NOTES

CONSTITUTIONAL LAW: ATTORNEY SUCCESSFULLY INVOKES PRIVILEGE AGAINST SELF-INCRIMINATION IN BEHALF OF CLIENT

THE FEDERAL courts are sharply divided on the question of an attorney's standing to invoke the fifth amendment privilege against self-incrimination in behalf of his client.[1] *United States v. Judson*,[2] which involved an attorney's refusal to produce his client's cancelled checks and bank statements[3] during a tax fraud investigation, presents a review of this problem. In a split decision, the United States Court of Appeals for the Ninth Circuit held that an attorney may invoke his client's privilege[4] where the client himself could do so were he in possession of the documents.[5]

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[1] *Compare* Colton v. United States, 306 F.2d 633 (2d Cir. 1962) (dictum) (attorney can invoke client's self-incrimination privilege) *and* Application of House, 144 F. Supp. 95 (N.D. Cal. 1956) (attorney can withhold accountant's workpapers under privilege against self-incrimination) *with* Bouschor v. United States, 316 F.2d 451 (8th Cir. 1963) (attorney cannot withhold accountant's workpapers) *and* United States v. Boccuto, 175 F. Supp. 886 (D.N.J.), *appeal dismissed*, 274 F.2d 860 (3d Cir. 1959) (attorney cannot withhold accountant's workpapers).

[2] 322 F.2d 460 (9th Cir. 1963).

[3] Certain other papers, because they were confidential and were prepared during the attorney-client relationship, were protected by the attorney-client privilege. However, the checks and bank statements were not confidential documents and therefore did not satisfy the necessary conditions for protection under the attorney-client privilege. See 8 WIGMORE, EVIDENCE § 2308 (McNaughton rev. 1961).

[4] The term "privilege," where used without further description, refers to the privilege against self-incrimination.

[5] In so ruling, the court adopted Wigmore's view that "if the client is compellable to give up possession, then the attorney is; if the client is not, then the attorney is not. It is merely a question of possession, and the attorney is in this respect like any other agent.... It follows, then, that *when the client himself would be privileged* from production of the document... the attorney having possession of the document is not bound to produce." 8 WIGMORE, EVIDENCE § 2307, at 591-92 (McNaughton rev. 1961) (Italics in original).

The court did not discuss the possibility that the documents were within the scope of the "required records" exception to the privilege against self-incrimination. According to this exception, fully discussed in Shapiro v. United States, 335 U.S. 1 (1948), the privilege may not be used to avoid disclosure of documents which are required by law to be kept. The Internal Revenue Code of 1954 provides that "every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary or his delegate may from time to time prescribe." INT. REV. CODE OF 1954, § 6001. Two federal courts have stated that on the basis of this provision tax records are within the "required records" exception. Falsone v. United States, 205 F.2d 734 (5th Cir. 1953); United States v. Willis, 145 F.

The fifth amendment privilege against self-incrimination is universally considered to be "personal."[6] However, the federal courts do not agree on the effect to be given this description in determining whether an attorney may invoke his client's privilege. One of the earliest and most frequently cited cases in which the Supreme Court so described the privilege was *Hale v. Henkel.*[7] There the Court refused to allow a corporate officer to invoke the privilege for the benefit of the corporation,[8] saying that the privilege against self-incrimination is "personal" and was never intended to be used for the protection of a third person.[9] In *Bouschor v. United States*[10] an attorney asserted his client's privilege to avoid production of an accountant's workpapers, which had been delivered to him by the accountant at his client's request. The court relied heavily upon the *Hale* description of the privilege as "personal"[11] and did not allow the attorney to withhold the papers. The *Bouschor* court and the dissenting judge in *Judson* felt that the description of the privilege as "personal" bars anyone but the privilege-holder from invoking it.[12] The rationale of the majority

Supp. 365 (M.D. Ga. 1955). These cases do not decide whether they would describe cancelled checks and bank statements as "required records." For a discussion of the "required records" exception and its significance in tax fraud cases, see Gordon, *When Can Records Be Withheld During Tax Investigations?*, 17 J. TAXATION 174, 176 (1962); Redlich, *Searches, Seizures, and Self-Incrimination in Tax Cases*, 10 TAX L. REV. 191, 192-95 (1954).

[6] See, *e.g.*, Rogers v. United States, 340 U.S. 367 (1951); United States v. White, 322 U.S. 694 (1944); Hale v. Henkel, 201 U.S. 43 (1906).

[7] 201 U.S. 43 (1906).

[8] The officer asserted his own privilege to avoid production of corporate records. However, the Court refused to allow him to withhold them since an immunity statute protected him against the use of any of this evidence in a later proceeding. Then the officer argued that he should be allowed to withhold the records because the immunity statute did not protect the corporation. The Court found that he could not invoke the privilege to protect the corporation. *Id.* at 69-70.

[9] *Ibid.*

[10] 316 F.2d 451 (8th Cir. 1963).

[11] *Id.* at 458.

[12] Before considering the capacity of an attorney to invoke his client's privilege against self-incrimination, the *Bouschor* court considered the applicability of the fourth amendment. In connection with the latter, the court stated: "Of course, a lawyer may assert a constitutional privilege on behalf of his client in a proceeding of this kind when the client is a party...." 316 F.2d at 458. In considering the self-incrimination privilege, the *Bouschor* court did not refer to this broad proposition. As a result, the holding of the case is not completely clear. The court may have meant that an attorney may *never* invoke his client's privilege. Or, considering the quoted proposition, the court may have meant to hold only that an attorney may not invoke the privilege when his client is not a party (in *Bouschor* the client was not a party). In either case the *Bouschor* holding would be contrary to *Judson* since the *Judson* court allowed the attorney to invoke his client's privilege without

Judson opinion, on the other hand, was that a description of the privilege as "personal" suggests only that it is limited to "natural individuals."[13]

It can be argued that *Judson* underemphasizes the importance of the use of the term "personal" in limiting the bounds of the privilege. The Supreme Court stated in *Hale v. Henkel* that even an agent is prohibited from withholding information by invoking the privilege in behalf of his principal.[14] It seems, therefore, that "personal," as utilized by the Court in *Hale*, imports more than mere limitation of the availability of the privilege to a "natural individual." On the other hand, it is arguable that the *Bouschor* court reaches the opposite extreme. Although the decision is primarily based on the *Hale* description of the privilege as "personal," *Bouschor* appears to extend the rationale of *Hale* beyond its intended limits. In connection with the statement that an agent may not invoke his principal's privilege, the *Hale* opinion noted that some courts have refused to allow an attorney to invoke the privilege for his client.[15] The language the Court used in this

any mention of a requirement that the client be a party. The policy considerations for allowing the attorney to invoke his client's privilege would seem to apply whether or not the client was a party so long as he was actually invoking the privilege in behalf of his client.

Although the reasons stated by the *Bouschor* court to be the basis of its decision reveal a conflict with the thinking of the *Judson* court, the *Judson* court distinguished the *Bouschor* case on other grounds considered *infra*.

[13] The Supreme Court was dealing with cases involving corporations and unincorporated associations when it developed the doctrine that the privilege is "personal." See United States v. White, 322 U.S. 694 (1944); Wilson v. United States, 221 U.S. 361 (1911); Hale v. Henkel, 201 U.S. 43 (1906). The *Judson* court reasoned that in those cases the Supreme Court was referring only to such entities when it qualified the privilege as "personal." 322 F.2d at 463-64.

[14] 201 U.S. at 69-70. At least one federal court has ignored this statement. That court, in holding that an attorney's invocation of his client's privilege was ineffective because the client had waived it, stated that an attorney may invoke his client's privilege. Brody v. United States, 243 F.2d 378 (1st Cir. 1957). In connection with this statement the *Brody* court said that "there appears to be some confusion concerning the power of a duly authorized attorney to claim the privilege against self-incrimination on behalf of his client in view of statements in two cases in other circuits that, because the privilege is a personal one, it cannot be asserted by a third party, not even by an attorney." The court here cited Ziegler v. United States, 174 F.2d 439 (9th Cir. 1949) and United States v. Johnson, 76 F. Supp. 538 (M.D. Pa. 1947). The court further stated that these two cases are distingnishable because they hold that a witness cannot successfully invoke the privilege in behalf of another person or a corporation. "This is quite different from a holding that a *properly authorized agent of an individual* including his attorney, is powerless to assert the privilege for his principal in appropriate circumstances. The Supreme Court has never so held, nor have we." 243 F.2d at 387 n.5. (Emphasis added.)

[15] "Indeed, so strict is the rule that the privilege is a personal one that it has been

context appears to isolate the attorney-client relationship from the Court's conception of the general agency rule.[16] Thus, the Supreme Court apparently did not intend its description of the privilege as "personal" to preclude an attorney from claiming it for his client.[17]

In *United States v. Boccuto*,[18] the District Court for New Jersey held, in a fact situation almost idential to that in *Bouschor*, that an attorney has no standing to invoke his client's privilege. In both *Boccuto*[19] and *Bouschor*[20] the court found that the documents in controversy belonged to a third person, not the client. Hence, as ownership or personal possession of the documents to be withheld is prerequisite to assertion of the privilege,[21] the client himself could not have invoked the privilege in either *Boccuto* or *Bouschor*. In such a situation the *Judson* court would also deny the attorney's claim of the privilege to avoid production since it ruled that the attorney can invoke the privilege only when his client can.[22] The *Judson* court distinguished *Boccuto* and *Bouschor* on this "title" basis.[23] According to the *Judson* decision, those two cases could have been decided solely on the fact that the client did not own the documents, without ever reaching the question of an attorney's

held in some cases that counsel will not be allowed to make the objection." 201 U.S. at 70.

[16] The Court did not reach the question of an *attorney's* standing to invoke the privilege. The only effect of the Court's statement is to isolate such a case as special, reserving its opinion on whether or not the attorney can invoke his client's privilege.

[17] A court could easily avoid the semantic difficulty presented by the description of the privilege as "personal." There is strong authority for the general proposition that the attorney-client relation "is purely a personal one," a very special principal-agent relation. See 5 AM. JUR. *Attorneys at Law* § 45, at 285-86 (1936), and cases cited therein. In this light it would seem that a court could easily construe the term "personal" to sustain the attorney's invocation of the right for his client. This solution is not a contradiction of the Court's language in *Hale*; rather it is an alternative to rejecting that language as one court has done. See note 14 *supra*.

[18] 175 F. Supp. 886 (D.N.J.), *appeal dismissed*, 274 F.2d 860 (3d Cir. 1959).

[19] 175 F. Supp. at 890.

[20] In *Bouschor* the attorney did not sustain his burden of proving that the documents in question were the property of the client. This finding was made in connection with the court's consideration of whether the attorney-client privilege was available to the client to avoid disclosure of the papers. 316 F.2d at 456. It would seem that this finding would also apply to his claim based upon the privilege against self-incrimination.

[21] United States v. White, 322 U.S. 694, 699 (1944). See generally 98 C.J.S. *Witnesses* § 448 (1957) and cases cited therein.

[22] See note 5 *supra*.

[23] Apparently, the only other case which purports to rule directly on the question of an attorney's standing to invoke the privilege is *In re* Brumbaugh, 9 Am. Fed. Tax R.2d 1748 (S.D. Cal. 1962). This case is also distinguishable in that the papers in question were the attorney's own cancelled checks and bank statements.

standing to invoke his client's privilege.[24] Therefore, the *Boccuto* and *Bouschor* cases do not represent strong authority against the *Judson* position.

Since the "personal" concept *is* subject to varying interpretations and since reasonable arguments can be advanced for each of these positions, policy considerations should play a decisive role in determining whether an attorney may invoke his client's privilege.[25] With this view in mind, it is readily apparent that the *Judson* court reached the better result. It is obvious that an attorney cannot prepare his case adequately unless he is given all the information at his client's disposal. The law encourages full cooperation between client and attorney. So strong is this policy that the attorney-client privilege was developed for the very purpose of insuring that a client may feel free to disclose all aspects of his case to his attorney.[26] The *Judson* rnle is in accord with this policy because it encourages full cooperation on the part of a client by allowing him to give his papers to an attorney without fear that the prosecution will be able to force the attorney to produce them.

The *Judson* decision complies with the Supreme Court's policy of liberally construing the fifth amendment[27] "to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him. . . ."[28] There is no question that the client himself can successfully invoke his privilege against self-incrimination if he owns the papers and retains possession of them.[29]

[24] Whether the court in *Boccuto* based its decision on the question of title or on the statement that an attorney cannot invoke his client's privilege is unclear. The court said: "The Court, therefore, concludes that the attorney does not, under these circumstances, have the right to invoke the privilege against self-incrimination in behalf of his client, and that the work papers are the property of the accountant and must be produced in accordance with the summons." 175 F. Supp. at 890.

[25] Although reasonable arguments based on the word "personal" can be advanced against the *Judson* position, as has been pointed out there is no strong case authority against the *Judson* view. The courts which have expressed the view that an attorney may not invoke the client's privilege have done so either in distinguishable cases or in dictum.

[26] See Glover v. Patten, 165 U.S. 394, 406-07 (1897); Blackburn v. Crawfords, 70 U.S. (3 Wall.) 175, 192-93 (1865); Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir. 1956); Clark v. Turner, 183 F.2d 141, 142 (D.C. Cir. 1950).

[27] See Hoffman v. United States, 341 U.S. 479, 486 (1951); Arndstein v. McCarthy, 254 U.S. 71, 72 (1920); Counselman v. Hitchcock, 142 U.S. 547, 562 (1892).

[28] United States v. White, 322 U.S. 694, 698 (1944).

[29] See United States v. White, *supra* note 28; Boyd v. United States, 116 U.S. 616 (1886). Of course, this statement is not meant to include those situations where invocation of the privilege is precluded by the "required records" exception discussed in note 5, *supra*.

Since the attorney-client relationship is so close, forcing the attorney to produce the papers is so much like forcing his client to do so that any distinction is logically untenable. The effect of the privilege is to require prosecutors to obtain independent evidence of the accused's wrong-doing[30] and a client's papers are not independent while they are in his possession. It is difficult to determine how they become independent when he leaves them with his attorney.[31] As the *Judson* opinion suggests, the refusal to allow an attorney to invoke his client's privilege requires the conclusion that a client "walked into his attorney's office unquestionably shielded with the [Fifth] Amendment's protection, and walked out with something less."[32]

No disadvantage accrues to the prosecution through adoption of the *Judson* rule. The papers will not be withheld unless the client so desires. If the attorney asserts the privilege without consulting his client, and it is later found that the client wishes to waive his privilege, then the client's wishes, as in the operation of the attorney-client privilege,[33] should prevail. Moreover, there is no practical reason for denying an attorney's standing to invoke his client's privilege. The attorney has such broad authority to act for his client that it would be little, if any, extension of his authority to allow him to invoke his client's privilege in the absence of the client.[34] The attorney normally represents his client at the numerous meetings which attend a tax fraud investigation.[35] Pre-

[30] United States v. White, 322 U.S. 694, 698 (1944).

[31] When the client hands over his papers to his attorney, he retains ownership of them. The papers are subject to the control of the client even though the attorney has temporary custody of them. Therefore, the evidence contained in the papers could not be said to be gained from a source independent of the client. Although this reasoning would appear to apply to any agency relationship, it would seem especially applicable in a consideration of the attorney-client relationship. The attorney has "powers entirely different from, and superior to, those of an ordinary agent." 5 AM. JUR. *Attorneys at Law* § 6 (1936), and see authorities cited therein.

[32] 322 F.2d at 466.

[33] "[The attorney-client] privilege is that of the client alone, and no rule prohibits the latter from divulging his own secrets; and if the client has voluntarily waived the privilege, it cannot be insisted upon to close the mouth of the attorney." Hunt v. Blackburn, 128 U.S. 464, 470 (1888).

[34] "It is well settled that short of a compromise of a client's claim or a confession of judgment the authority of counsel in a case extends generally to all the customary incidents of litigation and embraces all agreements, stipulations, and admissions appertaining to its conduct through the courts." Christy v. Atchison, T. & S. F. Ry., 233 Fed. 255, 256-57 (8th Cir. 1916). See Rogers v. The Marshal, 68 U.S. (1 Wall.) 644, 651 (1863).

[35] One court has stated that requiring the client to attend these meetings would place an unreasonable burden on the client. Application of House, 144 F. Supp.

sumably, if the client were present and the papers were demanded of the attorney, the client could invoke his privilege to avoid disclosure, even though the papers were in the temporary possession of the attorney.[36] Thus, a rule requiring the client to be present to invoke his privilege in person operates only as a formality. As such it lacks plausible justification when considered in relation to the fact that an attorney advises his client regarding when, and with respect to what, the client should invoke his privilege. The client does not ordinarily make this decision without the advice of counsel, and it seems doubtful that he would ignore this advice in view of the fact that the attorney-client relationship begins because the client recognizes a need for legal advice. Therefore, even when the client himself invokes his privilege, his attorney normally has made the decision that it should be invoked.

The advantages of allowing an attorney to invoke his client's privilege demand that the formal requirement of personal assertion of the privilege be ignored. The rule in *Judson* comports with the basic legal policy of promoting the ready availability of information to an attorney. In addition, it is consistent with the notion that the client enters his attorney's office for aid in protecting his rights, not to lose some of the protection he already has. Finally, it avoids requiring the client to give up valuable time in order to be available to observe a mere formality.

95, 100 (N.D. Cal. 1956). This statement was cited with approval by the court in *Judson*. 322 F.2d at 466. The refusal to allow an attorney to invoke his client's privilege results in requiring the client to attend these meetings, or, take the chance of losing the protection which the privilege should afford him.

[36] If this were not true, consideration of the client's convenience would be of no import because the client would not be able to invoke the privilege even if he were present. However, the cases do not indicate that this conclusion is ill-founded. There is a requirement that the person invoking the privilege be in possession of the documents. See Perlman v. United States, 247 U.S. 7 (1918). However, one court, at least, seems disposed to treat possession of the attorney as that of the client. See Application of House, *supra* note 35.