testimony of the attorney since ". . . it does not appear that this communication was one which came to the witness in his capacity as attorney for the defendant." Joy v. Litchfield, 189 Okla. 122, 123, 113 P. 2d 974, 975 (1941); cf. Modern Woodmen of America v. Watkins, 132 F. 2d 352 (C.C.A. 5th, 1942).

does not protect any communications from the client to a third party, even though made at a conference with an attorney in which all three parties are participating.[5] Such a distinction between statements made to attorneys and those made to third persons at the same conference is at best tenuous and was ignored by the present court.

The court, overlooking the fact that the claimant's disclosures were not made in order to secure legal advice, went on to consider the problems raised by the fact that the communications were made not in strict privacy to the attorney but in the presence of a third person. The willingness of a client to communicate with an attorney in the presence of a third party is generally held to negative any inference of confidence and to prevent the privilege from arising.[6] An exception is recognized, however, when the third person is present in order to facilitate the consultation.[7] The presence of a secretary of the attorney or an agent of the client intimately connected with the legal business has been said not to destroy the privilege.[8] The claimant in the present case was employed in connection with the administration of the estate. Thus her presence at the conference in that capacity was not sufficient to prevent the privilege from arising.

In some jurisdictions, where two independent parties consult the same attorney and subsequently become adversaries in litigation, the privilege does not cover communications made to the attorney while both parties were present.[9]

[5] Hanson v. Bean, 51 Minn. 546, 53 N.W. 871 (1892); Gallagher v. Williamson, 23 Cal. 331 (1863) (communication between client and third person present held not privileged; held otherwise as to confidential communication directly to attorney at same meeting); Coveney v. Tannahill, 1 Hill (N.Y.) 33 (1841). Where a communication is made to an attorney for the purpose of being conveyed by him to another it is not privileged. Hill v. Hill, 106 Colo. 492, 107 P. 2d 597 (1940); Riley v. State, 180 Ga. 869, 181 S.E. 154 (1935); Scott v. Harris, 113 Ill. 447 (1885).

[6] Ver Bryck v. Luby, 67 Cal. App. 2d 842, 155 P. 2d 706 (1945); Crawford v. Raible, 206 Iowa 732, 221 N.W. 474 (1928); People v. Buchanan, 145 N.Y. 1, 39 N.E. 846 (1895).

[7] Originally this exception applied only to interpreters who were the medium of communication between attorney and client. Canty v. Halpin, 294 Mo. 96, 242 S.W. 97 (1922); Morton v. Smith, 44 S.W. 683 (Tex. Civ. App., 1898); Goddard v. Gardner, 28 Conn. 172 (1859).

[8] 8 Wigmore, Evidence § 2311 (3d ed., 1940).

[9] Thus, where an attorney represents joint plaintiffs or defendants, he may testify in a subsequent suit between the clients as to their communications to him, although such communications are privileged in any litigation with outside parties. Grand Trunk Western R. Co. v. H. W. Nelson Co., 116 F. 2d 823 (C.C.A. 6th, 1941); Hoffman v. Labutzke, 233 Wis. 365, 289 N.W. 652 (1940); Stewart v. Todd, 190 Iowa 283, 173 N.W. 619 (1919). Such a result has been justified on this ground: "The matter communicated was not in its nature private as between those parties present at the time it was made, and consequently so far as they are concerned, it can not, in any sense, be deemed the subject of a confidential communication made by one which the duty of the attorney prohibits him from disclosing to the other." Rice v. Rice, 53 Ky. 417, 418 (1854).

Similarly, when both parties to a deed consult the same attorney, statements made at the conference can be introduced in evidence in a subsequent suit between grantor and grantee. Oard v. Dolan, 320 Ill. 371, 151 N.E. 244 (1926); cf. Griffin v. Williams, 179 Ga. 175, 175 S.E. 449 (1934); Doll v. Loesel, 288 Pa. 527, 136 Atl. 796 (1927); Scott v. Aultman, 211 Ill. 612, 71 N.E. 1112 (1904); Smick's Adm'r v. Bestwick's Adm'r, 113 Ky. 439, 68 S.W. 439 (1902); Thompson v. Cashman, 181 Mass. 36, 62 N.E. 976 (1902). For an excellent statement of the

It is true that in such cases the presence of the third party may be as necessary to facilitate the legal business as was the presence of the agent in the instant case. Nevertheless, the instant case may be distinguished inasmuch as the agent occupied a confidential relationship to the decedent. In a recent Ohio case[10] the privilege was invoked in respect to an admission of indebtedness made by the client to the attorney in the presence of the claimant. The claimant was a private detective employed by the client in connection with a pending divorce which the attorney was handling. The court, in recognizing the privilege, relied on the fact that the private detective was the client's confidential agent at the time of the communication. Under the circumstances the court felt it was "essential to the ends of justice that clients should be safe in confiding to their counsel the most secret facts and to receive advice without the perils of publicity."[11]

Recognition of the privilege on the ground that the client's disclosure made in the presence of the agent and the attorney was "secret" or "confidential" is merely a way of stating the result. It is clear that the communication is not more secret as to the third person present merely because he is a confidential agent. There is, however, a practical difference between the two situations: The agent is present in order to promote or protect the interests of the client rather than his own. The client may, therefore, be freer with his disclosures in the agent's presence than he would be in the presence of a party with independent interests. He may also have more reason to expect non-disclosure by his agent. The recognition of the privilege will, of course, protect such expectation and may help to promote full disclosure by clients to attorneys. The reasons for recognizing the privilege in this situation are therefore strong, and the fact that the confidential agent turns adversary would scarcely seem to justify the spreading of confidences on the public record of a trial.

It may be concluded, then, that had the communications in the instant case been made with a view to receiving legal advice, the court's recognition of the privilege would have been proper inasmuch as the claimant was a confidential agent of the decedent. Since, however, the communications did not appear to be connected with the legal business at hand, the court was clearly unwarranted in relying on the privilege.

rationale supporting this line of cases see Stone v. Minton, 111 Ga. 45, 47, 36 S.E. 321, 323 (1900).

The attorney-client privilege is also limited in cases where two parties consult an attorney in regard to a contract of employment over which a controversy between them later arises. Joy v. Litchfield, 189 Okla. 122, 113 P. 2d 974 (1941); Lawless v. Schoenaker, 147 N.Y. Misc. 626, 264 N.Y. Supp. 280 (1933).

[10] Foley v. Poschke, 137 Ohio St. 593, 31 N.E. 2d 845 (1941).

[11] Ibid., at 594, 846.