Montana Law Review

Volume 23
Issue 2 *Spring 1962*

Article 8

January 1962

United States v. Kovel, 296 F.2d 918 (2d Cir. 1961)

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AN ACCOUNTANT EMPLOYED BY AN ATTORNEY IS WITHIN THE ATTORNEY-CLIENT PRIVILEGE.—Defendant accountant was subpoenaed to appear before a federal grand jury to give testitmony concerning his communications with a taxpayer under investigation for alleged federal income tax violations. These communications were made pursuant to his employment by the law firm representing the taxpayer. Defendant invoked the attorney-client privilege and refused to answer questions concerning the financial affairs of the taxpayer. After being apprised by the federal district court that he had no privilege, defendant persisted in his claim of privilege and refused to answer, whereupon he was held in contempt of court and sentenced to one year in prison. On appeal to the United States Court of Appeals for the Second Circuit, *held,* reversed.[1] Communications to an accountant who has been employed to interpret and relay information to an attorney are within the attorney-client privilege. *United States v. Kovel,* 296 F.2d 918 (2d Cir. 1961).

It is settled that communications made in confidence by a client to an attorney for the purpose of obtaining legal advice are protected from disclosure.[2] This privilege is given on grounds of public policy in order that the client may make known to his lawyer all the facts without fear that the attorney may be compelled to reveal such information confided to him.[3] The privilege may not be invoked unless the communication was intended to be confidential.[4] Therefore, communications made by a client to his attorney in the presence of a third person ordinarily are not privileged.[5] However, where the assistance of an *agent* is necessary to facilitate communications between an attorney and his client, or to render other services in the process of giving legal advice, communications to such agent, as distinguished from other third persons, are within the privilege.[6] The reasons for this extention of the privilege are founded in necessity:[7]

> . . . the complexities of modern existence prevent attorneys from effectively handling the clients' affairs without the help of others; few lawyers could practice without the assistance of secretaries,

[1]The court remanded to the district court for a determination of the factual question which was necessary to provide the basis for deciding whether the privilege existed.

[2]Blankenship v. Rowntree, 219 F.2d 597 (10th Cir. 1955); Kent Jewelry Corp. v. Keefer, 202 Misc. 778, 113 N.Y.S.2d 12 (Supp. Ct. 1952); Shelly v. Landry, 97 N.H. 27, 79 A.2d 626 (1951); *Ex parte* Ochse, 38 Cal. 2d 230, 238 P.2d 561 (1951); Boyles v. Cora, 232 Iowa 822, 6 N.W.2d 401 (1942).

[3]Hohn v. Superior Court, 42 Cal. 2d 500, 267 P.2d 1065 (1954); *In re* Selser, 15 N.J. 393 (1954); Modern Woodmen of America v. Watkins, 132 F.2d 352 (5th Cir. 1942).

[4]United States v. Shibley, 112 F. Supp. 734 (S.D. Cal. 1953), *aff'd,* 236 F.2d 238 (9th Minn. 15, 62 N.W.2d 688 (1954); Falkenhainer v. Falkenhainer, 198 Misc. 29, 97 Cir.), *cert. denied,* 352 U.S. 873 (1956); Brown v. Saint Paul City Ry. Co., 241 N.Y.S.2d 467 (Sup. Ct. 1950); Piersky v. Hocking, 88 Mont. 358, 292 Pac. 725 (1930).

[5]State *ex rel.* Headrick v. Bailey, 365 Mo. 160, 278 S.W.2d 737 (1955); Tracy v. Tracy, 377 Pa. 420, 105 A.2d 122 (1954); Willard C. Beach Air Brush Co. v. General Motors Corp., 188 F. Supp. 242 (D.N.J. 1953); *In re* Fisher's Will, 67 Ohio App. 6, 35 N.E.2d (1941).

[6]State v. Kociolek, 23 N.J. 400, 129 A.2d 417 (1957) (psychiatrist); Schmitt v. Emory, 211 Minn. 547, 2 N.W.2d 413 (1942) (claim agent); Foley v. Poschke, 137 Ohio St. 593, 31 N.E.2d 845 (1941) (detective); Leyner v. Leyner, 123 Iowa 185, 98 N.W. 628 (1904). This principle has been recognized at common law as well as by statute. See, *e.g.,* Madame Du Barré v. Livette, Peake 108, 170 Eng. Rep. 96 (N.P. 1791) (interpreter); State v. Loponio, 85 N.J.L. 357, 88 Atl. 1045 (Ct. Err. & App. 1913) (amanuensis).

[7]Instant case at 921.

file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts.

One particular area of modern living which has become very complex and which gives rise to many legal problems is that of taxation. Necessarily incident to taxation are the accounting methods and systems which form the basis for computation of taxes and the keeping of records for tax purposes. Many accounting systems are extremely complicated and in giving legal advice concerning tax problems, attorneys often require the assistance of accountants.[8] Because of this, it would seem that accountants assisting attorneys should be within the attorney-client privilege. However, such has not always been the case. In *Himmelfarb v. United States*,[9] the earlier leading case on the question,[10] a lawyer hired an accountant to aid him in preparing the defense of a client against a charge of income tax evasion. In the *Himmelfarb* case the court recognized that where the presence of a third person is essential to communications between an attorney and his client, the privilege will enjoin disclosure of such communications. The court said, however, that the presence of an acountant at the conference between an attorney and client was a convenience and not a necessity.

In holding that the privilege was applicable to an accountant-agent, the court in the instant case expressly refused to assume that the services of an accountant to an attorney are a mere convenience. It recognized that an accountant may be essential in order for the attorney to understand the accounting concepts, and the accounts themselves, which may be involved in his client's case.[11]

While the instant case firmly establishes the proposition that an accountant employed by an attorney may be within the atorney-client privilege, it also provides a guide for the application of the privilege to such accountants. For the purposes of illustration, the court in the instant case examined four hypothetical situations, each involving a language interpreter employed to translate the story of a client who speaks a foreign language. The court suggests that these situations would be privileged. Furthermore, the court suggests that the principles dictating such a con-

[8]Lourie and Cutler, *Lawyer's Engagement of Accountant in a Federal Tax Fraud Case*, 10 TAX L. REV. 227 (1954-1955).

[9]175 F.2d 924 (9th Cir. 1949), *cert. denied*, 338 U.S. 860.

[10]Lourie and Cutler, *op. cit. supra* note 8. It should be noted that few courts have passed on the inclusion of an accountant within the attorney-client privilege. However, there is some dictum supporting the position in the Himmelfarb case. See Gariepy v. United States, 189 F.2d 459 (6th Cir. 1951); United States v. Stoehr, 100 F. Supp. 143 (M.D. Pa.), *aff'd*, 196 F.2d 276 (3d Cir. 1951), *cert. denied*, 352 U.S. 982 (1957). Apparently, the English courts, as early as 1863, have held contra to the Himmelfarb case. See Malsham v. Stainton, 71 Eng. Rep. 357 (1863; Lourie and Cutler, *op. cit. supra* note 8.

[11]Defendant conttended that he was an agent within the New York Civil Practice Act, section 353, which provides that: "An attorney . . . shall not disclose . . . a communication, made by his client to him, . . . in the course of his professional employment, nor shall any clerk, stenographer or other person employed by such attorney . . . disclose, or be allowed to disclose any such communication. . . ." In regard to that contention the court said, first, that it doubted the applicability of the statute in a federal grand jury proceeding, and, secondly, the "decision of the issue is unnecessary, for there is nothing to indicate that the New York legislature intended to do more than enact the principles of the common law." Instant case at 921, n.2.

clusion would be equally applicable o an accountant who interprets accounting data for an attorney because: "Accounting concepts are a foreign language to same lawyers in almost all cases, and to almost all lawyers in some cases."[12]

Two of these hypothetical cases involved (1) an attorney sending his client, who speaks only a foreign language, to an interpreter for a literal translation of the client's story, and (2) an attorney hiring an interpreter to be present when he confers with his client. In each situation the agent is indispensable to the attorney who cannot understand his client's language. The only difference between the two situations is the locality in which the interpreter performs his services. No authority was found which suggests that the place where the agent performs services for an attorney affects in any manner the applicability of the attorney-client privilege to such agent. Clearly, both should be privileged.

The courts third hypothetical case is one in which the client brings an interpreter to the interview with the attorney. Again, the services of the interpreter are essential and the fact that the *client*, rather than the attorney, has employed the agent will not destroy the privilege,[13] As stated by Wigmore:[14]

> The client's freedom of communication requires a liberty of employing other means than his own personal action. The privilege of confidence would be a vain one unless its exercise could be thus delegated. A communication, then, by *any form of agency* employed or set in motion by the client is within the privilege.

The court's fourth hypothetical case is one in which the attorney sends his client to an interpreter who has instructions to interview the client in the attorney's behalf. The interpreter is then to prepare for the attorney a summary translation of the client's story to help the attorney give proper legal advice. The distinction the court makes between the previous three situations and this fourth situation is that in the former the literal translations were merely ministerial tasks,[15] while here the preparation of the summary was a service demanding more of the interpreter's skill. However, as the court suggests, the privilege is not confined to agents who render only ministerial services.[16] Illustrative of this principle is *State v. Kociolek*,[17] where an attorney, representing a client charged with murder, hired a psychiatrist to determine whether the defendant was in-

[12]Instant case at 922.
[13]Mileski v. Locker, 14 Misc. 2d 364, 178 N.Y.S.2d 911 (Sup. Ct. 1958); Wojciechowski v. Baron, 274 Wis. 264, 80 N.W.2d 434 (1957); State v. Loponio, 85 N.J.L. 357, 88 Atl. 1045 (Ct. Err. & App. 1913)
[14]8 WIGMORE, EVIDENCE § 2317 (McNaughten rev. (1961).
[15]"Ministerial" is ordinarily a word of art in the law and pertains to an act which is to be performed in a given state of facts in a prescribed manner in obedience to the mandate of legal authority without the exercise of discretion. See State *ex rel.* Lee v. Montana Livestock Sanitary Bd., 135 Mont. 202, 339 P.2d 487 (1959); Kansas Milling Co. v. Ryan, 152 Kan. 137, 102 P.2d 970 (1940). The court in the instant case, however, used the word "ministerial" as descriptive of services to be performed, without discretion, in a manner prescribed by the *employer*.
[16]See State v. Hunt, 25 N.J. 514, 138 A.2d 1, (1958) (psychiatrist); *In re* Bates, 167 Ohio St. 82, 146 N.E.2d 306 (1957) (physician); Cold Metal Process Co. v. Aluminum Co. of America, 7 F.R.D. 684 (D. Mass. 1947) (metallurgist).
[17]22 N.J. 400, 129 A.2d 417 (1957).

sane. Although the psychiatrist's services were more than ministerial,[18] the court held that he was within the attorney-client privilege.

However, a case involving an accountant who is acting essentially as an interpreter for a lawyer must be distinguished from a possible fifth hypothetical case in which the court in the instant case said that the privilege would not be applicable. That situation is where the client tells his story to an accountant for the purpose of obtaining either accounting service or the accountant's own advice. In examining this situation it must be remembered that the attorney-client privilege is restricted to communications made for the purpose of "obtaining *legal advice* from a lawyer."[19] The courts have not recognized accounting service or advice, including the preparation of income tax returns, as constituting legal advice.[20] Thus, facts learned by an accountant in rendering such accounting services as keeping financial accounts and computing tax returns for the client would not be privileged, and the fact that a lawyer has been consulted about the same matter, either before or after the communication to the accountant, will not render that communication privileged.[21] Similarly, facts learned by an accountant in giving accounting advice, as distinguished from accounting service, are not privileged.[22]

Another possible variation of this fifth hypothetical case is where a taxpayer employs an accountant as his counsel before the Internal Revenue Service. Accountants are qualified to represent taxpayers in administrative proceedings of the Internal Revenue Service.[23] However, there are no federal statutes or regulations recognizing privileged communications in such administrative proceedings, and no privileges would be available, as a matter of right, unless (1) the law of the state in which the proceeding is held grants a privilege to the communications involved, and (2) the state law is applied in the proceeding.[24] In administrative proceedings in which the law of any state having a statutory *accountant-client* privilege[25] is

[18]It is submitted that such an examination conducted by a psyhciatrist would necessarily involve the exercise of his judgment and discretion and could not be said to be a "ministerial" service as that term was used by the court in the instant case.

[19]Instant case at 922. See United States v. United Shoe Mfg. Co., 89 F. Supp. 357 (D. Mass. 1950); State v. Addington, 158 Kan. 276, 147 P.2d 367 (1944); Solon v. Lichtenstein, 39 Cal. 2d 75, 244 P.2d 907 (1952).

[20]See, *e.g.*, *In re* Fisher, 51 F.2d 424 (S.D.N.Y. 1931); Olender v. United States, 210 F.2d 795 (9th Cir. 1954), *cert. denied*, 352 U.S. 982 (1957).

[21]See San Francisco Unified School Dist. v. Superior Court, 55 Cal. 2d 451, 359 P.2d 925 (1961); Grand Lake Drive-In, Inc. v. Superior Court, 179 Cal. App. 2d 122, 3 Cal. Rptr. 621 (Dist. Ct. App. 1960).

[22]The courts have not distinguished between accounting service and accounting advice. Therefore, it would seem that communications made for the purpose of obtaining accounting advice, as well as accounting service, are privileged. See *supra* note 19.

[23]Treas. Reg. § 10.3 (1958).

[24]Apparently the federal courts are not in accord as to whether state law, concerning privileged communications, must be applied. *Compare* Falsone v. United States, 205 F.2d 734 (5th Cir. 1953), *cert. denied*, 346 U.S. 864, *with* Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960).

[25]At least fourteen jurisdictions have enacted statutes granting a privilege directly to communications between accountants and their clients: ARIZ. REV. STAT. ANN. § 32-743 (1956) (certified public accountants and public accountants); COLO. REV. STAT. ANN. § 153-1-7 (1953) (certified public accountants); FLA. STAT. ANN. §473.15 (1952), (certified public accountants and public accountants); GA. CODE ANN. § 84-216 (1955) (certified puplic accountants); ILL. ANN. STAT. c. 110½, § 52 (Smith-Hurd, 1954) (public accountants); IOWA CODE ANN. § 116.15 (1946) (regis-

adopted, the suggestion of the court in the instant case as to the extent of the applicability of the attorney-client privilege to accountants would be irrelevant because the conversation would be privileged on another ground, namely, on an accountant-client privilege. Likewise, in administrative proceedings not adopting state law and recognizing no privileged communications of any kind, this limitation of the attorney-client privilege would not be relevant because it presupposes the existence of such a privilege. However, if an administrative tribunal adopts the law of any state having no accountant-client privilege the limitation would be relevant. The court in the instant case would limit the attorney-client privilege to communications made for the purpose of securing legal advice from a lawyer. Thus, although the accountant, in serving as an advocate in an administrative tax proceeding, is performing a function of a lawyer, he is not actually a lawyer,[26] and would not be within the privilege. It is submitted that the limitation suggested by the court in the instant case, as it applies in this situation is sound. The attorney-client privilege suppresses relevant,, and perhays vital, evidence, and for that reason the privilege is strictly construed.[27] If a privilege between accountant and client is considered to be desirable, it should be granted by Congress and the state legislatures and not by the judiciary.[28]

Thus, the principles developed in the instant case concerning the attorney-client privilege as it applies to accountants boil down to these: (1) the privilege includes accountants who are involved in the attorney-client relationship; (2) the applicability of the privilege to an accountant is not dependent upon where he performs his services, nor upon whether he is employed by the attorney or the client, nor upon whether or not his services are ministerial; (3) where the accountant is consulted for his own advice or solely for accounting service, rather than for the purpose of interpreting accounting data for a lawyer, the privilege is lost.

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tered practioners); KY. REV. STAT. § 325.440 (1959) (certified public accountants and public accountants); LA. REV. STAT. ANN. § 37:85 (1950) (certified public accountants and public accountants); MD. ANN. CODE art. 75A, § 11 (1957) (certified public accountants and public accountants); MICH. STAT. ANN. § 18.23 (1957) (certified public accountants and public accountants; NEV. REV. STAT. § 48.065 (1957) (accountant); N.M. STAT. ANN. § 67-23-26 (1953) (certified or registered public accountants); TENN. CODE ANN. § 62-114 (1955) (certified public accountants and public accountants); PUERTO RICO LAWS ANN. tit. 20, § 790 (1955) (certified public accountants and public accountants.)

[26]Apparently the minimum requirement is general legal training for the purpose of admission to the bar. See Georgia-Pacific Plywood Co. v. United States Plywood Corp., 18 F.R.D. 463 (S.D.N.Y. 1956); Zenith Radio Corp v. Radio Corp. of America, 121 F. Supp. 792 (D. Del. 1954); 8 WIGMORE, EVIDENCE § 2300 (McNaughton rev. 1961).

[27]Foster v. Hall, 29 Mass. (12 Pick). 89 (1831); City and County of San Francisco v. Superior Court, 161 Cal. App. 2d 823, 327 P.2d 195 (1958).

[28]It should be noted that a similar problem could arise in the Tax Court of the United States as accountants, possessing certain qualifications, may be admitted to practice before that court. See Tax Court Rules of Practice, Rule 2. The rules of evidence applied in the Tax Court are those applicable in a trial without a jury in the United States District Court for the District of Columbia. Tax Court Rules of Practice, Rule 31(a). There is no accountant-client privilege available in the District of Columbia, but an attorney-client privilege is recognized. See Clark v. Turner, 183 F.2d 141 (D.C. Cir. 1950); Cafritz v. Koslow, 167 F.2d 749 (D.C. Cir. 1948). Thus, whether or not an accountant acting as counsel would be within the attorney-client privilege depends on whether an accountant, for this purpose, is to be considered at attorney.

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There have been no cases in Montana pertaining to the question of whether or not the attorney-client privilege includes agents within the attorney-client relationship. The Montana statute which defines the attorney-client privilege makes no reference to the attorney's agents.[29] However, it was settled at common law that the agents of the attorney were within the privilege.[30] Further, at least twenty-two states have adopted statutes which are similar to the Montana statute in not expressly including agents of the attorney,[31] and the uniform construction of these statutes has been to include such agents.[32] In view of these factors, it may be expected that Montana will adopt a similar construction.

It is not surprising that the question has not been presented in Montana concerning accountants as agents, for the problem seems to arise most frequently in federal tax litigation. However, the problem could easily arise in other areas of litigation, and if it does, the instant case provides a sound guide for its solution.

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REGULATIONS ADOPTED BY MILK BOARD TO BE VALID MUST BE WITHIN AUTHORITY DELEGATED BY STATUTE.—The Milk Control Board charged that defendant had furnished milk dispensers to fraternities free of charge, thus violating fair-trade practices established by an official order of the Board issued in 1959. The district court sustained general demurrers to the plaintiff's complaint on the basis that the complaint failed to state a cause of action. On appeal to the Montana Supreme Court, *held,* affirmed. The regulations as to unfair trade practices adopted by the Board in 1959 are invalid as they did not cover all of the five provisions required by statute to be included in the regulations. *Montana Milk Control Board v. Community Creamery Co.,* 366 P.2d 151 (Mont. 1961).

The statute[1] under which the Milk Board enacted its 1959 order governing fair-trade practices states:

[29]"An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment." REVISED CODES OF MONTANA, 1947, § 93-701.4.

[30]See, *e.g.,* Madame Due Barré v. Livette, Peake 108, 170 Eng. Rep. 96 (N.P. 1791); Jackson *ex dem.* Haverly v. French, 3 Wend. (N.Y.) 337, 20 Am. Dec. 699 (1829); State v. Brown, 2 Marv. (Del.) 380, 36 Atl. 458 (1896).

[31]ALASKA COMP. LAWS ANN. § 58-6-4 (1949); ARK. STAT. ANN. § 28-601 (1947); IDAHO CODE ANN. § 9-203 (1948); IND. ANN. STAT. § 2-1714 (1946); KAN. GEN. STAT. ANN. § 60-2805 (1949); KY. REV. STAT. § 421.210 (1959); LA. REV. STAT. ANN. § 15:475 (1951); MICH. STAT. ANN § 28.945 (1) (1954); MO. ANN. STAT § 491.161 (1952); NEB. REV. STAT. § 25-1201 (1956); N.D. REV. CODE § 31-0106 (1943); OHIO REV. CODE ANN. § 2317.12 (Page, 1954); OKLA. STAT. ANN. tit. 12, § 385 (Supp. 1959); ORE. REV. STAT. § 44.040(1)(b) (1957); PA. STAT. ANN. tit. 28, § 321 (1958); S.D. CODE § 37.0101 (1939); TENN. CODE ANN. § 29-305 1955); TEX. CODE CRIM. PROC. ANN. art. 713 (1941) (applies to both civil and criminal proceedings); WASH. REV. CODE § 5.60.060 (1958); W. VA. CODE ANN. § 4992 (1955); WIS. STAT. ANN. § 325.22 (1958); WYO. STAT. ANN. § 3-2602 (1945)

[32]See, *e.g.,* Jayne v. Bateman, 191 Okla. 272, 129 P.2d 188 (1942); Foley v. Poschke, 137 Ohio St. 593, 31 N.E.2d 845 (1941). It should be noted, however, that not all of the states referred to *supra* note 31 have passed on the question.

[1]Revised Codes of Montana, 1947, 27-414, as amended, Laws of Mont. 1959, ch. 192, § 8. (Hereinafter REVISED CODES OF MONTANA will be cited R.C.M.)