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Recent Developments: In re Criminal Investigation No. 1/242Q: Attorney-Client Fee Records Not Privileged from Subpoena

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fied by a valid factor unrelated to economic protectionism." *Id.* at 2024 (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274 (1988)). Michigan and St. Clair County claimed that the amendments were not economically motivated; rather, they were intended to protect the health and safety of the citizens. *Fort Gratiot*, 112 S. Ct. at 2026. The Court explained that "because [the] provisions unambiguously discriminate against interstate commerce, the State bears the burden of proving that they further health and safety concerns that cannot be adequately served by nondiscriminatory alternatives." *Fort Gratiot*, 112 S. Ct. at 2027. In *Maine v. Taylor*, 477 U.S. 131 (1986), the Court upheld Maine's ban on the importation of live baitfish because of parasites and other problems the nonnative baitfish posed. The Court concluded that Michigan's Waste Import Restrictions violated the Commerce Clause because the amendments failed to present a reason, apart from origin, why solid waste from outside the county should be treated differently from solid waste from inside the county. *Fort Gratiot*, 112 S. Ct. at 2027-28.

The Court stressed that even if a legitimate goal were sought, illegitimate means to achieve that goal may not be used. *Id.* at 2027. Michigan and St. Clair County asserted that the restrictions were needed to allow counties to adequately plan for the safe disposal of future waste. *Fort Gratiot*, 112 S. Ct. at 2027. The Court acknowledged that "although accurate forecasts may be an indispensable part of a comprehensive waste disposal plan, Michigan could attain that objective without discriminating between in- and out-of-state waste." *Id.* at 2027.

In his dissent, Chief Justice Rehnquist argued that the case should be remanded for consideration of whether the SWMA amendments were based upon legitimate local health and safety concerns. *Id.* at 2028. The Chief Justice asserted that in light of the problems associated with the disposal of waste, Michigan was taking reasonable measures to protect its citizens and was not constructing a form of economic protectionism. *Id.* at 2028-29. Chief Justice Rehnquist declared, "the Court today penalizes the State of Michigan for what to all appearances are its good-faith efforts, in turn encouraging each State to ignore the waste problem in the hope that another will pick up the slack." *Fort Gratiot*, 112 S. Ct. at 2031.

In *Fort Gratiot*, the Court imposed a strict standard against the implementation of discriminatory waste import laws. The Court will strike down any statute that interferes with interstate commerce, unless a state can show that the restrictions were necessary to protect its citizens and that there were no less discriminatory options. In order for states or counties to enforce a waste management plan, the area that is to be protected must be held to the same standards that are imposed upon other counties and states.

- Carol Nakhuda Cohen

In re Criminal Investigation No. 1/242Q: **ATTORNEY-CLIENT FEE RECORDS NOT PRIVILEGED FROM SUBPOENA.**

The Court of Appeals of Maryland recently held that requiring an attorney to disclose jury records of the fees paid by two former clients to a grand jury did not violate the attorney-client privilege. *In re Criminal Investigation No. 1/242Q*, 326 Md. 1, 602 A.2d 1220 (1992). The court emphasized that although Rule 1.6 of the Model Rules of Professional Responsibility, governing confidentiality, is broader than the attorney-client privilege rule in Maryland, it does not provide an absolute shield to prevent this information from being subpoenaed.

As part of an investigation of known or suspected narcotics traffickers, the state routinely sought evidence of violations of the state income tax laws. The growing trend in narcotics investigation was to seek evidence of expenditures of large sums of money, including attorney's fees, as a means of interpolating the net worth of a suspect. For this reason, the Grand Jury for Anne Arundel County issued a subpoena duces tecum to attorney William H. Murphy, Jr. for the fee records of two of his former clients.

In a motion to quash the subpoena, Mr. Murphy pleaded that he had expressly promised his clients that all information about fees "would be personal, privileged, and confidential because of, among other things, the growing practice of prosecutors nationwide to use such information to establish violations of the narcotics laws . . . ." *Id.* at 6, 602 A.2d at 1222. He argued that to reveal the information in light of his client's express request that he not, was a breach of confidentiality.

The Circuit Court for Anne Arundel County granted the motion to quash the subpoena on the grounds that "the Maryland Rules of Professional Conduct have 'enlarged the general principle of confidentiality.'" *Id.* at 3, 602 A.2d at 1221. On behalf of the grand jury, the State filed an appeal to the court of special appeals. Before the intermediate court heard the case, however, the Court of Appeals of Maryland granted certiorari and reversed the circuit court's decision, holding that Rule 1.6 and the judicial application of the attorney-client privilege rule are distinct concepts. The court found that Rule 1.6 does not enlarge the attorney-client privilege rule in Maryland.

The court of appeals began by analyzing Rule 1.6 of the Model Rules of Professional Conduct. Citing the prefatory material to the Rules, which stated: "Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege, the court rejected the lower court's contention that the adoption of this rule by the Maryland legislature affectively expanded the attorney-client privilege." *Id.* at 4, 602 A.2d at 1221 (quoting Model Rules of Professional Conduct

Rule 1.6). The attorney-client privilege, which "applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client[,]" was distinguished from client-lawyer confidentiality, which "applies in situations other than those where evidence is sought from the lawyer through compulsion of law." *Id.* at 5, 602 A.2d at 1222. The court concluded that because Rule 1.6 applied in all situations, except where the protected information was requested under compulsion of law, the rule of confidentiality was broader in scope.

Applying the attorney-client privilege to the instant case, the court found that the information sought was beyond the scope of the privilege. The client's explicit request that information be kept confidential did not create a privilege under the law. While the court acknowledged that the attorney-client privilege is necessary to our legal system in order to assure that clients do not hesitate to seek legal advice or to confide in their lawyers, the court qualified this observation by noting that "[t]he privilege is not absolute; it does not restrict disclosure of every aspect of what occurs between the attorney and the client." *Id.* at 11, 602 A.2d at 1225.

The court noted that a clear majority of jurisdictions have held that requiring disclosure of attorney's fees did not violate the attorney-client privilege. Attorney's fees were an expected part of the relationship and to some extent the client was involved with the attorney in an arms-length transaction that was collateral to the privileged relationship. *Id.* at 7, 602 A.2d at 1223.

The court described three general exceptions to the rule requiring disclosure of attorney's fees. The "legal advice" exception would apply where the "disclosure of the information would implicate the client in the very matter for which legal advice was sought in the first case." *Id.* at 7, 602 A.2d at 1223 (quoting *In re Grand Jury Subpoenas Duces Tecum*, 695 F.2d 363 (9th Cir. 1982)). Another exception called the "last link" had been applied where only the client's identity was sought. The "communication exception" had been applied when "disclosure of the client's identity or the existence of a fee arrangement would reveal information that is tantamount to a confidential professional communication." *Id.* at 9, 602 A.2d at 1224. The court, however, concluded that these exceptions were "ill-defined and overlapping" and in any case, distinguishable from the case. *Id.* at 7, 602 A.2d at 1223.

Judge Bell, in the lone dissent, agreed with the majority's interpretation of Rule 1.6, as well as with the conclusion that the instant case did not fall under the recognized exceptions where the attorney-client privilege would be implicated. He dissented, nonetheless, because he found the rationale presented for the majority's holding that fee information was not confidential unpersuasive. *Id.* at 16, 602 A.2d at 1227. Payment of attorney's fees, he contended, was at the core rather than collateral to the attorney-client relationship and should, therefore, be privileged. *Id.* at 19, 602 A.2d at 1229.

By allowing the subpoena of attorney fee records, the court has given prosecutor another avenue for collecting evidence in the zealous hunt for drug traffickers. Presumably evidence of fees paid to an attorney would not be the only available evidence to establish the net worth of a suspect. More importantly, knowing that his attorney's fee records are likely to be subpoenaed in any future action against him, an individual accused of a crime involving large sums of money will think twice before he establishes this record. Allowing ready access to fee records may at some point conflict with Maryland's clear public policy of encouraging accused citizens to seek legal assistance without fear of lack of confidentiality.

- Dianne Moorehead Hughes

United States Dep't of Energy v. Ohio: FEDERAL GOVERNMENT'S SOVEREIGN IMMUNITY PROTECTED DEP'T FROM CIVIL PENALTIES FOR PAST VIOLATIONS OF THE CLEAN WATER ACT AND RESOURCE CONSERVATION RECOVERY ACT.

In *United States Dep't of Energy v. Ohio*, 112 S. Ct 1627 (1992), the United States Supreme Court held that the Department of Energy ("DOE") is exempt from state and federal civil penalties for past violations of the Clean Water Act ("CWA") and the Resource Conservation Recovery Act ("RCRA"). The Court held that because Congress did not expressly waive the federal government's sovereign immunity concerning past violations of the CWA and the RCRA, the federal government may only be liable for coercive fines which prospectively modify behavior.

In 1986, the State of Ohio sued the DOE for improperly disposing of hazardous wastes from its uranium processing plant in violation of the CWA and the RCRA. Relying on the federal facilities and citizen suit sections of the CWA and the RCRA, Ohio pursued both state and federal civil penalties for the DOE's past violations of these laws. The federal facilities sections govern the extent to which federal operations are subject to the CWA and RCRA statutes. The citizen suit sections allow private individuals to enforce the CWA and RCRA. Ohio brought suit in the United States District Court for Ohio, which held that the CWA and the RCRA federal facilities and citizen suit sections waived federal sovereign immunity for civil penalties. Holding that Congress waived immunity in all but the RCRA federal facilities section, the United States Court of Appeals for the Sixth Circuit affirmed in part and reversed in part. The United States Supreme Court granted certiorari to determine whether Congress waived immunity for punitive fines in the CWA and the RCRA.

The Court began its analysis by stating the common rule "that any