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Seymour Glanzer

Paul R. Taskier

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# ATTORNEYS BEFORE THE GRAND JURY: ASSERTION OF THE ATTORNEY- CLIENT PRIVILEGE TO PROTECT A CLIENT'S IDENTITY

SEYMOUR GLANZER\*  
PAUL R. TASKIER\*\*

## I. INTRODUCTION

With increasing frequency lawyers are summoned to testify before federal grand juries about what may be one of the most important of their client's communications: the client's identity.<sup>1</sup> This is particularly troubling when it is possible that revelation of that identity would result in the client's indictment. It is apparent from a number of recent investigations<sup>2</sup> that attorney testimony before the

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\* Partner of the law firm Dickstein, Shapiro & Morin, Washington, D.C. LL.B., New York Law School, 1960; B.S., Juilliard-New York University, 1955. Former Chief, Fraud Section, United States Attorney's Office, District of Columbia.

\*\* Associate of the law firm Dickstein, Shapiro & Morin, Washington, D.C. J.D., Georgetown University Law Center, 1982; B.A., Tufts University, 1978.

<sup>1</sup> See, e.g., *In re Grand Jury Investigation No. 83-2-35 (Durant)*, 723 F.2d 447 (6th Cir. 1983) [hereinafter cited as *In re Durant*], cert. denied sub nom. *Durant v. United States*, 104 S. Ct. 3524 (1984); *In re Osterhoudt*, 722 F.2d 591, 594 (9th Cir. 1983) (amicus briefs filed by National Ass'n of Criminal Defense Lawyers Inc. and Calif. Attorneys for Criminal Justice suggesting national pattern of governmental abuse of subpoena process to interfere with professional relationship between targets of grand jury investigations and their attorneys); *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026 (5th Cir. 1982) (en banc) [hereinafter cited as *In re Pavlick*]; *In re Grand Jury Proceedings (Jones)*, 517 F.2d 666, 874 (5th Cir. 1975) [hereinafter cited as *In re Jones*] (sole motive of government in examination of attorneys to corroborate or supplement already-existent information about persons suspected of income tax offenses); Zwerling, *Federal Grand Juries v. Attorney Independence and the Attorney-Client Privilege*, 27 HASTINGS L.J. 1263 (1976); Comment, *Assertion of the Attorney-Client Privilege To Protect the Client's Identity*, 28 U. CHI. L. REV. 533 (1961); Comment, *The Attorney-Client Privilege as a Protection of Client Identity: Can Defense Attorneys be the Prosecution's Best Witnesses?*, 21 AM. CRIM. L. REV. 81 (1983) [hereinafter cited as Comment, *Prosecution's Best Witnesses?*]. The scope of this Article is limited to federal law, and does not purport to address questions of privilege among the states and before state grand juries.

<sup>2</sup> See *United States v. Liebman*, 742 F.2d 807 (3d Cir. 1984); *In re Grand Jury Subpoena Duces Tecum (Shargel)*, 742 F.2d 61 (2d Cir. 1984) [hereinafter cited as *In re Shargel*]; *In Matter of Witnesses Before Special March 1980 Grand Jury*, 729 F.2d 489 (7th Cir. 1984) [hereinafter cited as *In re March 1980 Grand Jury*]; *In re Durant*, 723 F.2d

grand jury has become an increasingly favored tool of prosecutors in discovering information or proof necessary to build a case against the target of an investigation. This development has serious implications for every practicing attorney; it is by no means limited to attorneys who practice criminal law. The majority of cases involving the need to compel testimony from an attorney before the grand jury concern legal advice tendered by corporate or tax lawyers, which later becomes the subject of government scrutiny.

This Article will discuss: (1) the purpose of the attorney-client privilege; (2) the possibility of intervention for a client who fears that defense counsel will not risk being held in contempt and will disclose the client's identity; (3) the general rule excluding the client's identity from the protection of the attorney-client privilege; (4) the exceptions to that rule; (5) the important recent decisions in this area; and (6) the possibility of expanding fifth amendment protections defined under *Fisher v. United States*<sup>3</sup> to situations in which identity is not itself a confidential communication, but where revelation of identity would serve as a "link in the chain of evidence" leading to indictment.<sup>4</sup> This Article, in line with *Fisher*, also will advocate the position that a client's privilege in communications with his attorney is co-extensive with the client's fifth amendment privilege against self-incrimination.

The problem of protecting client identity has been addressed by numerous courts, and recent decisions in the Second, Fifth, Sixth, Seventh and Ninth Circuits,<sup>5</sup> rejecting the claim of privilege where incrimination was a clear factor, make more pressing than ever the need to develop a coherent and fair approach that fully comprehends the purpose of the attorney-client privilege and, in certain of these cases, the fifth amendment interests of a client.

## II. THE PURPOSE OF THE ATTORNEY-CLIENT PRIVILEGE

The privilege between the attorney and his client is of ancient origin. It stands as society's moral choice that confidentiality should

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447; *In re Osterhoudt*, 722 F.2d at 594. *In re Grand Jury Proceedings (Gordon)*, 722 F.2d 303 (8th Cir. 1983) [hereinafter cited as *In re Gordon*].

The authors of this Article represented Intervenor John Doe in *In re Gordon*, and filed a petition for a writ of certiorari to the Supreme Court in his behalf, No. 83-1309, denied on June 11, 1984, 104 S. Ct. 3524 (1984).

<sup>3</sup> 425 U.S. 391, 404 (1976).

<sup>4</sup> *Hoffman v. United States*, 341 U.S. 479, 486 (1951) ("The [fifth amendment] privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.").

<sup>5</sup> See *supra* note 2; see also *In re Pavlick*, 680 F.2d 1026 (5th Cir. 1982).

adhere to certain relationships. This choice has been grounded, moreover, in a practical consideration: "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."<sup>6</sup> Accordingly, the attorney-client privilege has been refined to apply only to certain situations. The classic formulation, by Judge Wyzanski, describes it clearly, if in staccato fashion:

The privilege applies only if (1) the asserted holder of the privilege is, or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceedings, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.<sup>7</sup>

Necessarily, the invocation of the privilege in a grand jury setting presupposes the existence and proof of these factors.

One of the earliest cases discussing the theory of the attorney-client privilege applies with equal force to the modern use of the privilege. In *Annesley v. Earl of Anglesea*,<sup>8</sup> the Recorder stated the basic premise of the attorney-client privilege:

Now, if an attorney was to be examined in every case, what man would trust an attorney with the secret of his estate, if he should be permitted to offer himself as a witness? If an attorney had it in his option to be examined, there would be an entire stop to business; nobody would trust an attorney with the state of his affairs. The reason why attorneys are not to be examined to anything relating to their clients or their affairs is because they would destroy the confidence that is necessary to be preserved between them. This confidence between the employer and the person employed, is so sacred a thing, that if they were at liberty, when the present cause was over that they were employed in, to give testimony in favor of any other person, it would not answer the end for which it was instituted. *The end is, that persons with safety may substitute others in their room; and therefore if you cannot ask me, you cannot ask that man; for everything said to him, is as if I had said it to myself, and he is not*

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<sup>6</sup> 8 J. WIGMORE, EVIDENCE § 2291 (McNaughton rev. 1961). See also C. McCORMICK, McCORMICK ON EVIDENCE § 87 (2d ed. Cleary 1984).

<sup>7</sup> United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950). See also 8 J. WIGMORE, *supra* note 6, § 2292, at 554. ("(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 instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection may be waived.")

<sup>8</sup> 17 How. St. Tr. 1129, 1225 (Ex. 1743).

to answer it.<sup>9</sup>

This central reason for the existence and scope of the privilege appears in American jurisprudence as often as it appears in the English authorities.<sup>10</sup> Chief Justice Shaw of Massachusetts stated as early as 1833:

This principle we take to be this; that so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country, and maintaining them most safely in courts, without publishing those facts, which they have a right to keep secret, but which must be disclosed to a legal advisor and advocate, to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts the mouth of the attorney shall be forever sealed.<sup>11</sup>

And Justice, then Circuit Judge, Brewer eloquently expressed the controlling principle that guides attorneys and instills confidence and reliance in clients:

[I]t is the glory of our profession that its fidelity to its client can be depended on; that a man may safely go to a lawyer and converse with him upon his rights in any litigation with the absolute assurance that that lawyer's tongue is tied from ever disclosing it . . . .<sup>12</sup>

These views have been ratified most recently by the Supreme Court in *Fisher v. United States*<sup>13</sup> and *Upjohn Co. v. United States*.<sup>14</sup> In *Fisher*, the Court viewed the matter pragmatically: "As a practical matter, if the client knows that damaging information could be more readily obtained from the attorney in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."<sup>15</sup> *Upjohn* similarly recognized the importance of the privilege's protection of "full and frank communication between attorneys and their clients."<sup>16</sup> The

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<sup>9</sup> *Id.* at 1225, quoted in 8 J. WIGMORE, *supra* note 6, §2291 (emphasis added).

<sup>10</sup> See, e.g., *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (privilege rests "upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."). See generally Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 68 CALIF. L. REV. 1061, 1087-91 (1978).

<sup>11</sup> *Hatton v. Robinson*, 31 Mass. (14 Pick.) 416, 422 (1833), quoted in 8 J. WIGMORE, *supra* note 6, §2291; see also *Wade v. Ridley*, 87 Me. 368, 373, 32 A. 975, 976 (1895), quoted in 8 J. WIGMORE, *supra* note 6, §2291.

<sup>12</sup> *United States v. Costen*, 38 F. 24, 24 (C.C.D. Colo. 1889).

<sup>13</sup> 425 U.S. 391 (1976).

<sup>14</sup> 449 U.S. 383 (1981).

<sup>15</sup> 425 U.S. at 403.

<sup>16</sup> 449 U.S. at 389.

Court went far to reaffirm the protections created by the privilege and their centrality in the relations between lawyer and client.<sup>17</sup> Without full information, and without the guarantee of absolute confidence that the attorney-client privilege engenders in every client, an attorney will find it impossible to fulfill his duty of representation. This, as *Fisher* and *Upjohn* both teach, is recognized by the courts in construing the privilege, and it is this vital interest of both attorneys and clients that is threatened by recent court rulings requiring revelation of the client's identity by his attorney before a grand jury.<sup>18</sup>

It is the historic judgment of the common law, as it apparently is of European law and is generally in western society, that whatever handicapping of the adjudicatory process is caused by recognition of the privileges, it is not too great a price to pay for secrecy in certain communicative relations. . . .

Therefore, to conceive of the privileges merely as exclusionary rules, is to start out on the wrong road and, except by happy accident, to reach the wrong destination. They are, or rather by the chance of litigation may become, exclusionary rules; but this is incidental and secondary. Primarily they are a right to be let alone, a right to unfettered freedom, in certain narrowly prescribed relationships, from the state's coercive or supervisory powers and from the nuisance of its eavesdropping.<sup>19</sup>

The recent court decisions dealing with the identity exclusion<sup>20</sup> to the attorney-client privilege generally characterize identity as being outside the ambit of the privilege, and unworthy of the protection of this "exclusionary rule," without regard to the client's intent or interests. In so doing, the importance of the privilege is derogated and the search for evidence magnified in a manner suggesting that the protection of the privilege may fall away even where it is most urgently needed.

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<sup>17</sup> The Court recognized in *Upjohn* that the "control group" test enunciated by the Sixth Circuit, in its decision below, 600 F.2d 1223, 1225 (1980), "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." *Id.* at 392.

<sup>18</sup> See *supra* note 2.

<sup>19</sup> Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 110-11 (1956).

<sup>20</sup> Though the courts refer to this as an "exception" to the privilege, we view this as an awkward and incorrect characterization. It is more properly termed as an exclusion because identity generally is considered outside the privilege. Those doctrines, see *infra* notes 48-97 and accompanying text, that allow the privilege to apply to identity may be considered *exceptions* to this *exclusion*.

## III. INTERVENTION BY THE CLIENT

An attorney faced with an order compelling him to identify, and possibly incriminate, his client before the grand jury is in a painful dilemma. He must either comply with the court's order, violating his client's confidence, or he must risk contempt, and possibly jail, in his attempt to vindicate his client's privilege. There is, however, an alternate approach.

It is established law that an order compelling testimony or denying a motion to quash a grand jury subpoena is not appealable.<sup>21</sup> The party opposing the order must either comply with its dictates, or refuse to do so and invite a contempt citation. Only after an order imposing contempt is entered does the matter then become subject to appellate review. An exception to this somewhat draconian rule is recognized when the party seeking review has a more direct interest in preventing disclosure of the information sought by the grand jury than the individual to whom the subpoena was directed does in preventing disclosure.<sup>22</sup> This exception, known as the *Perlman* exception, recognizes that the individual functioning under a court order which compels his testimony may well comply voluntarily with that order, and deprive the real party in interest of his protected right and the opportunity for appellate review of his claims.<sup>23</sup>

In the context of a client seeking immediate review of an order compelling testimony from his attorney, the federal courts of appeals have split upon the applicability of the *Perlman* exception.<sup>24</sup>

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<sup>21</sup> See, e.g., *United States v. Ryan*, 402 U.S. 530 (1971); *Cobbledick v. United States*, 309 U.S. 323 (1940); *Alexander v. United States*, 201 U.S. 117 (1906).

<sup>22</sup> *Perlman v. United States*, 247 U.S. 7 (1918).

<sup>23</sup> Nevertheless, a recent decision by the Supreme Court, holding that a pretrial order of disqualification of defense counsel is not immediately appealable under 28 U.S.C. § 1291, uses language that raises some doubt as to the survival of this exception. *Flanagan v. United States*, 104 S. Ct. 1051, 1054 (1984). It stresses the compelling interest of prompt criminal trials and the importance of the final judgment rule in refusing to permit piecemeal appellate review except in extremely limited circumstances. *Id.* at 1054-56. "The importance of the final judgment rule has led the Court to permit departures from the rule 'only when observance of it would practically defeat the right to any review at all.'" *Id.* at 1055 (citation omitted) (quoting *Cobbledick v. United States*, 309 U.S. 323, 324-25 (1940)). This would appear to leave open the use of the *Perlman* exception as contemplated in this Article inasmuch as the removal of this type of appellate review would "practically defeat the right to any review at all." *Id.*

<sup>24</sup> The First Circuit and the Circuit for the District of Columbia have denied the applicability of *Perlman*, and have held that the order is not immediately appealable. *In re Sealed Case*, 655 F.2d 1298 (D.C. Cir. 1981); *In re Oberkoetter*, 612 F.2d 15, 18 (1st Cir. 1980) ("An attorney . . . as proof of his own stout-heartedness, might be willing to defy a testimonial order and run the risk of a contempt proceeding.").

The Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits have applied *Perlman* and allowed immediate review. *In re Gordon*, 722 F.2d 303 (6th Cir. 1983); *United States v. Jones*, 696 F.2d 1069 (4th Cir. 1982); *In re Grand Jury*

The majority of circuits, however, do allow immediate appellate review.<sup>25</sup> The rationale permitting review is well articulated by the Fifth Circuit's decision in *In re Grand Jury Proceedings (Fine)*:

We suspect that the willingness of a lawyer to protect a client's privilege in the face of a contempt citation will vary greatly, and have a direct relationship to the value of the client's business and the power of the client in relation to the attorney. We are reluctant to pin the appealability of a district court order upon such precarious considerations . . . .

Although we cannot say that attorneys in general are more or less likely to submit to a contempt citation rather than violate a client's confidence, we can say without reservation that some significant number of client-intervenors might find themselves denied all meaningful appeal by attorneys unwilling to make such a sacrifice. That serious consequence is enough to justify a holding that a client-intervenor may appeal an order compelling testimony from the client's attorney.<sup>26</sup>

Assuming no change in the law as a result of *Flanagan*,<sup>27</sup> the procedure that is therefore available to a client whose attorney has been ordered to identify him to the grand jury is to intervene as a "John Doe" in the matter and seek appellate review of the trial court's order. This manner of clients asserting their rights is available in all but two circuits and it provides clients and attorneys with a powerful tool to vindicate their reliance upon the privilege.<sup>28</sup>

#### IV. THE IDENTITY EXCLUSION

The general rule under the attorney-client privilege is well-recognized: the identity of the client is not privileged and therefore may be compelled from the attorney in testimony before the grand

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Subpoenas (Lahodny), 695 F.2d 383 (9th Cir. 1982) [hereinafter cited as *In re Lahodny*]; *In re Grand Jury Proceedings (Damore)*, 689 F.2d 1351 (11th Cir. 1982); *In re Grand Jury Proceedings (Fine)*, 641 F.2d 199 (5th Cir. 1981); *In re Grand Jury Proceedings (Malone)*, 655 F.2d 882 (8th Cir. 1981); *In re 1979 Grand Jury*, 616 F.2d 1021 (7th Cir. 1980); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798 (3d Cir. 1979).

<sup>25</sup> See *supra* note 24 and cases cited therein.

<sup>26</sup> 641 F.2d 199, 202-03.

<sup>27</sup> 104 S. Ct. at 1054; see *supra* note 23.

<sup>28</sup> See *supra* note 24 and cases cited therein. As a practical matter, the attorney for the intervening client should prepare an affidavit by the intervening client, to be submitted *in camera*. The affidavit should recite the identity of a client, the existence of the attorney-client privilege between the client and subpoenaed attorney, tracking Judge Wyzanski's formula, *supra* note 7 and accompanying text, to establish for the trial court the existence of the privilege. It should note that the client specifically claims the privilege and, in order to ensure that his attorney does not reveal privileged information, wishes to intervene in the matter. Such an affidavit submitted *in camera* and in conjunction with a motion to intervene on behalf of this client should be sufficient to effectuate an intervention that would allow immediate protection for the client from the attorney's being held in contempt and subsequently revealing a privileged communication.



jury.<sup>29</sup> The rule seems to be rooted in three notions.

First, in order to *create* an attorney-client relationship in which communications are protected, the attorney must necessarily know the identity of the client. Because the client's identity predates and presupposes the relationship, however, it is not a communication protected by an existing privilege.<sup>30</sup>

Second, because protection of client identity is not a justifiable concern of civil litigation it should also not be of concern in the criminal arena. Dean Wigmore's treatise, often quoted by the courts,<sup>31</sup> states:

The identity of the attorney's client . . . will seldom be a matter communicated in confidence because the procedure of litigation ordinarily presupposes a disclosure of these facts. Furthermore, so far as a client may in fact desire secrecy and may be able to secure action without appearing as a party to the proceedings, it would be improper to sanction such a wish. Every litigant is in justice entitled to know the identity of his opponents.<sup>32</sup>

Third, because the privilege necessarily impedes the search for truth and frustrates the administration of justice, and because identity does not appear to be a protected communication, the privilege should be narrowly drawn so as to exclude identity from protection.<sup>33</sup>

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<sup>29</sup> See *Behrens v. Hironimus*, 170 F.2d 627 (4th Cir. 1948); C. McCORMICK, *supra* note 6, at § 90; 97 C.J.S. *Witnesses* § 283(e) (1957). The same rule, often enumerated in tandem, holds true for fee arrangements. This Article, however, will not address that separate area, though many of the approaches discussed have application to fees as well.

<sup>30</sup> See, e.g., *In re Osterhoudt*, 722 F.2d at 592; *Behrens*, 170 F.2d at 628; *People ex rel. Vogelstein v. Warden of County Jail*, 150 Misc. 714, 718, 270 N.Y.S. 362, 367 (N.Y. Sup. Ct.), *aff'd*, 242 A.D. 611, 271 N.Y.S. 1059 (N.Y. App. Div. 1934) ("The mere fact of the engagement of counsel is out of the rule because the privilege and duty of being silent do not arise until that fact is ascertained.").

<sup>31</sup> See, e.g., *Colton v. United States*, 306 F.2d 633, 637 (2d Cir. 1962); *Baird v. Koerner*, 279 F.2d 623, 630 (9th Cir. 1960); *Gretsky v. Miller*, 160 F. Supp. 914, 915 (D. Mass. 1958).

<sup>32</sup> 8 J. WIGMORE, *supra* note 6, § 2313, at 609.

<sup>33</sup> See *Fisher*, 425 U.S. at 403 ("[S]ince the privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose."); *In re Jones*, 517 F.2d at 671-72 ("[T]he purpose of the privilege—to suppress truth—runs counter to the dominant aims of the law."); *United States v. Pape*, 144 F.2d 778, 783 (2d Cir. 1944) ("[W]hen the narrow exclusionary rule ceases to apply, then the more general and pervasive rule of free disclosure to ascertain the truth and prevent the guilty from escaping furnishes the governing principle."); *Mauch v. Comm'r*, 113 F.2d 555 (3d Cir. 1940) (attorney charged with tax evasion asserted that client's funds were commingled with his and were not unreported income; court required identification of client when attorney used privilege to refuse to furnish client's identity); *United States v. Lee*, 107 F. 702, 704 (C.C. E.D.N.Y. 1901) (identity of client required to prove existence of client whose privilege attorney asserts); *People ex rel. Vogelstein*, 150 Misc. at 718, 720 (client must be named to prove existence of relationship; privilege must be confined within narrowest possible limits).

These notions have been articulated in various contexts in the early cases,<sup>34</sup> and have provided the basis for later holdings that identity is not protected by the privilege. Those holdings, but not the notions underlying them, have been uncritically adopted over the years so that there now exists a large body of precedent that states, with little exception, that the privilege does not protect client identity.<sup>35</sup> Insofar as these cases merely accept prior holdings without examining their foundations,<sup>36</sup> however, they fail to address basic flaws in the notions that gave rise to the identity exclusion. And, it may be argued, that if the existence of the identity exclusion were to be weighed today, *de novo* and without the baggage of precedent, the important purpose of an inviolable attorney-client privilege<sup>37</sup> would outweigh the inherited rationales of the past.

The first notion, that the client's identity is not protected because it presupposes the creation of the relationship, and the privilege only protects communications *within* the relationship,<sup>38</sup> exalts form over substance. It is, of course, a truism that a client cannot create a relationship without revealing some aspect of the client's identity, but it is illogical to suppose that the communication of identity must always be outside the privilege simply because it must, for however short a time, precede the formation of a relationship. The necessity of having to create a relationship should not preclude the relationship's protection of that which is central to its creation. The critical inquiry in examining the applicability of the privilege

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<sup>34</sup> See *supra* notes 31 and 33.

<sup>35</sup> See generally *In re Osterhoudt*, 722 F.2d at 592; *In re Durant*, 723 F.2d at 451-52; *In re Grand Jury Proceedings in Matter of Freeman*, 708 F.2d 1571 (11th Cir. 1983); *In re Grand Jury Proceedings (Twist)*, 689 F.2d 1351 (11th Cir. 1982) [hereinafter cited as *In re Twist*]; *In re Pavlick*, 680 F.2d at 1027; *In re Walsh*, 823 F.2d 489, 494 (7th Cir. 1980); *In re Semel*, 411 F.2d 195, 197 (3d Cir.), *cert. denied*, 396 U.S. 905 (1969); *In re Lahodny*, 695 F.2d 363 (9th Cir. 1982); *In re Grand Jury Witness (Salas & Waxman)*, 695 F.2d 359 (9th Cir. 1982) [hereinafter cited as *In re Salas & Waxman*]; *In re Grand Jury Investigation (Tinari)*, 631 F.2d 17 (3d Cir.), *cert. denied*, 449 U.S. 1083 (1980); *In re Grand Jury Proceedings (Lawson)*, 600 F.2d 215 (9th Cir. 1979); *United States v. Strahl*, 590 F.2d 10 (1st Cir. 1978); *United States v. Hodge and Zweig*, 548 F.2d 1347 (9th Cir. 1977); *In re Jones*, 517 F.2d at 670 n.2 (collected cases); *United States v. Tratner*, 511 F.2d 248 (7th Cir. 1975); *Tillotson v. Boughner*, 350 F.2d 663 (7th Cir. 1965); *Colton v. United States*, 308 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); *United States v. Pape*, 144 F.2d 778 (1944), and cases cited therein.

<sup>36</sup> See, e.g., *In re Slaughter*, 694 F.2d 1258 (11th Cir. 1982); *In re Twist*, 889 F.2d at 1352.

<sup>37</sup> See *supra* notes 6-20 and accompanying text. This should not be interpreted to suggest that the authors advocate a privilege that protects future criminal or fraudulent behavior, but rather a privilege consonant with the spirit of protected communications and one that does not countenance an attorney's incrimination of his own client before the grand jury.

<sup>38</sup> See *supra* note 30 and accompanying text.

should address whether the *purpose* of the privilege is served, not whether the formation of the relationship occurred one second after revelation of identity.

In most circumstances, the client's identity is not intended to be secret. But where the client's identity is crucial to the legal advice sought, it surely defeats the very purpose of the privilege not to protect that which gave rise to the relationship. In circumstances where advice is sought for a past crime, or regarding transactions that are later under investigation, and a trail of evidence leads to an attorney, it is clearly repugnant to the basis of the privilege to require the attorney to help indict his own client. It is in these circumstances, where the prerequisites of the privilege are met, and the attorney is asked to link illegal or suspect acts with his as-yet-undiscovered client, that the protections of the privilege ought to attach, and the client's identity ought to be considered a protected communication.

Rulings that identity is not protected because it was known before the existence of the relationship make form everything and substance nothing. Neither logic nor the concerns of the privilege support such a notion, and reliance upon it, through repetition of precedent, is misplaced.

Similarly, citation to Wigmore's discussion on client identity,<sup>39</sup> as support for its exclusion from the ambit of the privilege in criminal or grand jury settings, fails to recognize that Dean Wigmore there spoke purely about identity in the context of *civil* litigation. He stated that, "the procedure of litigation ordinarily presupposes a disclosure of [the client's identity],"<sup>40</sup> noting that "[e]very litigant is . . . entitled to know the identity of his opponents."<sup>41</sup> This is indisputable in a civil context. It does not hold true, however, in a grand jury setting where a client has not initiated litigation "without appearing as a party to the proceedings,"<sup>42</sup> and does not have opponents. The purpose of the privilege, again, must be that which is addressed. Where it appears that protection of identity serves to foster the goals of the privilege, as it clearly does in a grand jury context, then a notion imported from civil litigation simply is inapposite, and the indirect use of this notion to force attorneys to identify their clients is unsupportable.

Finally, the third notion underlying the exclusion states the conclusion of a balancing test that excludes identity from protection because the privilege impedes the search for truth. This presup-

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<sup>39</sup> See *supra* note 32 and accompanying text.

<sup>40</sup> 8 J. WIGMORE, *supra* note 6, § 2313, at 609.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

poses a low value for protecting identity and a high value for unfettered grand jury investigation.<sup>43</sup> Yet the real question that must be confronted is whether any *particular* case warrants denial of the privilege to identity where such may be inconsistent with the purpose of the privilege. *Fisher's* concern that the privilege should apply "only where necessary to achieve its purpose"<sup>44</sup> should not be construed to exclude identity from its scope.

The balance between the search for truth and the application of the attorney-client privilege must recognize the necessity of vindicating the purpose of the privilege.<sup>45</sup> If that balance is properly struck, then the value of protecting identity in appropriate settings outweighs other considerations.

It must, however, be recognized that these re-evaluations of the bases of the identity exclusion have not been considered by the courts. Rather, the courts have acknowledged, on a piecemeal basis, that there are significant difficulties with a general rule excluding identity. Accordingly, there have been promulgated at least three exceptions to the rule of exclusion<sup>46</sup> and there now exists at least one conflict among the circuits as to the applicability of these exceptions.<sup>47</sup>

## V. EXCEPTIONS TO THE IDENTITY EXCLUSION

The courts have stated several exceptions to the rule excluding client identity from the protection of the attorney-client privilege.<sup>48</sup> The modern discussion of these exceptions starts from the Ninth Circuit's seminal decision in *Baird v. Koerner*.<sup>49</sup>

*Baird* involved a claim of privilege regarding the identity of a *client-attorney*, who himself represented certain taxpayers and had not

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<sup>43</sup> See, e.g., *United States v. Calandra*, 414 U.S. 338 (1974); *Branzburg v. Hayes*, 408 U.S. 685, 686-87 (1972).

<sup>44</sup> *Fisher*, 425 U.S. at 403.

<sup>45</sup> "Throughout their judicial endeavors courts seek truth and justice and their search is aided significantly by the fundamental principle of full disclosure. *When that principle conflicts with the attorney-client privilege it must, of course, give way, but only to the extent necessary to vindicate the privilege and its underlying purposes. The matter is truly one of balance.*" *In re Richardson*, 31 N.J. 391, 401, 157 A.2d 695, 701 (1960) (emphasis supplied).

<sup>46</sup> See *In re Pavlick*, 880 F.2d at 1027-29; *Tillotson v. Boughner*, 350 F.2d 663, 665-66 (7th Cir. 1965); *NLRB v. Harvey*, 349 F.2d 900 (4th Cir. 1965); *Baird*, 279 F.2d at 631-32.

<sup>47</sup> See *In re Durant*, 723 F.2d at 453-54 (rejecting exception stated by Fifth Circuit in *In re Pavlick*); *In re Osterhoudt*, 722 F.2d 591 (rejecting former Ninth Circuit exception now adopted by First, Third, Fifth, Sixth, Seventh and Eleventh Circuits). See also *infra* text accompanying notes 132-53.

<sup>48</sup> See *supra* note 46.

<sup>49</sup> 279 F.2d 623 (9th Cir. 1960).

revealed *their* identities to Baird. Baird, a tax lawyer, had been asked by this client-attorney to evaluate the tax position of the undisclosed taxpayers and to recommend a course of action. He determined that the existing tax deficiencies should be paid to the Treasury, and to that effect he sent to the Internal Revenue Service a check representing the unpaid taxes and interest. The Internal Revenue Service thereupon issued him a subpoena and required him to identify the attorney, accountants, and taxpayers involved. Baird refused to divulge the identities of the attorney and accountants and, upon a hearing on the subsequent order to show cause, Baird was held in civil contempt.<sup>50</sup>

Upon review, the Ninth Circuit applied California law<sup>51</sup> which recognized an exception for identity cases:

The name of the client will be considered privileged matter where the circumstances of the case are such that the name of the client is material only for the purpose of showing an acknowledgment of guilt on the part of such client of the very offenses on account of which the attorney was employed . . . .<sup>52</sup>

In addition, the court noted that disclosure of the identity "may well be the link that could form the chain of testimony necessary to convict an individual of a federal crime."<sup>53</sup>

The *Baird* court considered and categorically rejected the civil litigation notion from Wigmore that absolutely excluded identity from the scope of the privilege.<sup>54</sup> Moreover, the court held that communications made *prior* to the retention of counsel, *including the name of the client*, fell within the privilege as certainly as those communications made after employment.<sup>55</sup> Importantly, *Baird* concluded that "there is no federal body of law that requires the exclusion of the identity of the client from the extent of the attorney-client privilege. . . . [I]t must be assessed on a case to case basis, depending on the particular facts of each case."<sup>56</sup>

Numerous cases have drawn upon *Baird's* recognition that there

<sup>50</sup> *Id.* at 625-27.

<sup>51</sup> *Id.* at 632-33 (construing *Ex parte McDonough*, 170 Cal. 230, 149 P. 566 (1915)).

<sup>52</sup> *Baird*, 279 F.2d at 633 (quoting 97 C.J.S. *Witnesses* § 283(e)).

<sup>53</sup> *Id.* (citing *Hoffman v. United States*, 341 U.S. 479 (1951)).

<sup>54</sup> *Id.* at 630-31 ("But here no litigation exists. The taxpayers have sought no judicial determination of the correctness of the amount paid . . . ."); see *supra* notes 39-42 and accompanying text.

<sup>55</sup> *Id.* at 635; see 8 J. WIGMORE, *supra* note 6, § 2304 (client-to-be must be protected in his preliminary statements).

<sup>56</sup> *Id.* at 631. The court came to this conclusion after a review of state and federal cases. The principle of case by case adjudication is universally accepted. See, e.g., *Jones*, 517 F.2d at 671 ("[B]y virtue of its very nature [the exception] must be considered on a case-to-case basis.").

should be exceptions to the rule of exclusion, and three distinct offshoots are now recognized.

#### A. THE "LEGAL ADVICE" EXCEPTION

The "legal advice" exception stems directly from *Baird*.<sup>57</sup> The Ninth Circuit, in *United States v. Hodge and Zweig*, restated the exception as follows:

The general rule, however, is qualified by an important exception: A client's identity and the nature of that client's fee arrangements may be privileged where the person invoking the privilege can show that a strong probability exists that disclosure of such information would implicate that client in the very criminal activity for which legal advice was sought.<sup>58</sup>

This articulation of the exception has been adopted by the First,<sup>59</sup> Third,<sup>60</sup> Fifth,<sup>61</sup> Sixth,<sup>62</sup> Seventh,<sup>63</sup> and Eleventh<sup>64</sup> Courts of Appeals. The Ninth Circuit has generally followed its guidance.<sup>65</sup>

This exception, however, has been limited sharply by a recent *per curiam* opinion of a panel of the Ninth Circuit in *In re Osterhoudt*,<sup>66</sup> which has repudiated *Hodge and Zweig's* articulation of the exception,<sup>67</sup> and returned to what may be considered the primary, but certainly not the sole, basis of decision in *Baird*.<sup>68</sup> The *Osterhoudt* court rejected prior judicial interpretation of *Baird* under which the privilege was applied because there was a strong probability that disclosure of the client's identity would incriminate him.<sup>69</sup>

In contrast, *Osterhoudt* states *Baird's* principle as allowing application of the privilege where the circumstances of the case show that disclosure of the client's identity would be in substance a disclosure

<sup>57</sup> See *Baird*, 279 F.2d at 633; see also *Ex parte McDonough*, 170 Cal. at 235-37, 149 P. at 568.

<sup>58</sup> 548 F.2d at 1353.

<sup>59</sup> *Strahl*, 590 F.2d at 11-12.

<sup>60</sup> *In re Grand Jury Investigation (Tinari)*, 631 F.2d at 19.

<sup>61</sup> *In re Grand Jury Proceedings (Fine)*, 641 F.2d at 204.

<sup>62</sup> *In re Durant*, 723 F.2d at 452.

<sup>63</sup> *In re Walsh*, 623 F.2d at 495 (citing *In re Grand Jury Proceedings (Lawson)*, 600 F.2d at 218).

<sup>64</sup> *In re Grand Jury Proceedings in Matter of Freeman*, 708 F.2d 1571, 1575-76 (11th Cir. 1983).

<sup>65</sup> See, e.g., *In re Lahodny*, 695 F.2d 365; *In re Salas & Waxman*, 695 F.2d 361-62; *United States v. Sherman*, 627 F.2d 189, 190-91 (9th Cir. 1980); *In re Grand Jury Proceedings (Lawson)*, 600 F.2d at 218.

<sup>66</sup> 722 F.2d at 593-94.

<sup>67</sup> See *supra* note 58 and accompanying text.

<sup>68</sup> See *supra* note 52 and accompanying text. For further discussion and analysis of the holding in *In re Osterhoudt*, see *infra* notes 133-135 and accompanying text.

<sup>69</sup> 722 F.2d at 593.

of the confidential communication in the professional relationship between the client and the attorney.<sup>70</sup>

The Ninth Circuit's limitation of the effect of incrimination on the availability of the privilege has been accepted only in the Second,<sup>71</sup> Third<sup>72</sup> and Seventh<sup>73</sup> Circuits. The adoption of the *Hodge and Zweig* articulation of the exception by the remaining other courts of appeals is presently unaffected. Accordingly, in those remaining jurisdictions, the identity of the client is still privileged where it can be demonstrated that disclosure of the client's identity would implicate him in the very activity for which he sought legal advice.

#### B. THE "SUBSTANTIAL DISCLOSURE" EXCEPTION

A second exception to the rule requiring identification of the client is what may be called the "substantial disclosure exception." This exception applies when there has already been so substantial a disclosure of the client's confidential communications that to require his identity as well would be to require disclosure of a confidential communication.<sup>74</sup>

The *Baird* court understood that a client's identity could well be comprehended within a "privileged communication" and that, absent specific and recognized factors militating against extending the privilege,<sup>75</sup> the client's identity ought to fall within it where necessary: "If the identification of the client conveys information which ordinarily would be conceded to be part of the usual privileged communication between attorney and client, then the privilege should extend to such identification in the absence of other factors."<sup>76</sup>

Following *Baird*, the Fourth Circuit in *NLRB v. Harvey*<sup>77</sup> stated the exception as follows: "To the general rule is an exception, firmly bedded as the rule itself. The privilege may be recognized when so much of the actual communication has already been dis-

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<sup>70</sup> *Id.* at 593-94. *But cf. Harvey*, 349 F.2d at 905 (*quaere* how *In re Osterhoudt* differs from *Harvey's* separate exception); *see infra* notes 74-86 and accompanying text.

<sup>71</sup> *In re Shargel*, 742 F.2d at 62-63.

<sup>72</sup> *Liebman*, 742 F.2d at 810.

<sup>73</sup> *In re March 1980 Grand Jury*, 729 F.2d at 494.

<sup>74</sup> *See Harvey*, 349 F.2d at 905.

<sup>75</sup> "Such factors are (a) the commencing of litigation on behalf of the client where he voluntarily subjects himself to the jurisdiction of the court; (b) an identification relating to an employment by some third person, not the client nor his agent; (c) an employment of an attorney with respect to *future* criminal or fraudulent transactions; (d) the attorney himself being a defendant in a criminal matter." *Baird*, 279 F.2d at 832 (emphasis in original).

<sup>76</sup> *Id.*

<sup>77</sup> 349 F.2d 900 (4th Cir. 1965).

closed that identification of the client amounts to disclosure of a confidential communication."<sup>78</sup>

This exception is recognized by the First,<sup>79</sup> Second,<sup>80</sup> Third,<sup>81</sup> Sixth,<sup>82</sup> and Seventh<sup>83</sup> Courts of Appeals. It has, moreover, been modified and broadened by the Seventh Circuit's opinion in *United States v. Jeffers*:

"The privilege may be recognized when so much of the actual communication has already been disclosed [not necessarily by the attorney, but by independent sources as well] that identification of the client [or of fees paid] amounts to disclosure of a confidential communication."<sup>84</sup>

Use of this exception could bring identity within the privilege where, by whatever manner, a communication between lawyer and client has been divulged, and all that would be needed to lay bare the whole communication would be the client's identity.

Similarly, the privilege could be claimed when actions resulting from the client's directions to the attorney are traced to the attorney and he is compelled to link the actions with his undiscovered client. Assuming that the acts were not in furtherance of a criminal or fraudulent scheme,<sup>85</sup> and that they related to the client's motive for the representation, disclosure of the client's identity would convey the entire substance of his confidential communication with, and directions to, his attorney. This protection should also apply to a communication made in anticipation of employment.<sup>86</sup>

### C. THE "LAST LINK" EXCEPTION

In *In re Grand Jury Proceedings (Pavlick)*,<sup>87</sup> the Fifth Circuit, *en banc*, articulated "a limited and narrow exception to the general

<sup>78</sup> *Id.* at 905.

<sup>79</sup> *Strahl*, 590 F.2d at 11.

<sup>80</sup> *Colton*, 306 F.2d at 637.

<sup>81</sup> *In re Grand Jury Empanelled February 14, 1978 (Markowitz)*, 603 F.2d 469, 473 (3d Cir. 1979) (emphasizing confidential communication rather than incrimination as triggering privilege); *see also* *United States v. Liebman*, 742 F.2d 807 (3d Cir. 1984).

<sup>82</sup> *In re Durant*, 723 F.2d at 453.

<sup>83</sup> *United States v. Tratner*, 511 F.2d 248, 252 (7th Cir. 1975); *see also* *Tillotson*, 350 F.2d at 666.

<sup>84</sup> 532 F.2d 1101, 1115 (7th Cir. 1976).

<sup>85</sup> Acts in furtherance of a criminal or fraudulent scheme would trigger the crime or fraud exception to the attorney-client privilege, thus obviating any protection that might have originally applied. *See* *Clark v. United States*, 289 U.S. 1, 15 (1933); *In re Pavlick*, 680 F.2d at 1028-29; *Hodge and Zweig*, 548 F.2d at 1354; *United States v. Friedman*, 445 F.2d 1076, 1086 (9th Cir. 1981); 8 J. WIGMORE, *supra* note 6, § 2298.

<sup>86</sup> *See supra* note 55; *see also* *Baird*, 279 F.2d at 635.

<sup>87</sup> 680 F.2d 1026 (5th Cir. 1982).



rule" that identity is not protected.<sup>88</sup> The exception obtains "when the disclosure of the client's identity by his attorney would have supplied the last link in an existing chain of incriminating evidence likely to lead to the client's indictment."<sup>89</sup> At present, only the Eleventh Circuit has adopted this exception,<sup>90</sup> and the Sixth Circuit has expressly rejected it.<sup>91</sup> Furthermore, the Seventh Circuit rejected any reliance upon an incrimination rationale in a case dealing with disclosure of fee information.<sup>92</sup>

Though *Pavlick's* concern with the possibility of incrimination hearkens to its predecessor case, *In re Grand Jury Proceedings (Jones)*,<sup>93</sup> the *Pavlick* majority misread *Jones'* rule of exception, thereby significantly reducing the availability of the exception.<sup>94</sup> The possibility of an attorney incriminating his client is evident in the articulation of the "last link" exception, but having narrowed the exception's scope to that of the "last link in an existing chain of incriminating evidence,"<sup>95</sup> *In re Pavlick* also acts to defeat any purpose served by the concept of incrimination in the exception. As one commentator has already noted:

[T]he last link analysis creates the problem of defining what the last link is. . . . Furthermore, the 'last link' test gives prosecutors the incentive to *start* their investigations with the defense attorney. By calling attorneys to testify early, the prosecutors could force the attorneys to reveal their client's identities before the identities provide the last link . . . . Thus, the 'last link' test . . . creates undesirable incentives

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<sup>88</sup> *Id.* at 1027. Although the *In re Pavlick* court characterizes this exception as having arisen in *In re Grand Jury Proceedings (Jones)*, 517 F.2d 666 (5th Cir. 1975), the exception promulgated in *In re Jones* was far more protective of the attorney-client privilege than the *Pavlick* statement. *In re Jones* held, in the circumstances of unquestionable incrimination of the clients, that:

Just as the client's verbal communications are protected, it follows that other information, not normally privileged, should also be protected *when so much of the substance of the communications is already in the government's possession that additional disclosures would yield substantially probative links in an existing chain of inculpatory events or transactions.*"

*Id.* at 674 (emphasis added).

<sup>89</sup> *Id.* (emphasis added). It may readily be seen that *Jones* adopts the *Harvey* "substantial disclosure" exception, *see supra* note 77 and accompanying text, but modifies it to include the concept of preventing incrimination of clients by their own lawyers. It also is obvious that the "substantially probative links" standard is far easier to meet in order to avoid disclosure than one which requires disclosure of the client's identity to constitute "the last link."

<sup>90</sup> *In re Twist*, 689 F.2d at 1352-53; *In re Slaughter*, 694 F.2d at 1260.

<sup>91</sup> *In re Durant*, 723 F.2d at 453-54. For further discussion, *see infra* notes 150-57 and accompanying text.

<sup>92</sup> *In re March 1980 Grand Jury*, 729 F.2d at 494-95.

<sup>93</sup> 517 F.2d 688 (5th Cir. 1975).

<sup>94</sup> *See supra* note 89.

<sup>95</sup> 680 F.2d at 1027.

for the prosecutor to subpoena defense attorneys at an early stage of a criminal investigation.<sup>96</sup>

Although incrimination is the basis of the "last link" exception, therefore, its protection is so narrow and the opportunities to avoid it so many that it fails to effect the purpose of the privilege in other than the most egregious factual situations. *Pavlick*, accordingly, states only a half-hearted attempt to protect against incrimination of the client by the lawyer.

## VI. RECENT DECISIONS

Until December of 1983, *In re Pavlick, Harvey, Hodge and Zweig* and *Baird* dominated the landscape in the area of the identity exclusion. Yet, just as *Pavlick's* appearance in 1982 reshaped concerns about the incrimination of a client by his attorney,<sup>97</sup> six recent cases<sup>98</sup> narrow still further a client's access to the "limited and rarely available sanctuary"<sup>99</sup> of the three exceptions to the general rule. Although *United States v. Liebman*<sup>100</sup> sustained the invocation of the privilege in circumstances similar to *Baird*, *In re Grand Jury Subpoena Duces Tecum (Shargel)*,<sup>101</sup> *In Matter of Witnesses Before Special March 1980 Grand Jury (March 1980 Grand Jury)*,<sup>102</sup> *In re Osterhoudt*,<sup>103</sup> *In re Grand Jury Investigation No. 83-2-35 (Durant)*,<sup>104</sup> and *In re Grand Jury Proceedings—Gordon*<sup>105</sup> have each eroded something from the protections of the attorney-client privilege in this area, and their cumulative effect may yet preclude any resort to the sanctuary of the privilege.

<sup>96</sup> Comment, *Prosecution's Best Witnesses*, *supra* note 1, at 91-92 (emphasis in original).

<sup>97</sup> See *supra* notes 87-96 and accompanying text. *In re Pavlick's* unnecessary narrowing of *Jones'* "substantially probative links" test to the difficult-to-envision "last link" analysis, see *supra* note 96 and accompanying text, was not even required in view of the majority's holding that *Pavlick's* retention as counsel fell within the crime or fraud exception to the attorney-client privilege. See *supra* note 85. Moreover, Judge Politz' eloquent dissent, 680 F.2d at 1031-34, points out all too clearly how *In re Pavlick's* "natural consequence [is] defense counsel becoming the government's unwilling instrument for the investigation and prosecution of clients for *past* criminal acts." *Id.* at 1034 (emphasis in original). As he notes, the majority's "invasion, indeed destruction, of the attorney-client privilege [is] unfortunate, unwarranted, and unwise." *Id.* at 1032.

<sup>98</sup> See *Liebman*, 742 F.2d 807; *In re Shargel*, 742 F.2d 61; *In re March 1980 Grand Jury*, 729 F.2d 489; *In re Durant*, 723 F.2d 447; *In re Gordon*, 722 F.2d 303; *In re Osterhoudt*, 722 F.2d 591.

<sup>99</sup> *In re Jones*, 517 F.2d at 871.

<sup>100</sup> 742 F.2d 807 (3d Cir. 1984).

<sup>101</sup> 742 F.2d 61 (2d Cir. 1984).

<sup>102</sup> 729 F.2d 489 (7th Cir. 1984).

<sup>103</sup> 722 F.2d 591 (9th Cir. 1983).

<sup>104</sup> 723 F.2d 447 (6th Cir. 1983).

<sup>105</sup> 722 F.2d 303 (6th Cir. 1983).

A. *UNITED STATES V. LIEBMAN*

In this case, the Third Circuit sustained the protection of the attorney-client privilege in circumstances highly reminiscent of *Baird*, yet in doing so it relied exclusively upon the “substantial disclosure exception” articulated in *Harvey* and its progeny.<sup>106</sup>

The sole issue of the case was whether the privilege protected from disclosure the identity of clients who deducted legal fees for tax advice on their income tax return. The IRS had contended that the fees for Liebman’s services were not tax deductible because the type of service rendered was not “legal,” making the fee a non-deductible brokerage charge. The IRS sought to compel Liebman and his law firm to disclose the identities of clients who paid such fees in connection with the acquisition of real estate partnership interests in specified years.<sup>107</sup>

The *Liebman* court determined that the specificity of the summons—which identified every matter dealing with the clients’ relationship except their names—placed the request squarely within the “substantial disclosure exception.”<sup>108</sup> It recognized that the issue was “not the mere disclosure of the act of retaining a lawyer, a fact not normally privileged, but the disclosure of a substantial confidential communication.”<sup>109</sup> Because disclosure of the clients’ identities would invade the privilege’s protection of confidential *communications* and breach the entire protected communication, the court followed *Baird*’s result and sustained the invocation of the privilege.<sup>110</sup> The court specifically held that *Pavlick*’s “last link” exception was unnecessary to the decision in view of the finding that there were protected communications.<sup>111</sup> It accordingly declined either to embrace or reject the “last link” exception, although it cited dictum from a previous decision that militates against acceptance of an incrimination rationale.<sup>112</sup>

*Liebman* shows that the “substantial disclosure exception” retains vitality when, as in *Baird*, the circumstances clearly show that revelation of identity is tantamount to revealing the entire confiden-

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<sup>106</sup> 349 F.2d at 905. See *supra* notes 74-86 and accompanying text.

<sup>107</sup> *Liebman*, 742 F.2d at 808-09.

<sup>108</sup> *Id.* at 808.

<sup>109</sup> *Id.* at 810.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 810 n.2.

<sup>112</sup> *Id.* (citing *In re Grand Jury Empanelled February 14, 1978* (Markowitz), 603 F.2d 469 (3d Cir. 1979)). The *Markowitz* court stated in a footnote that “it is the previously revealed confidence, not the fact of potential criminal prosecution, which accounts for the privilege.” 603 F.2d at 473 n.4.

tial communication. Nevertheless, as discussed *infra*,<sup>113</sup> the application of the "substantial disclosure exception" can be far from consistent, making difficult any access to the "sanctuary" of the privilege in the situations where it is most appropriate.

B. *IN RE GRAND JURY SUBPOENA DUCES TECUM (SHARGEL)*

In this case, arising from a subpoena for client fee records, the Second Circuit rejected any reliance upon the attorney-client privilege in circumstances where incrimination of the client is a danger.<sup>114</sup> The court strictly construed the limits of the privilege to encompass "only those confidential communications necessary to obtain informed legal advice."<sup>115</sup> Although the opinion recognized the historic importance of the privilege and acknowledged the fact that consultation (and identity) may be a precondition to seeking legal advice, it nevertheless refused to extend the privilege further.<sup>116</sup> And it did so despite its concession that the availability of legal advice may thereby be limited: "[W]e would be less than candid not to concede that the lack of a privilege against disclosure of the fact of an attorney-client relationship may discourage some persons from seeking legal advice at all."<sup>117</sup>

Nevertheless, predicating its rationale regarding the privilege upon the need to secure informed legal advice, and *not* upon the need for the lawyer to stand in the shoes of his client, the *In re Shargel* court effectively eviscerated the privilege's protection of

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<sup>113</sup> See *infra* notes 160-170 and accompanying text.

<sup>114</sup> 742 F.2d 61 (2d Cir. 1984).

<sup>115</sup> *Id.* at 62.

Shortly before the publication of this Article, the Second Circuit decided *In re Grand Jury Subpoena Served Upon John Doe*, 759 F.2d 968 (2d Cir. 1985) [hereinafter referred to as *In re Doe*]. Relying upon *In re Shargel*, see text accompanying notes 114-122, *infra*, the court determined that the attorney-client privilege did not prevent a subpoenaed attorney's disclosure to the grand jury of fee information relating to a client. *Id.* at 971 n.3. Nevertheless, in an analysis that centered on the quashing of the grand jury subpoena because the attorney's testimony might require his later disqualification under MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1979) DR 5-102(B), the court found that the client's sixth amendment right to counsel of his choice was implicated. *Id.* at 972-73. It held that the government must demonstrate, in a preliminary showing, the relevance *and* need for the attorney's testimony. *Id.* at 975. Failure to meet either prong of this test would cause the subpoena to be quashed, thus obviating any issue of information disclosure by a client's attorney. *Id.* *In re Doe* thus provides a powerful alternative method—in appropriate cases—for preventing the disclosure of confidences by counsel when the attorney-client privilege is held inapplicable. Although *In re Doe* is beyond the narrow scope of this Article, as it provides a new area to be examined by students of grand jury activity, its potential importance in preventing improper attorney testimony should not be overlooked.

<sup>116</sup> 742 F.2d at 63-64.

<sup>117</sup> *Id.* at 63.

identity in the Second Circuit, leaving as cold comfort the undefined concession that “[w]e of course continue to recognize that ‘there may be circumstances under which the identification of a client may amount to the prejudicial disclosure of a confidential communication. . . .’”<sup>118</sup> Those circumstances are not defined, and it may therefore be considered as a statement by the court that *ad hoc* determinations, possibly based upon a narrow “legal advice exception” or, perhaps, a “substantial disclosure exception,” will be the rule.

An evident concern of *Shargel* and one that would seem to be comprehended in Judge Wyzanski’s formulation of the privilege<sup>119</sup> is the Second Circuit’s fear that extending the privilege would “become an immunity for corrupt or criminal acts.”<sup>120</sup> If that is understood to be the underlying rationale for rejecting the historic protections of the privilege,<sup>121</sup> then the *Shargel* decision does not respond to the privilege’s protections as much as it addresses a perceived problem on the part of defense counsel. It may readily be seen that reducing the ambit of the privilege to correct perceived behavior does little, if nothing, to effectuate a client’s fifth amendment right under *Fisher* not to be incriminated by his own lawyer. The privilege is simply inapplicable *ab initio* if it is invoked for the purpose of committing a crime or fraud.<sup>122</sup> Limiting the privilege further in circumstances when it does not exist anyway does nothing but destroy the privilege in circumstances where its protections are, or should be, warranted.

### C. *IN RE WITNESSES BEFORE THE SPECIAL MARCH 1980 GRAND JURY*

The Seventh Circuit in this case reversed the district court’s ruling that fee information fell within the privilege because it was a link in a claim of evidence which might incriminate the client.<sup>123</sup> In so doing, the court determined that two rationales were the predicate for reliance upon the privilege: confidential communications and incrimination.<sup>124</sup> The court held that the possibility of incrimination did not implicate confidential communications and thus was not a basis for invocation of the privilege.<sup>125</sup> In reaching that conclusion,

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<sup>118</sup> *Id.* at 63 (quoting *Colton v. United States*, 306 F.2d at 637).

<sup>119</sup> *See supra* text accompanying note 7.

<sup>120</sup> 742 F.2d at 64.

<sup>121</sup> *See supra* notes 8-19 and accompanying text.

<sup>122</sup> *See supra* note 7 and accompanying text; *see also In re Pavlick*, 680 F.2d at 1028-29.

<sup>123</sup> 729 F.2d at 490.

<sup>124</sup> *Id.* at 491.

<sup>125</sup> *Id.* at 494-96.

the court collapsed *Fisher's* analysis and concluded that the Supreme Court "focused only on the protection of confidential communications."<sup>126</sup> That conclusion having been reached (it is submitted, wrongly), the result is almost pre-ordained. The Seventh Circuit thus narrows the privilege to include fee information or client identity only where "its disclosure would result in the disclosure of confidential communications."<sup>127</sup>

The opinion reanalyzes *Baird*<sup>128</sup> and *In re Grand Jury Proceedings (Jones)*<sup>129</sup> to discover how confidential communications were protected, and it goes so far as to conclude, contrary to the decision of a majority of the Fifth Circuit,<sup>130</sup> that *In re Jones* was based upon confidential communications and not incrimination.<sup>131</sup> The purpose of the privilege is thus redefined, both historically and by an incorrect reading of *Fisher*, to narrow its scope and exclude a rationale of incrimination. This of course limits recourse to the privilege except in circumstances, rare as those may be, where the client's identity was clearly expressed as a confidential communication or where the "substantial disclosure exception" applies.

#### D. *IN RE OSTERHOUDT*

In this case dealing with the disclosure of fee arrangements in the context of possible income tax violations by the client, the Ninth Circuit returned to the first notion underpinning the identity exclusion in the early cases.<sup>132</sup> It summarily dismissed the idea that fee arrangements could be privileged "because such information ordinarily reveals no confidential professional communication."<sup>133</sup> Furthermore, the *Osterhoudt* panel stated that *United States v. Hodge and Zweig*<sup>134</sup> and its progeny's<sup>135</sup> statement of the *Baird* exception was incorrect because it comprehended questions of incrimination and

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<sup>126</sup> *Id.* at 491-92 (construing *Fisher*, 425 U.S. at 403).

<sup>127</sup> *Id.* at 492. The opinion does, however, still endorse *Harvey's* "substantial disclosure exception." *Id.* at 494.

<sup>128</sup> 279 F.2d 623 (9th Cir. 1960).

<sup>129</sup> 517 F.2d 666 (5th Cir. 1975).

<sup>130</sup> *In re Pavlick*, 680 F.2d at 1027.

<sup>131</sup> 729 F.2d at 493. The opinion does concede that revelation of identity is more likely to reveal confidences than is fee information. *Id.* at 494.

<sup>132</sup> See *supra* notes 29-38 and accompanying text. (Identity, fact of retention, and fee arrangements are all preliminary to existence of attorney-client relationship and therefore are not protected). See, e.g., *Chirac v. Reinicker*, 11 Wheat. (24 U.S.) 280, 6 L.Ed. 474 (1826) (Story, J.).

<sup>133</sup> 722 F.2d at 593.

<sup>134</sup> 548 F.2d 1347 (9th Cir. 1977).

<sup>135</sup> See, e.g., *In re Lahodny*, 695 F.2d at 365; *In re Salas & Waxman*, 695 F.2d at 361-62; *Sherman*, 627 F.2d at 190-91; *In re Lawson*, 600 F.2d at 218.

did not focus solely on whether disclosure of the client's identity was a confidential communication.<sup>136</sup> Retreating from *Baird's* broader statement,<sup>137</sup> the panel held:

The principle of *Baird* was not that the privilege applied because the identity of the client was incriminating, but because in the circumstances of the case disclosure of the identity of the client was in substance a disclosure of the confidential communication in the professional relationship between the client and the attorney.<sup>138</sup>

The court quoted from *Baird*, implying that the sole basis of decision was as follows:

The name of the client will be considered privileged matter where the circumstances of the case are such that the name of the client is material only for the purpose of showing an *acknowledgement* of guilt on the part of such client of the very offense on account of which the attorney was employed . . . .<sup>139</sup>

In so doing, the *Osterhoudt* panel significantly reduced the availability of the *Hodge and Zweig* exception<sup>140</sup> and foreclosed even the opportunity to show how fee information (or identity) could constitute a privileged communication.

Indeed, *Osterhoudt's* narrow reading of *Baird* is contrary to readings of previous panels of the Ninth Circuit,<sup>141</sup> as well as other courts of appeals in *Harvey*,<sup>142</sup> *In re Grand Jury Proceedings (Jones)*,<sup>143</sup> and *In re Grand Jury Proceedings (Pavlick)*.<sup>144</sup> Though *Baird* relied heavily upon the communication of the client's identity as an acknowledgement of guilt, the court also balanced the public benefit of disclosure "against the sacredness of the attorney's obligation to keep inviolate the secrecy of the client's confidence."<sup>145</sup> In addition, the *Baird* court considered the applicability of the privilege; the fact that this was not a civil suit instituted by the client; that there was no reference to future criminal or fraudulent conduct; and whether the attorney raised the privilege to protect himself from

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<sup>136</sup> 722 F.2d at 593.

<sup>137</sup> See *supra* note 52 and accompanying text.

<sup>138</sup> 722 F.2d at 593.

<sup>139</sup> *Id.* (quoting *Baird*, 279 F.2d at 633, and 97 C.J.S. *Witnesses* § 283(e), at 803) (emphasis added in *In re Osterhoudt*).

<sup>140</sup> See generally *In re Salas & Waxman*, 695 F.2d at 362 (leaving open the possibility that requested information would implicate clients in the very activity for which they sought legal advice).

<sup>141</sup> See, e.g., *In re Lahodny*, 695 F.2d at 365; *In re Salas & Waxman*, 695 F.2d at 361-62; *Sherman*, 627 F.2d at 190-91; *In re Lawson*, 600 F.2d at 218.

<sup>142</sup> 349 F.2d at 905.

<sup>143</sup> 517 F.2d at 671-72.

<sup>144</sup> 680 F.2d at 1027; see *supra* notes 65, 74, 88 and accompanying text.

<sup>145</sup> 279 F.2d at 633.

liability.<sup>146</sup>

Most importantly, the court in *Baird* acknowledged that compelling Baird to divulge his client's identity could "well be the link that could form the chain of testimony necessary to convict an individual of a federal crime."<sup>147</sup> This anticipates *Fisher's* dictum, quoting Wigmore, that the attorney-client privilege protects documents (or testimony) of the client in the hands of the attorney when the client himself would have a fifth amendment privilege against self-incrimination.<sup>148</sup> This understanding, that the client's fifth amendment privilege against self-incrimination allows invocation of the attorney-client privilege, is the basis underlying the decisions in *Hodge and Zweig*, *In re Jones* and *Pavlick*.<sup>149</sup>

The *Osterhoudt* court's failure to recognize these precepts of *Baird* and *Hodge and Zweig* along with its narrow focus excluding incrimination as a basis for invoking the privilege, therefore, presages significant erosion in the protections of the attorney-client privilege.

E. *IN RE GRAND JURY INVESTIGATION NO. 83-2-35 (DURANT)*

In *Durant*, the Sixth Circuit addressed the identity question in a context where, "[i]n effect, the identity of Durant's client was the last link of evidence necessary to effect an indictment."<sup>150</sup> In that case, the Federal Bureau of Investigation (FBI), in investigating a scheme whereby checks made payable to and stolen from International Business Machines, Inc. (IBM) were deposited into various bank accounts opened in the names of fictitious organizations, discovered that a check, drawn upon one of the bank accounts, was made payable to Richard Durant's law firm. Durant was subpoenaed before the grand jury where he asserted the attorney-client privilege on behalf of his client. The government then procured a hearing in which the district court held that the privilege did not attach, ordering Durant to testify. Durant refused to comply with the court's or-

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<sup>146</sup> *Id.* at 634.

<sup>147</sup> *Id.* at 633 (citing *Hoffman v. United States*, 341 U.S. 479 (1951)).

<sup>148</sup> 425 U.S. at 404 (quoting 8 J. WIGMORE, EVIDENCE § 2307).

<sup>149</sup> See *supra* text accompanying notes 67-70 and 87-96.

<sup>150</sup> 723 F.2d at 449. Durant's unchallenged testimony recited a statement by a Federal Bureau of Investigation agent that "as soon as we get the name of that client, we are going to arrest the client . . ." *Id.* at 449 n.2. Further, when Durant rejected the government's suggestion that he reveal the client's identity and not inform him, presumably to give the FBI time to effect his arrest, the government agent indicated that they could get time by [finger]printing Durant and holding him incommunicado for six or seven hours. *Id.* at 449-50 n.3. Durant countered by telling the agent that his office had instructions to appear in court with a petition for a writ of habeas corpus if he had not returned by a certain time.



der and was held in contempt.<sup>151</sup>

In passing upon the applicability of the privilege, the Sixth Circuit reviewed the state of the law in this area since *Baird* and addressed each of the three exceptions to the identity exclusion.<sup>152</sup> While conceding that Durant's position fell squarely within the *Pavlick* "last link" exception, and recognizing the viability of the "legal advice" and the "substantial disclosure" exceptions,<sup>153</sup> the court concluded that the "last link" exception should be rejected because it was not grounded in the preservation of confidential communications and, therefore, was "not justifiable to support the attorney-client privilege."<sup>154</sup> Although the court did not limit applicability of the "legal advice" exception, which Durant claimed,<sup>155</sup> it held that the burden of proving the applicability of the privilege rested on Durant.<sup>156</sup> Because Durant failed to request an *in camera ex parte* hearing to adduce evidence supporting his contentions of privilege, he did not meet his burden.<sup>157</sup>

It can be observed, therefore, that *In re Durant*, without knowledge of *In re Osterhoudt*, nevertheless parallels its approach and holding. Like the Ninth Circuit in *Osterhoudt*, *Durant* has focused solely on the preservation of confidential communications as the touchstone for the privilege. The two cases, therefore, reject the importation of any concerns regarding incrimination of the client into determinations of privilege.

#### F. *IN RE GRAND JURY PROCEEDINGS — GORDON*

*Gordon*,<sup>158</sup> handed down almost simultaneously with *In re Grand Jury Investigation No. 83-2-35 (Durant)*,<sup>159</sup> rests in part upon *Durant's*

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<sup>151</sup> *Id.* at 448-49.

<sup>152</sup> *Id.* at 452-54. Because the opinion was handed down three weeks prior to *In re Osterhoudt*, 722 F.2d 591 (9th Cir. 1983), the Sixth Circuit did not address the change in the Ninth Circuit's rule nor its effect on the generally accepted exception.

<sup>153</sup> *Id.* at 452-53; see *supra* text accompanying notes 87-96.

<sup>154</sup> 723 F.2d at 454.

<sup>155</sup> *Id.* at 454. It should be noted that the court expressed some doubt as to the consistency of Durant's statements regarding his representation. *Id.* at 455. At a March 2 hearing, Durant disavowed knowledge of the stolen checks, yet the court points out that on March 22, when claiming the "legal advice" exception, Durant stated that he had been engaged for past activity related to stolen IBM checks. *Id.* This suggests the possibility of an alternate basis of decision.

<sup>156</sup> *Id.* at 454.

<sup>157</sup> *Id.* at 454-455. A petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit was filed in the Supreme Court in *Durant*, No. 83-1468, and denied June 11, 1984, 104 S. Ct. 3524 (1984).

<sup>158</sup> 722 F.2d 303 (6th Cir. 1983).

<sup>159</sup> 723 F.2d 447 (6th Cir. 1983).

rejection of the "last link" exception<sup>160</sup> and illustrates the decreasing availability of the privilege.

A grand jury, investigating possible income tax violations of Reuben Sturman, subpoenaed attorney Larry S. Gordon to testify regarding twelve corporations incorporated by his law firm and four other corporations that were his clients. During his testimony, Gordon acknowledged that Sturman was a client of the firm and was represented by Gordon. However, when Gordon was asked to tell the grand jury (1) who requested each incorporation, (2) who provided shareholder and officer information to the law firm, (3) who was (were) the agent(s) of the corporations with whom the law firm dealt regarding legal matters, and (4) who requested and/or received custody of corporate records from the law firm, Gordon refused to answer, invoking the attorney-client privilege.<sup>161</sup>

After the government filed a motion to compel Gordon's testimony, a "John Doe" filed a motion to intervene stating that he was the individual sought by the government.<sup>162</sup> Upon the issuance of an order compelling Gordon's testimony and allowing intervention, Doe, as client-intervenor, sought appellate review.

The Sixth Circuit opinion characterizes the four interrogatories to Gordon as "merely seek[ing] the identity of his client," and then states the "unanimously embraced" general rule that identity is not within the privilege.<sup>163</sup> Concurring with the district court's ruling that the "legal advice" exception was inapplicable,<sup>164</sup> the court turned to the "substantial disclosure exception." With regard to each of the four inquiries the Court cursorily concluded that none of them amounted to a confidential communication in the context of prior disclosures.<sup>165</sup>

The court held that the identity of the client who requested incorporation "merely amount[ed] to a disclosure of the scope and objective of the legal employment undertaken by Gordon," which is not subject to privilege.<sup>166</sup> In consequence, it required disclosure of

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<sup>160</sup> *In re Gordon* was handed down on December 5, 1983, while *In re Durant* was issued on December 7, 1983. Both opinions are authored by Judge Krupansky, and *Gordon's* analysis rests upon *Durant's* discussion of the exceptions to the rule of exclusion, and its rejection of the "last link" exception. 722 F.2d at 307.

<sup>161</sup> 722 F.2d at 305.

<sup>162</sup> *Id.*; see also *supra* notes 21-28 and accompanying text.

<sup>163</sup> 722 F.2d at 307 (citing *In re Durant*, 723 F.2d at 451).

<sup>164</sup> *Id.* It was apparent that Doe's relationship comprehended legal assistance in the incorporation of several corporations, and did not seek legal advice for a past crime.

<sup>165</sup> *Id.* at 308.

<sup>166</sup> *Id.*

Gordon's client's identity.<sup>167</sup> Yet the court's reasoning fails to address the real issue raised and protected by the "substantial disclosure exception." When (by whatever means) the entire substance of a privileged conversation is known, save for the identity of the client, then more than unprotected facts are revealed by disclosure. In *Harvey*,<sup>168</sup> the Fourth Circuit protected the identity of the client because once that identity is revealed in conjunction with all the other previously disclosed facts, "[m]ore than the identity of the client will be disclosed by naming the client."<sup>169</sup>

Certain acts, otherwise seemingly important or unimportant, gain or diminish in relevance depending upon with whom they are associated. Disclosure of Doe's identity in a context where the rest of his communications were known would disclose his motive in seeking legal advice. Because that is protected by the privilege,<sup>170</sup> and because, as will be discussed within, disclosure of Doe's identity might incriminate him before the grand jury, his identity should have been considered a confidential communication within the "substantial disclosure exception."

The same analysis, showing that disclosure of client identity might be incriminatory and certainly would reveal the "ultimate motive" of consultation by the client, holds true in the second and third inquiries as well. Nevertheless, the *Gordon* court failed to consider these implications, relying as it did upon *In re Durant*, which eliminated the obvious concern of incrimination of the client. With a "last link" exception rejected, the "legal advice" exception limited, and facile analysis of the applicability of privilege such as appears in *In re Gordon*, it is apparent that few circumstances, if any, will fall within the now very narrow exceptions to the identity exclusion.

## VII. POSSIBILITY OF PROTECTION THROUGH THE FIFTH AMENDMENT

It is well recognized that the Fifth Amendment's privilege against self-incrimination is a purely personal privilege.<sup>171</sup> As a concept, it is fundamental to our system of justice. Still, despite its limits, our concern that no man be required to incriminate himself from

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<sup>167</sup> *Id.*

<sup>168</sup> 349 F.2d 900 (4th Cir. 1965).

<sup>169</sup> *Id.* at 905.

<sup>170</sup> "A communication as to . . . the ultimate motive of the litigation, is equally protected with others, so far as any policy of the privilege is concerned." 8 J. WIGMORE, EVIDENCE § 2313 (quoted in *Tillotson*, 350 F.2d at 666); *In re Jones*, 517 F.2d at 674.

<sup>171</sup> U.S. CONST. amend. V.; see *Fisher*, 425 U.S. at 398; *Couch v. United States*, 409 U.S. 322, 328 (1973).

his own mouth has penetrated the attorney-client privilege.<sup>172</sup> The *Baird* court's belief that disclosure of the client's identity may "well be the link [to] form the chain of testimony necessary to convict an individual of a federal crime"<sup>173</sup> reflected this conclusion, and it has since been imported, in some form, into each of the exceptions to the identity exclusion.<sup>174</sup> There is, accordingly, substantial authority to consider questions of incrimination where client identity is sought to be compelled.<sup>175</sup>

Under *Fisher*, the fifth amendment privilege of a client has clear application, through the attorney-client privilege, to the attorney's disclosure of information.<sup>176</sup> Quoting Wigmore, the Supreme Court emphasized: "It follows, then, that *when the client himself would be privileged* from production of the document, either as a party at common law . . . or as exempt from self-incrimination, the attorney having possession of the document is not bound to produce."<sup>177</sup> A 1982 case from the New York Court of Appeals, *In the Matter of Vanderbilt*,<sup>178</sup> addressed precisely this question and determined that when the attorney-client privilege applies, "counsel cannot be compelled to deliver material that would be privileged [as against self-incrimination] in the client's hands."<sup>179</sup>

*Vanderbilt* dealt with what the court assumed to be a tape-recorded confession to an attempted murder. The client attempted suicide after making the recording, and his wife delivered the cassette tape to his attorney.<sup>180</sup> Recognizing that the attorney had no right directly to assert the client's fifth amendment privilege, the New York Court of Appeals nevertheless relied upon *Fisher*, stating: "[A]n attorney may rely on the attorney-client privilege to prevent discovery of materials that would not have been discoverable if in

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<sup>172</sup> See, e.g., *In re Pavlick*, 680 F.2d 1026; *In re Jones*, 517 F.2d 688; *Tillotson*, 350 F.2d 663; *Hodge and Zweig*, 548 F.2d 1347; *Harvey*, 349 F.2d 900; *Baird*, 279 F.2d 623.

<sup>173</sup> 279 F.2d at 633 (citing *Hoffman*, 341 U.S. at 486).

<sup>174</sup> See *supra* note 172. It is, of course, recognized that *In re Osterhoudt*, *In re Durant* and *In re Gordon* represent a rejection of this position and these concerns.

<sup>175</sup> See *supra* notes 48-96 and accompanying text.

<sup>176</sup> 425 U.S. at 404.

<sup>177</sup> 425 U.S. at 404 (quoting 8 J. WIGMORE, EVIDENCE § 2307) (emphasis added in *Fisher*).

<sup>178</sup> 57 N.Y.2d 66, 453 N.Y.S.2d 662, 439 N.E.2d 373 (1982).

<sup>179</sup> *Id.* at 80, 453 N.Y.S.2d at 670, 439 N.E.2d at 386.

<sup>180</sup> *Id.* at 70-71, 453 N.Y.S.2d at 665, 439 N.E.2d at 380-81. The court remanded the case to determine the capacity in which the client's wife acted. *Id.* at 80, 453 N.Y.S.2d at 670-71, 439 N.E.2d at 386. If she acted as her husband's agent in soliciting legal advice by delivering the cassette, then the court held the client's rights remain intact and the tape is privileged. *Id.*

the client's hands."<sup>181</sup> *Vanderbilt*, therefore, applied concepts of fifth amendment self-incrimination *through* the attorney-client privilege to protect the client's incriminating utterances from being disclosed,<sup>182</sup> and it stands as an intermediate step between *Fisher* and cases such as *In re Grand Jury Proceedings—Gordon*.

In *Fisher*, the Court only passed on *documents* that could be protected by the privilege.<sup>183</sup> In *Vanderbilt*, the very voice of the client, incriminating himself, was the subject of compulsion.<sup>184</sup> In *Gordon*, the government sought to compel the lawyer to divulge the client's identity and link him to certain acts, in a manner no less incriminating than compelling the client himself to testify to the acts.<sup>185</sup> Inasmuch as the lawyer's only knowledge of the client's identity and actions came from their relationship and the client could not be compelled to testify about his acts, then under *Fisher* and *Vanderbilt*'s rationales, *Gordon* should not have been compelled to testify and incriminate his client. Such a result clearly conflicts with the long-standing purpose of the privilege: "The end is, that persons with safety may substitute others in their [place]; and therefore if you cannot ask me, you cannot ask that man; for everything said to him, is as if I had said it to myself, and he is not to answer it."<sup>186</sup>

The Sixth Circuit's opinion in *Gordon* generates legitimate concern whether the attorney-client privilege protects confidential communications that could not be compelled from the client. Upon its specific facts, it would appear that, in line with *Fisher* and *Vanderbilt*, the privilege should hold. *Gordon* appeared before the grand jury, identified corporations as having been incorporated by him, and stated the identities of such corporate and individual clients as were requested. Only when the government's questions went beyond the narrow inquiry — "Who is your client?" — did *Gordon* assert the privilege. His assertion was in response to questions which stated communications or acts<sup>187</sup> *and which required him to pair his client with these acts and communications before the grand jury*. Recognizing that to name his client in conjunction with these acts would be nothing less

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<sup>181</sup> *Id.* at 75-76, 453 N.Y.S.2d at 668, 439 N.E.2d at 383 (citing *Fisher*, 425 U.S. at 404).

<sup>182</sup> 722 F.2d 303 (6th Cir. 1983).

<sup>183</sup> 425 U.S. at 394 (income tax documents prepared by client's accountants and possessed by attorney *Fisher*).

<sup>184</sup> See *supra* notes 178-80 and accompanying text.

<sup>185</sup> See *supra* note 161 and accompanying text.

<sup>186</sup> *Annesley*, 17 How. St. Tr. 1129 (Ex. 1743) (quoted in 8 J. WIGMORE, EVIDENCE § 2291).

<sup>187</sup> Depending upon the grand jury's perceptions and the name or names given in conjunction with them, these acts or communications could either be entirely legitimate or highly incriminatory.

than explicitly linking his client with conduct considered illegal by the grand jury, Gordon necessarily claimed the protections of the attorney-client privilege.

It is apparent, therefore, that the government was not seeking the "identity" of Gordon's client or clients. Gordon had revealed his clients' identities upon demand. What the government did seek, and what the Sixth Circuit approved and compelled,<sup>188</sup> was the use of an attorney before the grand jury to testify to privileged relations and thus expressly to incriminate his client by naming him in response to every question setting out incriminatory facts. It is in these circumstances that the use of the identity exclusion becomes an overwhelmingly powerful weapon in the government arsenal. The narrowed availability of the privilege and the court's cursory analysis of the "substantial disclosure exception," therefore, resulted in a compulsion beyond that contemplated by the identity exclusion.

In *Gordon*, the issue was a question of having the attorney repeat before the grand jury the essential missing element of communications that had already been disclosed. The missing element was the client's identity which, if provided, would result in compelled testimony from the attorney that could never have been compelled from the client consistent with the mandate of the fifth amendment.

It is in these circumstances, where the attorney is asked to incriminate his client by revealing information that would disclose an incriminating communication that could not be compelled from the client himself, that fifth amendment protection *through* the attorney-client privilege is appropriate and necessary.

### VIII. CONCLUSION

It is undisputed that the general rule regarding client identity excludes it from protection under the attorney-client privilege. Yet conversely, the attorney-client privilege is uniquely valuable to our system of justice:

In our legal system the client should make full disclosure to the attorney so that the advice given is sound, so that the attorney can give all appropriate protection to the client's interest, and so that proper defenses are raised if litigation results. The attorney-client privilege promotes such disclosure by promising that communications revealed for these legitimate purposes will be held in strict confidence. The privilege encourages persons to seek advice as to future conduct. But

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<sup>188</sup> On February 4, 1984, Intervenor Doe filed a petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in the Supreme Court, No. 83-1309, which was denied June 11, 1984, 104 S. Ct. 3524 (1984).

so important is full disclosure that the law recognizes the privilege even if the advice is sought by one who has already committed a bad act. Thus, the attorney-client privilege is central to the legal system and the adversary process. For these reasons, the privilege may deserve unique protection in the courts.<sup>189</sup>

At present, the grand jury is the scene for repeated assertions of the privilege where attorneys are asked to reveal their clients' identities; and it is apparent that in this setting attorneys will continue to assert their clients' privilege.<sup>190</sup> That privilege is available without resort to a contempt citation by client intervention under *Pertman v. United States*.<sup>191</sup> Yet, in view of the limited nature of the exceptions to the identity exclusion, and recent case law limiting client access to the attorney-client privilege, the success of such contests is likely to be limited. Still, the exceptions to the exclusion do maintain some vitality, the concerns of the attorney-client privilege undeniably carry much weight, and the possibility of fifth amendment protection through the attorney-client privilege, in line with *Fisher*, remains a powerful argument to be asserted.

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<sup>189</sup> *Hodge and Zweig*, 548 F.2d at 1355.

<sup>190</sup> On August 2, 1983, the new MODEL RULES OF PROFESSIONAL CONDUCT were adopted by the House of Delegates of the American Bar Association. The new rules modify and broaden DR 4-101(A), extending the privilege to information "relating to representation of a client . . ." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a), reprinted in 52 U.S.L.W. 1, 5 (Aug. 16, 1983) (emphasis added).

The new rules do not require the client to indicate information that is to be confidential. ABA/BNA *Lawyers' Manual on Professional Conduct* (1984) at 55:303. Moreover, the new MODEL RULES OF PROFESSIONAL CONDUCT deleted the provision of the old MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981) DR 4-101(C)(23), allowing revelation of confidences when "required by law or court order."

Thus, it is clear that in order to follow the dictates of the new rules, an attorney is obligated to press his client's claims opposing disclosure of identity based upon the privilege through the courts of appeals, if not to review by certiorari.

<sup>191</sup> 247 U.S. 7 (1918); see *supra* note 22 and accompanying text; see also *supra* note 115 discussing availability of sixth amendment protection when attorney-client privilege is inapplicable.