

PROFESSIONAL LIABILITY UPDATE

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ATTORNEY-CLIENT PRIVILEGE

California Law

By Jennifer A. Becker

People v. Urbano (2005) 128 Cal. App.4th 396

The Fifth District holds that a client's comment and gesture made to his attorney in the presence of others while court was not in session is not protected by the attorney-client privilege.

After a jury found Raymond Urbano guilty of assault by means likely to produce great bodily injury, he argued that the admission in evidence at trial of a comment and a gesture he made to his attorney in the jury box of his preliminary hearing courtroom when court was not in session violated the attorney-client privilege.

The trial court admitted the testimony of the crime victim that he saw Urbano point to a witness and heard him tell his counsel that the witness was drunk at the time of the assault. At the time of the communication, court was not in session and lawyers were engaged in conversation throughout the courtroom.

The trial court had previously ruled as privileged an overheard comment Urbano made while talking with his attorney at counsel table during a court session. The trial court was persuaded by Urbano's testimony that when he made the comment he considered it part of his communication with his attorney

and had no idea how loudly he spoke. The court found that if counsel and clients need to communicate during court proceedings they should be able to do so without fear that overheard communications could be used against the client.

The trial court disagreed that the controlling analysis to statements made while court was not in session is whether Urbano intended to communicate confidentially with his attorney. It distinguished cases where the client had no option to avoid disclosure to a third person of the attorney-client communication at issue. By contrast Urbano had no need to speak loud enough for others to overhear because his attorney was sitting right next to him. The communication was made in a way that clearly disclosed it to others.

As far back as the 19th century the Supreme Court held the attorney-client privilege inapplicable to a conversation a client and his attorney held in the

presence of a third party. The attorney-client privilege is inapplicable where a conversation between an attorney and client is held in the presence of a court reporter. Thus, Urbano's comments made loudly enough for others to hear when court was not in session and lawyers were engaged in conversation throughout the courtroom is not protected by the attorney-client privilege.

Comment: This case demonstrates that clients should be advised that they need to take care that third parties are not present when engaging in confidential communications with counsel.