

LEGAL UPDATE

CLIENT NEWSLETTER OF
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CIVIL RIGHTS

TESTING THE MARGINS OF THE RIGHT AGAINST SELF- INCRIMINATION IN THE DIGITAL AGE

During ratification of the Constitution, Alexander Hamilton and the Federalist Party argued against the Bill of Rights by reasoning that the Constitution served only to set forth the domain of the new federal government and that any rights of the new government not explicitly stated did not exist. Hamilton viewed the Bill of Rights as superfluous and further felt they would only serve to create confusion – Is the Bill of Rights an exhaustive list encapsulating all of our citizens' rights against the government? Or merely a sampling of those rights the Framers deemed important at the time? And if it is only a sampling, what other rights do we have? Essentially, Hamilton and other Federalists believed in the British system of common law which did not define or quantify natural rights. Setting aside Hamilton's argument of being unnecessary, interpretation of the Bill of Rights has challenged the Judicial Branch throughout our nation's existence and will likely continue to do so in perpetuity. Technological progress has exacerbated these challenges, calling on the Supreme Court for ever-finer interpretations of our rights. The Information Revolution provided world-wide, instantaneous access to information. The question naturally turns to what extent individuals can protect their privacy and restrict others' access to that which they hold private. Many commentators believe that the coming decades will bring cause for the

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TAX

INCOME TAXATION OF PUERTO RICO RESIDENTS – PART I

The island of Puerto Rico was acquired by the U.S. from Spain under the Treaty of Paris of 1898. Puerto Ricans have been U.S. citizens since 1917, but Puerto Rico is not a state. It is organized as a Commonwealth of the United States. As such it has no votes in the Electoral College and no voting representation in Congress. Puerto Ricans, however, can be subject to conscription in the U.S. armed forces and travel with U.S. passports under the protection of the U.S. government. Puerto Rico's Commonwealth status has given rise to a complicated tax situation. The general rule is that *bona fide* residents of Puerto Rico can exclude from gross income all income from sources in Puerto Rico. They pay income tax to the Commonwealth under its tax laws. This general rule is extremely complex in its details because U.S. citizens or resident aliens need to establish all the conditions of *bona fide* residence and all the conditions of income exclusion to qualify for the general rule.

Bona fide residence. In order to qualify for *bona fide* residence in Puerto Rico, a taxpayer needs to meet the presence test, may not have a tax home outside Puerto Rico, and may not have a closer connection to the U.S. or to a foreign country. In order to meet the presence test a taxpayer must meet at least one of the following four conditions:

- 1 – Taxpayer must be present in Puerto Rico at least 183 days during the tax year. There are exceptions to the physical presence test for medical treatment, temporary presence in the U.S. as a student, and others.
 - 2 – Taxpayer may not be present in the U.S. for more than 90 days during the tax year.
 - 3 – Taxpayer had U.S. earned income of not more than \$3,000 and was present in Puerto Rico more days than in the U.S. during the tax year. Earned income is pay for personal services, such as wages, salaries or professional fees.
 - 4 – Taxpayer had no significant connection to the U.S. during the tax year.
- Item 4 with respect to significant connection

is itself evaluated by *any* one of three factors. A taxpayer is treated as having a significant connection to U.S. if her or she:

- 1 – Has a permanent home in the U.S. This includes a house, apartment or furnished room owned by taxpayer or spouse. The dwelling must be available at all times and continuously, rather than only for short stays. If taxpayer and spouse own a dwelling which is rented out to someone else at fair rental value at any time during the tax year, then other more complex rules come into effect. Discussion of those rules is beyond the scope of this introductory article.
- 2 – Is registered to vote in U.S.
- 3 – Has a spouse or child under 18 whose main home is in the U.S., other than a child in the U.S. as a student or a child of divorced or separated parents.

Tax home outside Puerto Rico. A taxpayer will meet this test if taxpayer did not have a tax home outside Puerto Rico during any part of the tax year. A tax home is the regular or main place of business, employment or post of duty regardless of where the taxpayer maintains a family home. If taxpayer does not have a regular or main place of business because of the nature of taxpayer's work, his or her tax home is the place where taxpayer regularly lives. Days in the U.S. temporarily as a student or serving as an elected representative of Puerto Rico, or serving full time as an elected or appointed official or employee of Puerto Rico are not counted. For example Puerto Rico has a Resident Commissioner in the U.S. House of Representatives who has voice but not vote. Seafarers are subject to special rules.

Closer connection test. A taxpayer will have met the closer connection test, if during any part of the tax year; he or she does not have a closer connection to the U.S. or a foreign country. A taxpayer will be considered to have a closer connection to Puerto Rico than to the U.S. or a foreign country if he or she has maintained more significant contacts with Puerto Rico than with the U.S. or foreign country. The facts and circumstances considered include but are not limited to: location of permanent home, family, tangible personal property, lo-

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**PRIVILEGE
ATTORNEY-CLIENT
PRIVILEGE—THE ULTIMATE
TEST**

The attorney-client privilege is well known and often discussed. Simply stated, an attorney must not disclose confidential communications between himself and his client. Generally, the privilege extends even after death of the client. It is said that the attorney-client privilege is the cornerstone of the legal profession. Because communications are confidential, clients feel free to honestly discuss their cases and obtain legal advice. An important caveat is that attorneys may disclose information obtained from a client if doing so would prevent a *future* crime or harm.

In 1982 two public defenders in Cook County, Illinois, Dale Coventry and Jamie Kunz, were put to the ultimate test. Their dilemma has received a great deal of media attention in recent weeks, and Coventry and Kunz have been both condemned and applauded for the tough decision they made. In 1982 Coventry and Kunz were representing Andrew Wilson on charges that Wilson murdered two Chicago police officers (he was found guilty of these crimes and sentenced to life in prison). Around the same time, another man, Alton Logan, was on trial for fatally shooting a security guard at a McDonald's. Coventry and Kunz obtained from Wilson a confession that Wilson was, in fact, the man who fatally shot the McDonald's security guard, not Logan. Bound by the attorney-client privilege, the attorneys felt they could not disclose what Wilson had told them. Instead, they (along with two other lawyers) recorded the secret in a notarized affidavit, which they secured in a sealed envelope in a locked metal box. Coventry and Kunz state that Wilson gave them permission to disclose the secret after he died. Meanwhile, Logan was found guilty and sentenced to life in prison for the crime Coventry and Kunz knew was committed by Wilson. Andrew Wilson died in 2007. Twenty-six years after Logan was convicted, Coventry and Kunz opened the metal box and read its contents in court. Logan is still in prison, but his attorney is attempting to have him released.

Not surprisingly, there has been a public outcry and a great deal of discussion about

what the lawyers could have done besides remain silent for so many years. Despite the tragic outcome for Logan, many have defended the actions of the public defenders. Some argue that had it not been for the attorney-client privilege, Wilson would never have shared his confession with Coventry and Kunz and would have taken the secret to his grave. And, it is unclear what impact the disclosure would have made. There was other evidence linking Wilson to the crime—namely, a recovered shotgun used by Wilson as well as other connections that may have been known to prosecutors and police. Further, the attorney-client privilege belongs to the client, so Wilson may have blocked the lawyers' disclosure had they attempted to relay it to the court. Finally, the information could have been barred as inadmissible hearsay. Coventry and Kunz believed the privilege needed to be defended at all costs. However, both Coventry and Kunz state that had Logan been sentenced to death in 1982 they would have broken their silence.

DANA THERIOT

**EVIDENCE
D.C. COURT EMPHASIZES
REQUIREMENT THAT
MEDICAL EXPERT ESTABLISH
NATIONAL STANDARD OF
CARE**

In two recent cases the D.C. Court of Appeals confronted challenges to medical expert witness testimony that was not based squarely on an established *national standard of care*. In both cases the Court unequivocally ruled that a liability expert in a medical malpractice matter must establish that his or her opinion is grounded in a national standard and not merely personal opinion.

In the case of *Nwaneri v. Sandidge*, No. 05-CV-1202 (Sept. 6, 2007), the defendant-physician on appeal challenged the trial court's denial of his summary judgment motion. Dr. Nwaneri argued that plaintiff-appellee's expert witness, Dr. Woratyla, "failed to provide a sufficient foundational basis for his knowledge of the national standard of care in performing below-the-knee surgery on claudicant patients, or to provide a basis for his expert opinion that appellant deviated from the national

standard of care." Dr. Woratyla, plaintiff's sole expert, is a board-certified general and vascular surgeon. In essence he testified that performing an aggressive composite graft procedure on Mr. Sandidge's knee when less invasive options were available breached the national standard of care. After thoroughly reviewing precedent in this area, the Court agreed with appellant that the testimony was improper because the witness was never asked to explain the *basis* of his knowledge of the national standard of care or the *basis* of his opinion that Dr. Nwaneri's treatment deviated from that standard.

(All was not lost for Mr. Sandidge, however. Because the trial court had overruled foundational objections to the expert's testimony, it may have been reasonable for counsel to conclude that he had met his burden in proving the basis for the opinion testimony. Accordingly, rather than entering judgment, the Court remanded for a new trial—where counsel now has the road map for proving the basis of Dr. Woratyla's opinions.)

In *Hill v. Medlantic Healthcare Group*, Nos. 05-CV-776 & 05-CV-806 (Oct. 4, 2007), the Court of Appeals applied the same principles in again disallowing improperly grounded expert testimony. Mr. Hill sued a number of physicians and other health care providers for sub-standard treatment of his traumatically injured leg. At trial on the key malpractice claim, his orthopedic expert was called to testify regarding the failure to remove certain fixating devices and the treatment of osteomyelitis. An excerpt of the trial transcript is cited by the appellate court to demonstrate that, although the expert was qualified, counsel never elicited testimony to establish that his testimony was *grounded in and based on a national standard of care*. Without that anchor the expert's proffered testimony was just his personal opinion and therefore impermissible.

These two cases, both authored by Judge Anna Blackburne-Rigsby but reflecting unanimous decisions, reflect the Court's commitment to a national standard of care in malpractice cases. An expert's education and personal experience alone will not satisfy the Court's clearly articulated requirements. An applicable national standard of care must be established, and an expert's opinions must be *based* on that standard.

LAWRENCE CARR

CIVIL RIGHTS*Continued from page 1*

Court to revisit the nature of privacy.

With the foregoing as a backdrop, the United States District Court for Vermont is addressing a novel issue concerning the Fifth Amendment's Right against Self-Incrimination. Sebastien Boucher was stopped when entering the U.S. from Canada. In questioning Boucher helped agents access his laptop computer, on which the agents found images of child pornography. Boucher was arrested on charges of possessing child pornography and his laptop seized. Investigators' later attempts to retrieve the illegal images from the laptop for use in evidence were foiled by encryption software (Boucher previously typed in a password bypassing the encryption protection to allow access at the initial questioning). Federal agents state that without Boucher's password, gaining access to the laptop's files could be impossible. In prosecuting the case, U.S. Attorneys subpoenaed Boucher to release the password; Boucher moved to quash the subpoena on grounds that the forced release of the password would violate his Fifth Amendment protection against compelled self-incrimination.

After more than two centuries of American jurisprudence, the contours of the protection from government provided by the Bill of Rights have taken shape. The first ten Amendments do not provide the absolute, literal rights many imagine they do. For instance free speech does not allow falsely "shouting fire in a crowded theatre." *Schenck v. United States*. Other restrictions sometimes characterized as an assault on free speech include perjury, slander, obscenity, speech inciting violence, copyright infringement, threats, sedition, etc. The Second Amendment's text "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed!" has been interpreted to allow individuals to own firearms, but few would argue that this right should be unlimited. The Framers could not have envisioned the technological progress leading to modern weaponry and assuredly an individual's right to bear arms does not include the right to possess today's deadliest military weapons. Likewise, Alexander Hamilton and his contemporaries could not have envisioned the iPhone, voice-mail and Caller-ID, thumb drives, MySpace, computer encryption software, or the tremendous power of Google search.

The Fifth Amendment protects witnesses from being forced to incriminate themselves. To "plead the Fifth" is a refusal to answer a question because the response could form self-

incriminating evidence. Yet it does not protect individuals from being forced to turn over incriminating documents or tape-recordings, from being forced to release a key to a locked safe, or from being made to give blood for DNA matching. As a side-note regarding disclosure of illegal income on federal tax returns, it would have behooved Al Capone to have read *U.S. v. Sullivan* and *Garner v. U.S.*, which, in tandem, stand for the proposition that on a required Federal income tax return a taxpayer would probably have to report the amount of the illegal income, but might validly claim privilege by labeling the source "Fifth Amendment" (instead of "illegal gambling income," "illegal drug sales"). However, the advent of powerful personal computing encryption software presents a novel issue for our courts. Federal investigators have every right to seize the incriminating evidence for use against Boucher; but, despite being aware of its existence and location, they are barred by the encryption software—the password to which only exists in Boucher's mind. In similar previous cases investigators have used other means to ascertain the password, such as surveillance programs that capture keyboard strokes, or they simply abandoned the case prior to indictment. On first review a federal magistrate judge has agreed with Boucher and quashed the government's subpoena, declaring that if Boucher does know the password "he would be faced with the forbidden trilemma: incriminate himself, lie under oath, or find himself in contempt of court." Fearing the precedent this case may become, the government has appealed the magistrate judge's ruling.

If fully litigated, this case may take up to several years to wind its way through our legal system before this issue of self-incrimination is definitely resolved, assuming it can be. Many eyes will follow this case as its ramifications are paramount to the protection of privacy in the digital age. Interestingly, as we move from physical to electronic storage of our communications, writings, videos, pictures and audio recordings, the use of encryption may provide greater privacy than ever before available, while, at the same time, the internet conversely limits our expectation of privacy as to our identity and past deeds. Technological progress always presents new issues and the issue of the Digital Age will be privacy.

JUSTIN BANFORD

(Footnotes)

¹ The original and copies distributed to the states, and then ratified by them, had different capitalization and punctuation: "A well regulated militia being necessary to the security of a

free State, the right of the People to keep and bear arms shall not be infringed." Both versions are commonly used in official government publications.

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cation of social, political, cultural or religious organizations in which taxpayer has current membership, driver's license jurisdiction, and voting jurisdiction. Alert readers will no doubt recognize many of these factors are also used by the Internal Revenue Service to determine domicile for purposes of the estate tax.

After determining whether a taxpayer is a *bona fide* resident of Puerto Rico, the next issue is the source of each item of income received during the tax year. The basis for sourcing is known as the "U.S. income rule." This rule states income is not Puerto Rico income if, under IRC Sections 861 to 865, it is treated as income from sources in the U.S. or income effectively connected with the conduct of a U.S. trade or business. Most of the rules have a certain internal logic.

Personal service income includes wages, salaries, commissions, fees, per diem allowances and bonuses. Pay received for services performed in Puerto Rico is sourced to Puerto Rico. Pension income is sourced according to where the services were performed which earned the pension.

Interest income is sourced by the residence of the payer. Interest paid by corporations organized in Puerto Rico or by individuals who are *bona fide* residents of Puerto Rico are sourced to Puerto Rico. Similarly, dividends paid by a Puerto Rican corporation are sourced to Puerto Rico. Rental from property located in Puerto Rico is also sourced to Puerto Rico. Royalties from natural resources located in Puerto Rico are sourced there. Royalties received for the use in Puerto Rico of patents, copyrights, trade secrets, goodwill, trademarks, franchises and other like property are sourced to Puerto Rico.

Gain from the sale of realty in Puerto Rico is sourced there. Gain from the sale of tangible personal property is sourced according to the seller's tax home. Income from the sale of purchased inventory is sourced where the goods are sold. Income from the sale of inventory produced in Puerto Rico and sold outside the island (or *vice versa*) is sourced based on an allocation.

In Part II of the article we will continue discussion of sourcing rules, and also discuss filing requirements, deductions and policy considerations.

NÉSTOR CRUZ

**CARR, MORRIS
& GRAEFF, P.C.**

Carr, Morris & Graeff, P.C., was established in 1982 by the named principals—Lawrence Carr, Roy Morris and Stephen Graeff. It is a diversified firm structured primarily to meet the legal needs of businesses and their principals.

The firm strives to provide full service representation to its corporate and individual clients. It is designed to provide such service by organization and presentation of an array of attorneys with diverse backgrounds in specialized areas of the law as well as a generalized background which enables them to look beyond a narrow specialty or need. The academic and cultural backgrounds of the attorneys of the firm are as diverse as their experience and specializations.

Carr, Morris & Graeff, P.C., specializes in the following areas: Corporate/General Business; Taxation/Estate Planning; Civil/Commercial Litigation; Criminal Representation; Alternative Dispute Resolution; Employment/Labor; Discrimination; and Wage-Hour.

The firm maintains its office in the Metro Center region of downtown Washington. It has attorneys admitted to all of the local judicial jurisdictions—the District of Columbia, Maryland and Virginia.

STAFF NOTES

Roy and Marie Morris returned safely from their motorcycle tour of the Andalusia region of Spain with a small group organized by Edelweiss Bike Travel. Roy reports that the German morning schedule (breakfast at 7:30 AM, briefing at 8:30, ride leaves at 9:00 sharp) doesn't mesh well with the Spanish evening schedule (dinner from 9:00 PM until). It was great fun blasting around the mountainous back roads of Andalusia all day, even if only Marie noticed the scenery. She took pictures from the bike so that Roy could later see where they had been.

Movie buffs debate whether the name character survives in the classic western *Shane*. As the hero rides away, slumped in the saddle, is he alive or dead? We'll never know. In a real life parallel, what is Phil Schwartz's condition, wearily trudging down the first fairway at Springfield Country Club after completing two years as club president?...nay, clearly alive and verily skipping toward the horizon. Fewer phone calls, fewer emails, fewer meetings. Life is good.

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