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## Evidence--Attorney Client Privilege--Matters Relating to Receipt of Fees from a Client Are Not Usually Privileged

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statutes<sup>27</sup> which are designed to protect this information as though it were the personal asset of the party. In the sense that *Sawyer* protects the party's right of privacy, it is consistent with the Oklahoma view; but Oklahoma, in rejecting the theory of settlement, has adopted limitations on discovering a party's ability to pay which are far more restrictive than those of New Hampshire. In view of the restrictive language in *Carman*, it seems likely that if the question of discovering the defendant's financial situation in a tort action for wrongful death or injury arose, the Oklahoma court would follow the lead of *Sawyer* in refusing discovery of the party's personal assets and would continue to deny discovery of any liability insurance.

*Kenneth L. Brune*

EVIDENCE—ATTORNEY CLIENT PRIVILEGE—MATTERS RELATING TO RECEIPT OF FEES FROM A CLIENT ARE NOT USUALLY PRIVILEGED. *United States v. Hodgson*, 492 F.2d 1175 (10th Cir. 1974).

Pursuant to an investigation of the federal income tax liability of A, a known gambling suspect, an Internal Revenue Service summons was issued and served upon Paul Hodgson, an attorney, requiring him to produce certain records related to his employment by A.<sup>1</sup> Hodgson appeared before an IRS special agent at the time and place specified by the summons but declined to produce the requested records or to testify, on the presumption that such acts would be a violation of the attorney-client relationship. Hodgson also based his refusal upon the

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27. OKLA. STAT. tit. 36, § 1657 (1971). OKLA. STAT. tit. 47, § 2-111 (1971). OKLA. STAT. tit. 47, § 10-115 (1971).

1. *United States v. Hodgson*, No. 73-C-24 at 3 (N.D. Okla. 1973). Respondent, Hodgson, was directed to bring with him the following documents:

- 1) Records of all charges to or in behalf of [A] during the years 1966 through 1971, inclusive, for legal fees, advice and/or other services.
- 2) Records of all moneys received and/or amounts credited by you for or in the behalf of [A] for legal fees, advice and/or other services rendered during 1966 through 1971, inclusive. This includes, but is not limited to:
  - a. Amounts
  - b. Dates of Payment
  - c. By whom paid or who caused the credit to be made
  - d. How the payments or credits were made, i.e., check, currency or other,

fifth amendment privilege against self-incrimination, claiming that the requested information might tend to incriminate his client.

In an opinion by Judge Breitenstein, the United States Court of Appeals for the Tenth Circuit reversed a district court order that denied the judicial enforcement of the summons.<sup>2</sup> The appellate court dismissed the fifth amendment claim<sup>3</sup> and focused its attention upon the question of whether the attorney-client privilege extended to the records and information sought from Hodgson. After consideration of the issue, the court concluded that matters relating to receipt of fees from a client are not usually privileged.<sup>4</sup>

One of the decisive factors in the adjudication of the case was whether the guidelines for the recognition of information deemed within the privilege are to be governed by state or federal law. Hodgson's basic premise in both district and appellate court was that state law should be followed by the federal courts.<sup>5</sup> Relying upon this presumption, Hodgson based his defense upon a Mississippi case wherein the court, interpreting a state statute similar to Oklahoma's privilege statute,<sup>6</sup> held that certain matters, including records of dates and amounts paid by the client to the attorney, are privileged.<sup>7</sup> However, the court of appeals in *Hodgson* ruled that in the area of federal income

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2. *United States v. Hodgson*, 492 F.2d 1175 (10th Cir. 1974).

3. The court based its holding upon *Couch v. United States*, 409 U.S. 322, 336 (1973); see also *United States v. Theodore*, 479 F.2d 749 (4th Cir. 1973); *United States v. Cote*, 456 F.2d 142, 144 n.1 (8th Cir. 1972); *In re Fahey*, 300 F.2d 383 (6th Cir. 1961). *Contra*, *United States v. Judson*, 322 F.2d 460 (9th Cir. 1963).

4. *United States v. Hodgson*, 492 F.2d 1175, 1177 (10th Cir. 1974); accord, *United States v. Ponder*, 475 F.2d 37, 39 (5th Cir. 1973); *In re Semel*, 411 F.2d 195, 197 (3d Cir. 1969); *Wirtz v. Fowler*, 372 F.2d 315, 332 (5th Cir. 1966); *N.L.R.B. v. Harvey*, 349 F.2d 900 (4th Cir. 1965); *Colton v. United States*, 306 F.2d 633, 638 (2d Cir. 1962); *In re Wasserman*, 198 F. Supp. 564, 566 (D.D.C. 1961); *United States v. Schmidt*, 360 F. Supp. 339, 349 (M.D. Penn. 1973). *But see* *Tillotson v. Boughner*, 350 F.2d 663, 666 (7th Cir. 1965).

5. In support of this premise, Hodgson cited 36 C.J.S. *Federal Courts* § 190 n.96 (1960). However, the text from which the footnote was drawn recites *in toto*, "While it has been held that state law governs as to the admissibility of evidence in a diversity case, it has also been held that the matter is governed by federal law, and that in a proper case evidence which is incompetent under state law may be received." See *United States v. Cromer*, 483 F.2d 99 (9th Cir. 1973); *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960).

6. OKLA. STAT. tit. 5, § 3 states in pertinent part: "It is the duty of the attorney and counselor . . . [t]o maintain inviolate the confidence, and, at any peril to himself, to preserve the secrets of his client."

7. *United States v. Ladner*, 238 F. Supp. 895 (S.D. Miss. 1965). It should be noted that Mississippi is in the Fifth Circuit and in light of the following appellate court opinions *Ladner* is probably no longer good law in Mississippi: *United States v. Ponder*, 475 F.2d 37 (5th Cir. 1973); *United States v. Finley*, 434 F.2d 596 (5th Cir. 1970).

tax investigation, the question of privilege is a matter of federal, not state law.<sup>8</sup>

Assuming that the Tenth Circuit's decision as to applicable law represents the majority opinion of the eleven circuits and likewise their decision concerning the status of fees paid by the client, the legal profession remains confronted with the question of the effect of this and other similar rulings upon the individual attorney. In the face of a summons to discover the amount of fees paid, by whom paid, and for what services, does the lawyer still have an ethical obligation to his client to challenge the summons even though the weight of authority would seem to indicate that the court will ultimately compel disclosure? Absent any definitive ruling by the Standing Committee on Professional Ethics of the American Bar Association, the answer to this question must be yes, such a duty still exists.

In all of the cases dealing with this matter of fees and privilege, not one of the courts has asserted that fee-related information is absolutely outside of the privilege.<sup>9</sup> Their decisions in this regard are generally stated in terms that such matters, i.e. receipt of fees, are *usually* or *normally* not within the privilege. While it may be argued that this is but a matter of semantics, one should consider whether just such a qualification might not be sufficient to render an attorney liable to his client. It is important to note that in the district court hearing of *Hodgson*, Judge Allen E. Barrow stated: "The court further finds that the Respondent might subject himself to a law suit if he submitted the information and testimony in compliance with the summons and failed to assert the attorney-client privilege."<sup>10</sup> The court of appeals likewise commented upon the lawyer's duty to call such a matter to the attention of the court, raising the privilege "as to each record sought and each question asked so that at the enforcement hearing the court can rule with specificity."<sup>11</sup> It would thus appear that while the courts have followed a general pattern of denying privileged status to financial transactions between the attorney and his client, they have been unwilling to adopt a blanket rule to this same end.

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8. *United States v. Finley*, 434 F.2d 596, 597 (5th Cir. 1970); *Colton v. United States*, 306 F.2d 633, 636 (2d Cir. 1962); *In re Albert Lindley Lee Memorial Hospital*, 209 F.2d 122 (2d Cir. 1953), *cert. denied*, 347 U.S. 960 (1954). *Contra*, *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960).

9. Cases cited note 4 *supra*.

10. *United States v. Hodgson*, No. 73-C-24 at 5 (N.D. Okla. 1973); *see In re Wasserman*, 198 F. Supp. 564, 566 (D.D.C. 1961), *noted in* 13 *MERCER L. REV.* 434 (1962).

11. *United States v. Hodgson*, 492 F.2d 1175, 1177 (10th Cir. 1974).

The American Bar Association's Standing Committee on Professional Ethics has thus far failed to provide an adequate guide as to the course an attorney should take when confronted with a situation such as that posed in *Hodgson*. The question of whether the amount of fee paid by a client is privileged was first posed in the Committee's Informal Opinion No. 311, but no answer was given.<sup>12</sup> Informal Opinions Nos. 393<sup>13</sup> and 1110<sup>14</sup> are both addressed to the question of compelled disclosure of fees paid by clients; however, each defers the matter to Formal Opinion No. 247 wherein it is stated that whether certain information is privileged is a question of law and not of ethics.<sup>15</sup> For this reason, the Committee stated that it would not attempt to decide the issue. This attitude might perhaps alleviate the concern of the attorney affected, in that he could rely upon the precedent in his own jurisdiction, were it not for a singular statement included in Informal Opinion No. 795:

The Committee is of the opinion that dealings between a lawyer and his client concerning the pecuniary considerations (or lack thereof) for the performance of the legal services, is included within the client's confidences which the lawyer must preserve.<sup>16</sup>

Despite the seeming clarity and finality of this statement, there still exists an ambiguity created by the factual patterns involved. Informal Opinion No. 393 dealt with a factual situation directly in point with that of *Hodgson*. Informal Opinion No. 795 concerned a situation wherein a lawyer, running for public office, wished to include in his political advertising the fact that he had performed free legal services for various people and organizations, the specific names of which were to be listed. The principle involved in each case would appear to be the same; yet, differing results were reached. The sequence of publication might arguably suggest that Informal Opinion No. 795, being the more recent of the two opinions, supersedes Informal Opinion No. 393. However, in 1969, four years after the publication of Informal Opinion No. 795, the ABA Committee on Professional Ethics issued Informal Opinion No. 1110, reaffirming its position as stated in Informal Opinion No. 393. Therein lies the ambiguity. Was Informal Opinion

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12. ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 311 (1952).

13. ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 393 (1961) (factual pattern in point with that in *Hodgson*).

14. ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 110 (1969).

15. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 247 (1942).

16. ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 795 (1965).

No. 795 meant to be a broad policy statement or to be confined to the specific facts involved? Caution should dictate that the attorney follow the more conservative interpretation and govern his actions in accordance with the policy of Informal Opinion No. 795. Under such circumstance, the attorney has no alternative but to challenge a summons requesting financial records on the basis of the attorney-client privilege.<sup>17</sup>

The effect of the *Hodgson* decision should therefore serve primarily as an indicator of the manner in which the federal courts are inclined to treat matters relating to fees paid by clients. While this type of information is not deemed to be a confidential communication such as to afford it privileged status within the federal judiciary system, it nonetheless remains a potential confidence or secret as defined and protected within the Code of Professional Responsibility. Until such time as the issue is brought before a competent court of law and disclosure is ordered therein, the attorney is under a strict duty to preserve this information from outside discovery. When served with summons, such as the one involved in the instant case, the attorney may owe his client the courtesy of advising him as to the probability of the court's compelling disclosure. When called before the court, the attorney has the duty to raise the issue of attorney-client privilege as to each record sought and question asked and thereupon to challenge the validity of the summons.<sup>18</sup> Having done this, the attorney has fulfilled his obliga-

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17. While this is the conclusion that must be reached from the opinions dealing specifically with fees, there would seem to be no reason prohibiting the Committee from using the same rationale with regard to fees as they used with the identity and address of a client in Informal Opinion No. 1188 (reaffirmed in Informal Opinion No. 1200). Though the opinion specifically concerned the revealing of names and addresses, the principle underlying the opinion is broad enough to extend to other situations which would produce similar results. These are situations in which the contested information, innocuous under normal circumstances, would, due to unique factors of the case, tend to prove a fact such as guilt or liability. The Committee stated that whether certain information is "secret" within the meaning of Canon Four and Disciplinary Rule No. 4-104 of the Code of Professional Responsibility is an issue of fact, not law, the final determination of which is governed by the response to three basic questions.

- (a) Will the disclosure of the client's name (or address) likely be detrimental to the client?
- (b) Will such disclosure be embarrassing to the client?
- (c) Did the client request that his name (or address) not be disclosed?

If any of these three questions are answered in the affirmative, the information is secret and protected by DR 4-104(B). If the term "fees" is substituted for "name (or address)" in the above test, a subsequent affirmative response will likewise indicate that this information comes within the protection of DR 4-104(B).

18. *Donaldson v. United States*, 400 U.S. 517, 536 (1971); *Reisman v. Caplin*, 375 U.S. 440 (1964); *United States v. Billingsley*, 469 F.2d 1208 (10th Cir. 1972); *United States v. Roundtree*, 420 F.2d 845 (5th Cir. 1970). The *Donaldson* case establishes the two requirements for a valid summons as: (1) Issued in good faith; and (2) Issued prior to a recommendation for a criminal prosecution. *Billingsley* interpretes "recommenda-