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A v. District Court of Second Judicial Dist.

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IN THE
SUPREME COURT
STATE OF COLORADO
No. **27044**

FILED
CLERK
OF THE

DEC 11 1975 36

A, B, C, D, E, F, G, and H,)
Petitioners,)
vs.)
THE DISTRICT COURT OF THE)
SECOND JUDICIAL DISTRICT)
and THE HONORABLE LEONARD)
PLANK, Judge thereof,)
Respondents.)

ORIGINAL PROCEEDING
SEEKING EXTRAORDINARY
RELIEF IN THE NATURE
OF PROHIBITION

COME NOW Petitioners, A, B, C, D, E, F, G, and H, by and through their attorney, Jon L. Holm, of Holm, Willis & Dill, Professional Corporation, and do hereby and respectfully make application to this Honorable Court pursuant to Colorado Appellate Rule 21 for an extraordinary writ in the nature of prohibition directing the Respondents to rescind their order requiring the Petitioners to appear before the Grand Jury of the Second Judicial District, City and County of Denver, State of Colorado, to testify and to produce certain evidence.

AND AS GROUNDS AND IN SUPPORT OF THIS APPLICATION for a Writ of Prohibition, the Petitioners state and allege as follows:

1. The Honorable Leonard Plank, Judge of the District Court, Second Judicial District, is the Presiding Judge of the 1975 Statutory Grand Jury, Second Judicial District, City and County of Denver, Colorado.

2. On December 10, 1975, Judge Plank signed and entered an Order containing the pertinent facts, findings of the Court, and orders of the Court relating

to this matter. (Such orders are attached hereto as Exhibit "A".)

3. The documents which Judge Plank ordered to be produced to the Grand Jury by Petitioners are attached hereto in a sealed envelope and are denominated as Exhibits B-1 through B-25.

WHEREFORE:

4. Petitioners pray this Honorable Court to issue an Extraordinary Writ in the Nature of Prohibition directing the District Court, in and for the City and County of Denver and the Honorable Leonard Plank, Judge thereof, to rescind its order denying the Motions to Quash filed by Petitioners' counsel and to vacate the Order requiring Petitioners to appear, testify, and produce the above-stated evidence to the Grand Jury of the Second Judicial District, State of Colorado, or for whatever other relief this Honorable Court deems just and reasonable.

AND AS GROUNDS THEREFORE:

5. All Petitioners have been identified as potential suspects by the District Attorney. As they are potential suspects, to require them to appear before the Grand Jury, testify, and produce evidence would be in direct contravention of their constitutional Fifth Amendment rights.

In the case of People v. Schneider, 292 P. 2d 982 (Colo.-1956), county commissioners were potential suspects before the Grand Jury in regard to allegations of malfeasance in office. The commissioners were served with Subpoenas Duces Tecum requiring them to appear and produce certain records from the County Commissioner's Office. This Court specifically dis-

approves such conduct,

"Courts have been and ever should be zealous to preserve the constitutional guarantees of this provision against self-incrimination. It should be respected rationally, not blindly worshiped, and each must be considered on its merits. In State v. Faulkner, 175 Mo. 546 at p. 611, 75 S.W. 116, it was said: 'It is intolerable that one whose conduct is being investigated for the purpose of fixing on him a criminal charge, should, in view of our constitutional mandate, be summoned to testify against himself and furnish evidence upon which he may be indicted. It is plain violation both of the letter and spirit of our organic law.'"

ABA Standards for Criminal Justice, The Prosecution Function and the Defense Function, 3.6, Quality and Scope of Evidence Before Grand Jury, states:

"The prosecutor should not compel the appearance of a witness whose activities are the subject of the inquiry if the witness states in advance that if called he will exercise his constitutional privilege not to testify."

"The Grand Jury exists as part of our jurisprudence, not only as a sword so that those who are suspect of wrongdoing may be properly brought to trial, but also as a shield to protect the people from arbitrary prosecution." State v. Sibilila, 212 A. 2d 869 (N.J.-1965).

In another case, this Honorable Court stated, ". . . where . . . the investigation before the Grand Jury is a proceeding against him . . . the Defendant's constitutional right is violated if he be subpoenaed before the Grand Jury, sworn and questioned . . ." People v. Clifford, 98 P.2d 272 (Colo-1940).

6. The materials ordered produced by Judge Plank can be divided into four general categories:

1. Letters and memoranda from the Petitioners' counsel to them, or from Petitioners to their counsel. (See Exhibits B-3, 4, 5, 6, 7, and 10.)
2. Reports from adjustors to claims managers. (See Exhibits B-8, 9, and 11.)
3. Reports from Factual Services to Petitioners. (See Exhibits B-12, 13, 14, 15, 16, 17, 18, 19, 20, and 21.)
4. Checks to Factual Services from Petitioners and acknowledgments and billings from Factual Services to Petitioners. (See Exhibits B-1, 2, 22, 23, 24, and 25.)

7. Clearly the letters between attorney and client are squarely within the attorney-client privilege and should be protected. Further, the fact that the client is a corporation does not destroy that privilege.

In the Matter of Grand Jury Proceedings,
Frank J. Duffy v. United States of America, 473 F. 2d 840 (Court of Appeals, 8th Circuit, 1973), "The fact that the client is a corporation in no way affects the claim of an attorney to his work product privilege."

"The Court concludes that the attorney was not only entitled, but probably required, to withhold answers to a Grand Jury's questions."

"It is too often overlooked that the lawyer and the law officer are indispensable parts of our administration of justice. The welfare and tone of the legal profession is therefore of prime consequence to society, which would feel the consequences of a practice impairing the lawyer's effective representation of his client."

Sylgab Steel and Wire Corporation vs. Imoco-Gateway Corporation, 62 Fed. Rules Decisions, 454 (Dist.

Ct. of Ill.-1974),

"The confidentiality of the documents in question is apparent from the face of such documents. All recipients of the documents in question were acting in their capacity as either attorney for the Defendant or employees of the Defendant where they had primary responsibility for dealing with the Defendants patent infringement problems. It is well settled that the dissemination of a communication between the corporation's lawyer and an employee of that corporation to those employees directly concerned with such matters does not waive the attorney-client privilege."

8. The group of documents ordered produced, identified previously as being reports of Factual Services to the insurance company, and internal memoranda from adjustors to claims managers must also fall within the attorney-client privilege. Bellman v. District Court, 531 P. 2d 632 (Colo.-1975).

In the Bellman case, this Court held that,

"The Dairyland contract requires the company to defend the petitioner in civil suits such as were filed against him shortly after the accident. Pursuant to this provision, Dairyland retained a local law firm to represent petitioner in these civil matters. Since control of petitioner's defense rested entirely with Dairyland and counsel retained by them, we hold that the insurance investigator who took the petitioner's statement was, in effect, an agent of the attorneys for the purpose of acquiring and transmitting this information to them. As such, the communication falls within the attorney-client relationship and is therefore privileged.

The obvious purpose of the reports and memoranda relating to Factual Services falls square within the doctrine of Bellman, and other jurisdictions have adopted similar stands. State v. Kociolek, 129 A. 2d

417 (N. J. 1956),

"Because it is often necessary for clients to communicate with their attorneys with the assistance or through the agency of others, as well as by their own personal action, the privilege extends to a communication prepared by an agent or employee, whether it is transmitted directly to the attorney by the client or his agent or employee. * * * Where a document is prepared by an agent or employee by direction of the employer for the purpose of obtaining the advice of the attorney or for use in prospective or pending litigation, such document is in effect a communication between attorney and client. The client is entitled to the same privilege with respect to such a communication as one prepared by himself. The agent or employee as well as the attorney is prohibited from testifying with respect thereto without the client's consent." (See also Brakhage v. Graff, 206 N.W. 2d 45 (Neb.-1973)).

"A communication then by any form of agency employed or set in motion by the client is within the privilege," San Francisco v. Superior Court, 231 P. 2d 26 (Cal.-1951), U. S. v. Schmidt, 360 F. Supp. 339 (D.C.-Penn.-1973)

Scourtes v. Fred W. Albrecht Grocery Company, 15 FRD 55 (Ohio-1953), "Likewise the impressions, observations and opinions of a person hired by him and acting under his supervision and direction in the investigation of a case and its preparation for trial are part of his work product."

The invocation of privilege is not affected by whether or not there is pending litigation or prospective litigation.

American Optical Corporation v. Medtronic, Inc., 56 FRD 426 (1972), "If the prospect of litigation is identifiable because of specific claims that have

already arisen, the fact that, at the time the document is prepared, litigation is still a contingency has not been held to render the privilege inapplicable."

9. The reports, letters, and memoranda listed herein are also protected by the doctrine of the work product of an attorney. In the Matter of Grand Jury Proceedings, Frank J. Duffy, supra.

"It is clear, for example, that a broad range of common law privileges applies to Grand Jury witnesses. While a Grand Jury witness is not allowed to interpose objections to questions on the grounds of strict evidentiary rules, insuring relevance for probity, he may be able to avoid answering by invoking applicable common law or statutory privileges. A refusal to answer is justified where the information sought is protected from disclosure by the husband-wife privilege, the attorney-client privilege, the physician-patient privilege, or other similar roles guarding against revelation or protective relationships.

It is apparent that the work product doctrine is firmly established as a common law privilege. As such Branzberg, supra and other cases call for its application in Grand Jury proceedings.

There is an especially strong tendency toward the protection of materials that are work products of an attorney in criminal cases."

This doctrine was upheld in People v. District Court, In and For the County of Larimer, 531 P. 2d 626 (Colo.-1975).

10. The only manner in which the attorney-client privilege and the attorney work product privilege is destroyed is by making a prima facie showing of evidence of criminality. People v. District Court, In and For the County of Larimer, supra. Schaffer v. Below,

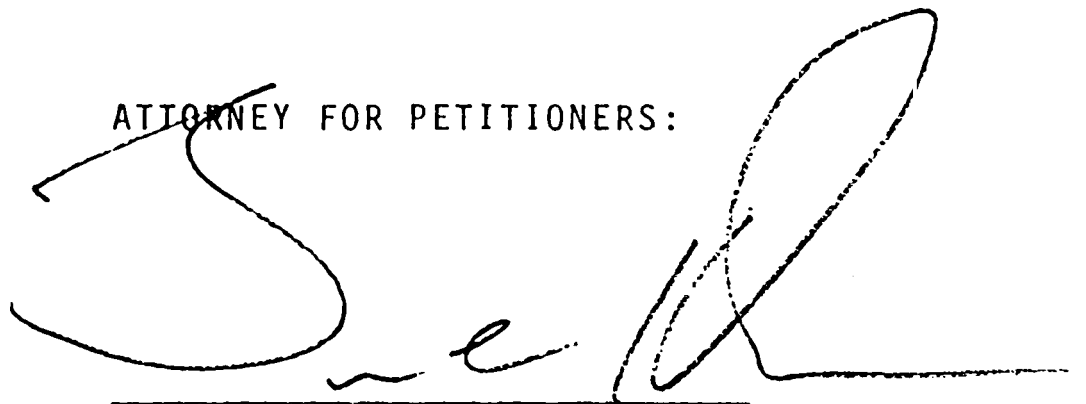
278 F. 2d 619 (C.A. 3rd-1960). Nowell v. Superior Court, 36 Cal. Rptr. 21 (1963), U.S. v. Bob, 106 F. 2d 37, (C.A. 2d-1939), Clark v. U. S., 289 U.S. 177 Lawyers Ed. 993.

No prima facie showing having been made by the District Attorney, the privilege should not be deemed destroyed and the evidence should not be submitted to the Grand Jury. The matter was timely raised and argued to the Court. Nitti v. U. S., 336 F. 2d 576 (10th Cir. C. A.-1964).

11. In any event, it is improper for the District Attorney to use a Grand Jury Subpoena Duces Tecum in such a manner as has been done here, which effectively abrogates the Petitioners' Fourth Amendment protections. U.S. v. Richardson, 469 F. 2d 349 (10th C.C.A.-1972) U.S. v. Midwest Business Forms, 474 F. 2d 722 (8th C.C.A.-1973).

RESPECTFULLY SUBMITTED this 10th day of December, 1975.

ATTORNEY FOR PETITIONERS:

A large, stylized handwritten signature in black ink, appearing to read 'Jon L. Holm', is written over the printed name and address below.

JON L. HOLM
Holm, Willis & Dill
1385 South Colorado Boulevard
Suite 700 West
Denver, CO 80222
756-3664

IN THE SUPREME COURT
FOR THE STATE OF COLORADO

No. _____

IN RE 1975 STATUTORY
GRAND JURY

)
)
)

O R D E R

THIS MATTER coming on for numerous hearings, the petitioners, A through H, appearing through their attorney, Jon Holm of Holm, Willis and Dill, Respondent District Attorney for the Second Judicial District, through his duly authorized Deputy, and Intervenor Attorney, Q, through his attorney, Paul D. Cooper of Yegge, Hall and Evans, and the court being fully advised, finds and orders as follows:

1. Petitioners A through H, insurance companies and their employees doing business in the State of Colorado were duly served with Grand Jury Subpoenas Duces Tecum in November, 1975. All of the Subpoenas Duces Tecum to petitioners required production of:

All of the following for the period of November 1, 1972, to date, in which the Colorado offices or agents of [petitioner named or petitioner's insurance company employer named] are or have been in any way involved:

1. Original and copies of all correspondence, communications (including notations, memoranda summaries or recordings thereof) between [petitioner] its agents and employees and Factual Service Bureau, Inc. (hereinafter "Factual") and its agents and employees.
2. All cancelled checks of [petitioner] payable to Factual.
3. All billings and invoices of Factual to [petitioner].
4. Originals and copies of all medical information and records (including summaries thereof) transmitted to [petitioner] by Factual.

5. All orders from or on behalf of [petitioner] to Factual for medical information or investigation.
6. All microfilm copies of the below, if the originals or copies are not available in documentary form.
7. Complete file on Claim No. _____ concerning the claim of _____."

Numerous "complete files" were subpoenaed from each petitioner. The claims involved cases not yet referred to counsel, Workman's Compensation cases, cases in suit pending trial, cases after trial pending appeal, and cases tried once and awaiting re-trial. In addition, closed files on settled cases were subpoenaed, involving claimants represented by counsel.

2. Lawyer Q is a member of the Denver law firm which has represented petitioners A, B, C, D, E and F and has been retained as counsel for those petitioners in excess of twenty years. Lawyer Q was served with a Grand Jury Subpoena in November of 1975.

3. Petitioners G and H had retained other counsel during the entire periods covered by the subpoenaed material. Their attorneys have not yet been subpoenaed.

4. None of the subpoenas attempt to exclude privileged communications between petitioners and their counsel or the work product of counsel.

5. The Deputy District Attorneys advised counsel for petitioners and intervenor that ^{1 Amec of LPP} petitioners and intervenor were suspects of the investigation by the Grand Jury and would be advised of their rights when they appeared. The Deputy District Attorneys advised the presiding judge of the Grand Jury that the prosecution claimed that the attorney and clients may have been jointly conspiring to obtain medical information by criminal means.

6. Petitioners filed Motions to Quash their Subpoenas. A hearing was held before the presiding judge of the Grand Jury,

this Court, as the presiding judge of the 1975 Statutory Grand Jury, on November 21, 1975. Counsel for intervenor was permitted to appear as his client had an interest in the hearing.

7. At this hearing, it was held:

A. No Fifth Amendment privilege protected petitioner suspects from producing corporate records under their care, custody and control.

B. I recognized the existence of an attorney-client privilege as to confidential communications and work product of counsel and find that the subpoenas required production of documents of this type.

C. Petitioners and intervenor requested the court to require the prosecution to make a prima facie showing from sources independent of the subpoenaed documents that the attorney-client privilege as to said documents was lost or dissolved because they related to alleged criminal activity being perpetrated by the attorney and client.

D. Production of all subpoenaed documents for the court's in camera inspection and later ruling, without requiring any showing of independent evidence of the alleged criminal acts by the attorney and clients.

8. On November 25, 1975, the subpoenaed documents were delivered for this in camera, ex parte inspection.

9. On December 3, 1975, counsel for the parties hereto were advised that I had reviewed the files and was ordering production of portions thereof. The documents ordered produced consist of twenty-five documents which have been copied and are sealed and are submitted to the Supreme Court for its inspection.

10. In turning over these documents, the court rules that even though the documents would be subject to the attorney-client privilege protecting confidential communications and

work product, the privilege was dissolved and because in this court's opinion, these twenty-five exhibits contain evidence that petitioners and intervenor ordered Factual's investigation of claims which they were jointly defending.

A. These twenty-five exhibits were the duly subpoenaed documents relevant to the scope of the Grand Jury investigation as I understand it.

B. All other subpoenaed documents were either unrelated to Factual Service Bureau, Inc. or were protected by the attorney-client privilege and did not contain any evidence of possible misconduct by petitioners and their counsel in obtaining medical records from Factual.

11. The documents ordered turned over to the Grand Jury were given to counsel for intervenor for copying on December 5, 1975. The documents fall into the following categories:

A. Invoices and billings from Factual to petitioners for services rendered and their checks or drafts in payment thereof. I find these documents subject only to the Fifth Amendment arguments, which are denied. They are not work product or confidential communications.

B. Printed forms and completed printed forms for ordering Factual's investigative services and advertising brochures from Factual. These are subject to the same findings and order as the documents in A above.

C. The reports from Factual for which the charges above were incurred. These reports contained summaries of investigations by Factual and some reports included summaries of hospital and physician medical information about the claimant's physical condition and history. They are attorney's work product prepared for defense of cases, but are ordered produced.

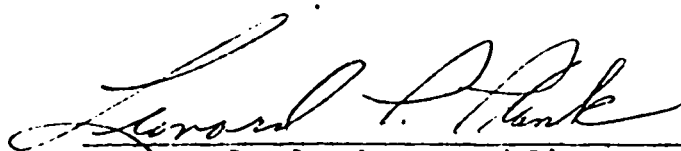
D. Memoranda from petitioners' adjustors to

petitioners about these claims. These are subject to the same ruling as the documents in C above. The production of these documents is ordered because they contain evidence of knowledge by petitioners and intervenor concerning Factual's services, and they are evidence of possession of the reports from Factual.

E. Correspondence between petitioners and their counsel, including intervenor, containing any reference to utilization of Factual's services. These are records of confidential communications within the attorney-client privilege. They are ordered produced for the same reason stated above regarding work product materials in D.

12. On each and every document ordered produced, Factual had been utilized in connection with investigation or defense of pending or prospective litigation against petitioners' insured. Petitioners' contracts of insurance with their insureds required petitioners to defend any suit against the insured seeking damages on account of the claims covered by the subpoenaed documents even if the allegations of such suit were false, fraudulent or groundless.

So ordered this 10th day of December, 1975.


Leonard Plank, Presiding Judge
1975 Statutory Grand Jury