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Defense Counsel as Prosecution Witness: A Combined Doctrine to Govern Attorney Disclosure

David B. Merchant

DEFENSE COUNSEL AS PROSECUTION WITNESSES: A COMBINED DOCTRINE TO GOVERN ATTORNEY DISCLOSURE

Abstract: Prosecutors have increasingly used grand juries to compel defense attorneys to disclose client administrative data such as clients' names, fee amounts, or third-party fee payments. A majority of the federal circuit courts protect administrative information only if disclosure would reveal the substance of previous attorney-client conversations. In contrast, a minority of the circuits protect such information when disclosure would incriminate a client in the case at bar. This Comment argues that neither of the current doctrines accomplishes the goals of the attorney-client privilege. Instead, a doctrine that combines the majority and minority views would more effectively promote the policies underlying the attorney-client privilege.

The attorney-client privilege is the oldest of all evidentiary privileges,[1] yet the law governing this fundamental area of Anglo-American judicial practice remains unsettled.[2] Particularly troublesome is whether the privilege protects administrative information such as the names of clients, the amount of fees paid for representation, or third-party payments of fees.

Since the 1980s, prosecutors have increasingly challenged the traditional view that defense lawyers should not be called as witnesses against their own clients.[3] Following the United States Justice Department's lead, prosecutors have subpoenaed defense attorneys as witnesses before grand juries to learn administrative information about the attorneys' clients.[4] Three basic fact patterns compel prosecutors to call defense attorneys to the stand. Two of these patterns involve unidentified persons and the third involves unidentified sums of money.

The first instance arises when a third party wants to pay a defendant's legal expenses. For example, in drug conspiracy cases a drug lord may intend to pay for an employee's defense.[5] In an attempt to gather evidence connecting the drug lord to the case at trial, the prose-

1. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW (J. McNaughton rev. ed. 1961) § 2290, at 542. *See generally* Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061 (1978).

2. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS xi (Tent. Draft No. 2, 1989).

3. Stern & Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. PA. L. REV. 1783, 1787–88 (1988).

4. *See, e.g., In re* Attorney Representing Criminal Defendant Reyes-Requena, 913 F.2d 1118, 1123 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1581 (1991).

5. *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1517 n.91 (1985) [hereinafter *Developments*].

cutor calls the defense attorney as a witness to learn the name of the third-party benefactor.

In the second case, after consultation with an attorney, a taxpayer wants to anonymously remit underpaid back taxes. By paying the taxes, the taxpayer hopes to avoid compounding penalties should the Internal Revenue Service (IRS) learn of the underpayment. The IRS, however, would like to collect any penalties and taxes that the taxpayer might owe. Upon receipt of the payment, the IRS calls the attorney before a grand jury to begin its investigation.[6]

The third fact pattern also involves an alleged underpayment of taxes. The prosecutor asks the defense attorney to divulge how much money the defendant has paid in legal fees. With this tactic, the prosecutor hopes to prove that the defendant received unreported income.[7]

Federal courts currently employ competing doctrines to define the scope of the attorney-client privilege. Several circuits protect administrative information when disclosure would incriminate a client in the case at bar.[8] A majority of the courts, however, shield administrative information only when disclosure would reveal the substance of a previous confidential communication.[9] Neither of these approaches, acting alone, effectuate the principles underlying the attorney-client privilege. Instead, a test combining the current approaches will more effectively protect the goals and principles of the attorney-client privilege.

I. DEVELOPMENT OF PRIVILEGE GOVERNING ADMINISTRATIVE INFORMATION

A. Goals of the Attorney-Client Privilege

The primary goal of the attorney-client privilege is to promote clients' subjective freedom to obtain legal advice. In *Fisher v. United States,*[10] the Supreme Court concluded that the legal system can meet this primary goal only by eliminating clients' fear that their attorneys

6. *Id.*

7. *Id.* Although IRS regulations require attorneys to disclose the name, address, and taxpayer identification number of persons transferring over $10,000 in cash, these regulations do not affect attorneys' obligations to raise the attorney-client privilege. Michigan State Bar Comm. on Professional and Judicial Ethics, Op. RI-54 (1990).

8. *See infra* notes 60–63 and accompanying text.

9. *See infra* notes 64–76 and accompanying text.

10. 425 U.S. 391, 403–04 (1976).

will disclose damaging information.[11] Encouraging persons to seek legal assistance benefits the public by promoting obedience to the law and administration of justice.[12]

Three policies underlie the attorney-client privilege. First, the attorney-client privilege protects innocent clients' rights.[13] As the American legal system grows more complex, the line between guilt and innocence becomes increasingly blurred.[14] Without competent legal assistance, clients cannot determine or defend their rights.[15] Innocent clients who fear that their attorneys will disclose incriminating information, however, may decide either to forego counsel or to avoid a legal remedy altogether.[16]

Second, the attorney-client privilege ensures accuracy in legal proceedings.[17] Although removing the privilege would not deter the guilty from obtaining legal help,[18] it would encourage wrongdoers to lie or fail to disclose information to their attorneys.[19] Thus, without the privilege, attorneys may be forced to work with partial or inadequate knowledge of their clients' cases and may not be able to provide effective legal counsel.[20]

Third, the attorney-client privilege encourages people to obey the law. Many laws are so complex that even law-abiding citizens sometimes need legal assistance to understand the legal intricacies.[21] The privilege allows clients to seek advice without fear of disclosure.[22] As a result, clients will be better informed and more capable of following the law.[23]

Despite these beneficial aspects, the attorney-client privilege potentially hinders courts by obscuring information from the fact-finder.[24]

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11. *Id.; see* Upjohn Co. v. United States, 449 U.S. 383 (1981) (attorney-client privilege shields employee conversations with corporate counsel); *see also* J. WIGMORE, *supra* note 1, § 2291, at 545.

12. *Upjohn*, 449 U.S. at 389.

13. *Developments, supra* note 5, at 1505–07.

14. *Id.;* 8 J. WIGMORE, *supra* note 1, § 2291, at 552.

15. 8 J. WIGMORE, *supra* note 1, § 2291, at 552.

16. *See, e.g.*, E. CLEARY, MCCORMICK ON EVIDENCE § 87, at 204–06 (3d ed. 1984) [hereinafter MCCORMICK].

17. The privilege encourages clients to fully disclose the facts of their situations to their attorneys. *Id.* Once attorneys have obtained accurate facts, they are in a better position to represent their clients. *Id.*

18. 8 J. WIGMORE, *supra* note 1, § 2292, at 553–54.

19. *Id.*

20. *See* MCCORMICK, *supra* note 16, § 87, at 204–05.

21. *Developments, supra* note 5, at 1506.

22. Fisher v. United States, 425 U.S. 391, 403 (1976).

23. *See Developments, supra* note 5, at 1506.

24. *See* United States v. Nixon, 418 U.S. 683, 709 (1974).

Because one of the legal system's primary functions is to discover the truth,[25] commentators agree that courts should interpret the privilege only so far as to carry out its underlying principles.[26] The Supreme Court has followed this analysis, holding that courts should narrowly construe the privilege because it hinders the search for truth.[27] Furthermore, the Court recognized that to effectuate its goals, the attorney-client privilege must be predictive.[28] An uncertain privilege, the Court concluded, is little better than no privilege at all.[29]

In an attempt to follow the Supreme Court's directive, modern courts have struggled to develop a rational test that balances the competing interests of client confidentiality and full disclosure of the truth.[30] As one aspect of this balancing, courts have adopted James Wigmore's formulation of the privilege.[31] According to Wigmore, when clients seek legal advice from attorneys, private communications relating to that advice are protected from attorney disclosure.[32]

The current dispute concerning the privilege's protection of administrative information involves two aspects of Wigmore's formulation. One source of disagreement stems from attempts to define "communication." Although communication includes more than just oral exchanges, courts do not agree whether client administrative data fits within the boundaries of this term.[33] Wigmore suggests that communications include a client making a handwriting specimen, displaying

25. *Id.*

26. *See, e.g.,* 8 J. WIGMORE, *supra* note 1, § 2291, at 554.

27. *Nixon,* 418 U.S. at 709. Additionally, the crime-fraud exception denies protection for a client who consults with an attorney in furtherance of crime. 8 J. WIGMORE, *supra* note 1, § 2298, at 572. Because courts developed the attorney-client privilege to promote justice, the crime-fraud exception asserts that it would pervert the privilege to protect a client who seeks advice in pursuit of an illegal or fraudulent scheme. MCCORMICK, *supra* note 16, § 95, at 229. The exception applies if a prosecutor can establish that a client is using an attorney to engage in crime or fraud. Clark v. United States, 289 U.S. 1, 15 (1933). If the exception applies, then the attorney-client privilege will not protect administrative information, regardless of which doctrine a court might employ. *See* MCCORMICK, *supra* note 16, § 95, at 229–30.

28. Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).

29. *Id.*

30. Evidentiary privileges in the federal courts are governed by common law. FED. R. EVID. 501.

31. *In re* Walsh, 623 F.2d 489, 492–93 (7th Cir.), *cert. denied,* 449 U.S. 994 (1980); Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 323–24 (7th Cir. 1963) (en banc), *cert. denied,* 375 U.S. 929 (1963).

32. 8 J. WIGMORE, *supra* note 1, § 2292, at 554.

33. *Id.* § 2306, at 590. *Compare In re* Cherney, 898 F.2d 565, 567 (7th Cir. 1990) (client administrative information conveys information that the attorney-client privilege may protect) *with* Rabin v. United States, 896 F.2d 1267 (11th Cir.) ("communication" includes only verbal statements or physical acts intended as information about the client's problem; it does not include fee payments or the client's name), *vacated,* 904 F.2d 1498 (11th Cir. 1990).

an identifying scar, or showing a secret token.[34] If the client performs any of these acts while consulting[35] with an attorney, then the privilege protects the exchange.[36]

A second source of disagreement has been the definition of "client." In particular, courts have argued whether a person who hires an attorney to pay for someone else's defense is a client.[37] On the one hand, Wigmore stresses that every civil litigant is entitled to know the opponent's identity.[38] On the other hand, Wigmore notes that the privilege should protect certain client administrative information.[39] He argues that courts should protect administrative information which conveys the ultimate motive of litigation.[40] Whether courts should protect administrative information, according to Wigmore, depends on the facts of each case.[41]

B. Judicial Development of the Privilege Governing Client Administrative Information

Federal courts' treatment of client administrative information began in 1960 with *Baird v. Koerner*.[42] Subsequent courts derived two lasting doctrines from the *Baird* decision. First, the legal advice doctrine focuses on whether disclosure of administrative information incriminates the client.[43] Second, the confidential communication doctrine protects administrative information when disclosure would reveal the content of other attorney-client communications.[44] Federal courts currently rely on either the legal advice doctrine or the confidential communication doctrine,[45] but no court since *Baird* has fully combined the two theories.[46]

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34. 8 J. WIGMORE, *supra* note 1, § 2306, at 590.

35. Consultation is the "act of . . . conferring; e.g., . . . client with lawyer." BLACK'S LAW DICTIONARY 286 (5th ed. 1979).

36. 8 J. WIGMORE, *supra* note 1, § 2306, at 590.

37. *See, e.g., In re* Attorney Representing Criminal Defendant Reyes-Requena, 913 F.2d 1118, 1123 (5th Cir. 1990); *Cherney*, 898 F.2d at 568.

38. 8 J. WIGMORE, *supra* note 1, § 2313, at 609 (courts should not force litigants to "struggle in the dark against unknown forces").

39. *Id.*

40. *Id.*

41. *Id.* at 610.

42. 279 F.2d 623 (9th Cir. 1960).

43. United States v. Hodge & Zweig, 548 F.2d 1347, 1353 (9th Cir. 1977).

44. United States v. Liebman, 742 F.2d 807, 808–09 (3d Cir. 1984).

45. *See infra* notes 60–76 and accompanying text.

46. The "last link" doctrine, a short-lived development originating in the Fifth Circuit, shielded client administrative information that formed the final link in a chain of inculpatory evidence. United States v. Jones, 517 F.2d 666 (5th Cir. 1975). Although several circuits noted the fundamental fairness of the last link doctrine, only the Eleventh Circuit joined the Fifth in

1. The Baird *Decision*

Baird v. Koerner[47] forms the legal cornerstone of contemporary efforts to analyze issues of client administrative information. In *Baird,* the Ninth Circuit restated the general rule that client administrative information is usually not privileged.[48] The court then created a limited exception to this general rule which protects client confidential information in limited circumstances.[49]

The *Baird* case originated with a tax dispute. Alva Baird, a tax attorney, directed several businessmen who had underpaid their taxes to remit the unpaid amounts to the IRS without disclosing their names.[50] This strategy would place the businessmen in a favorable position if the IRS learned about the disputed underpayments and filed criminal charges.[51] After receiving the payments, the IRS initiated court action to compel Baird to disclose the names of the businessmen.[52] Baird refused, citing the attorney-client privilege, and the district court found him in contempt.[53]

On appeal, the Ninth Circuit held that Baird did not have to disclose his clients' names.[54] The court based its holding on two complementary grounds. First, the court reasoned that the voluntary payment of overdue taxes communicated a feeling of guilt stemming from a nonpayment of taxes.[55] The guilty feeling may not have been of a criminal nature, but the feeling conveyed the businessmen's reason for contacting an attorney.[56] Disclosing the businessmen's names, therefore, would reveal the substance of a confidential communication between the clients and Baird.[57] Second, the court noted that the gov-

adopting the doctrine. *Compare In re* Twist, 689 F.2d 1351 (11th Cir. 1982) (adopting last link doctrine) *with In re* Anderson, 906 F.2d 1485, 1491 (10th Cir. 1990) (noting last link's fairness, but rejecting); *In re* Grand Jury Investigation No. 83-2-35 (Durant), 723 F.2d 447, 453–54 (6th Cir. 1983) (noting last link's fairness but rejecting), *cert. denied,* 467 U.S. 1246 (1984). Courts originally adopting the doctrine now reject their earlier decisions. *See In re* Attorney Representing Criminal Defendant Reyes-Requena, 913 F.2d 1118, 1124–25 (5th Cir. 1990) (arguing *Jones* did not actually articulate a last link doctrine); *see also* Rabin v. United States, 896 F.2d 1267 (11th Cir. 1990) (uses term "last link" but takes precedent and logic from confidential communication decisions), *vacated,* 896 F.2d 1267, 1283 (11th Cir. 1990).

47. 279 F.2d 623 (9th Cir. 1960).
48. *Id.* at 630–31.
49. *Id.* at 631.
50. *Id.* at 626.
51. *Id.*
52. *Id.* at 627
53. *Id.*
54. *Id.* at 635.
55. *Id.* at 633.
56. *Id.*
57. *Id.*

ernment wanted the names only for their incriminatory nature.[58] Ultimately, the court protected the clients' names, stating that revelation "may well be the link that could form the chain of testimony necessary to convict [the] individual[s] of a federal crime."[59]

2. *Legal Advice Doctrine*

The first enduring offshoot from *Baird,* the legal advice doctrine, focuses on the damaging results flowing from the disclosure of client information.[60] The legal advice doctrine shields client administrative information when disclosure would implicate a client in the very activity for which the client sought legal advice.[61] By protecting incriminating information, this doctrine attempts to promote clients' subjective freedom to consult legal advisors.[62] According to proponents of the legal advice doctrine, courts can enact the policy of the attorney-client privilege only if the law prohibits disclosure of incriminatory client communications.[63]

3. *Confidential Communication Doctrine*

The second theory evolving from *Baird,* the confidential communication doctrine, hinges on the definition of "communication" to determine whether the attorney-client privilege protects administrative

58. *Id.*

59. *Id.* The court differentiated the situation from one in which a taxpayer had filed suit against the government. *Id.* at 630–31. The court reasoned that public policy clearly requires disclosure of plaintiffs' identities because concealing plaintiffs' identities denies defendants their right to confront their accuser. *Id.* at 630 (quoting 8 J. WIGMORE, *supra* note 1, § 2313, at 609–10). The clients in *Baird,* however, were not plaintiffs in litigation. *Id.* at 630. Rather, the taxpayers were merely stating through their attorney their concern over possible underpayment of taxes. *Id.* at 631. The taxpayers were not attempting to anonymously take advantage of the court system, but instead sought to avoid the court system altogether. *See id.* at 630–31 (quoting 8 J. WIGMORE, *supra* note 1, § 2313, at 609–10).

60. *In re* Anderson, 906 F.2d 1485 (10th Cir. 1990).

61. United States v. Hodge & Zweig, 548 F.2d 1347, 1353 (9th Cir. 1977). Richard Hodge and Robert Zweig were law partners representing various clients implicated in a drug-related conspiracy. *Id.* at 1349. In an attempt to find evidence of unreported income to use in a tax-evasion case, the prosecution asked the attorneys to divulge client fee information to a grand jury. *Id.* The court stated the fee information was not privileged because disclosure of the fee would not implicate the clients in the very conspiracy for which they sought advice. *Id.* at 1353.

62. *Id.* at 1353.

63. *Id.* (quoting 8 J. WIGMORE, *supra* note 1, § 2291, at 545). Within six years of *Hodge & Zweig,* courts in five circuits accepted the legal advice doctrine. *See In re* Grand Jury Investigation No. 83-2-35 (Durant), 723 F.2d 447 (6th Cir. 1983) (also adopted confidential communication doctrine), *cert. denied,* 467 U.S. 1246 (1984); *In re* Harvey, 676 F.2d 1005, 1009 (4th Cir.), *vacated,* 697 F.2d 112 (4th Cir. 1982); *In re* Walsh, 623 F.2d 489 (7th Cir. 1980); United States v. Strahl, 590 F.2d 10 (1st Cir. 1978), *cert. denied,* 440 U.S. 918 (1979).

information.[64] Federal courts have developed two interpretations of the confidential communication doctrine. The first interpretation, the communication-centered approach, focuses exclusively on the nature of the communication between client and attorney. The second interpretation, the attorney-centered approach, examines the effect of disclosure on the attorney's ability to provide counsel.[65]

The majority of courts follow the communication-centered approach, which protects only those transfers of client administrative information that would necessarily reveal the content of previous confidential conversations.[66] For example, the confidential communication doctrine acts as a shield when prosecutors know the substance of previous conversations between clients and attorneys but do not know the clients' names.[67]

Current court decisions following the communication-centered approach[68] have established a two-prong test to analyze client administrative information. Defense attorneys must satisfy both prongs before the attorney-client privilege will protect client administrative information.[69] First, disclosing client administrative information must amount to a disclosure of previous confidential communications.[70] Second, the previous communication must concern a case currently under investigation.[71] For example, the communication-centered approach would shield a client's identity when revealing the identity to the police would name the client as the perpetrator of a crime under investigation.[72]

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64. United States v. Liebman, 742 F.2d 807, 808–09 (3d Cir. 1984).

65. The Sixth Circuit adopted both the legal advice doctrine and the confidential communication doctrine. *Durant*, 723 F.2d at 452–53 (finding that both doctrines were well grounded in logic and precedent).

66. *See, e.g.*, Doe 1 v. Under Seal, 926 F.2d 348, 352–53 (4th Cir. 1991); *In re* Special March 1980 Grand Jury, 729 F.2d 489 (7th Cir. 1984); *Liebman*, 742 F.2d at 810; *In re* Osterhoudt, 722 F.2d 591, 594 (9th Cir. 1983); *In re* Slaughter, 694 F.2d 1258, 1260 (11th Cir. 1982); *see also In re* Shargel, 742 F.2d 61 (2d Cir. 1984) (protects communications revealing privileged information only if revelation would harm attorney's effectiveness).

67. *Liebman*, 742 F.2d at 807. Liebman, an attorney and a real estate broker, attempted to negotiate several real estate transactions for his clients. *Id.* at 809. Liebman charged only those clients who entered into real estate transactions. *Id.* Several clients improperly deducted these fees as legal expenses. *Id.* Before a subsequent grand jury, Liebman refused to disclose his clients' names to the IRS. *Id.* The Third Circuit shielded the information, holding that disclosing the names to the IRS would reveal the substance of prior confidential conversations Liebman held with his clients. *Id.* at 810.

68. *See supra* note 66.

69. *In re* Anderson, 906 F.2d 1485, 1492 (10th Cir. 1990).

70. *Id.*

71. *Id.*

72. *Id.* In another recent development, the Seventh Circuit adopted a more liberal interpretation of the confidential communication doctrine. *In re* Cherney, 898 F.2d 565, 568 (7th

An alternative interpretation of the confidential communication doctrine, the attorney-centered approach, focuses on the attorneys' ability to provide legal services.[73] Under this interpretation, the attorney-client privilege protects attorneys from the dilemma of either gathering all necessary data from the client or shielding the client from compelled disclosure.[74] Instead, if disclosure impairs attorneys' ability to provide legal advice, then the attorney-client privilege protects that information.[75] Conversely, if disclosure does not impair counsel effectiveness, then prosecutors can elicit the client's administrative information.[76]

In sum, the dispute over the proper interpretation of the *Baird* decision continues. Although recent court decisions profess a growing consensus of circuits adopting the confidential communication doctrine,[77] the apparent consensus is illusory. The fundamental dispute over whether the attorney-client privilege should protect client administrative information based on the incrimination rationale of the legal advice doctrine or on the communication rationale of the confidential communication doctrine remains unsettled.

II. CURRENT DOCTRINES DO NOT EFFECTUATE THE GOALS OF THE ATTORNEY-CLIENT PRIVILEGE

Modern courts view the legal advice doctrine and the confidential communication doctrine as mutually exclusive means of examining client administrative information. Courts' exclusive adoption of either doctrine fails to adequately protect clients' right to obtain fully-informed legal assistance. To correct this failure, courts should accept

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Cir. 1990). The court held that the attorney-client privilege shielded an attorney's refusal to disclose the name of a third-party benefactor who paid for a drug defendant's legal fees when both the defendant and the benefactor were clients. *Id.* at 569. The third-party payment represented an acknowledgement of a tie between the benefactor and the defendant. *Id.* at 568. The appeals court concluded that disclosure of the benefactor's identity would reveal the premise of a confidential communication between an attorney and a client. *Id.*

73. *See In re* Shargel, 742 F.2d 61, 63 (2d Cir. 1984). This variation draws on the theory that the attorney-client privilege enables attorneys to act effectively, justly, and expeditiously. *See* 2 J. WEINSTEIN & M. BERGER, EVIDENCE § 503(2) (1990).

74. Rabin v. United States, 896 F.2d 1267, 1275 (1990) (referencing *Shargel,* 742 F.2d at 63).

75. *Shargel,* 742 F.2d at 64.

76. *Id.*

77. *See, e.g.,* Doe 1 v. Under Seal, 926 F.2d 348, 352 (4th Cir. 1991) (stating that most circuits now follow the confidential communication doctrine); *In re* Attorney Representing Criminal Defendant Reyes-Requena, 913 F.2d 1118, 1123–24 (5th Cir. 1990) (rejects the *Jones* court's interpretation of the last link doctrine in favor of the confidential communication doctrine); *In re* Anderson, 906 F.2d 1485, 1488–92 (10th Cir. 1990) (notes demise of last link doctrine and adopts confidential communication doctrine).

that both doctrines have legitimate applications.[78] The resulting privilege will give courts a framework through which they can analyze each case on its individual merits. Such an individual evaluation is necessary to implement the policies of the attorney-client privilege.

A. The Legal Advice Doctrine Is Too Narrow

Although the legal advice doctrine addresses many issues fundamental to the attorney-client privilege, courts adopting the legal advice doctrine have interpreted it too narrowly. Currently, the legal advice doctrine fails to protect attorney-client contacts that are not directly related to the case at bar. This failure results in a doctrine that does not encourage clients to seek legal advice.

The legal advice doctrine protects only those exchanges that tend to implicate a client in the very crime for which the client sought advice.[79] For example, the doctrine shields a client's name from disclosure to the IRS when the client originally sought advice concerning a possible tax liability.[80] Clients, however, may want to remain anonymous for reasons unrelated to the case before the court. Two examples of desired anonymity include clients with questionable immigration status or tax standing.[81] Disclosure of client administrative information in either instance might harm the client. Yet, because the disclosure would be unrelated to the case for which the client sought advice, the legal advice doctrine would provide the client no protection.

As a result of this narrow interpretation, clients may refrain from seeking necessary legal advice. Clients who fear that their attorneys will disclose damaging information may forego representation.[82] Without adequate legal representation, clients may not be able to fully assess their legal claims and may fail to receive justice. Because the legal advice doctrine may dissuade clients from seeking legal advice, the doctrine does not fully enact the principles of the attorney-client privilege.

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78. The Sixth Circuit has adopted this approach. *In re* Grand Jury Investigation No. 83-2-35 (Durant), 723 F.2d 447, 452–53 (6th Cir. 1983).

79. *See supra* notes 60–63 and accompanying text.

80. Baird v. Koerner, 273 F.2d 623 (9th Cir. 1960).

81. Stern & Hoffman, *supra* note 3, at 1799.

82. *In re* Cherney, 898 F.2d 565, 569 (7th Cir. 1990); Fisher v. United States, 425 U.S. 391, 403 (1976).

B. The Confidential Communication Doctrine Does Not Accomplish the Goals of the Attorney-Client Privilege

Like the legal advice doctrine, the confidential communication doctrine fails to encourage clients to seek legal advice. Under the two primary interpretations of the doctrine, the courts focus on issues which do not correlate to clients' fears of disclosure. The communication-centered interpretation focuses too strictly on the definition of "communication." The attorney-centered view of the doctrine, on the other hand, misinterprets the policies underlying the attorney-client privilege by focusing on attorneys' fears instead of clients' fears.

1. The Communication-Centered Interpretation of the Confidential Communication Doctrine Is Too Narrow

The communication-centered approach fails to fully implement the goals of the attorney-client privilege. By incorrectly interpreting precedent, the approach has developed too narrow a scope and is not predictive. As a result, attorneys are without guidance in their dealings with clients.

The communication-centered interpretation of the confidential communication doctrine misinterprets precedent by focusing exclusively on whether disclosure reveals the content of previous conversations.[83] By so doing, the confidential communication doctrine attempts to categorize attorney-client contacts as either communicative acts or non-communicative acts.[84] This narrow decision base fails to consider whether disclosure of client administrative information furthers the principles of the attorney-client privilege. As a result, the doctrine may allow disclosure of client information that has little value to the courts, yet devastates the attorney-client relationship.[85]

A close reading of *Baird,* however, reveals that the Ninth Circuit protected client administrative information not only because it represented a communication, but also because the evidence may have

83. *See, e.g., In re* Osterhoudt, 722 F.2d 591, 592–93 (9th Cir. 1983); *In re* Anderson, 906 F.2d 1485, 1492 (10th Cir. 1990); *In re* Attorney Representing Criminal Defendant Reyes-Requena, 913 F.2d 1118, 1125 (5th Cir. 1990).

84. *See supra* notes 64–67 and accompanying text.

85. For example, in *In re* Newton, 899 F.2d 1039 (11th Cir. 1990), the court upheld a grand jury demand that the defense attorney, Newton, disclose his client's name and the client's fee amount. *Id.* at 1044–45. Although grand juries have the power to call attorneys, trial courts do not because the sixth amendment right to counsel attaches after indictment. Massiah v. United States, 377 U.S. 201 (1964). The unwanted disclosure before the grand jury may irreparably harm the relationship between the attorney and client. *See infra* notes 100–106 and accompanying text.

helped incriminate the client in a federal crime.[86] The *Baird* court's consideration of the incriminating effect of disclosure creates a privilege that protects clients' freedom to acquire attorneys and to fully disclose information to those attorneys.

The communication-centered approach also draws an artificial and unclear line between acknowledgements of guilt and mere evidence pointing towards acknowledgements of guilt.[87] The doctrine shields acknowledgements of guilt as protected communications under the attorney-client privilege.[88] Statements that are mere evidence of acknowledgements of guilt are evidentiary facts subject to discovery.[89] The courts provide no clear line where client-provided information tending toward guilt becomes an acknowledgement of guilt.[90]

Furthermore, without a definition of communication to guide them, attorneys cannot predict whether the attorney-client privilege will protect a given exchange. The Supreme Court condemns doctrines that have no predictive ability.[91] The privilege is designed to encourage clients to obtain counsel and to encourage client disclosure to counsel.[92] If clients cannot be certain of confidentiality in a given situation, the privilege will not encourage disclosure.

The communication-centered approach, which focuses on whether present disclosure reveals past conversations, ultimately fails to encourage clients to seek legal advice. Under this approach, courts will not protect client administrative information standing alone, no matter how incriminating.[93] Therefore, this approach ignores clients' fears that prosecutors will exploit original consultations at trial. A

86. Baird v. Koerner, 279 F.2d 623, 633 (9th Cir. 1960) (the sought-after evidence "may be the link that could form the chain of testimony necessary to convict an individual of a federal crime"); *see also* Stern & Hoffman, *supra* note 3, at 1798 n.58.

87. *See* Glanzer & Taskier, *Attorneys Before the Grand Jury: Assertion of the Attorney-Client Privilege to Protect a Client's Identity,* 75 J. CRIM. L. & CRIMINOLOGY 1070, 1084 (1984).

88. *See* United States v. Liebman, 742 F.2d 807, 809 (3d Cir. 1984) (communications privileged when disclosure would reveal client's motive for securing advice).

89. In Rabin v. United States, 896 F.2d 1267 (11th Cir. 1990), the court acknowledged that a payment of fees conveys information. *Id.* at 1274. An exchange conveying information is, by definition, a communication. BLACK'S LAW DICTIONARY 253 (5th ed. 1979). Because the client in *Rabin* communicated to the attorney in private and in expectation of privacy, 896 F.2d at 1274, all of the elements of the attorney-client privilege were met. Despite acknowledging that monetary exchanges convey potentially incriminating information, the *Rabin* court stated that records of fees paid are privileged only if accompanied by another communication. *Id.*

90. *See Rabin,* 896 F.2d at 1274.

91. Upjohn Co. v. United States, 449 U.S. 383, 393 (1981). Although Wigmore states that courts should narrowly interpret the privilege, he cautions that interpretations must support the goal of the privilege. 8 J. WIGMORE, *supra* note 1, § 2292, at 554.

92. *See supra* notes 10–12 and accompanying text.

93. *See In re* Osterhoudt, 722 F.2d 591, 593–94 (9th Cir. 1983).

doctrine that purports to encourage communication but penalizes consultation is both paradoxical and counter-productive.[94] Communication can only occur once clients initially contact their attorneys. A doctrine cannot logically promote communication if it discourages contact.[95]

2. *The Attorney-Centered Approach is Based on a Flawed Focus*

Like courts following the communication-centered approach, courts adhering to the attorney-centered approach incorrectly focus their analysis of client administrative information. Under the attorney-centered approach, courts focus on whether disclosure of administrative information harms attorneys.[96] The attorney-client privilege, however, exists not for the sake of the legal profession in general, but for the sake of clients needing legal advice.[97] The attorney-centered approach's concern that an attorney may have to choose between obtaining full disclosure and protecting a client's rights does not address the primary issues of the privilege.[98] Protecting an attorney's peace of mind should not be an end in itself. Whether disclosure of administrative information affects an attorney is important only because of the subsequent effect on the client.

Courts following the attorney-centered approach's exclusive focus on an attorney's ability to provide competent legal advice ignore the effect disclosure has on a client and thereby dilute the privilege. Even

94. Stern & Hoffman, *supra* note 3, at 1838.

95. Instead of protecting attorney-client communications, the communication-centered approach may actually encourage prosecutors to call defense attorneys before grand juries. Whether the doctrine shields administrative information depends upon prosecutors' knowledge of the case. *Id.* at 1799. If prosecutors know the content of privileged attorney-client conversations, but are unaware of the clients' names or fee information, then the privilege protects client administrative information. *See supra* note 67 and accompanying text. If, however, prosecutors have only incomplete information about clients, the doctrine will not shield administrative information. Stern & Hoffman, *supra* note 3, at 1799. Consequently, the doctrine provides relatively little protection during the opening stages of an investigation. Thus, the confidential communication doctrine may encourage prosecutors to call attorneys to testify early in an investigation. *Id.* Although Justice Department rules bar unnecessary or premature interrogation of defense counsels, these rules are not enforceable in court. EXECUTIVE OFFICE FOR THE UNITED STATES ATTORNEYS, DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-2.161(a) (1985), *quoted in* Stern & Hoffman, *supra* note 3, app. A, at 1848. A client's only protection against prosecution interrogation of his or her attorney would be the Justice Department's compliance with internal, unenforceable rules. Stern & Hoffman, *supra* note 3, at 1799.

96. *In re* Shargel, 742 F.2d 61, 63 (2d Cir. 1984).

97. 8 J. WIGMORE, *supra* note 1, § 2304, at 586.

98. *See supra* notes 10–12 and accompanying text (discussing primary purpose of the attorney-client privilege); *see also* 8 J. WIGMORE, *supra* note 1, § 2291, at 545 ("apprehension of compelled disclosure [of client confidences] must be removed").

if an attorney must disclose every word the client speaks, the attorney can still give competent legal advice. The quality of legal advice does not necessarily depend on its confidentiality. Whether a client would visit an attorney to receive that advice in the first place, however, may depend on confidentiality.[99] As the Supreme Court recognized, a client who knows that the government could obtain damaging information from his or her lawyer may be unable to obtain effective, informed representation.[100] Moreover, when a client has little choice but to secure representation, such as in a murder charge or a multi-million dollar civil suit, the attorney-centered approach may encourage clients to shield information from their attorneys. Thus, this interpretation of the confidential communication doctrine discourages clients from obtaining fully-informed legal assistance and is repugnant to the goals of the attorney-client privilege.[101]

Under either the communication-centered approach or attorney-centered approach, courts may compel attorneys to incriminate their clients.[102] Judicial compulsion, however, may eliminate a client's assurance of receiving legal assistance. An attorney required to disclose incriminating information about a client has three options. First, the attorney can disclose the information. The client, understandably, may never trust the attorney again.[103] Second, the attorney can refuse to answer. The court may then hold the attorney in contempt and incarcerate the attorney.[104] Third, the attorney can withdraw from the case.[105] Ultimately, each of these options effectively denies the client the counsel of his or her choice and reduces the effectiveness of the attorney-client privilege.[106]

C. *The Courts Should Adopt Both the Confidential Communication Doctrine and the Legal Advice Doctrine*

In order to effectuate the goals of the attorney-client privilege in a predictable manner, courts should enact a dual doctrine based on a

99. *Shargel,* 742 F.2d at 63 ("we 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.").

100. Fisher v. United States, 425 U.S. 391, 403 (1976).

101. *Id. See* 8 J. WIGMORE, *supra* note 1, §§ 2290–91, at 543–49.

102. *See supra* notes 93 (communication-centered aproach allows disclosure even if client incriminated), 96 (attorney-centered approach focuses exclusively on attorney) and accompanying text.

103. Note, *Benefactor Defense Before The Grand Jury: The Legal Advice and Incrimination Theories of the Attorney-Client Privilege,* 6 CARDOZO L. REV. 537, 567–68 (1985).

104. FED. R. CRIM. P. 17(g); The Recalcitrant Witness Statute, 28 U.S.C. § 1826 (1984).

105. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1989).

106. *See* Note, *supra* note 103, at 567–68 (discussing consequences of attorney disclosure).

combination of both the legal advice doctrine and the confidential communication doctrine. This new doctrine would require an initial in camera defense showing that the dual rule applies to the client administrative information in question.[107] Before compelling disclosure, courts would require a prosecution showing either that the defense reasons for asserting the privilege are false or that the desired information is exempt from the privilege's protection.[108] If the defense puts forth a prima facie case for protecting the information, and the prosecutor cannot show falsity or fraud, then the privilege applies.

Moreover, courts should expressly include administrative information under the attorney-client privilege.[109] Many courts have already recognized that paying money or revealing an identity necessarily conveys information.[110] Unless courts extend protection to administrative information, potential clients will remain fearful of disclosure and will not seek legal assistance.[111]

The proposed doctrine implements the policies of the attorney-client privilege better than does the legal advice doctrine or the confidential communication doctrine standing alone. The proposal is an improvement on the status quo for three reasons. First, the proposal correctly interprets the *Baird* precedent. Second, the proposed policy is predictive. Third, the proposal effectuates the policies of the privilege without the unnecessary excesses of an absolute privilege that would shield all client administrative information.

1. The Proposed Doctrine Correctly Interprets Precedent

The proposed dual doctrine correctly interprets the Ninth Circuit's seminal *Baird* decision. The *Baird* court protected the clients' names not only because disclosure would reveal previous attorney-client communications,[112] but also because disclosure would incriminate the clients in the very situation for which they sought advice.[113] The proposed dual doctrine retains the *Baird* court's multi-faceted analysis

107. The Sixth Circuit implied a similar procedure in *In re* Grand Jury Investigation No. 83-2-35 (Durant), 723 F.2d 447, 452–53 (6th Cir. 1983).

108. *Id.*

109. The *Cherney* court ruled that incriminating information provided by the client as an integral part of obtaining legal assistance is a communication. *See supra* note 72.

110. *See* Rabin v. United States, 896 F.2d 1267, 1274 (11th Cir. 1990).

111. *In re* Cherney, 898 F.2d 565, 569 (7th Cir. 1990).

112. Baird v. Koerner, 279 F.2d 623, 633 (9th Cir. 1960) (disclosure would reveal confidential reason clients approached attorney).

113. *Id.* at 633 (when the IRS desired names only for their incriminating value, the court protected the names, stating the names may be the evidence necessary to convict the clients of a crime).

of the attorney-client privilege. Courts exclusively adopting either the legal advice doctrine or the confidential communication doctrine, on the other hand, apply only portions of *Baird* and ignore language that contradicts their positions.[114]

2. *The Proposal Is Predictive*

Working together, the confidential communication doctrine and the legal advice doctrine allow attorneys and clients to predict whether courts will shield particular exchanges. Each doctrine eliminates the ambiguities of the other. The legal advice doctrine avoids artificial and unclear characterizations of communications between attorneys and clients.[115] The confidential communication doctrine protects administrative information that is unrelated to the case at bar, but that reveals the substance of confidential communication.[116] This complementary coverage enables attorneys to foresee which communications the privilege protects.

The combined doctrine also eliminates the vagaries inherent in the confidential communication doctrine. Whether the information is an acknowledgment of guilt or mere evidence of an acknowledgement of guilt is irrelevant.[117] Under the combined doctrine, the attorney-client privilege shields all client-supplied incriminating information that relates to the case at bar.[118] This change benefits clients by allowing them to fully disclose information that may assist the growth of an attorney-client relationship but that is not directly related to the original controversy.

In exchanges unrelated to the case at bar, broadening the definition of communication to include administrative data allows attorneys to more accurately predict whether the attorney-client privilege applies. Thus, attorneys could assure clients that courts will protect any incriminating information provided as a necessary part of obtaining counsel.[119] For example, a relative could help pay for a defendant's legal fees without fear that the IRS, as part of a separate tax-evasion case, will force the attorney to disclose who paid the fees. This greater coverage and predictability encourages clients to seek legal assistance and to fully disclose their cases to their attorneys.

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114. *See* Note, *supra* note 103, at 557.

115. The legal advice doctrine focuses on whether disclosure is incriminating and does not attempt to categorize the communication. *See supra* notes 60–63 and accompanying text.

116. *See supra* notes 64–72 and accompanying text.

117. *See supra* notes 87–90 and accompanying text.

118. *See supra* notes 60–63 and accompanying text (discusses legal advice doctrine).

119. *In re* Cherney, 898 F.2d 565, 568 (7th Cir. 1990); *see supra* notes 72 & 109.

3. *The Combined Doctrine Successfully Balances Courts' Duties With Clients' Needs*

The proposed combined doctrine provides a balanced interpretation of the attorney-client privilege. Previous doctrines have been too restrictive, thereby failing to encourage clients to obtain counsel.[120] A blanket privilege protecting all administrative information, on the other hand, fails to further courts' duties to discover the truth. The proposal seeks a middle ground, effectively balancing courts' duties to discover and discern the truth with clients' needs to obtain representation.

Modern courts have unjustifiably restricted the attorney-client privilege through a strict interpretation of the *Baird* decision. This restrictive interpretation incorrectly implies that only guilty parties benefit from the attorney-client privilege.[121] The privilege, however, is more than just an exclusionary rule.[122] The attorney-client privilege is primarily a right to privacy in dealings with an attorney.[123] As such, the privilege stands as society's choice to have vigorous advocacy in an adversary system.[124]

A total privilege shielding all client administrative information, on the other hand, would unnecessarily hamper the judicial truth-finding function. As the Supreme Court has indicated, courts should not broadly construe privileges.[125] More narrow interpretations that provide for disclosure in the majority of instances help courts reach accurate findings and increase the public's confidence in the legal system.

Rather than interpreting the attorney-client privilege too narrowly or too broadly, the proposed dual doctrine balances individual needs and governmental duties. Because the defense has the original burden of production, a presumption remains in favor of disclosure.[126] If, however, defense attorneys can show that disclosing client administrative information incriminates their clients or reveals other confidential communications, courts will protect that information.[127] In the event

120. *See supra* notes 93–106 and accompanying text.

121. MCCORMICK, *supra* note 16, § 90, at 216. MCCORMICK asserts that *Baird* opened a "false trail" to the general rule that administrative information is not privileged. *Id.* MCCORMICK argues for a narrow interpretation of the privilege, stating that the cases dealing with administrative information have a "prevailing flavor of chicanery and sharp practice." *Id.*

122. Glanzer & Taskier, *supra* note 87, at 1074 (quoting Loiusell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today,* 31 TUL. L. REV. 101, 110–11 (1956))

123. *Id.*

124. *See In re* Cherney, 898 F.2d 565, 569 (7th Cir. 1990).

125. United States v. Nixon, 418 U.S. 683, 710 (1974).

126. *See supra* notes 107–08 and accompanying text.

127. *Id.*

that the defendant attempts to use the legal system for illegal purposes, prosecutors have the authority to pierce the attorney-client privilege.[128] Through this process, the proposal achieves an equitable balance between an unnecessarily narrow interpretation and an excessive blanket privilege for all administrative information.

III. CONCLUSION

Early commentators and courts examined the issue of client administrative information as it related to the greater goals and principles of the attorney-client privilege. Modern courts, however, have formulated exclusive doctrines to govern the release of client administrative information. None of these doctrines, taken alone, adequately addresses all of the considerations inherent in the attorney-client privilege. The legal advice doctrine allows prosecutors to force disclosure of client information not directly related to the case at bar. On the other hand, under the confidential communication doctrine, prosecutors can compel defense attorneys to disclose incriminating client information. Each doctrine inhibits the formation of open attorney-client relationships.

Rather than exclusively adopt one doctrine or the other, courts should widen their perspective and view the doctrines as complementary devices to analyze the attorney-client privilege. Under this dual proposal, courts can shield administrative information after a defense showing based on either doctrine. This broader perspective of client administrative information will allow courts more effectively to evaluate each case in light of the fundamental policies underlying the attorney-client privilege.

David B. Merchant

128. *See supra* note 27.