Internal Revenue Code Summons Enforcement and the Accountant
An increasingly large number of taxpayers—guilty and innocent—have been faced with tax investigations as the Government seeks to enforce the civil and/or criminal sanctions of the Internal Revenue Code. Tax practitioners representing such taxpayers have been confronted with a conflict between the demands of the Internal Revenue Service and his clients' interests. In addition, the extensive use of the administrative subpoena, the most powerful weapon in the Internal Revenue Service's arsenal, augmented by the timidity and genuflections of taxpayers and tax practitioners, and complimented by the broad construction given this weapon by the courts, have established precedents thought of by many as "the law".

This article will briefly acquaint the reader with the procedural steps taken by the Internal Revenue Service to enforce compliance with its request for information, before discussing several controversial aspects of the accountant's involvement in federal tax investigations. Of necessity, the mythical "required-records doctrine" will be disposed of, for if an individual himself is required to produce incriminating personal records, there would be little use in presenting the problems of testimonial privileges.

PROCEDURE

Under section 7602 of the Internal Revenue Code,¹ the Secretary of the Treasury or his delegate is authorized to investigate income tax liability. Generally, authority is granted to examine relevant or material books and records; to summon the taxpayer or other persons to produce records; and to take testimony under oath. Although the persons who may be summoned under this section appear limited, a closer examination reveals an unlimited choice, including persons liable for the tax; any officer or employee of such persons; any person having possession, custody or care of books of account contain-

¹. INT. REV. CODE OF 1954, §7602.
ing entries relating to the business of the person liable for the tax; and, last but not least, any other person who may be deemed proper by the agent issuing the summons. Various subordinate officers and employees of the Internal Revenue Service, including revenue agents and special agents, have received delegated authority to perform these functions.

The summons may be used to compel testimony and/or the production of books, papers, records or other data, only if relevant or material, and only if for any of the following five purposes:

1. Ascertaining the correctness of any return;
2. Making a return where none has been made;
3. Determining the liability of any person for any internal revenue tax;
4. Determining the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax;
5. Collecting any internal revenue tax liability.

Summonses issued for purposes other than those enumerated in section 7602, such as to aid the government in obtaining pre-trial information from a third person for use in a pending criminal trial of a taxpayer, can be stayed, enjoined or quashed.

Investigations generally begin with oral requests that the taxpayer or third person make available various documents, records and data. Upon refusal to obey this oral request, a summons may be issued. Although section 7602(1) authorizes examination of books and records, the possessor of those books and records is not liable to any sanction on refusal to allow examination in the absence of a summons.

3. Commissioner Delegation Order No. 4, 1957-1 CUM. BULL. 718; Treas. Reg. § 301.7602-1(c).
4. In re Myers, 202 F.Supp. 212, 9 Am. Fed. Tax R.2d 1303 (E.D.Pa. 1962) "we believe the government's purpose is contrary to our fundamental and deepseated conceptions of fair play. . . . (The government) . . . should not oppress a defendant . . . or his prospective witness by invoking in aid of a criminal charge the processes which Congress has authorized for the administration of the revenue laws"

5. Supra note 1; Paragraph 678 of the Internal Revenue Agent Manual of Instruction, Investigations and Procedure, instructs agents not to issue a summons to an individual taxpayer who is under investigation for possible criminal violations.
The summons form consists of two pages; the first sheet, marked "ORIGINAL" (Form 2039), has a certificate of service on the reverse side; the second sheet, designated "ATTESTED COPY" (Form 2039A), has pertinent sections of the statute on the reverse side. The face of the "ATTESTED COPY" (an exact copy of the "ORIGINAL") bears the signature and title of the issuer, names the individual whose tax liability is involved, designates the period or periods under examination, names the individual before whom the person summoned should appear, and sets an exact time and place for appearance.

Section 7605(a) provides that the date and time fixed for appearance in response to a summons shall be reasonable under the circumstances and shall not be less than 10 calendar days from the date of the summons. Although a person summoned may indicate a willingness to comply with the requirements of the summons on a date earlier than required by this section, the time for appearance will, nevertheless, be designated on the summons as not less than 10 days from the date of the summons. This 10 day delay was apparently designed to permit adequate consideration of the advisability of contesting the summons. Although the statute literally states that the 10 day period commences on the "date of the summons", this provision would presumably be interpreted to mean the date of the service of the summons. Otherwise, a delay in serving the summons could eliminate the intent of this 10 day benefit. Although this subsection places no specific limitation on the distance that a person may be required to travel in complying with the mandate of the summons, appearance at the nearest Internal Revenue Office is customary and is "reasonable under the circumstances".

Any officer or employee of the Internal Revenue Service may be designated as the individual before whom a person shall appear in response to a summons, and any such person so designated in the summons may take testimony under oath and may receive books and records produced in response to the summons. Thus, the person issuing the summons may designate any other officer or employee of the Internal Revenue Service as the individual before whom the person summoned shall appear.

The formal requirements for service of the summons appear in section 7603 and provide only two methods of service. Service can be made by delivery in hand of an attested copy (Form 2039A) to the person to whom it is directed or the attested copy can be left at the last and usual place of abode of the person to whom it is directed.

Although section 7603 does not technically require the summons to be left with a person present at the last and usual place of abode, the Certificate of Service of Summons which appears on the reverse side of the "ORIGINAL" summons (Form 2039) specifically requests the name of the person with whom the summons was left.\(^9\) The certificate of service signed by the person serving the summons is evidence of the facts it states at an enforcement hearing.\(^{10}\) Unlike judicial subpoenas served under Rule 45(e) of the Federal Rules of Civil Procedure,\(^{11}\) which are generally effective only within the district wherein it originated, Internal Revenue summonses apparently have no geographic limitations. Even the physical location of documents requested to be produced in a summons duces tecum is unimportant, provided they are subject to the control of the individual served.\(^{12}\)

Neglect or refusal to obey a summons subjects the affected individual to civil\(^{13}\) and possibly criminal\(^{14}\) consequences.

*Willful* failure to supply information required by the Internal Revenue Code is a misdemeanor.\(^{15}\) The refusal must be prompted by the bad faith or evil intent implicit in the term "willful".\(^{16}\) Thus, an individual who refuses to comply with a summons does not risk criminal prosecution if he believes in good faith that his refusal is legally justified, even if his position proves to be erroneous.\(^{17}\)

Complete disregard of a summons, either by failure to appear or failure to produce the designated books and records, subjects the summoned party to criminal prosecution.\(^{18}\) In this situation, crimi-

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9. *But see* Rev. Proc. 55-6, 1955-2 *Cum. Bull.* 904, at 905, which allows the summons to be "left . . . in a place where the person summoned will be likely to find the copy".!!


11. 28 U.S.C. Rule 45(e).


13. INT. REV. CODE OF 1954, § 7402(b) and 7604(a).


15. INT. REV. CODE OF 1954, § 7203 "Any person . . . required by this title . . . to . . . supply any information, who willfully fails to . . . supply such information . . . shall . . . be guilty of a misdemeanor . . . ."


18. INT. REV. CODE OF 1954, § 7210 "Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda, or other papers . . . , neglects to appear or to product such books, accounts, records, memoranda, or other papers, shall, on conviction thereof be fined . . . or imprisoned . . . or both . . . ."
nal punishment is prescribed for "neglect" to appear or produce records. Here, the word "neglect" connotes something more than mere inadvertence. To make it a crime to "neglect" implies a willful failure with knowledge that a reasonable man should have that he was failing to do what the summons requested.\textsuperscript{19} A conviction under either criminal provision is permitted only under regular criminal proceedings, including trial by jury and proof beyond a reasonable doubt.

Sections 7604(a) and 7402(b)\textsuperscript{20} provide that the United States District Court, for the district in which the person (to whom the summons is directed) resides or is found, shall have jurisdiction by appropriate process to compel attendance, testimony, or production of records. Section 7402(a)\textsuperscript{21} grants general jurisdiction to the District Courts in civil actions to enforce the revenue laws by necessary or appropriate orders and processes.\textsuperscript{22} In the usual case of refusal to fully comply with a summons, the Internal Revenue Service will institute proceedings in accordance with section 7604(b).\textsuperscript{23} A literal reading of this section provides for the enforcement of any summons through the issuance of a writ of body attachment, upon proper application, by the judge of the district court, or even a United States commissioner, directed to some proper officer for the arrest of the person summoned. It is the duty of the judge, or even a United States commissioner,\textsuperscript{24} "to hear the application" for an attachment against the person who had been summoned, and had neglected or refused to comply, "as for a contempt"; and then, "if satisfactory proof is made",\textsuperscript{25} to issue an attachment for the arrest of that person. This incongruous procedure\textsuperscript{26} subjects a witness, who may have merely availed himself of his Constitutional right against self-incrimination or who felt himself silenced by the seal of a confidential communic-

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\item[\textsuperscript{19}] United States v. Becker, 1 Am. Fed. Tax R.2d 1437 (S.D.N.Y., 1958), aff'd, 259 F.2d 869, 2 Am. Fed. Tax R.2d 6041 (2d Cir. 1958); Reisman v. Caplin, \textit{supra} note 17 ("noncompliance is not subject to prosecution \ldots when the summons is attacked in good faith"); \textit{Brief for the Respondent Caplin}, pp. 9, 22.
\item[\textsuperscript{20}] \textit{Supra} note 13.
\item[\textsuperscript{21}] \textit{INT. REV. CODE OF 1954}, § 7402(a).
\item[\textsuperscript{22}] Original jurisdiction is granted to the United States District Courts under any act of Congress providing for internal revenue, 28 U.S.C.A. 1340.
\item[\textsuperscript{23}] \textit{INT. REV. CODE OF 1954}, § 7604(b).
\item[\textsuperscript{24}] 28 U.S.C.A. § 631 and 633(3).
\item[\textsuperscript{25}] United States v. Powell, 325 F.2d 914, 64-1 U.S. Tax Cas. ¶ 9146 (3rd Cir. 1963).
\item[\textsuperscript{26}] Authorization for enforcement of an administrative summons by body attachment may not be found in the statutes applicable to other federal agencies, \textit{E.g.}, 15 U.S.C.A. 78u(c) (S.E.C.); 29 U.S.C.A. 161 (2) (N.L.R.B.); 15 U.S.C.A. 49 (F.T.C.).
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tion, to the opprobrium of an arrest on a warrant issued after an inadequate *ex parte* hearing. Based on such a literal interpretation, the commands of a summons have been enforced by body attachment before a court determined whether the summons was even valid.27 This attachment procedure has occasionally been used where the person summoned merely refused to testify because of a claimed privilege.28

Since other enforcement procedures are available, it would seem preferable for a District Court to issue a rule on the respondent witness to show cause why he should not obey the summons or be adjudged in contempt rather than an order for his forthwith arrest. Such procedure is authorized by the general language of section 7604(a)29 which grants the District Court jurisdiction to enforce compliance “by appropriate process”. In this way, the affected individual would be given a reasonable period to appear voluntarily at a full hearing without being subject to the stigmas of an arrest. The likelihood that the witness will leave the jurisdiction is apparently not a major risk since a witness is often released on his own recognizance.30 Even where an individual is charged with a Federal criminal offense, Rule 9 of the Federal Rules of Criminal Procedure provides that “upon the request of the attorney for the government or by direction of the court”, he may be summoned “to appear before the court at a stated time and place” instead of being arrested and brought before the Court.

In 1964, the Supreme Court, after reviewing the legislative history of Section 7402(b), stated that the physical attachment of a witness who has neither defaulted nor contumaciously refused to honor a summons would raise constitutional considerations. It thus appears that the attachment provision has been interpreted to apply only to

27. Judge Johnsen, in a concurring opinion in Sale v. United States, 228 F.2d 682, 48 Am. Fed. Tax R. 794 (8th Cir. 1956) *cert. denied* 350 U.S. 1006, 76 S.Ct. 650 (1956), severely criticized this procedure. “I should not have supposed that a Court would lend its sanction to any laying of hands upon an individual’s person and the dragging of him bodily before a magisterial bench, for an administrative purpose and as an administrative incident, without being able to read, ... language from a statute which expressly spelled out the administrative right thus to have his liberty imposed upon and to have these indignities inflicted upon him.” This attachment procedure has occasionally been used where the person summoned refused to testify because of a claimed privilege.


29. INT. REV. CODE OF 1954, § 7604(a).

persons who are summoned and wholly default or *contumaciously* refuse to honor it.\textsuperscript{31}

After the attachment has been served and the person involved arrested (either actually or constructively), the judge or United States commissioner must "proceed to a hearing of the case". After such hearing, the judge and even a United States commissioner (!!) "shall have the power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts" to compel compliance with the summons and to penalize the person involved for his default or disobedience.

Thus, the statute\textsuperscript{32} provides for an *ex parte* preliminary hearing prior to the issuance of an actual or constructive attachment, followed by an advisory hearing prior to the issuance of a final order directing compliance.

Enforcement petitions are usually supported by the examining agents' affidavits which set forth the nature and purpose of the examination, the testimony and/or records involved, and their relevancy or materiality to the examination. A copy of the summons which had been issued to and served upon the respondent is generally attached as an Exhibit, as is a transcript of any hearing before the Internal Revenue Service which reflects the non-compliance. Whenever a petition is so implemented, the respondent's answer or other pleading should be likewise supported by affidavits. Affidavit-fortified petitions usually pronosticate an effort by the Government to have the matter disposed of under Rule 43(e) of the Federal Rules of Civil Procedure (hearing the matter on affidavits presented by the parties). If more than a skirmish is contemplated, such a hearing is not satisfactory or recommended; for quoting Mr. Justice Frankfurter's reference to modern equity practice in *Eccles v. Peoples Bank of Lakewood Village*,\textsuperscript{33} "Modern practice has tended away from a procedure based on affidavits and interrogatories, because of its proven insufficiencies". Indeed, where the pleadings raise any factual issue, the Court of Appeals will reverse the District Court which undertakes thus summarily to decide such issues.\textsuperscript{34}

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\item \textsuperscript{31} Reisman v. Caplin, *supra* note 17.
\item \textsuperscript{32} *Supra* note 23.
\item \textsuperscript{33} 333 U.S. 426, at 434 (1948).
\item \textsuperscript{34} D.I. Operating Co. v. United States, 12 Am. Fed. Tax R. 2d 5493, at 5496 (9th Cir. 1963) where the issue was whether the items requested "dovetailed" with the other records. A district court's reliance on affidavits, to the exclusion of other evidence, was criticized in Local 174 v. United States, 240 F.2d 387 (9th Cir. 1956) and Hubner v. Tucker, 245 F.2d 35, 51 Am. Fed. Tax R. 494 (9th Cir. 1957); United States v. Powell, *supra* note 25.
\end{itemize}
At every stage of the proceeding the "Secretary or his delegate" has the burden of proving every fact requisite for the statutory relief or assistance sought. "The service has only that power which the statute confers". The statute commands that "satisfactory proof" must be made before an attachment may even be issued. At the ensuing hearing, the "Secretary or his delegate" must offer proof having the cogency which makes it "not inconsistent with the law for the punishment of contempts".

The peregrination of the proceeding may result in the witness being required to come forward with "confession and avoidance" evidence. This would be particularly true where an affirmative defense is interposed, such as privilege or the assertion of any Constitutional or statutory privilege. In such a proceeding, the District Court may punish the person summoned "for his default or disobedience" to the court's order directing compliance with the summons. Refusal to obey an administrative summons is not contempt because such sanction is only appropriate for disobedience of a court order.

Emphasis on criminal sanctions to enforce the revenue laws has forced knowledgeable practitioners representing taxpayers who are the subject of tax fraud investigations to avoid cooperation unless the taxpayer is not only innocent, but has facts to prove it. Often such taxpayers believe either that antagonizing the agent will automatically convict them, or that the law requires them to comply. It


38. Interstate Commerce Commission v. Brimson, 154 U.S. 447, at 488-489, 14 S.Ct. 1125 (1894) ("the question of punishing defendants for contempt could not arise before the commission; for, in a judicial sense, there is no such thing as contempt of a subordinate administrative body. No question of contempt could arise until the issue of law in the circuit court is determined adversely to the defendants and they refuse to obey, not the order of the commission, but the final order of the court..."); Sale v. United States, supra note 27 (concurring opinion) ("Contempt or contumacy in the nature of contempt... does not, and cannot, lawfully exist in the administrative or executive branch of government—as it inherently does in the judicial field...."); Application of Howard, 325 F.2d 917, 64-1 U.S. Tax Cas. § 9147 (3rd Cir. 1963) ((A) person who disobeys such an order may be punished for contempt of court. But he is not subject to this sanction until the court has found the administrative summons lawful and proper and has ordered him to honor it.); Reisman v. Caplin, supra note 17 ("only a refusal to comply with an order of the district judge subjects the witness to contempt proceedings").
must be remembered that the Government must establish beyond a reasonable doubt both a deficiency and an intent to evade before they can convict a person of the crime of tax evasion. Non-cooperation is not accorded to the passive resistant, or the person who is ignorant of his rights, or one indifferent thereto. Non-cooperation commences the fight. Its benefits can be retained only by sustained combat.

REQUIRED RECORDS DOCTRINE

Where the Government seeks to elicit information and an individual resists, his most powerful weapon is his privilege against self-incrimination as guaranteed by the Fifth Amendment. The command of the Fifth Amendment ("nor shall any person . . . be compelled in any criminal case to be a witness against himself . . .") has been interpreted to permit the assertion of the privilege in any federal proceeding, including grand jury proceedings and Congressional investigations. Although this constitutional privilege may, on occasion, save a guilty man, "it was aimed at a more far-reaching evil — a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality. Prevention of the greater evil was deemed of more importance than occurrence of the lesser evil. Having had much experience with a tendency in human nature to abuse power, the Founders sought to close the doors against like future abuses by law-enforcing agencies."

Until 1948, and the landmark decision of Shapiro v. United States, it was generally agreed that an individual's private records were protected by the Fifth Amendment. That decision incarnated skepticism as to the quiddity and scope of the Fifth Amendment, and reincarnated the "required records doctrine."

Under the so-called "required records doctrine" an unanswered question remains as to whether an individual taxpayer himself may be required, despite constitutional privileges, to produce records prescribed by Internal Revenue Code Sec. 6001. In substance, this doc-

42. 335 U.S. 1, 68 S.Ct. 1375 (1948).
43. INT. REV. CODE OF 1954, § 6001
NOTICE OR REGULATIONS REQUIRING RECORDS, STATEMENTS, AND SPECIAL RETURNS
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. Whenever in the judgment of the Secretary or his delegate it is necessary, he may require any person, by notice served
trine, as restated in *Shapiro v. United States*, views documents which are required by statute to be kept for administrative regulation as "public records" which must be produced.

Shapiro, a licensee under O.P.A. regulations, was summoned by administrative subpoena duces tecum and ad testificandum to appear and produce his sole proprietorship business records. He appeared at the hearing but claimed the immunity provided under the Emergency Price Control Act. Believing that the presiding administrative official had granted the statutory immunity, and after expressly reserving his constitutional privilege, he produced the subpoenaed records. Using information thus obtained, Shapiro was later tried for violations of the Emergency Price Control Act. His plea in bar, claiming immunity from prosecution under Sec. 202(g) was denied by the trial court. Following conviction and appeal, the Supreme Court granted certiorari. The Supreme Court interpreted the immunity proviso to be coterminous with what would otherwise have been one's constitutional privilege under the Fifth Amendment, and, since the records which Shapiro was compelled to produce were records required to be kept by administrative regulation, "as to which no constitutional privilege against self incrimination attaches," the statutory immunity of Sec. 202(g) did not extend to the production of these records.

Thus, in a facile fashion the Court decided that "all records which Congress may require individuals to keep in the conduct of their affairs, because they fall within some regulatory power of Government, become 'public records' and thereby, *ipso facto*, fall outside the protection of the Fifth Amendment that no person 'shall be compelled in any criminal case to be a witness against himself.'"

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44. *Supra* note 42.

45. 56 Stat. 23, as amended, 50 U.S.C. App. Sec. 901 et seq., 50 U.S.C.A. Appendix, Sec. 901 et seq.; Section 202(g) stated that "no person shall be excused from complying with any requirements... because of his privilege against self-incrimination, but the immunity provisions... (from prosecution or penalty on account of anything concerning which he may testify or produce evidence in obedience to the agency's subpoena) shall apply with respect to any individual who specifically claims such privilege."

46. The Supreme Court expressly stated that "... all writings whose keeping as records has not been required by valid statute or regulation... (as well as) all oral testimony by individuals..." continues to be privileged, *supra* note 42, at 27.

47. *Shapiro v. United States, supra* note 42, at 37 (dissenting opinion).
This decision was based largely on dictum of the Supreme Court in *United States v. Wilson*,\(^4\)\(^8\) wherein the Court declared that the doctrine precluding assertion of privilege with respect to public records "... applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulations and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained."\(^4\)\(^9\)

An over-zealous extension of the concept would preclude assertion of a Constitutional privilege with respect to all records which are required by law to be kept, including those relating to an individual's liability for income tax. Dicta of various decisions has indicated that the rule of the *Shapiro* case applies to the tax records required by the Internal Revenue Code, section 6001.\(^5\)\(^0\) Although the applicability of the "required-records doctrine" to income tax records has never been squarely tested, numerous decisions have implied that an individual's records are immune from compulsory production in a criminal tax investigation.\(^5\)\(^1\) Moreover, the Government seems to have hesitated

\(^4\)\(^8\) Wilson v. United States, 221 U.S. 361, 31 S.Ct. 538 (1911) (where the Court held that a corporate officer could be compelled to produce books and records belonging to a corporation suspected of fraudulent use of the mails, even thought the officer might himself be incriminated by their contents).

\(^4\)\(^9\) Id at 380; Davis v. United States, 328 U.S. 582, at 590; 66 S.Ct. 1256, at 1260 (1946).

\(^5\)\(^0\) Falsone v. United States, 205 F.2d 734, 44 Am. Fed. Tax R. 123 (5th Cir. 1953), cert. denied, 346 U.S. 864, 74 S.Ct. 103 (1953) (after noting that the Internal Revenue Code requires taxpayers to keep records and that inspection thereof is authorized, the court decided that the taxpayer, and a fortiori a third person, could have been required to produce his records (citing *Shapiro* and that such records are not protected by the Fifth Amendment); Beard v. United States, 222 F.2d 84, 47 Am. Fed. Tax R. 808 (4th Cir.), cert denied, 350 U.S. 62 (1955) (where a taxpayer was convicted in district court on instructions to the jury that a taxpayer's refusal to produce tax records was a circumstance from which an inference of guilt could be drawn. In affirming the conviction, the court of appeals held that there was a "... duty imposed by the taxing statutes upon the defendant to keep records of his transactions so that the extent of his liability to income tax might be ascertained; and therefore the case falls within the rule laid down in *Shapiro v. U.S.* ... It was held that all records which Congress in the exercise of its constitutional powers may require individuals to keep in the conduct of their affairs relating to the public interest became public records in the sense that they fall outside the constitutional protection of the Fifth Amendment."); U.S. v. Willis, 145 F.Supp. 395 (D.C.Ga., 1955) ("... it matters not whether the special agent ... is interested primarily in the stamp tax liability ... or the income tax liability ... The records are 'required records' and subject to examination.")

\(^5\)\(^1\) Landy v. United States, 283 F.2d 303, 60-2 U.S. Tax Cas. ¶9765 (5th Cir. 1960), cert. denied, 365 U.S. 845, 81 S.Ct. 805 ("The privilege of the Fifth Amend-
when squarely faced with this question. The American Bar Association filed a brief with the Supreme Court in the *Beard* case wherein the question was directly posed: "Are personal records of Taxpayer outside the protection of the Fifth Amendment by virtue of the provisions of the Internal Revenue Code?" There, the government successfully opposed the granting of certiorari.

It is submitted that the *Shapiro* opinion does not invite the extension of the "required-records doctrine" to the records of an individual mentioned in section 6001 of the Internal Revenue Code. Such over-extension would mancipate the Fifth Amendment, limiting Constitutional protection only to documents which "the Secretary or his delegate" did not have the foresight or cupidty to require to be kept.

Chief Justice Vinson, writing the decision, himself recognized "... that there are limits which the government cannot constitution-
ally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself.”

True public records, in the sense of publicly owned or governmental records, fall outside the Fifth Amendment and may be demanded as instruments of self-crimination. True public records were defined in *Evanston v. Gunn* as those “... of a public character, kept for public purposes, and so immediately before the eyes of the community that inaccuracies, if they should exist, could hardly escape exposure.” The government should be able to seize or examine such records and the public should have a right to peruse them.

Records do not become public records merely because they are required to be kept by law. Private records continue to be private records. Otherwise, we are all living in glass houses. The phrase, “required to be kept by law” is no magic phrase which gives Congress, must less “the Secretary or his delegate,” the power to legislate private papers in the hands of their owner out of the protection of the Fifth Amendment. “(T)he compulsory disclosure of a man's private books and papers, to convict him of crime ... is contrary to the principles of a free government. ... It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom.”

Because an application of the “required records doctrine” to personal income tax records could substantially nullify the protection afforded to individuals by the Fifth Amendment, it may be said that this doctrine, as promulgated in the 5-4 decision of *Shapiro*, reaches its breaking point in those situations where a licensee is required to maintain “quasi-public” records (i.e. — druggist required by statute to keep records of sales of narcotics or records required to be kept by other occupations which involve items which may be malum in se) or the exigency of wartime regulation demands curtailment of individual rights. The ease or convenience of enforcing statutes based on the revenue power should not be raised above long-standing rights of an individual. All constitutional safe-guards are vulnerable to the same criticism.

The importance of the Fifth Amendment privilege was

55. *Shapiro v. United States*, *supra* note 42, at 32.
57. 99 U.S. 660, at 666.
59. *Shapiro v. United States*, *supra* note 42, at 69 (dissenting opinion) (“While law enforcement officers may find their duties more arduous and crime detection more difficult as society becomes more complicated, the constitutional safeguards of the individual were not designed for shortcuts in the administration
stressed by the Supreme Court in *Slochower v. The Board of Higher Education of the City of New York* when it said "the right of an accused person to refuse to testify . . . was so important to our forefathers that they raised it to the dignity of a constitutional enactment, and it has been recognized as 'one of the most valuable prerogatives of the citizen.'"

A preclusion of an extension of the "required records doctrine" to an individual's records prescribed by the Internal Revenue Code safeguards the continued existence of the general rule that an individual may withhold information if there is a reasonable probability that it might furnish a link in a chain of evidence which could subject him to any (including non-tax) criminal prosecution.

The Fifth Amendment's privilege against self-incrimination is generally available only to the individual who may be incriminated by the disclosure. It is only when a disclosure tends to also incriminate the third person that he, that third person, can assert his privilege. Thus, an accountant engaged by the taxpayer may refuse to orally testify or to produce his own records only if they might incriminate the accountant.

However, in certain situations, the tax accountant can refuse to reveal information concerning the taxpayer. The privilege available where an attorney hires an accountant in connection with the attorney's client's tax fraud case will be examined herein, as well as the existence and applicability of state statutory accountant-client privileges.

Although there is little authority relating to the application of privileges in administrative investigations, it is generally assumed that such inquiries are subject to the same common law testimonial privileges as judicial proceedings. In cases involving tax investigations, the courts have either held or assumed that the common law attorney-client privilege may be asserted during the investigatory stage.

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61. 8 WIGMORE, EVIDENCE § 2260 (McNaughton rev. ed. 1961)
63. McMann v. SEC, 87 F.2d 377 (2d Cir. 1937).
ACCOUNTANT ENGAGED BY ATTORNEY

Throughout common law history it has been thought essential to adequate legal representation that the attorney obtain from his client a complete disclosure of all pertinent information within the client's knowledge. In order to prevent compulsory disclosure of the information thus illicitly a privileged relationship came to be recognized at common law between an attorney and his client. This privilege was necessarily extended to include communications made to the attorney's agents and to the attorney by the client's agents.

Such privilege should extend to the situation where a lawyer, in seeking the information necessary to properly defend his client in anticipated or pending tax disputes, seeks an expert to assist him in interpreting and analyzing complicated financial data. The Committee on Procedure in Fraud Cases of the American Bar Association has stated that where an attorney hires an accountant in connection with the attorney's client's tax fraud case, the attorney-client privilege should attach. An extension of the attorney-client privilege to certified public accountants retained by the attorney for interpretation and summarization of matters bearing on tax liability of the lawyer's client is clearly analogous to other situations where the privilege has been held to include communications made to the attorney's agent.

In 1949, the Court of Appeals for the Ninth Circuit in Himmelfarb v. United States held that the attorney-client privilege does not extend to accountants employed by lawyers. In Himmelfarb the taxpayer's attorney engaged an accountant to assist him in preparing a tax fraud defense. At trial, the accountant was called to identify docu-

65. 8 Wigmore, Evidence, § 2301 (McNaughton rev. ed. 1961), Agents of an attorney to which the attorney-client privilege has been held to apply includes attorney's secretaries and stenographers, (Taylor v. Taylor, 179 Ga. 691, 177 S.E. 582 (1934)); engineers consulted (Lewis v. United Airlines Transport Corp., 32 F.Supp. 21 (W.D. Pa. 1940)); patent experts (Lalance and Grossjean Mfg. Co., 87 F.563 (C.C.S.D. N.Y., 1898)); physicians (City and County of San Francisco v. Superior Court, 37 Cal.2d 277. 231 P. 2d 26 (1951)); interpreters to interpret ancient documents (Churton v. Frewen, 62 Eng.Rep. 669 (1865)).


67. 8 Wigmore, Evidence § 2301 (McNaughton rev. ed. 1961) ("it has never been questioned that the privilege protects communications to the attorney's clerks and his other agents (including stenographers) for rendering his services. The assistance of these agents being indispensable to his work and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents.")

68. A.B.A. Committee Report, Section of Taxation 112 (1953).

69. Himmelfarb v. United States, 175 F.2d 924, 49-1 U.S. Tax Cas. § 9319 (9th Cir. 1949), cert. denied, 338 U.S. 860, 70 S.Ct. 103.
ments which he had prepared, including a net worth statement, and to testify with respect to disclosures made by the defendants, despite an objection that such testimony was within the attorney-client privilege. The court held that communications made in the accountant's presence were not privileged, even though he was the attorney's agent, because his presence "was not indispensable in the sense that the presence of an attorney's secretary may be. It was a convenience which, unfortunately for the accused, served to remove the privileged character of whatever communications were made. (G) ranting that ... voluntary extrajudicial disclosures by the attorney are generally inadmissi- ble, we feel that the client impliedly authorized the attorney to make disclosures to the third person." This court apparently felt that expertise in accounting matters is not necessary in properly preparing a client's defense, although secretaries, expert interpreters, physicians, expert engineers, etc. have been clearly held to be within the area protected by the attorney-client umbrella. An attorney who is also qualified as a certified public accountant may agree with the court that the expert assistance of a certified public accountant as an agent of the attorney, is not "necessary" for an interpretation and analysis of complicated financial data. However, it is obvious that the great majority of attorneys recognize that they do not have sufficient depth when faced with complicated financial analysis. The conclusion of this decision forces this majority to choose between adequately prepared representation, jeopardized by potential compulsory disclosure by the assisting accountant, or representation deficient in preparation as insurance against such compulsory disclosure. It would seem that the fundamental reason for the existence of the privilege would justify an extension where the client could not clearly and accurately communicate pertinent, though complex or technical, information to the attorney. Full disclosure necessarily includes a comprehension of all the information within the client's knowledge. While a legal secretary may be "indispensable" in all situations, an expert agent of the attorney conceivably could be "more indispensable" for adequate legal representation in certain situations!

70. The last sentence quoted infers that if the attorney had disclosed matters received in confidence from his clients to an unauthorized person the disclosure would be inadmissible, where as if the attorney had implied authority (not actual authority) to disclose there would be no privilege.

71. Accountants required to testify see, Gariepy v. United States, 189 F.2d 459 (5th Cir. 1951); Olender v. United States, 210 F.2d 795 (9th Cir. 1954) (privi-

le did not apply where the attorney was employed by an accounting firm and engaged by the client to render accounting services).

72. United States v. Judson, supra note 51. ("The very nature of the tax laws requires taxpayers to rely on attorneys, and requires attorneys to rely, in turn, upon documentary indicia of their client's financial affairs.


In 1963 the Court of Appeals for the Ninth Circuit again reviewed the applicability of the attorney-client privilege to an accountant engaged by an attorney. In *United States v. Judson* the taxpayer, learning that he was under investigation by the Intelligence Division, retained attorney Judson to represent him in the pending investigation. The attorney advised the taxpayer that he needed a net worth statement in order to adequately represent him. The taxpayer then retained an accountant who prepared the net worth statement and turned it over to the attorney for use in rendering the specific professional services requested by his client. Subsequently the attorney was served with a subpoena *duces tecum* to produce documents, including the net worth statement, before the Grand Jury. The attorney filed a motion to quash the subpoena which was granted by the District Court "on the ground that it would be a violation, not only of the attorney-client privilege in that these are part of the attorney's workpapers, but also on the further ground that it would be a violation of the Fifth Amendment". On appeal, the court pointed out that "the net worth statement and the various preliminary memo-

randa which culminated in the net worth statement . . . (were) prepared at the attorney's request, in the course of an attorney-client relationship, for the purpose of advising and defending his clients. The accountant's role was to facilitate an accurate and complete consultation between the client and the attorney about the . . . (taxpayer's) financial picture. The lower court was correct in determining that these documents constituted confidential communications within the attorney-client privilege". Thus, the Ninth Circuit has reappraised its position as regards a privilege extended to an accountant engaged by an attorney and has apparently agreed with the Second Circuit's 1961 decision in the case of *United States v. Kovel*.

Kovel was employed as a full-time accountant under the direct supervision of the partners of a law firm specializing in tax law. He was subpoenaed to appear before a federal grand jury investigating alleged tax violations of a client of the law firm. Kovel appeared before the grand jury but declined to answer certain questions on the ground of the attorney-client privilege. Subsequently, district court Judge Cashin directed Kovel to answer the questions, dogmatically stating, after refusing to review any authority, "You have no privilege as


76. *Supra* note 36.
such, 'and' I'm not going to listen". The next day Kovel again refused to answer the question relating to communications from the client on the ground that it was privileged communications. Judge Cashin held Kovel in contempt, sentencing him to a year's imprisonment, immediate commitment and denial of bail. An appeal from the sentence for criminal contempt followed. Judge Friendly of the Court of Appeals, in vacating the judgment and remanding, recognized that "... the complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others ...". The Judge analogized this case to a situation where a client, who speaks only a foreign language, is sent by an attorney to an interpreter with instructions to interview the client on the attorney's behalf and submit his summary so that the attorney can give his client proper legal advice. This analogy is properly extended to accounting concepts which "... are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases. Hence the presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege, any more than would that of the linguist.... What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer". Thus, this case clearly holds that a client's communication to an accountant employed by an attorney in the course of the attorney's professional employment is within the attorney-client privilege. Although this decision related specifically to a fulltime employee of the attorney, it is clear from the opinion, the analogy to the linguist, and the cases cited, that the privilege would be equally applicable to an independent certified public accountant engaged to assist an attorney in rendering professional services within the scope of the attorney's employment by the client. 77

Unless an attorney is an authority on all subjects and an expert on all matters he is certain to be faced with problems which require the assistance of an expert when developing federal tax fraud defenses. Take the hypothetical situation of a Chinese immigrant who has continued to use Chinese characters in maintaining the books of account of his laundry business. Hardly able to speak English and unable to communicate his good faith and honesty to the Internal Revenue Service, he is faced with federal tax charges. When he approaches your office seeking your assistance in defending him, are you, as defense attorney, required to prepare your case based on the information you can glean from his gestures and handsigns only (as insur-

77. It should be noted that there may be no privilege as to information obtained by an accountant independent of an integral client-attorney-accountant relationship, but see a discussion of this question later in this article.
ance against compulsory disclosures), or would justice demand that the attorney employ a confidential agent to assist him in preparing the defense. Without the aid of a Chinese interpreter to convey the correct information to the attorney, it would be beyond the lawyer's capacity to develop his client's case, for Chinese is not a required course in any law school in this country! Is this Chinaman to be left nude, without his just defense? It is submitted that information elicited by an interpreter would readily be enclosed within the privilege and free from compulsory disclosure. The answer would be no different if a Chinese accountant would be required to translate the Chinese accountant would be required to translate the Chinese characters to Arabic financial statements. The answer should be no different if a certified public accountant assists an attorney in interpreting and analyzing complicated books and records.

On June 17, 1963 the Supreme Court granted certiorari in *Reisman v. Caplin*. This case appears to be in conflict with *United States v. Kovel*.

In *Reisman v. Caplin* taxpayer's attorney, deciding that he needed skilled accounting advice, engaged the accounting firm of Peat, Marwick, Mitchell & Co., to examine and analyze the original books and records of the attorney's client in connection with the determination of the liability for federal income taxes of numerous domestic and foreign corporations, partnerships and individual enterprises in which the taxpayer was involved. The attorney had hired the accountants specifically to assist in the preparation for trial of cases pending in the Tax Court against the taxpayer and to enable the attorney better to advise the taxpayer in connection with a criminal investigation the commissioner was threatening to institute. The attorney paid the accountants for their services. Some of the books were transmitted to the accountants from the attorney. One year later, while four civil tax cases were pending in the Tax Court, the Internal Revenue Service issued summonses to the accountants in three of their offices, which called for testimony before a special agent concerning the work performed in the employment of the attorney and the production of all books, documents and records, including workpapers and audit reports, pertaining to the corporations', partnerships' and the individual's tax liabilities. The attorney sought an injunction to restrain the Government from summoning accountants' work sheets and the taxpayer's books and records, and to restrain the accountants, who had advised the attorney that they would produce the re-


In a terse decision, the court denied the injunction, holding that the taxpayer's attorney had no standing to sue or restrain the summons to the accountants because the records and work sheets neither fall within the attorney-client privilege nor the work product of the attorney. An appeal was affirmed on different grounds. Among the questions presented were: (1) Does the attorney-client privilege extend to accountants' papers bearing on tax liability of lawyers' clients, and (2) Will enforcement of the summons violate a lawyers' right not to reveal their work-product?

The Supreme Court deferred answering both of these questions and rather dismissed the injunction suit for want of equity, concluding that the petitioning attorney had an adequate remedy at law in a court proceeding brought by the Commissioner to enforce the summons. Since enforcement proceedings will now apparently be brought in three different places (Los Angeles, Chicago and New York), in three separate enforcement suits on three separate subpoenas, in three different circuits, the attorney for the taxpayer will be harassed and economically burdened in any attempt to, in the words of counsel, "avoid disclosure and unlawful appropriation of their work-product and trial preparation by their opponent, and to prevent unconstitutional seizure without warrant of confidential and privileged documents for future use as evidence in criminal proceedings." It would thus appear that the question of the inclusion within the attorney-client privilege of a certified public accountant retained to assist an attorney in the attorney's professional employment is bound to reappear in the near future.

In summary, the rule now appears to be that information obtained by an accountant from the attorney's client, where an integral client-
attorney-accountant relationship exists, would be privileged communications, with the attorney-client umbrella. But, even where such integral relationship exists, it is only the oral or written communications received by the accountant *from the client* which are privileged.\(^8\)\(^6\) Because documents previously in existence do not become immune merely by placing them in the hands of an attorney or his agent, the original books and records upon which the accountant's analysis is based are not within the attorney-client privilege. Information obtained from other persons would only be privileged if within the "work-product rule."\(^8\)\(^7\)

**Statutory Accountant-Client Privilege**

Because the accounting profession had not developed to a point where need for a privilege arose during the formative period of common law privileges, no common law accountant-client confidential communication privilege exists.\(^8\)\(^8\) Therefore, such privilege must arise from some federal or state statute.\(^8\)\(^9\) At least fourteen states have enacted varying forms of statutory privilege for communication between accountants and clients.\(^9\)\(^0\) "The C.P.A. Law" of Pennsylvania\(^9\)\(^1\) makes communications between a client and a certified public accountant confidential and privileged.

Statutory privileges for confidential communications are created because the State thinks a particular relationship sufficiently impo-
tant for its confidentiality to be preserved, even at the cost of losing evidence which could help in establishing facts in litigation. Recent over-emphasis of the exclusionary function has deprecated the social and moral significance of privileged communications. Correctly emphasizing the moral importance of refraining from coercion of witnesses in matters of conscience, loyalty and duty would not only reduce the likelihood of perjury, but would re-establish an individual's fundamental right to be left alone, in a certain narrowly prescribed relationship, freed of potential governmental interference.

Two cases regarding the applicability of state-created privileges in federal tax fraud investigations appear to be in conflict.

In *Falsone v. United States*[^92^] an Internal Revenue agent served a certified public accountant with a summons to appear before him and produce his workpapers and other documents relating to the tax liability of a client whom Falsone represented. The accountant appeared but refused to testify or produce his workpapers. The United States then sought and obtained an *ex parte* District Court order directing the accountant to obey. A motion to vacate that order and to quash the summons was filed by the accountant which, after a hearing, was denied by the District Court. On appeal, Falsone argued that, since the proceeding was a civil case it should be governed by the Federal Rules of Civil Procedure under which privileges of witnesses would be controlled by Florida statute[^93^] making communications between accountants and clients privileged. The Court of Appeals indicated that in a civil proceeding to enforce the summons of an Internal Revenue agent it would apply the Federal Rules of Civil Procedure, but it considered this situation to be merely an administrative "proceeding," inquisitorial in character, to which the Federal Rules of Civil Procedure would be inapplicable.

In the second case, *Baird v. Koerner,*[^94^] the Court of Appeals applied the Federal Rules of Civil Procedure to invoke the state law in determining the nature and extent of the privilege created by the attorney-client relationship. Attorney Baird, who had transmitted a substantial payment to the government covering prior years deficiencies of an unidentified client, was summoned to identify the attorney and accountant who assisted him, and to name his taxpayer client. A petition was filed in the District Court to enforce the summons and compel the identity of the client. The attorney refused to answer on the ground that the names were privileged communications between

[^92^]: *Supra* note 50.


attorney and client. The District Court found Baird guilty of civil contempt. On appeal, the Court of Appeals reversed, relying on Rule 43(a) of the Federal Rules of Civil Procedure and the California law relating to attorney-client privilege. The court said, "this is a civil case ... (I)n civil cases, the strong inference exists that the law of the forum state has generally been, and should be, applied."

It should be noted that although Baird v. Koerner arose as a proceeding to enforce an Internal Revenue Code summons, it was from a citation for civil contempt that the appeal was taken. In Falsone v. United States the appeal was from a denial of a motion to vacate the District Court's order to obey the summons. It may be that if Falsone had persevered and had traced steps comparable to Baird's through the procedural labyrinth the state statutory privilege would have been available to him. However, such a distinction based on niceties perceptible only to judges should not pervert ultimate justice.

The Federal Rules of Civil Procedure control the procedural aspects, as distinguished from substance, in civil actions in district courts. Administrative procedure ordinarily has not been governed by the Federal Rules of Civil Procedure. However, such rules do apply in a proceeding to compel testimony or production of documents before administrative tribunals in accordance with statute or order. Federal Rule 81(a)(3) specifically states that

"these rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States . . . , and (2) to appeals in such proceedings."

Since the term "proceeding" is very comprehensive, one should be able to argue that the Federal Rules of Civil Procedure apply to administrative proceedings. Nevertheless, they have been held not to apply in the administrative proceeding itself.95

In any case, the Federal Rules are and have been held applicable in proceedings which invoke the jurisdiction of district courts to compel the production of books, paper or other data for examination by internal revenue agents.96 This is undoubtedly correct since the administrative functionary comes into court for its assistance in

95. Falsone v. United States, supra note 50; In Albert Lindley Lee Memorial Hospital, 209 F.2d 122 (2d Cir. 1953), cert. denied, 347 U.S. 960, 74 S.Ct. 709; In re Colton, 201 F.Supp. 13 (D.C.N.Y. 1961), affirmed, 306 F.2d 633 (2d Cir. 1962) ("Investigation before special agent of Internal Revenue Service is not a civil action to which these rules are applicable.").

obtaining what he failed to get otherwise. By doing this his activity ceased being an administrative act and became a "lawsuit".97

Rule 43 of the Federal Rules of Civil Procedure regulates the form, admissibility and scope of evidence in federal civil proceedings. This rule was intended to provide liberality and flexibility on questions of evidence in federal proceedings pending the adoption of a detailed set of evidence rules. Federal Rule 43(a) provides for the admission of evidence in federal district courts if it is admissible "... under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state...".98 In summary, this rule provides for the introduction of evidence if admissible under:

1. Statutes of the United States.99
2. Federal equity precedents.100
3. Rules of evidence applied in the forum state.

If the evidence offered satisfies any one of these three tests, the rule permits its admission.

Because Federal Rule 43(a) purports to deal with admission of evidence, rather than its exclusion, difficulty arises only when a state law would exclude evidence. In such a case, the federal court must determine whether the evidence is admissible under rules previously applied in federal courts of equity.

In early years federal courts were compelled, in actions at law, to follow the statutory rules of the forum state, regardless of whether rules of evidence were regarded as substantive or procedural.101 However, in equity actions, the federal equity courts apparently operated without systematic rules of admissibility.102 Federal Rule 43(a) was created to achieve consistency between federal law and equity procedure; however, not to alter substantive rights.103

97. Reisman v. Caplin, supra note 84, at 512 ("any enforcement action... would be an adversary proceeding affording a judicial determination of the challenges to the summons and giving complete protection to witnesses").
99. Few important federal statutes concerning admissibility of evidence exist (E.g.—Federal Business Record Act, 28 U.S.C.A. 1732 (1958)).
100. There were very few decisions on the admissibility of evidence under the old equity procedure.
102. 1 WIGMORE, EVIDENCE § 6, at 171 (3rd ed. 1940).
Federal Rule 43(a) requires that federal courts allow the introduction of evidence that would have been admissible under "the rules . . . heretofore applied in the Courts of the United States on the hearing of suits in equity," when such rules favor admission. Because equity precedents in fact do not exist, Dean Wigmore has interpreted this rule to mean that the federal courts should strictly conform to state law and avoid perpetuating a plethora of conflicting federal judge-made rules. Other commentators also agree that the federal courts must defer to state privileges, in all cases, diversity and non-diversity. Professor Moore states that, with one unrelated exception, the question of privilege "is controlled principally by state statutes, which under Rule 43(a) will clearly govern, if no federal statutes or rules of court contrary to the state statutes are enacted or promulgated, since the state statutes were followed under the federal equity practice." 

Case law involving the effect of state-recognized privilege in federal courts ranges from recognition of all state privileges to non-recognition of any privilege. The Court of Appeals for the Third Circuit has required direct proof of an existing federal equity rule when choosing as between a state exclusionary rule or the rule of 43(a) requiring admission if any equity rule so provides. Some courts have been inclined to accede to a state exclusionary statute. In Anderson v. Benson the Court said "(A) state statute, if there is one, should control though it is more restrictive than federal precedents, but if there is no state statute and the (state) rule is doubtful as to the particular situation, the more liberal federal precedents may be followed.

In theory, the federal rules' attempt to achieve procedural uniformity within the various federal courts may not be inconsistent with the

post-1938 policy of federal-state conformity in matters of substantive law. However, differentiating between substantive and procedural rules and the effect that rules, traditionally regarded as procedural, may have on a litigant's substantive rights, raises a question as to whether the federal rules may encroach on the area set aside to state law. Professor Louisell argues that "... privileged relations are institutions of the states resulting in substantive rights under state law which cannot be undermined by federal mandate merely because the holder of the privilege may be involved in federal litigation. ...".

Nevertheless, absent challenge, most courts have regarded evidentiary questions as procedural. For one reason or another, in non-diversity cases, evidence which would otherwise be privileged under state law, has generally been admitted under Federal Rule 43(a) without appreciation of the problems thereby engendered.

THE ATTORNEY-CLIENT PRIVILEGE AND ITS APPLICATION TO PATENT ATTORNEYS

Frequently in litigation in the federal courts, discovery of papers, documents and the like in the possession of the opposing client or his attorney is requested. Just as frequently, discovery of much of the requested materials is resisted on the grounds that it is privileged. The Federal Rules of Civil Procedure, while permitting liberal discovery of evidence, recognize privileged material as an exception. 1

What is or is not privileged within the meaning of that term as used in Rule 34 of the Federal Rules of Civil Procedure, is to be determined by the law of evidence. 2 One of the notable privileges recognized in the law of evidence concerns communications between an attorney and his client.

Historically, the attorney-client privilege developed in the courts of England. 3 The privilege originally belonged to the attorney;

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1. Supra note 104, at 120.
2. Wild v. Payson, 7 F.R.D. 495 (S.D.N.Y. 1946). At 499 the court stated: "The word 'privileged' as used in Rule 26(b) relating to depositions and in Rule 34 dealing with discovery and production of documents, etc., should be interpreted as it is in the law of evidence."
3. 8 Wigmore, Evidence § 2290 (McNaughton rev. 1961) (hereinafter cited as Wigmore).