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The Attorney Client Privilege Under the Foreign Agents Registration Act of 1938: *Attorney General v. Covington and Burling*

The Foreign Agents Registration Act of 1938¹ was enacted to protect the interests of the United States by requiring complete disclosure by persons acting on behalf of foreign principals and whose activities are political in nature.² Since the Act's inception, several questions have been raised concerning the duties of attorneys who are duly registered under the Act and who represent foreign principals.³ In *Attorney General v. Covington and Burling*,⁴ a court dealt for the first time with the attorney client privilege and the Act. The district court for the District of Columbia held that the attorney client privilege was inherently contained within provisions of the Act, and was therefore applicable to attorneys registered under the Act who represent foreign principals. A year later, the court handed down a memorandum opinion, *Attorney General v. Covington and Burling*,⁵ outlining the scope and extent of the privilege where the attorney representing a foreign principal is asked to divulge confidential communications from his foreign client. The cases illustrate the inherent conflict between the disclosure provisions of the Act, the national interests the Act was intended to protect and the benefits gained by the attorney client privilege. *Covington 1977* set forth guidelines for the application of the privilege in situations where it conflicts with the Act's disclosure provisions. An analysis of these guidelines and their practical impact upon attorneys representing foreign principals is the focus of this note.

In 1967, Covington and Burling [hereinafter C&B], a large Washington law firm, registered as an agent of the Republic of Guinea.⁶ The firm's main activities for Guinea involved a project to develop the country's bauxite resources. C&B engaged in negotiations with U.S. and foreign corporations to mine the bauxite, and helped negotiate loans for the project from various international lending agencies.⁷ In addition,

¹ 22 U.S.C. §§ 611-621 (1970) [hereinafter the Act].

² H.R. REP. NO. 1470, 89th Cong., 2d Sess. 2 (1966), reprinted in [1966] U.S. CODE CONG. & NEWS 2397.

³ The first is when attorneys representing foreign principals must register under the Act. See notes 48, 49 and 71-74 *infra* and accompanying text for a discussion of this as it relates to this note. A second involves the records attorneys who register must keep. This is answered by dicta in the note case. See notes 50-52 and 70 *infra* and accompanying text.

⁴ 411 F. Supp. 371 (D.D.C. 1976) [hereinafter cited as *Covington 1976*].

⁵ 430 F. Supp. 1117 (D.D.C. 1977) [hereinafter cited as *Covington 1977*].

⁶ 411 F. Supp. at 372.

⁷ *Id.*

C&B hired consultants to prepare negotiating positions for Guinea.⁸ C&B also represented Guinea in a number of smaller matters.⁹

In January 1975, officials of the Registration Unit of the Justice Department (acting as the Attorney General's agents) sought to inspect the records C&B maintained with respect to Guinea. The firm turned over approximately ninety-five percent of the records requested, but refused to allow the government to inspect the remaining five percent, amounting to one thousand pages.¹⁰ C&B claimed these documents were confidential communications between Guinea and the firm regarding legal matters, and were protected from disclosure by the attorney client privilege. The Attorney General then filed suit seeking a mandatory injunction ordering C&B to allow the Registration Unit to examine the documents.¹¹ The court in *Covington 1976* held that an attorney who has registered under the Act and who represents a foreign principal may validly claim the attorney client privilege to prevent disclosure of any documents required to be kept under the Act. The court then said it would determine by an *in camera* inspection whether such documents were within the scope of the privilege.¹² C&B turned the documents over to Judge Sirica, the presiding judge, who became concerned that C&B might have been claiming more than it was entitled to claim under the privilege as traditionally defined. He asked the parties to submit additional memoranda on this point.¹³

In *Covington 1977*, the court stated that it was "imperative that the privilege recognized be narrowly limited within its traditional confines,"¹⁴ and set forth the following guidelines in determining whether a document was covered by the privilege: (1) the privilege was upheld for communications from the client to the attorney and the attorney's agents where C&B alleged disclosure would tend to reveal the client's

⁸ 430 F. Supp. at 1121. The largest consultant was the accounting firm Price Waterhouse, which prepared a negotiating position for taxation of the corporation that developed the bauxite.

⁹ 411 F. Supp. at 372. Among others, a contract claim arising from bauxite transactions, and a contract dispute arising out of Guinea's exhibit at the New York World's Fair in 1964.

¹⁰ *Id.*

¹¹ The authority for the Attorney General to seek an injunction is in 22 U.S.C. § 618(f) (1970), which reads in part:

Whenever in the judgment of the Attorney General . . . any agent of a foreign principal fails to comply with any of the provisions of this Act or the regulations issued thereunder, or otherwise is in violation of the Act, the Attorney General may make application to the appropriate United States district court for an order . . . requiring compliance with any appropriate provision of the Act or regulation thereunder. The district court shall . . . issue a temporary or permanent injunction, restraining order or such other order which it may deem proper.

¹² 411 F. Supp. at 377.

¹³ 430 F. Supp. at 1119.

¹⁴ *Id.* at 1120.

confidence specifically;¹⁵ (2) the privilege was granted for communications from the client's agents only to the extent disclosure tended to reveal a confidence from the client to an agent or to the attorney;¹⁶ (3) the privilege was not upheld with respect to communications only tangentially related to legal matters;¹⁷ and (4) the court allowed the privilege to prevent disclosure in all instances where C&B was unsure of a document's confidentiality, except where the document (a) might be of interest to the Attorney General under the Act, (b) contained information likely to be disclosed to third persons in the future, or (c) could have been definitely classified as confidential or not by the attorney through information from other sources.¹⁸ Following these guidelines, Judge Sirica found that "none of the documents held privileged would, if disclosed, add measurably to the Registration Unit's knowledge of the activities of C&B on behalf of Guinea."¹⁹

In addition, the court rejected a proposal by the Registration Unit that it be allowed to view all documents turned over to the court under a protective order forbidding disclosure. If the Unit found information it felt should or must be disclosed under the Act, it would ask the court for a specific determination of whether and to what extent that particular information might be privileged. While recognizing the advantages of the Unit's expertise, Judge Sirica rejected the proposal.²⁰

The attorney client privilege rests upon the rationale that it provides certain "benefits to justice." "In order to promote freedom of consultation of legal advisors by clients, the apprehension of compelled disclosure by the legal advisors must be removed; hence the law must prohibit such disclosure except on the client's consent."²¹ Today, according to *Fisher v. United States*,²² "confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged."²³ It is felt that full disclosure by the client to his attorney will promote the administration of justice in an adversary system.²⁴

¹⁵ *Id.* at 1120-22.

¹⁶ *Id.* at 1121.

¹⁷ *Id.* at 1121-22.

¹⁸ *Id.* at 1122.

¹⁹ *Id.*

²⁰ *Id.* at 1119, 1120.

²¹ 8 J. WIGMORE, EVIDENCE § 2291 (McNaughten rev. ed. 1961) at 545 [hereinafter cited as 8 WIGMORE]. See also MCCORMICK ON EVIDENCE 187 (2d ed. E. Cleary ed. 1972) [hereinafter cited as MCCORMICK].

²² 425 U.S. 391 (1976).

²³ *Id.* at 403-04. Wigmore defines the privilege as follows:

(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived. 8 WIGMORE, *supra* note 21, at 554.

²⁴ For a thorough discussion of this, see 8 WIGMORE, *supra* note 21, § 2291 and MCCORMICK, *supra* note 21, § 87.

The privilege has been criticized for obstructing justice by restricting access to pertinent facts, and for encouraging unfounded litigation based on partial disclosure of facts.²⁵ For these reasons, recent case law has confined the attorney client privilege to the narrowest possible limits consistent with its purpose of allowing the client to place full and unrestricted confidence in his attorney. In the recent *Fisher* decision, the Supreme Court held that "the privilege applies only where necessary to achieve its purpose. Accordingly, it protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege."²⁶

In applying the privilege, courts distinguish between the attorney's acting as a lawyer, *i.e.*, giving predominately legal advice, applying rules of law and preparing cases for litigation and prosecuting appeals,²⁷ and his acting in any other capacity.²⁸ Thus the privilege has not been applied to communications connected with transactions where the attorney has acted as a business agent or advisor,²⁹ as a negotiator,³⁰ as a banker,³¹ as an accountant,³² or in providing ministerial, clerical and

²⁵ See 8 WIGMORE, *supra* note 21, § 2291 and MCCORMICK, *supra* note 21, at 176-77. If one were legislating for a new commonwealth, without history or customs, it might be hard to maintain that a privilege for lawyer client communications would facilitate more than it would obstruct the administration of justice . . . [but] confined as we are by this 'cake of custom,' it is unlikely that enough energy could not be generated to abolish the privilege. *Id.* at 176.

²⁶ *Id.* at 403.

²⁷ *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792, 794 (D. Del. 1953).

²⁸ See 8 WIGMORE, *supra* note 21, § 2296. As a practical matter, Wigmore states: Where the general purpose concerns legal rights and obligations, a particular incidental transaction would receive protection though in itself it was merely commercial in nature And the privilege of nondisclosure is not lost merely because relevant non-legal considerations are expressly stated in a communication which also includes legal advice. *Id.* at 567.

See *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357 (D. Mass. 1950) (where one part of a conversation was confidential and the rest not, the entire was protected).

²⁹ 4 MOORE'S FEDERAL PRACTICE ¶26.60(2) (2d ed. 1976). See *United States v. Vehicular Parking Ltd.*, 52 F. Supp. 751 (D. Del. 1943) (business advice and direction by an attorney who was promoter, director, and manager of the corporation in antitrust litigation were not privileged); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 347 (D. Mass. 1950) (communications seeking business or personal advice are not privileged); *In re Grand Jury Subpoena Duces Tecum*, 391 F. Supp. 1029 (S.D.N.Y. 1975) (business advice from an attorney not privileged); *Georgia Plywood Co. v. United States Plywood Corp.*, 18 F.R.D. 463 (S.D.N.Y. 1956) (communications of patent advice and technical knowledge not held privileged); *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314 (7th Cir. 1963).

³⁰ See *Myles E. Reiser Co. v. Loew's, Inc.*, 81 N.Y.S.2d 861 (1948) (information obtained by attorneys for clients in negotiations as negotiators was not privileged); *Banks v. United States*, 204 F.2d 666 (8th Cir. 1953) (communications to an attorney acting in the capacity of negotiator with an IRS officer held not privileged); *Radio Corp. of America v. Rauland Corp.*, 18 F.R.D. 440 (N.D. Ill. 1955) (negotiations between different corporations conducted by attorneys are not protected by the privilege).

³¹ See *Belcher v. Sommerville*, 413 S.W.2d 620 (Ky. 1967) (conversations with attorney/banker contacted as a banker were not privileged).

³² See *In re Fisher*, 51 F.2d 424 (S.D.N.Y. 1931) (information given to an attorney for

drafting services without legal advice.³³ The privilege has not been extended to uphold the confidentiality of documents which are intended to be communicated to third parties,³⁴ or which do not reveal confidential information.³⁵

The burden of showing the elements of the privilege with respect to each communication rests with the invoking party. Wigmore states with regard to the elements:

- 1) The communications must originate in a *confidence* that they will not be disclosed.
- 2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relations between the parties.
- 3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
- 4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of the litigation.

Only if these four conditions are present should a privilege be recognized.³⁶

Accordingly, the attorney or client must show that the communications were given in confidence to an attorney acting in his capacity as legal advisor and were given for the purpose of obtaining legal advice from him.

Whereas the attorney client privilege is intended to preserve confidentiality by restricting disclosure, the Foreign Agents Registration Act of 1938 destroys confidentiality by requiring complete disclosure. The Act has been amended seven times,³⁷ and its focus has shifted from

the purpose of making a financial statement was not privileged); *United States v. Chin Lim Mow*, 12 F.R.D. 533 (N.D. Cal. 1952) (where attorney acts solely as an accountant, information communicated for that purpose is not privileged); *Oleander v. United States*, 210 F.2d 795 (9th Cir. 1954) (communications to attorney/accountant for accounting purposes are not privileged in a tax evasion suit).

³³ 8 WIGMORE, *supra* note 21, at 570. *See also* *Canady v. United States*, 354 F.2d 849 (8th Cir. 1966) (no privilege where attorney merely prepared a tax return without giving legal advice or service); *Pollock v. United States*, 202 F.2d 281 (5th Cir. 1953) (uncomplicated real estate transactions do not qualify for protection of the privilege); *United States v. Bartone*, 400 F.2d 459 (6th Cir.), *cert. denied*, 393 U.S. 1027 (1968) (information disclosed by an attorney tracing funds to and from various corporations and his client held not privileged).

³⁴ *See* *United States v. Johnson*, 465 F.2d 793 (5th Cir. 1972) (privilege not applicable to documents of the type designed to be disclosed to third parties); *United States v. Int'l Business Machs. Corp.*, 66 F.R.D. 206, 215 (S.D.N.Y. 1974).

³⁵ *See* McCORMICK, *supra* note 21, at 91; *United States v. Int'l Business Machs. Corp.*, 66 F.R.D. 206, 214 (S.D.N.Y. 1974); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357 (D. Mass. 1950) (privilege not applied to information coming from sources outside the client corporation, or to information obtained from conferences held in the presence of outsiders).

³⁶ 8 WIGMORE, *supra* note 21 at 527.

³⁷ In 1939, 1942, 1950, 1956, 1961, 1966, and 1970. 22 U.S.C. § 611-621 (1972).

curbing "subversive and marginally subversive activity"³⁸ to providing "the public with information about foreign agency relationships."³⁹ The Act requires every "agent of a foreign principal" to file a registration statement with the Attorney General.⁴⁰ This statement must include all activities undertaken on behalf of the principal.⁴¹ A copy of any "political propaganda" the agent publicizes on the principal's behalf must also be disclosed.⁴² All "books of account and other records with respect to all his activities" on behalf of the foreign principal must be preserved and disclosed upon demand.⁴³ The Attorney General must in turn make such records available to the public and interested parties in the government.⁴⁴ Penalties for non-disclosure or non-registration are up to a \$10,000 fine and/or five years in prison.⁴⁵ The Attorney General may also request a mandatory injunction to force disclosures,⁴⁶ and may require disclosure of any information deemed necessary to accomplish the purpose of the Act.⁴⁷

Two important exemptions from registration are set forth in section 613. Section 613(d) exempts "[a]ny person engaging or agreeing to engage only (1) in private or non-political activities in furtherance of the bona fide trade or commerce of such a foreign principal; or (2) in other activities not serving predominantly a foreign interest . . ."⁴⁸ Section 613(g) exempts:

Any person qualified to practice law, insofar as he engages or agrees to engage in the legal representation of a disclosed foreign principal before any court of law or any agency of the Government of the United States; provided, that for the purpose of this subsection legal

³⁸ Note, *Attorneys under the Foreign Agents Registration Act of 1938*, 78 HARV. L. REV. 619, 620 (1965).

³⁹ *Id.* at 620-21.

⁴⁰ 22 U.S.C. § 611 (1970). The term "foreign principal" includes foreign governments, foreign political parties, all persons outside the United States, and all combinations of persons or corporations organized under foreign law or having their principal place of business in a foreign nation. *Id.* § 611(b). "Agent of a foreign principal" includes "any person who acts as an agent, representative, employee, or servant," or any person who acts "at the order, request, or under the direction or control, of a foreign principal," and i) engages in political activities on behalf of the principal, ii) acts as "a public relations counsel, publicity agent, information-service employee, or political consultant" on behalf of the principal, iii) within the United States solicits or disburses funds, loans, or contributions for the principal, iv) represents the interests of a foreign principal before an agency or official of the United States Government in the United States. *Id.* § 611(c).

⁴¹ *Id.* § 612. Agents must also disclose fully the purposes and terms of their contract with the principal, all records of receipts pursuant to the contract, the names of those assisting in the activities which require disclosure, and all personal activities on behalf of the foreign principal.

⁴² *Id.* § 614.

⁴³ *Id.* § 615.

⁴⁴ *Id.* § 616.

⁴⁵ *Id.* § 618.

⁴⁶ *Id.* See note 11 *supra*.

⁴⁷ *Id.* § 620.

⁴⁸ *Id.* § 613(d).

representation does not include attempts to influence or persuade agency personnel or officials other than in the course of established agency proceedings, whether formal or informal.⁴⁹

Judge Sirica in *Covington 1976* ruled that the section 613(g) exemption, where applicable, does not include all communications traditionally protected by the attorney client privilege.⁵⁰ He read section 613(d) to require "an attorney who engages in any non-exempt activities on behalf of a foreign principal . . . must include in his registration statement a description of the otherwise exempt legal activities . . ." ⁵¹ In effect, if the attorney registers, some confidential communications might be included in the books and records he is required to keep and hence would be subject to disclosure. Judge Sirica deemed the attorney client privilege the wisest way to protect against this.⁵²

The guidelines set forth in *Covington 1977* for the most part apply the attorney client privilege inherently contained in the Act within the narrow limits set forth in *Fisher*. By restricting the privilege for communications from the client and its agents to that information which tended to reveal a confidence specifically,⁵³ and by not granting the

⁴⁹ *Id.* § 613(g). Prior to 1966, § 613(d) exempted "any person engaging or agreeing to engage only in private and nonpolitical financial or mercantile activities in furtherance of the bona fide trade or commerce of such foreign principal . . ." In 1964, the Supreme Court in *Rabinowitz v. Kennedy*, 376 U.S. 605 (1964), interpreted the "nonpolitical financial or mercantile activities" exemption to be unavailable to an attorney representing Cuba in allegedly financial and mercantile matters. In 1966, Congress noted that the decision in *Rabinowitz* "caused some uncertainty as to whether a foreign government could ever act in a private capacity within the meaning of the commercial exemption." H.R. REP. NO. 1470, *supra* note 2, at 2405. In the amendments and additions to § 613, the House Judiciary Committee desired to broaden the exemption to include "all private and non-political activities with a bona fide commercial purpose" and further stated that "attorneys at law are not required to register because they engage in legal representations of foreign principals whose identity they disclose." *Id.* at 2398.

For an in-depth criticism of *Rabinowitz* and its effect on the Act prior to the 1966 amendments, see Note, *Attorneys under the Foreign Agents Registration Act of 1938*, *supra* note 38.

⁵⁰ Judge Sirica noted that the "privilege extends to all communications where legal advice of any kind is sought, whether made in contemplation of litigation or not." 411 F. Supp. at 374. On its face, § 613(g) exempts only legal representation before a court or agency of the Government. See note 49, *supra* and accompanying text.

⁵¹ 411 F. Supp. at 374.

⁵² Without the privilege, two situations arise where confidential communications might be disclosed. (1) The Registration Unit may be forced by § 616(c) of the Act to disclose all information it receives. That section states: "The Attorney General is authorized to furnish to departments and agencies in the executive branch and committees of the Congress such information obtained by him in the administration of this [Act] . . . as may be appropriate in the light of this [Act]." (2) The Freedom of Information Act, 5 U.S.C. § 552 (1970) *as amended* (Supp. V, 1975), may require disclosure of any records the Unit obtains: "[s]uch documents could conceivably be considered 'records' under § 552(a)(3), and might not fall within one of the specific exemptions from disclosure of § 552(b)." 430 F. Supp. at 1120. Also, there is no protection against the documents being leaked, except by protective order, which the court recognized would not satisfy a foreign client unfamiliar with the American system of justice. The Registration Unit's suggested procedure was rejected for this reason. *Id.*

⁵³ See notes 28, 34 and 35 *supra* and accompanying text.

privilege to communications only tangentially related to legal matters,⁵⁴ the court adhered to the spirit of *Fisher* and recent case law.

Only where the court allowed the privilege to protect documents whose confidentiality C&B was unsure of did the court extend the privilege beyond the narrow bounds of recent case law. The most C&B could allege in good faith for the documents was "[w]e cannot determine that this [document] does not disclose a confidential communication from [Guinea] to the firm."⁵⁵ The court reasoned "that Guinea may not have understood how the American legal system works, and for that reason . . . not cooperated fully with C&B."⁵⁶ By giving the attorney some leeway in this situation,⁵⁷ the guidelines recognize that "where a country is involved, a somewhat broader rule might apply."⁵⁸

This broader rule permits the attorney to invoke the privilege for communications for which he cannot allege the element of confidentiality necessary to the privilege.⁵⁹ Requiring the attorney to show the elements of the privilege is necessary to guard against the attorney's naming as agents all persons with whom he has contact, thereby protecting all communications with such person.⁶⁰ Though this application of the privilege is limited to the representation of foreign nations where the client has not cooperated fully with the attorney, it is an expansion of the privilege.

This expansion can be criticized on national security grounds. It has been held consistently in cases of foreign policy and national security that traditional rights and privileges may be subordinated where "there is strong governmental interest supporting the disclosures sought . . ."⁶¹ In *Attorney General v. Irish Northern Aid Committee*,⁶² the district court held that the foreign agent must divulge membership information even though such information is usually protected by the first amendment.⁶³ The court stated that "[t]he governmental interest may fairly be said to outweigh any possible infringement of first amendment rights of the

⁵⁴ See notes 27-33 *supra* and accompanying text.

⁵⁵ 430 F. Supp. at 1122.

⁵⁶ *Id.*

⁵⁷ See note 18 *supra* and accompanying text for exceptions to this application.

⁵⁸ 430 F. Supp. at 1122.

⁵⁹ See note 33 *supra* and accompanying text. Judge Sirica himself recognized that it is not sufficient for the attorney "simply to allege with respect to a particular document that each element of the privilege was, and continues to be, present. The attorney also has the burden of showing with sufficient certainty that the elements do, in fact, exist." 430 F. Supp. at 1122.

⁶⁰ See *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26 (D. Md. 1974).

⁶¹ *Attorney Gen. v. Irish Northern Aid Comm.*, 346 F. Supp. 1384, 1390 (S.D.N.Y. 1972). The basis for the strong governmental interest is the "indisputable power of the Government to conduct its foreign relations and to provide for the national defense . . ."
Id.

⁶² *Id.*

⁶³ Forced disclosure under the Act was held constitutional in *United States v. Peace Information Center*, 97 F. Supp. 255 (D.D.C. 1951).

defendant's members or contributors."⁶⁴ Against this background, any existing attorney client privilege that is inconsistent with the Act might be challenged, and as a matter of national security, there is no basis for applying a broader rule to foreign countries.

The broader rule for foreign nations that do not fully cooperate is contradicted by Judge Sirica's own statement that, given the unusual way the issue arose, "it is imperative that the privilege recognized be narrowly limited within its traditional confines."⁶⁵ However, it is doubtful whether the broader rule or the privilege itself as applied to foreign nations will have any practical effect upon the national security. As noted earlier, an exception to the expanded rule disallows the privilege where the communication might be of interest to the Attorney General in fulfilling his obligations under the Act. The basis of the national security argument against a broader privilege reflects a fear that the court's *in camera* judgment in balancing the national security and disclosure needs against the benefits obtained by the privilege will allow relevant information under the Act to be withheld from the Attorney General. However, there is no reason to believe that the Attorney General's need will be weighed any less against the privilege than it was against a constitutional right in *Attorney General v. Irish Northern Aid Committee*.⁶⁶ In subjecting communications to an *in camera* inspection, Judge Sirica stated that "[t]he court believes that in all or nearly all instances an impartial judicial officer would be able to disclose portions of a confidential document, or the substance of it, relevant to the Attorney General's needs under the Act without compromising the attorney client relationship."⁶⁷

The decisions in the *Covington* cases will have a practical impact upon the status of attorneys representing foreign clients under the Act that extends beyond the guidelines set for the attorney client privilege. The interpretation of sections 613 (d) and (g), which require record keeping and possible disclosure of *all* the attorney's activities on behalf of the foreign principal, have clarified which records an attorney registered under the Act must preserve.⁶⁸ The question of when an attorney must

⁶⁴ 346 F. Supp. at 1391.

⁶⁵ 430 F. Supp. at 1120.

⁶⁶ See note 64 *supra* and accompanying text regarding the weight of governmental interest.

⁶⁷ 411 F. Supp. at 376-77.

⁶⁸ 22 U.S.C. § 613 (1970). A regulation by the Attorney General now requires an agent who registers to keep "[a]ll correspondence, memoranda, cables, telegrams, teletype messages, and other written communications to and from all foreign principals and all other persons relating to the registrant's activities on behalf of or in the interest of any of his foreign principals." 28 C.F.R. § 5.500(a)(1) (1976). Although the interpretation of § 613(d) and (g) in *Covington 1976* (see notes 48-51 *supra* and accompanying text) was dicta, it is the first judicial interpretation of the records an attorney registered under the Act must keep.

register under the Act was not litigated in *Covington*.⁶⁹ The added protection against disclosure provided to the client by the attorney client privilege, appended to the penalties for non-registration,⁷⁰ may cause prudent attorneys to register under the Act out of caution.⁷¹ It is more likely that attorneys representing foreign principals in situations similar to that of C&B may not register, and risk the penalties in order to avoid the expense and inconvenience of litigation. If this latter possibility prevails, the intent of Congress concerning the registration of attorneys under the Act may be fulfilled;⁷² however, this issue has not been decided definitely.⁷³

The guidelines in *Covington 1977* have provided a practical basis for resolving the tension between the national interests protected in the Act

⁶⁹ According to the court in *Covington 1976*, C&B registered under the Act out of an abundance of caution and alleged it was not subject to it at all, but agreed for purposes of argument to assume this contention failed. 411 F. Supp. at 372-73 n.l.

⁷⁰ Up to \$10,000 fine and/or five years in jail. 22 U.S.C. § 618 (1970).

⁷¹ See note 71 *supra*.

⁷² The registration issue is tangential to *Covington*, but practically important because to reach the issue decided in *Covington*, the attorney must first have registered under the Act. The intent of Congress is seen in the following from H.R. REP. No. 1470, *supra* note 2:

A specific exemption for attorneys for representation of foreign clients in the courts and before administrative agencies is contained in [section 613(g)], but the day-to-day, routine activities of attorneys in advising and counseling with foreign clients will continue to be exempt under this section. When advice is given or assistance is rendered with the intent to influence Government policy, the agent is engaged in a political activity and the exemption will not apply. *Id.* at 2405.

....

[Section 613(g) was intended to allow attorneys an exemption] broad enough to cover legal representation even when the proceedings or the activities involved are informal. . . . The test of the exemption would be legal representation. An attorney would still be precluded from using the case or proceeding as a vehicle for generating propaganda for his principal. If the attorney's activities outside the court room or hearing room go beyond the bounds of normal legal representation of his client's case and amount to efforts to influence public opinion, his activities become political activities and the exemption does not apply. *Id.* at 2408.

The Attorney General's regulations pursuant to the § 613(g) lawyer's exemption indicate:

(a) Attempts to influence or persuade agency personnel or officials other than in the course of established agency proceedings, whether formal or informal, shall include only such attempts to influence or persuade with reference to formulating, adopting, or changing the domestic or foreign policies of the United States or with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party . . . 28 C.F.R. § 5.306(a) (1976).

Nothing in the case indicates C&B attempted to influence public opinion on behalf of Guinea. Litigation concerning registration of an attorney in the situation of C&B would clarify the registration issue.

⁷³ The issue was litigated in *Rabinowitz v. Kennedy*, 376 U.S. 605 (1964); however, the subsequent amendment of section 613(d) and addition of section 613(g) to the Act indicated Congress' dissatisfaction with the *Rabinowitz* holding, as it "caused some uncertainty as to whether a foreign government could ever act in a private capacity within the meaning of the commercial exemption." H.R. REP. No. 1470, *supra* note 2, at 2405. The issue has not been litigated since the amendments.

and the benefits to justice provided by the attorney client privilege. Both decisions in *Covington* clarify the duties of attorneys registered under the Act. If future litigation indicates attorneys in the position of C&B need not register, the *Covington* cases will not be as significant as they would be if attorneys are required to register. Unless future decisions hold that attorneys representing foreign principals need not register, the *Covington* cases will continue to be useful for the guidelines they enunciate.

— STUART OLIVER BAESEL, JR.

