Montana Law Review Online

Volume 79 Article 1

1-24-2018

Precap: *Sweeney v. 3rd Judicial District*

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PRECAP; Sweeney v. 3rd Judicial District

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Oral arguments are scheduled for Wednesday, January 31, 2018, at 9:30 a.m. in the Courtroom of the Montana, Supreme Court, Joseph P. Mazurek Justice Building, Helena, Montana.

I. INTRODUCTION

The question in this case is whether the attorney-client privilege covers an attorney's communication to a client about a public court date. This case arose after the petitioner, defense attorney Shannon Sweeney, refused to disclose her communication with a client who had failed to show up to a mandatory pre-trial conference and was consequently charged with bail jumping. The State subpoenaed Sweeney for the communications and documents between Sweeney and her client to prove the required knowledge element in the client's felony bail jumping case, but Sweeney has asserted that any communication with her client is protected under the attorney-client privilege.

This case is significant because it will help define the scope of Montana's unique attorney-client privilege. Sweeney now asks the Montana Supreme Court to issue a Writ of Supervisory Control to advise the district court whether this particular type of communication is protected by the attorney-client privilege.

II. FACTUAL AND PROCEDURAL BACKGROUND

On May 25, 2016, the Anaconda-Deer Lodge District Court appointed Shannon Sweeney to represent Dakota James McClanahan in a drug-related criminal case.[1] The district court released McClanahan on his own reconnaissance and ordered him to maintain contact with his attorney and to make all court appearances.[2] When McClanahan did not show up for his mandatory pre-trial conference, the State charged him with bail jumping.[3] To convict a defendant of bail jumping, the State must prove the defendant had knowledge of the court date, and "purposefully fail[ed] without lawful excuse to appear at that time and place."[4] To prove the

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[1] Petition for a Writ of Supervisory Control at 2, *Sweeney v. Mont. Third Dist. Court*, https://supremecourtdocket.mt.gov/view/OP%2017-0677%20Writ%20-%20Supervisory%20Control%20--%20Petition?id={608DC05F-0000-CF12-AEE2-5704FB011F41} (Mont. Nov. 15, 2017) (OP 17-0677) [hereinafter Petitioner's Petition].

[2] District Court's Response to Petition for a Writ of Supervisory Control at 2, *Sweeney v. Mont. Third Dist. Court*, https://supremecourtdocket.mt.gov/view/OP%2017-0677%20Petition%20for%20Writ%20--%20Response/Objection?id={90103360-0000-C712-8619-B9B6B58EF1BA} (Mont. Dec. 07, 2017) (OP 17-0677) [hereinafter Respondent's Response Brief].

[3] Petitioner's Petition, *supra* note 1, at 2; Respondent's Response Brief, *supra* note 2, at 2–3.

[4] Mont. Code Ann. § 45–7–309 (2017); State v. Blackbird, 609 P.2d 708 (Mont. 1980).

knowledge element of bail jumping, the State subpoenaed Sweeney to have her testify that she informed McClanahan about his upcoming pre-trial conference.[5]

Sweeney believed that testifying against her client or disclosing any communication between herself and her client constituted a violation of the attorney-client privilege.[6] Sweeney requested a hearing to assert this privilege and argue her positions, but the district court denied her request.[7] She moved to quash subpoenas from the State to appear and testify.[8] The district court denied her motion but granted a motion in limine from the State, ruling that Sweeney only had to testify whether she had informed McClanahan about the final pre-trial conference.[9] In response to this ruling, Sweeney submitted a petition for a writ of supervisory control to the Montana Supreme Court.

III. ARGUMENTS

A. Petitioner

The Montana Supreme Court only issues a writ of supervisory control in exigent cases where:

> (a) the other court is proceeding under a mistake of law and is causing a gross injustice; (b) constitutional issues of state-wide importance are involved; or (c) the other court has granted or denied a motion for substitution of a judge in a criminal case.[10]

Here, Sweeney argues that the district court's denial of her request to invoke the attorney-client privilege in this case is a constitutional issue of state-wide importance and that the district court is proceeding under a mistake of law by ruling that the privilege does not apply.[11]

Sweeney asserts that she is obligated to protect and not disclose information shared between herself and McClanahan as a matter of both the attorney-client privilege and her duty of confidentiality. First, she asserts that the attorney-client privilege is applicable.[12] Sweeney states the

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[5] Petitioner's Petition, *supra* note 1, at 2; Respondent's Response Brief, *supra* note 2, at 3.
[6] Petitioner's Petition, *supra* note 1, at 8; Mont. Code Ann. § 26–1–803.
[7] Brief of the *Amicus Curiae* Montana Association of Criminal Defense Lawyers, National Association of Criminal Defense Lawyers, The National Association for Public Defense, and Sherry Staedler, Regional Deputy of the Office of the Public Defender for Region 5 at 5, *Sweeney v. Mont. Third Dist. Court*, https://supremecourtdocket.mt.gov/view/OP%2017-0677%20Amicus%20--%20Brief?id={D0BD3160-0000-C510-8B6F-CF5208264157} (Mont. Dec. 6, 2017) (OP 17-0677) [hereinafter *Amicus Curiae* Brief].
[8] *Amicus Curiae* Brief, *supra* note 7, at 5; Respondent's Response Brief, *supra* note 2, at 4; Petitioner's Petition, *supra* note 1, at 3.
[9] *Amicus Curiae* Brief, *supra* note 7, at 20; Respondent's Response Brief, *supra* note 2, at 2–3.
[10] Mont. Code Ann. § 25–21–14 (2017); Larry Howell, *Montana's Unique Writ of Supervisory Control*, TR. TRENDS 15 at 23 (2009), https://scholarship.law.umt.edu/faculty_barjournals/47/.
[11] Petitioner's Petition, *supra* note 1, at 5.
[12] Petitioner's Petition, *supra* note 1, at 8.

attorney-client privilege is a bedrock of our legal system, protecting any communications between an attorney and a client within the scope of legal representation that were made in confidence.[13] She argues that the district court abused its discretion when it denied her motion to keep her communications privileged.[14]

Sweeney dismisses the eight elements used by the Montana Supreme Court to define the scope of the attorney-client privilege.[15] These elements include:

> (1) where legal advice of any kind is sought,
> (2) from a professional legal advisor in her capacity as such,
> (3) the communications relating to that purpose,
> (4) made in confidence,
> (5) by the client,
> (6) are at this instance permanently protected,
> (7) from disclosure by himself or by the legal adviser,
> (8) unless the protection be waived.[16]

Sweeney suggests the Montana Supreme Court use this opportunity to simplify their jurisprudence. She argues "simply, the statute only requires communication." Sweeney believes that to prove the knowledge element of bail jumping, she would have to disclose both whether she communicated the court date to McClanahan and whether McClanahan somehow communicated his understanding to her. By couching these exchanges in terms of "communication," Sweeney argues that these exchanges constitute protected communications.[17]

Sweeney also cites her ethical duty against disclosure and, more specifically, a Montana Bar Ethics Opinion on Rule 1.6 of the Montana Rules of Professional Conduct.[18] This opinion advises attorneys against telling the district court whether their client has checked in as a requirement of bond unless the client gives consent.[19] Although the district court did not find the advisory opinion binding, Sweeney argues "the rules and concepts upon which the opinion is based are not advisory."[20] Sweeney has interpreted this to include communication of a third party

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[13] Mont. Code Ann. § 26–1–803; MONT. R. PROF'L CONDUCT 1.6; *Inter-Fluve*, 112 P.3d at 261 (citing State ex rel. U.S. Fid. & Guar. Co. v. Mont. Second Judicial District Court, 783 P.2d 911 (Mont. 1989)); Petitioner's Petition, *supra* note 1, at 6.
[14] MONT. R. PROF'L CONDUCT 1.6(b)(4); Respondent's Response Brief, *supra* note 2, at 8; Petitioner's Petition, *supra* note 1, at 9–10.
[15] *State ex rel. U.S. Fid. & Guar. Co.*, 783 P.2d at 914–915; Petitioner's Petition, *supra* note 1, at 9–10.
[16] *State ex rel. U.S. Fid. & Guar. Co.*, 783 P.2d at 914.
[17] *Id.*
[18] MONT. R. PROF'L CONDUCT 1.6; State Bar of Mont., Ethics Op. 050621 (2005); Petitioner's Petition, *supra* note 1, at 9.
[19] State Bar of Mont., Ethics Op. 050621; Petitioner's Petition, *supra* note 1, at 9.
[20] MONT. R. PROF'L CONDUCT 1.6 ("a lawyer shall not reveal information relating to the representation of a client"); Petitioner's Petition, *supra* note 1, at 9.

relayed via an attorney.[21]

B. Respondents

The respondents take the position that the attorney-client privilege is not applicable in this case. This stance represents the district court's opinion; thus, the respondents argue that the lower court is not proceeding under a mistake of law. Additionally, they argue that if the attorney-client privilege is not at play, there are no constitutional issues implicated and Supervisory Control would not be appropriate.

The respondents contend that Sweeney was conveying information from a third party (the court) to McClanahan and was not providing advice to a client in confidence.[22] They conclude that Sweeney has failed to prove that the communication about the pre-trial date was made in confidence, one of the eight required elements of the attorney-client privilege.[23] Although other jurisdictions have distinguished this type of third-party communication, the Montana Supreme Court has not yet spoken on this issue.[24] The most persuasive authority cited, *United States v. Freeman*, is also a bail-jumping case in which a district court required Freeman's attorney to testify whether the defendant was informed by her attorney about a court order to appear.[25] In *Freeman*, the Ninth Circuit Court of Appeals found that "the evidence sought to be elicited from [the attorney] was not of a confidential nature and hence was not protected by the attorney-client privilege."[26]

Further, the district court has the authority to order Sweeney to reveal the requested information because such a disclosure would be required "to comply with other law or a court order."[27]

The respondents also contend that there is no other option for proving the element of notice in this case.[28] The only other person who can prove this element, McClanahan, is protected by the constitutional right against self-incrimination.[29]

C. *Amicus*

The Amicus brief, submitted by Montana Association of Criminal Defense Lawyers, et al. contends the Court should grant this petition

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[21] *Amicus Curiae* Brief, *supra* note 7, at 12–13; Petitioner's Petition, *supra* note 1, at 9–10;
[22] Respondent's Response Brief, *supra* note 2, at 7.
[23] *State ex rel. U.S. Fid. & Guar. Co.*, 783 P.2d at 914; Respondent's Response Brief, *supra* note 2, at 6.
[24] Respondent's Response Brief, *supra* note 2, at 6.
[25] United States v. Freeman, 519 F.2d 67, 68–69 (9th Cir. 1975); Respondent's Response Brief, *supra* note 2, at 6–7.
[26] *Freeman*, 519 F.2d at 68.
[27] MONT. R. PROF'L CONDUCT 1.6(b)(4); *see also* State Bar of Mont., Ethics Op. 050621.
[28] Respondent's Response Brief, *supra* note 2, at 8–9.
[29] *Id.* at 8; *see* U.S. CONST. amend. V.

because they argue that the attorney-client privilege should apply in this case and because they warn about the potentially disastrous impacts of denying this petition. The *amici* believe granting this petition will uphold candor to the tribunal, maintain the duty of confidentiality, and preserve legal traditions and professional standards.[30] On the other hand, they argue that denying Respondent's petition could destroy Respondent's law practice and credibility, degrade attorney-client communication state-wide, de-incentivize counsel's attempts to locate, arrange, advice, or convince defendants to appear, and overburden the already strained Public Defender system.[31]

The *amici* strongly defend Sweeney's right not to testify on this issue, citing the attorney-client privilege, the duty of confidentiality, and the duty of loyalty.[32] Absent a waiver by the client or any exceptions, this privilege bars disclosure of the requested information.[33]

Next, the amici look at the bigger picture. They fear that compelling Sweeney to testify against her client may erode trust and hinder free communication between attorneys and clients in general. The policy behind the attorney-client privilege is to give both parties the freedom to express themselves openly.[34] As *amici* point out, this is especially critical with court-appointed defense counsel,[35] who are often called upon to "locate, arrange, advise, and sometimes even convince defendants to re-appear."[36] A decision for the Defense could lead defense attorneys to be less likely to perform those functions leading to more missed court dates and a decline in judicial efficiency.[37] Further, the amici believe a decision for the respondents may erode trust between attorneys and clients. This erosion of trust may have tangible impacts for Sweeney and other small-town practitioners who may develop a reputation for testifying against clients.[38]

Finally, the amici cite cases where the State used other evidence, such as "testimony of a District Court Clerk, legal assistants or through submissions of minute entries," to prove the knowledge element of bail-jumping cases.[39]

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[30] *Amicus Curiae* Brief, *supra* note 7, at ii.
[31] *Id.* at 13–14, 25–27.
[32] *Id.* at 6.
[33] *Id.* at 6–7, 8.
[34] Palmer by Diacon v. Farmers Ins. Exch., 861 P.2d 895, 904–05 (1993); Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).
[35] *Amicus Curiae* Brief, *supra* note 7, at 11–12.
[36] *Id.* at 14.
[37] *Id.*
[38] *Id.* at 13.
[39] State v. Nolan, 66 P.3d 269, 272 (Mont. 2003); State v. Kaske, 47 P.3d 824, 829 (Mont. 2002); State v. Wereman, 902 P.2d 1009, 1012 (Mont. 1995); *Amicus Curiae* Brief, *supra* note 7, at 8.

IV. ANALYSIS

The petition for a writ of supervisory control will likely not be granted. Despite a brief heyday, writs of supervisory control are now used sparingly and are only appropriate where an appeal is insufficient to correct the mistake.[40] The respondent's best chance to succeed on this petition is to argue the "impact of the erroneous ruling."[41] Although the *amici* thoroughly covered potential impacts of denying attorney-client privilege, both the *amici* and petitioner have failed to show an appeal would be insufficient in this case. The Court has granted supervisory control in attorney-client privilege cases, but only on a case-by-case basis where it has examined the privileged material and concluded that an appeal would be insufficient.[42] Thus far, petitioner has refused to reveal the contents of her communication with her client, even with a limiting motion in limine.[43]

Additionally, the Court will likely agree with the respondents that the attorney-client privilege does not apply, thus the lower court is not proceeding under a mistake of law, nor are there state-wide constitutional issues involved. Since this is a novel legal issue, the Court may still issue a published opinion weighing in on the issue presented, or they may leave this issue to appeal.[44]

The question of whether relaying court dates falls within the protection of the attorney-client privilege has not yet been decided in Montana, so the parties have looked to creative authorities. The respondents rely on jurisprudence from other jurisdictions, which all find that relaying court dates does not constitute communication.[45] These cases come from multiple jurisdictions that also follow the Model Rules of Professional Conduct, including Rule 1.6.[46] Sweeney's argument, on the other hand, contends that Montana should adopt an interpretation of Rule 1.6 found in a nonbinding advisory opinion from the Montana State Bar.[47] Unfortunately, the advisory opinion that Sweeney relies on specifically distinguishes itself from bail-jumping cases.[48] For bail jumping cases, the Montana opinion defers to an ABA formal opinion that has since been

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[40] Howell, *supra* note 10, at 23.
[41] *Id.*
[42] *See State ex rel. U.S. Fid. & Guar. Co.*, 783 P.2d 911.
[43] Respondent's Response Brief, *supra* note 2, at 4.
[44] *See* Inter-Fluve v. Mont. Eighteenth Judicial Dist. Court, 112 P.3d 258 (Mont. 2005); Hegwood v. Mont. Fourth Judicial Dist. Court, 75 P.3d 308 (Mont. 2003).
[45] Respondent's Response Brief, *supra* note 2, at 6–7.
[46] Austin v. State, 934 S.W.2d 672, 674 (Tex. App. 1996); United States v. Freeman, 519 F.2d 67, 68–69 (9th Cir. 1975); United States v. Bourassa, 411 F.2d 69, 74 (10th Cir. 1969); In re Grand Jury Proc., Des Moines, Iowa, 568 F.2d 555, 557 (8th Cir.1977); *compare* MODEL RULES OF PROF'L CONDUCT R. 1.6 *with* ALASKA R. PROF'L CONDUCT 1.6, KAN. R. PROF'L CONDUCT 1.6, PA. DISCIPLINARY R. PROF'L CONDUCT 1.6, *and* TEX. R. PROF'L CONDUCT 1.6.
[47] MONT. R. PROF'L CONDUCT 1.6; State Bar of Mont., Ethics Op. 050621; Petitioner's Petition, *supra* note 1.
[48] State Bar of Mont., Ethics Op. 050621 at 1.

specifically withdrawn because it is considered inconsistent with the Model Rules of Professional Conduct.[49]

All the jurisdictions cited by the respondents allow communication of court dates under the Model Rules of Professional Conduct.[50] Even if Sweeney's reliance upon the nonbinding advisory opinion is warranted, the Montana Supreme Court has not hesitated to rule against these opinions in the past.[51]

To address the mounting jurisdictions cited by the respondent, Sweeney and the *amici* argue that Montana should act independently on this issue due to our uniquely small Bar and small towns, where word travels quickly and an attorney can quickly earn a negative reputation by testifying against clients.[52] Sweeney has described the worst possible outcomes in which this single decision undermines trust between clients and their attorneys. However, the jurisdictions cited by the respondents maintain their stance on this issue, speaking to the improbability of Sweeney's threatened outcomes.[53]

Even though a decision in favor of the respondents is unlikely to single-handedly eliminate client trust, it would certainly limit the scope of the attorney-client privilege. Any limitations of the attorney-client privilege should be carefully and narrowly defined.

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[49] ABA Standing Comm. On Ethics & Prof'l Responsibility, Formal Op. 155 (1936); ABA Standing Comm. On Ethics & Prof'l Responsibility, Formal Op. 84–349 (1984); State Bar of Mont., Ethics Op. 050621 at 1; *see also* MONT. R. PROF'L CONDUCT 1.6.

[50] *Austin*, 934 S.W.2d at 674; *Freeman*, 519 F.2d at, 68–69; *Downie*, 888 P.2d at 1308; *In re Adoption of A.S.S.*, 907 P.2d 913; *Bourassa*, 411 F.2d at 74; *In re Grand Jury Proc*., 568 F.2d 557.

[51] State v. Landis, 43 P.3d 298 (Mont 2002); Campbell v. Bozeman Investors of Duluth, 964 P.2d 41 (1998).

[52] *See* Petitioner's Petition, *supra* note 1, at 6; *Amicus Curiae* Brief, *supra* note 7, at 13.

[53] *Austin*, 934 S.W.2d at 674; *Freeman*, 519 F.2d at, 68–69; *Downie*, 888 P.2d at 1308; *In re Adoption of A.S.S.*, 907 P.2d 913; *Bourassa*, 411 F.2d at 74; *In re Grand Jury Proc*., 568 F.2d 557.