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Ellen R. Gershow

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harm must be proved in court before any compensatory damages can be recovered, a task traditionally recognized as difficult.[43]

Yet a constitutional decision such as this was not made without reason.[44] Despite the burdens for a particular plaintiff, he now has a much better chance of "stinging" the media with a lawsuit. With the privilege of publishers and broadcasters removed, a private citizen can quite easily get a jury trial because the direction of recent cases has been to view all libel as actionable per se.[45] Even if he doesn't recover the damages allowed under the new standard and vindicate himself in the process, he is still able to harass the defendant with a trial.[46]

More importantly, *Gertz* reverses an attitude. The lower courts,[47] plaintiff's attorneys,[48] law review commentators,[49] and even the American Law Institute[50] have assumed that the *New York Times* privilege pre-empted the field of defamation except in the rarest of cases. The decision will encourage potential plaintiffs and their attorneys to be bold, with the likely result that many more publishers and broadcasters will find themselves defendants in libel actions in the years ahead.

BRADFORD SWING

IRS PREVENTED FROM SEIZING DOCUMENTS: ATTORNEY ASSERTS CLIENT'S FIFTH AMENDMENT PRIVILEGE

Dr. Mason, a taxpayer, was visited by Special Agents of the Internal Revenue Service, who informed him that his tax returns were under investigation. He immediately called his accountant, defendant Candy, who advised Dr. Mason not to show any of his records to the agents. Defendant Candy then called defendant Kasmir, an attorney,

43. W. PROSSER, THE LAW OF TORTS § 112, at 765 (4th ed. 1971).

44. Justice Blackmun suggested that it was to resolve the "uncertainty" of a "sadly fractionated" Court in *Rosenbloom*. 94 S. Ct. at 3014.

45. RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 569, at 59 (Tent. Draft No. 20, 1974). It is interesting to note that the Supreme Court's decision to prohibit imposition of strict liability has removed the basis for the per se/per quod controversy, and thus has ended the matter. *Id.*

46. Note that the burden of proving truth lies with the defendant once a per se case of libel is established.

47. For a list of decisions by lower courts assuming the *Rosenbloom* plurality opinion to have become the established law, see Note, *Misinterpreting the Supreme Court: An Analysis of How the Constitutional Privilege to Defame Has Been Incorrectly Expanded*, 10 IDAHO L. REV. 213, 217 (1974).

48. On the attitude of attorneys, see *id.*

49. One commentator expressed support of the standard ultimately adopted in *Gertz*, but seemed resigned to the inevitability of the *Rosenbloom*, or even of Justice Black's, standard. Note, *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 38, 227-28 (1971).

50. RESTATEMENT (SECOND) OF TORTS, Chapter 24A, at 133-45 (Tent. Draft No. 20, 1974).

who, at Candy's request, contacted Dr. Mason. Mason retained Kasmir as his attorney. The next day, Dr. Mason received from Candy an assortment of records and documents. Within minutes, Dr. Mason turned them over to his attorney. The following day, summons were served upon Kasmir and Candy ordering Kasmir to give up the documents and Candy to testify about them. Both men refused to comply with the summons, and the government sought enforcement in the district court. The district court granted the government's petition, but stayed its order pending appeal. The Court of Appeals for the Fifth Circuit *held,* reversed: The constitutional privilege against compulsory self-incrimination may be invoked on behalf of a taxpayer by his attorney to prevent the production of documents which the taxpayer has turned over to his attorney. *United States v. Kasmir,* 499 F.2d 444 (5th Cir. 1974).[1]

In resolving the issues presented by the instant case, the court sought guidance from the decision of the United States Supreme Court in *Couch v. United States,*[2] and from its own pronouncements in *United States v. White.*[3] In *Couch,* the taxpayer had hired an independent accountant to whom she had regularly delivered various business and tax records. The IRS sought to enforce its summons to view these records which had remained in the accountant's possession for many years. The Supreme Court held that the taxpayer was not entitled to assert her privilege against self-incrimination to prevent production of the records which she had turned over to her accountant.[4] The Court determined that "possession bears the closest relationship to the personal compulsion forbidden by the Fifth Amendment,"[5] and found that the taxpayer's "divestment of possession was of such a character as to disqualify her entirely as an object of any impermissible Fifth Amendment compulsion."[6] The Court also decided that there could be no expectation of privacy when records were turned over to an accountant for disclosure in an income tax return.[7] The *Couch* Court was careful to point out that it was not establishing a per se rule as to the necessity of possession in order to assert the fifth amendment privilege; the Court acknowledged that situations might arise "where constructive possession is so clear . . . as

1. The Court held that the Internal Revenue Service was entitled to enforce the summons served upon accountant Candy if it believed this would be of benefit to the government.

2. 409 U.S. 322 (1973) [hereinafter referred to as *Couch*].

3. 477 F.2d 757, *aff'd on rehearing en banc,* 487 F.2d 1335 (5th Cir. 1973) [hereinafter referred to as *White*].

4. This decision has received much criticism as sanctioning "yet another tool of the ever-widening governmental invasion and oversight of our private lives." Couch v. United States, 409 U.S. 322, 338 (1973) (Douglas, J., dissenting). *See, e.g.,* Comment, 1973, UTAH L. REV. 106; 48 TUL. L. REV. 160 (1973); 26 U. FLA. L. REV. 142 (1973).

5. Couch v. United States, 409 U.S. 322, 331 (1973).

6. *Id.* at 334-35.

7. *Id.* at 335. The Court noted that, although not in itself a controlling factor, no confidential accountant-client privilege exists under federal law.

to leave the personal compulsions upon the accused substantially intact."[8]

The Court of Appeals for the Fifth Circuit had its first opportunity to apply the *Couch* decision in *United States v. White.*[9] The taxpayer in *White,* upon learning that he was the subject of an Internal Revenue Service investigation, retained White as counsel. White immediately contacted the taxpayer's accountant and obtained all worksheets used in preparing the taxpayer's returns. Summons was served upon White for production of those documents. White refused to comply, asserting his client's fifth amendment privilege. Two issues faced the court: 1) whether an attorney has standing in an Internal Revenue proceeding to assert a privilege on behalf of his client, and 2) whether the fifth amendment shields a client from compulsory production of work papers owned and prepared by an accountant and in the possession of the taxpayer's attorney, but never in the actual possession of the taxpayer. The court assumed, without actually deciding the issue, that attorney White did have standing to assert any privilege his client might have. However, the court then held that the privilege, under the circumstances, did not exist. It reasoned that because the taxpayer was not in possession of the documents, the necessary element of personal compulsion, as prescribed in *Couch,* was missing. The court rejected the taxpayer's claim of constructive possession, as suggested in *Couch,* maintaining that an attorney could not be in constructive possession of the papers for his client when the client never had actual possession of them.[10]

Confronted with the *White* decision, attorney Kasmir successfully distinguished the instant case. His client, unlike the taxpayer in *White,* had obtained actual possession of the worksheets and had personally transferred the documents to Kasmir pursuant to an attorney-client relationship. The court correctly held that under these facts, the taxpayer was entitled to assert his privilege against self-incrimination to prevent production of the documents. It found that the taxpayer had a legitimate expectation of privacy based on the nature of the attorney-client relationship,[11] which is guaranteed by the sixth amendment right to counsel, the attorney-client evidentiary privilege,[12] and ethical restraints on the attorney.[13] The court also determined that under

8. *Id.* at 333.

9. 477 F.2d 757, *aff'd on rehearing en banc,* 487 F.2d 1335 (5th Cir. 1973).

10. Contra, United States v. White, 487 F.2d 1335, 1339-40, *aff'd en banc,* 477 F.2d 757 (5th Cir. 1973) (Ainsworth, J., dissenting).

11. The attorney-client relationship as distinguished from the attorney-client privilege.

12. But note that the attorney-client privilege is not available to prevent production of documents created prior to the attorney-client relationship. 8 J. WIGMORE, EVIDENCE § 2307 (McNaughton rev. 1961). See Comment, 74 YALE L.J. 539 (1965) for recommendations that in cases such as this, the court look to expansion of the attorney-client privilege for a non-constitutional rationale.

13. The attorney has a strict ethical obligation to prevent disclosure. This ethical obligation is broader than, and independent of, the attorney-client privilege. 499 F.2d at 453.

these circumstances, the attorney was in constructive possession of the papers for his client.

In its analysis, the court recognized that unless a taxpayer retains his fifth amendment privilege to prevent production of documents which he has transferred to his attorney, his rights are effectively decreased by the transfer.[14] Since taxpayers are often dependent upon their attorneys to decipher today's complex tax laws, and therefore must deliver their records to them, the practical effect of denial of the privilege would be virtual elimination of the protection against self-incrimination in criminal tax investigations.[15] The Fifth Circuit Court of Appeals, in *Kasmir,* rejected the government's contentions which would have led to such consequences.[16]

Having determined that a taxpayer retains his privilege to prevent the production of documents in his attorney's possession, the court answered in the affirmative the question left unanswered in *White:* whether the attorney has standing to assert his client's claim of privilege. The court recognized that the "realities of tax litigation require that the attorney be allowed to press his client's claim where the client could successfully do so."[17]

The decision in *Kasmir* clarified the position taken by the Fifth Circuit in *White,* and considerably limited that decision. Many commentators expressed fears that after the *White* decision a taxpayer would automatically lose his fifth amendment privilege in documents when his attorney took possession of them.[18] It is now clear that if the proper procedure is followed, no such loss of privilege will result. Unfortunately, by distinguishing *White* rather than overruling it, the *Kasmir* court makes it

> appear as if the applicability of the privilege is more a matter of the form of the transfer than the substance behind the privilege since the most important difference between this case and *White* is taxpayer's fleeting actual possession between that of the accountant and that of the attorney.[19]

The court rationalized its decision by asserting that it was merely permitting the taxpayer in *Kasmir* to retain his privilege while the taxpayer in *White,* never having had possession of the documents, had no privilege to retain.[20] Such contrived reasoning is unpersuasive. It leaves a constitutional guarantee dependent upon the ritualistic touching of the documents by the taxpayer. The decision is therefore con-

14. "The government would have us hold that the taxpayer walked into his attorney's office unquestionably shielded with the amendment's protection, and walked out with something less." 499 F.2d at 452 n.5, *quoting* United States v. Judson, 322 F.2d 460, 466 (1963).

15. Couch v. United States, 409 U.S. 322, 342 (1973) (Douglas, J., dissenting).

16. 499 F.2d at 452.

17. *Id.* at 454.

18. *See, e.g.,* 1973 DUKE L.J. 1080.

19. 499 F.2d at 451.

20. Id. at 453-54.

trary to the policy that the privilege against self-incrimination is to be liberally construed and applied.[21] Regardless of the manner in which an attorney obtains possession of tax records and documents, it should be recognized that he possesses them constructively for his client in order to prepare his client's defense.

Of course, it must be noted, the court was not forced to overrule *White* in order to reach a proper and just decision in *Kasmir*. Hopefully, when the Fifth Circuit is again faced with a situation in which the taxpayer has not actually touched the documents en route to his attorney, it will acknowledge that such a slight distinction from *Kasmir* does not justify denial of the taxpayer's privilege. Today, a careful attorney can insure that his client's privilege will not be jeopardized by involving the taxpayer in any transfer of documents to him.

The *Kasmir* decision is an important one,[22] necessary to the safeguard of constitutional guarantees and protection of the attorney-client relationship. The Fifth Circuit has recognized that the Supreme Court's pronouncements in *Couch* do not defeat the taxpayer's claim of privilege with respect to documents in his attorney's possession, but rather, serve to strengthen that claim.[23] It is to be hoped that other circuits will follow the *Kasmir* court in its protection of the rights of taxpayers.

ELLEN R. GERSHOW

DISCLOSURE OF CLIENT CONFIDENCES BY SECURITIES ATTORNEY NAMED AS A DEFENDANT IN A CIVIL ACTION DOES NOT VIOLATE CODE OF PROFESSIONAL RESPONSIBILITY

Can an attorney, who is named as a defendant in a civil action along with his former corporate client, reveal client confidences to plaintiffs' counsel? Should plaintiffs' counsel be disqualified from participating in the suit on the grounds that he has received such

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21. Hoffman v. United States, 341 U.S. 479, 486 (1951); Counselman v. Hitchcock, 142 U.S. 547, 562 (1892).

22. The field of taxation represents probably the greatest single area of contact between individuals and the force of the state. A slight invasion of the right against self-incrimination in this field has as great and baleful consequences upon the relations between the individual and the state as does an invasion of that right in the more dramatic areas of public life.

Application of House, 144 F. Supp. 95, 103 (N.D. Cal. 1956).

23. *But cf.* United States v. Fisher, 500 F.2d 683 (3d Cir. 1974), a post-*Couch* decision involving the same fact pattern as *Kasmir* but dealing with a non-criminal investigation. Cases which dealt with this issue prior to *Couch* include United States v. Judson, 322 F.2d 460 (9th Cir. 1963); Bouschor v. United States, 316 F.2d 451 (8th Cir. 1963); *In re* Fahey, 300 F.2d 383 (6th Cir. 1961); United States v. Boccuto, 175 F. Supp. 886 (D.N.J. 1959), *appeal dismissed*, 274 F.2d 860 (3d Cir. 1959); Application of House, 144 F. Supp. 95 (N.D. Cal. 1956).