

THE DECISION KENNEDY MUST MAKE

By Bill Duncliffe

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EDGARTOWN — The facts, the fates, and a sacred something known as the "lawyer-client relationship" may confront Sen. Edward M. Kennedy next week with one of the most difficult decisions of his life.

For if he decides one way, his account of the tragedy of Chappaquiddick Island may remain — in the minds of some people — forever in doubt.

And if he decides the other, he could expose his two close friends, Paul F. Markham, of Melrose, and Joseph F. Gargan Jr., of Milton, to a most searching ordeal.

Sacrosanct Principle

What lies at the root of the dilemma is the sacrosanct legal principle that a lawyer cannot divulge anything told to him in confidence by a client — or even by a prospective client.

Both Markham and Gargan are lawyers — and to a lawyer the principle is only slightly less binding than the seal of confession to a priest.

But where a priest can never, under any condition, reveal what he hears in the privacy of the confessional, there are some circumstances in which a lawyer could freely talk — and one would be if the client, or prospective client, gave him permission to do so.

No Ordinary Client

But Kennedy is no ordinary client — or citizen. He is a lawyer and a United States senator; these are factors which he could take into account in deciding whether he should waive his lawyer-client privilege at the inquest beginning in Edgartown district court next Wednesday.

For Markham and Gargan are the only living beings who can corroborate key portions of the story that is now in doubt.

In that story, related by Kennedy on television a week after the car he was driving plunged off the Dyke Bridge in the dark of the moon and carried Mary Jo Kopechne to her death in Poucha Pond, he said in part:

"I remember thinking as the cold water rushed in around my head that I was for certain drowning. Then water entered my lungs and I actually felt the sensation of drowning.

"But somehow I struggled to the surface alive.

"I made immediate and repeated efforts to save Mary Jo by diving into the strong and murky current, but succeeded only in increasing my state of utter exhaustion and alarm.

"My conduct and conversation during the next several hours, to the extent that I can remember them, make no sense to me at all. My doctors informed me I suffered a cerebral concussion as well as shock.

"I do not seek to escape responsibility for my actions by placing the blame either on the physical, emotional trauma brought on by the accident or anything else.

Indefensible Fact

"I regard as indefensible the fact that I did not report the accident to the police immediately. Instead of looking directly for a telephone, after lying exhausted on the grass for an undetermined time, I walked back to the cottage where the party was being held and requested the help of two friends, my cousin Joseph Gargan, and Paul Markham, and directed them to return immediately to the scene with me — this was sometime after midnight — in

**WILL SENATOR FREE THEM TO TALK?**

Kennedy attorneys Joseph Gargan, Paul F. Markham

order to undertake a new and strenuous effort to dive down and locate Miss Kopechne."

To get back to the cottage, and then return to the bridge with his friends, meant that Kennedy twice had to pass a small firehouse where, by pulling an alarm, help could have been summoned.

In continuing his story, Kennedy told how hard his friends tried to save the girl, saying:

"Their strenuous efforts, undertaken at some risk to their own lives, also proved futile. All kinds of scrambled thoughts, all of them confused, some of them irrational, many of them which I cannot recall, and some which I would not have seriously entertained under normal circumstances went through my mind during this period . . .

Overcome By Emotion

"I was overcome, I am frank to say, by a jumble of emotion — grief, fear, doubt, torture, panic, confusion, exhaustion, and shock.

"I instructed Markham and Gargan not to alarm Mary Jo's friends that night. I had them take me to the ferry crossing, the ferry having shut down for the night.

"I suddenly jumped into the water and impulsively swam across, nearly drowning once again in the effort, and returned to my hotel about 2 a.m. and collapsed in my room."

No Consent Needed

To all this, Markham and Gargan will presumably be able to testify — if, when Kennedy sought them out, he went to them as friends.

And they will not need his consent to do so.

But if, in that first frightful hour after Mary Jo met her doom, he considered them lawyers whose counsel he needed, they are sworn to respect his confidence and remain silent about anything he may have told them.

That is the lawyer-client relationship and, according to Philip L. Sisk of Lyon, president of the Massachusetts Bar Association, Markham and Gargan could consider themselves bound by it without any specific word from the senator.

If they only thought such a relationship existed or even if, because of his condition, they were in some doubt on that point, it would have been unethical for them to do anything about notifying the police about the accident, Sisk maintained.