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EVIDENCE-PRIVILEGE-EXTENSION OF ATTORNEY-CLIENT PRIVILEGE TO ADMINISTRATIVE PRACTITIONERS

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EVIDENCE—PRIVILEGE—EXTENSION OF ATTORNEY-CLIENT PRIVILEGE TO ADMINISTRATIVE PRACTITIONERS—In an action for rescission for transfer of patent rights, for breach of warranty of title and fraud, a pretrial examination of defendant's agent, as one familiar with facts concerning the transfer, was ordered by the court. Defendant objected to certain questions on the ground that the agent was in the status of attorney to defendant and that the matters in question were confidential communications protected from disclosure by the common law and statutory[1] attorney-client privilege. The agent was a patent agent duly registered and authorized to practice as such before the United States Patent Office, but was not admitted to practice as an attorney in any state or federal court. *Held,* objections overruled. A patent agent is not an attorney within the meaning of the rule against disclosure of privileged communications.[2] *Kent Jewelry Corp. v. Kiefer,* (N.Y. 1952) 113 N.Y.S. (2d) 12.

The rule of evidence protecting confidential communications between attorney and client from compulsory disclosure has outgrown its historical origins[3] as a privilege of the attorney and has become one enjoyed by and invoked by the client. The justification for this exception to the general duty to disclose lies in the policy consideration that complete freedom of consultation between attorney and client is essential before an attorney competently can give legal advice, and this freedom of consultation cannot be achieved if there exists in the client's mind any apprehension that his admissions to the attorney will later be used against him. The privilege has traditionally been applied strictly and expanded infrequently.[4] Illustrative of this restrictive treatment has been the courts' determination of the issue presented in the principal case—i.e., whether

[1] The relevant portion of §353 of the New York Civil Practice Act, which codifies the common law rule, reads: "An attorney or counselor at law shall not be allowed to disclose a communication, made by his client to him, or his advice given thereon, in the course of his professional employment. . . ."

[2] A second ground mentioned by the court to support its decision was that even if a patent agent falls within the privilege the particular matters in question here were outside the scope of the agent's professional employment as a patent agent.

[3] See 8 WIGMORE, EVIDENCE, 3d ed., §2290 (1940).

[4] "The privilege is an anomaly, and ought not to be extended." Best, C. J., in Broad v. Pitt, 1 M. & M. 233, 173 Eng. Rep. 1142 (1828). "Since the protection against privileged communications often leads to a suppression of the truth and to a defeat of justice, the tendency of the courts is toward a strict construction of such statutes." Samish v. Superior Court, 28 Cal. App. (2d) 685 at 695, 83 P. (2d) 305 (1938), as applied in People v. Curry, 97 Cal. App. (2d) 537, 218 P. (2d) 153 (1950).

the privilege should be recognized for communications between clients and those agents who practice before administrative tribunals or offices but who are not members of the bar. The handful of relevant cases have all involved patent agents and in general have supported the conclusion of the New York court in refusing to extend the privilege to such agents.[5] Although none of the opinions in these cases dwells long on the reasoning underlying the decision, the theory is that the communicant must be a "lawyer acting as a lawyer," that the mere similarity in function between an administrative practitioner[6] and an attorney at law does not justify extension of the privilege to cover the former, and that if extension is to be made it should occur as a product of legislation. While close logic yields this result, nonetheless there are convincing arguments to the contrary in view of modern conditions. The widespread development of administrative bodies to regulate and adjudicate many matters of business and social importance is a contemporary phenomenon now well established.[7] With the increasingly complex and technical nature of the problems handled by these agencies there has evolved a need for persons with highly specialized training to represent adequately private individuals' interests as they are involved in controversies heard by the agencies. In these controversies the individual's need is often not for an attorney generally qualified to practice law, but for a specialist specifically qualified to practice before a certain administrative body. Whether he retains a patent attorney or a patent agent the individual must feel confident in stating his cause fully to his representative if he is to receive adequate professional service.

Representation by administrative practitioners before many federal agencies is essentially similar to representation by the legal practitioner. The hearings and mode of reaching decision are usually quasi-judicial in nature; proceedings are governed by more or less formal procedure; some of the agencies adopt the technical rules of evidence[8] and almost all require that evidence be material

[5] Moseley v. Victoria Rubber Co., 3 Reports of Patent Cases 351 (1886); Brungger v. Smith, (C.C. Mass. 1892) 49 F. 124 (two paragraph opinion); United States v. United Shoe Mach. Corp., (D.C. Mass. 1950) 89 F. Supp. 357. See, however, McKercher v. Vancouver-Iowa Shingle Co., [1929] 4 D.L.R. 231, in which the Moseley case was distinguished.

[6] As indicative of the recent recognition of the importance of administrative practitioners who are not attorneys, reference is made to a resolution introduced in the 82nd Congress, H.R. 3097 ("Administrative Practitioners Bill"), which was supported by the American Bar Association [see 19 J.B.A.D.C. 6 (Jan. 1952)] and which would establish a credentials system for attorneys and agents practicing before the agencies. Partial test of §3: "Practice as attorneys . . . shall be governed by the canons of professional ethics generally applicable to members of the bar of courts. Agents admitted to practice . . . shall be subject to the same requirements (including limitations on solicitation, advertising, and division of fees). . . ."

[7] Rules of some of the administrative agencies, such as the Patent Office and the Interstate Commerce Commission, require the taking of an oath before the agent is admitted to practice. The Patent Office oath, inter alia, binds the agent to secrecy as to his client's confidences. For text of this oath see "Admission to and Control Over Practice Before Federal Administrative Agencies," Report of Committee on Administrative Practice of the Bar Association of the District of Columbia 54 (1938).

[8] E.g., the Federal Communications Commission (47 C.F.R. §1.871), the Interstate

and relevant to be admissible; some agencies maintain registers to which practitioners must be admitted before they may appear before the agency;[9] often there are qualifications as to character or examinations which must be met by aspiring practitioners, and unethical conduct will lead to suspension or disbarment.[10] It is submitted that there is scant argument against granting the same protection to the client who must deal with the administrative practitioner,[11] assuming that the privilege will be qualified by the usual limitations; such is the view of Professor Wigmore.[12] Extension of the rule is not of necessity solely a function of the legislature since it is the duty of the courts to apply the statutory language under present conditions and in accordance with the purpose of the statute. Precedents for the position adopted in the principal case are, with the exception of the 1950 *United Shoe Case*,[13] nineteenth century decisions which did not purport to grapple with the problem as it exists today. The *United Shoe Case*, moreover, involved communications between a defendant and its own patent department, which may be distinguished from the situation under discussion in which the client retains the attorney or agent. Of course the courts must distinguish those particular relationships in which the practitioner is not held to essentially the same high standards as the attorney and which consequently should not be encompassed by the privilege; and, as always, care must be taken to see that the privilege is not abused or used as a mere harassing obstacle to investigation and discovery of the truth. But when the relationship is substantially the same as that existing between client and attorney and the usual limitations on the rule are available, it seems consonant with the purpose and rationale of the privilege, in view of the vast amount of specialized law necessarily decided today before administrative tribunals, to entitle the client to invoke the privilege to protect confidential communications made between himself and his administrative practitioner.

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Commerce Commission (49 C.F.R. §1.75), the National Labor Relations Board (29 C.F.R. §101.10(a)), and the Tax Court (26 C.F.R. §701.31).

[9] E.g., the Patent Office (37 C.F.R. §1.341), the Treasury Department (31 C.F.R. §10.6), the Tax Court (see 29 C.F.R. §701.2(e)), the Veterans Administration (recognition system—38 C.F.R. §§14.629 to 14.635), and the Interstate Commerce Commission (49 C.F.R. §1.7).

[10] For two compact works listing in detail the admission requirements, practice techniques, admission procedure, suspension and disbarment procedure, etc., in the various federal agencies, see report referred to in note 7 supra, and "A Manual on Trial Technique in Administrative Proceedings and Illustrative Federal Administrative Agencies," prepared by Bar Association of the District of Columbia (1950). As to standards of professional conduct: for patent agents, see 37 C.F.R. §1.344; for Tax Court practitioners, see 26 C.F.R. §701.2(h).

[11] There have been advanced, of course, arguments against the privilege itself. See, e.g., discussion and quotation of Bentham's views in 8 WIGMORE, EVIDENCE, 3d ed., §2291 (1940).

[12] "There is every reason . . . for recognizing a privilege for those confidences; nor is there any apparent reason against it." 8 WIGMORE, EVIDENCE, 3d ed., §2300a (1940). Wigmore expressed the extension discussed above in terms of a definite principle.

[13] See note 5 supra.