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Legal and Professional Ethics: Protection of Client Identity

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COMMENT

Legal and Professional Ethics: Protection of Client Identity

I. Introduction

For over a decade, many prosecutors have favored the practice of subpoenaing attorneys to testify before federal grand juries about their clients' communications.[1] More precisely, these prosecutors are requesting that the subpoenaed attorneys reveal the identity of a client so that the prosecutor can build a case against the client,[2] and while trial courts usually issue an order requiring attorneys to reveal their clients' identities, attorneys continually appeal these orders. The controversy lies in the question: "When should the attorney-client privilege protect a client's identity?"

Most of the subpoenaed attorneys claim the attorney-client privilege on behalf of their client, noting their professional and ethical obligation of confidentiality under their state's rules of professional responsibility. The attorneys believe that they have a duty to keep the client's identity confidential anytime disclosure of the information is contrary to their client's desires, especially if revealing the information could adversely affect the client. As a general rule, the attorney-client privilege does not extend to protect a client's identity.[3] However, courts recognize at least three specific exceptions to this rule: (1) the last-link exception, (2) the confidential-communication exception, and (3) the legal-advice exception. Additionally, courts may protect a client's identity on a case-by-case basis without citing a specific exception to the rule.[4]

Despite these general principles, many attorneys continue to appeal court orders requiring them to reveal their client's identity because of the inconsistency with which courts apply the exceptions to the general rule. Because the attorney-client privilege is the vehicle that encourages clients to truthfully and completely reveal information to their attorney, a consistent model is needed to ensure that attorneys can adequately

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1. *See In re* Grand Jury Subpoena, 204 F.3d 516 (4th Cir. 2000); *In re* Grand Jury Proceedings 88-9 (MIA), 899 F.2d 1039 (11th Cir. 1990); *In re* Grand Jury Proceedings (Pavlick), 680 F.2d 1026 (5th Cir. 1982); *In re* Burns, 536 N.E.2d 1206 (Ohio Ct. Com. Pl. 1988).

2. *See* cases cited *supra* note 1; *see also* Seymour Glanzer & Paul R. Taskier, *Attorneys Before the Grand Jury: Assertion of the Attorney-Client Privilege to Protect a Client's Identity*, 75 J. CRIM. L. & CRIMINOLOGY 1070 (1984).

3. *See In re* Grand Jury Subpoenas (Anderson), 906 F.2d 1485, 1488 (10th Cir. 1990) (stating that every circuit acknowledges that the identity of an attorney's client is generally not protected by the privilege); Baird v. Koerner, 279 F.2d 623, 632 (9th Cir. 1960) (recognizing that confidential communications between attorney and client are privileged, but noting that identity is a disclosure of fact in the litigation process); *see also* 8 JOHN HENRY WIGMORE, EVIDENCE § 2313, at 609 (McNaughton rev. ed. 1961).

4. *See* Colman v. Heidenreich, 381 N.E.2d 866 (Ind. 1978); *In re* Kozlov, 398 A.2d 882 (N.J. 1979).

represent their clients by protecting their clients' identities under appropriate circumstances.

Part II of this comment gives a brief overview of the history of the attorney-client privilege. Part III discusses cases that focus on protecting client identity, highlighting cases decided within each of the three recognized exceptions. It also discusses cases that protect a client's name on a case-by-case basis. It further discusses Rule 1.6 of the Model Rules of Professional Conduct, entitled Confidentiality of Information, and gives an analysis of several corresponding state bar association rules. Part IV suggests alternative methods of protecting a client's identity and emphasizes the problems courts have in applying the recognized exceptions to allow for protection of a client's identity. Part V discusses the implications of these general rules for Oklahoma and the Tenth Circuit.

II. History

A. Creation and Development of the Attorney-Client Privilege

The appearance of the attorney-client privilege dates back to the reign of Elizabeth I, where it appeared as an unquestioned privilege.[5] The privilege, known as the theory of the attorney's exemption, was objective and was based on "the oath and honor" of the attorney rather than the apprehensions of the client.[6] While the privilege did not extend to the client, the attorney could claim the privilege every time he was asked information concerning his client.[7]

However, by the early 1700s, in the search for judicial truth, a new theory developed.[8] This theory emphasized the client's need for such a privilege.[9] Courts began to believe that a client could only openly consult a legal adviser if the client could exercise the privilege of confidential communications.[10] It was this belief that led courts to recognize that the privilege should belong to the client and not to the attorney.[11] The original attorney-client privilege only protected communications received by the attorney from the beginning of the litigation at bar.[12] However, by 1870, the privilege covered any communication given to the attorney by the client in the consultation for legal advice.[13]

One of the first clearly stated arguments for the protection of attorney-client communications came in 1943, in *Annesley v. Earl of Anglesea*:[14]

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5. *See Burns*, 536 N.E.2d at 1208; 8 WIGMORE, *supra* note 3, § 2290, at 542.

6. 8 WIGMORE, *supra* note 3, § 2290, at 543.

7. *See id.* The attorney was acting under a pledge of secrecy, and his first duty was to keep the secrets of his client. *Id.*

8. *Id.*

9. *See id.*

10. *See id.*

11. *Id.*

12. *Id.* § 2290, at 544.

13. *See id.* Open communication developed slowly because the old theory of only extending the privilege to the attorney was not significantly challenged until 1801. *See id.*

14. 17 How. St. Tr. 1129 (Ex. 1743); *see* 8 WIGMORE, *supra* note 3, § 2291, at 545.

> 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 attornies [sic] 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 favour [sic] 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 said it to myself, and he is not to answer it.[15]

Courts today continue to follow the reasoning of *Annesley* as the policy justifications for the attorney-client privilege. Finally, while the modern attorney-client privilege belongs to the client, the attorney retains the ability to claim the privilege for the benefit of the client.

B. Principles Behind Protection of Communications — Civil and Criminal

1. Protection in Civil Cases

It has been suggested that the attorney-client privilege is not necessary because "the deterring of a guilty man from seeking legal advice is no harm to justice, while the innocent man has nothing to fear and therefore will not be deterred [from seeking legal advice]."[16] However, in most civil cases there is no bright-line rule to determine guilt or innocence.[17] It is rarely the case in civil litigation that one side is completely truthful and blameless while the other side has clearly acted unlawfully.[18] Seldom will a civil case arise in which *A* will have absolutely no fear of disclosure, while *B* will have all the fear and, thus, be hesitant to reveal any information.[19] If the attorney-client privilege did not extend to all clients in civil litigation, many clients would not consult an attorney because of something they did that they thought might have been wrong. This fear would exist even if the person had a strong foundation for a defense or a suit against someone else for the wrong committed against them. Alternatively, many clients would consult an attorney but only reveal beneficial facts. Because very few civil cases deal with clients who are either completely innocent or completely guilty, the individuals in the middle of the sliding scale of liability need the protection afforded by the attorney-client privilege.

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15. *Annesley*, 17 How. St. Tr. at 1225, *quoted in* 8 WIGMORE, *supra* note 3, § 2291, at 545-46.
16. 8 WIGMORE, *supra* note 3, § 2291, at 552.
17. *Id.*
18. *Id.*
19. *Id.* This is especially true in a civil case when some part or percentage of total liability may be placed on both parties.

These clients should be able to rely on the privilege when revealing truthful information to their attorney.

2. Protection in Criminal Cases

In the criminal context, it is unreasonable to believe that a lack of confidentiality would deter an individual who has committed a crime from seeking representation. The more probable result would be that the guilty party would still seek representation but would hide any self-incriminating details.[20] If the guilty party withheld vital information from his attorney, the justification for allowing the privilege would be lost, the defense counsel could not fulfill his obligations to defend his client and to serve and help protect society, because without full disclosure from the client, the attorney would lose the ability to exercise his full discretion in deciding both how to handle a criminal case and whether some information should be revealed to prevent future harm.

If the attorney-client privilege did not extend to criminal communications, society as a whole would suffer. For example, in several instances an attorney has discretion to reveal otherwise confidential information to prevent harm to individuals. However, if the general attorney-client privilege were limited, the client would likely never reveal an intent to commit a criminal act, and the attorney would not have the opportunity to prevent harm to society. This is especially important when the prospective harm could result in death or serious bodily injury.

C. Elements Used to Establish a Claim of Privilege

There are four elements that are necessary to allow an attorney to claim the attorney-client privilege for a client. First, the person asserting the privilege must be a client or intend to become one.[21] Second, the communication must be made to a member of the bar of a court who is acting in his professional capacity as a lawyer.[22] Third, the communication must relate to an issue for which the attorney was consulted by his client (or prospective client), without the presence of strangers and for the purpose of a legal opinion, legal service, or assistance with a legal issue, and not for purposes of committing a crime.[23] Finally, the client must claim the privilege and not waive it.[24]

A statement is not considered privileged, even if all the elements are present, if: (1) the professional communication is made in furtherance of any criminal purpose;[25] (2) a fact has been observed by the legal adviser in the course of employment, showing that a crime or fraud has been committed since the beginning of his employment, whether his attention was drawn to it by the client or otherwise;[26] (3)

20. *See id.* § 2291, at 552-53.

21. *Id.* § 2292, at 554.

22. *Id.*

23. *Id.*

24. *Id.*; *see also In re* Grand Jury Proceedings (Jones), 517 F.2d 666, 670-71 (5th Cir. 1975).

25. *See* JOHN FRELINGHUYSEN HAGEMAN, PRIVILEGED COMMUNICATIONS AS A BRANCH OF LEGAL EVIDENCE 15 (1983).

26. *Id.*

the statement relates to facts that the attorney discovered other than in his role as legal adviser;[27] or (4) the statement relates to testamentary communications in regard to a will after the testator has died.[28] If any of these situations are present, the privilege will not protect the client's identity, even if the case fits into one of the recognized exceptions.

III. Case Law

A. Case Opinions as to the Protection of Client Identity

1. General Rule

Generally, the attorney-client privilege does not protect a client's identity because the client's identity is not the underlying reason that the client sought legal advice.[29] Because the client's identity was not the subject of the communication between the attorney and client, it is understood to have been readily disclosed and, thus, not in need of protection.[30] For example, if a client seeks an attorney to advise him on his legal rights after the police arrest him for a crime; it is the protection of rights and the prevention of punishment that motivate the communication. The client probably readily disclosed his identity to the attorney in the initial consultation without intending his identity to remain private.

2. Recognized Exceptions

a) Last-Link Exception

Although a client's identity is generally not protected by the attorney-client privilege, the last-link exception can be used to protect a client's identity when revealing his identity would be the last piece of information necessary to link the individual to a crime. In *Baird v. Koener*,[31] an attorney advised several accountants who represented undisclosed taxpayers regarding the taxpayers' income tax.[32] The taxpayers did not want their identities revealed to the IRS.[33] The attorney advised

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27. *Id.*

28. *Id.*

29. *See* Vingelli v. United States, 992 F.2d 449, 453 (2d Cir. 1993) (indicating that a client's identity is only generally protected when the disclosure, in substance, would be a disclosure of the confidential communications between attorney and client); *In re* Grand Jury Proceedings 88-9 (MIA), 899 F.2d 1039, 1043 (11th Cir. 1990) (requiring disclosure of client identity because client did not seek legal advice anticipating that his name would be kept confidential); United States v. Garland, No. CIV. 191-CV-2267-ODE, 1992 WL 138116 (N.D. Ga. Apr. 9, 1992) (requiring law firm to disclose identities of clients who made cash payments to law firm in excess of $10,000).

30. *See In re* Grand Jury Subpoena, 204 F.3d 516, 520 (4th Cir. 2000). *But see In re* Burns, 536 N.E.2d 1206 (Ohio Ct. Com. Pl. 1988) (protecting the identity of a perpetrator of sex-related crimes where client sought advice as to whether to reveal his identity).

31. 279 F.2d 623 (9th Cir. 1960).

32. *Id.* at 626. In *Baird*, the accountants contacted the attorneys as agents of the taxpayers. The attorney never met with the taxpayers nor did he ever learn their names. *Id.*

33. *Id.*

the accountants to anonymously pay the taxes in order to protect the taxpayers in case they were criminally charged in the future.[34]

The accountants told the attorney that their clients owed the IRS $12,706.85 in back taxes and interest.[35] The attorney then sent a cashier's check for the amount to the District Director of Internal Revenue, with a letter stating that the cashier's check represented amounts due, for some past years, from one or more taxpayers, whose identity he did not know.[36] The letter also correctly informed the District Director that there was not a current investigation in progress by the IRS.[37]

The following year, a special agent for the IRS issued a summons requiring the attorney to identify all the parties on whose behalf the attorney sent the cashier's check.[38] The attorney refused to disclose any of the identities, claiming such information was a privileged communication.[39] At a hearing, the district court found the attorney guilty of civil contempt for refusing to identify the individuals.[40] The attorney was committed to custody until he complied with the order. However, a stay was granted to permit his appeal.[41] The Ninth Circuit Court of Appeals, after a thorough discussion of the privilege and the policy behind it, noted that a client's identity is seldom considered a matter communicated in confidence.[42] However, the court further reasoned:

> 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 . . . .[43]

In holding that the attorney was not required to disclose the identities,[44] the *Baird* court noted that the government could only use the clients' names for one purpose — to ascertain which taxpayers might have been delinquent and to check their tax records.[45] The court further noted that the voluntary nature of the payments indicated a belief that more taxes, interest, or penalties were due than the original amount submitted.[46] As such, revealing the taxpayers identities was "*the link that*

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34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 627.
39. *Id.* The attorney specifically declined to name the taxpayers on the ground that he did not know their names. Further, he declined to identify any of the taxpayers' agents on the ground that any information revealed by such individuals was revealed as a privileged communication. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 629.
43. *Id.* at 633 (alteration in original) (quoting 97 C.J.S. *Witnesses* § 283, at 803 (1957)).
44. *Id.* at 635.
45. *Id.* at 633.
46. *Id.* The court noted that it was the taxpayers' feelings of guilt that prompted them to consult an attorney, via their agent accountants, to determine what action should be taken. *Id.* Had the accountants

could form the chain of testimony necessary to convict an individual of a federal crime."[47]

Baird, although often cited as precedent, can be distinguished in several ways from most cases in which an attorney is subpoenaed to disclose his client's identity. First, in *Baird* there was not an investigation or litigation underway at the time the money was sent to the government. Second, if not for the action on the part of the taxpayers, the government might never have determined that the individuals owed back taxes. Third, the attorney in *Baird* claimed not to know the identities of his clients, because he acted on their behalf through their agents, the accountants, and never met any of the taxpayers in person.

In *In re Grand Jury Proceedings (Jones)*,[48] the Fifth Circuit altered the *Baird* exception. In *Jones*, the government subpoenaed several attorneys to appear before a federal grand jury investigating the possible narcotics and income tax violations of several individuals.[49] Each of the attorneys refused to identify clients who might have paid the legal fees of the individuals suspected of criminal activities.[50] The attorneys stated that their unidentified clients made communications to them in an atmosphere of confidentiality.[51] The *Jones* court noted, "[I]t is readily apparent the [attorneys] were called to testify before the grand jury for the purpose of incriminating their undisclosed clients as to privileged communications, perhaps to the point at which indictments could be returned against those clients."[52] *Jones* broadens the *Baird* exception by allowing an attorney to protect a client's identity if it may *substantially* link the client to an incriminating event or transaction, while the *Baird* last-link exception only allows protection of the client's identity if it is the *last* piece of information needed to link the client to the crime.

In broadening the *Baird* exception, the *Jones* court stated that "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.*"[53]

Several years later, in *In re Grand Jury Proceedings (Pavlick)*,[54] the Fifth Circuit narrowed the *Baird* exception. The court, misquoting the *Jones* rule, noted that it would recognize an exception "*when the disclosure of the client's identity by his attorney would have supplied the last link in an existing chain of incriminating*

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thought that the attorney would discover their clients' identities and then disclose those identities to the IRS, it is likely that the accountants would never have contacted the attorney. *Id.*

47. *Id.* (emphasis added).

48. 517 F.2d 666 (5th Cir. 1975).

49. *Id.* at 668.

50. *Id.*

51. *Id.* at 669.

52. *Id.* at 672-73.

53. *Id.* at 674 (emphasis added). The last-link exception is generally referenced as it appears in *Baird* and is less often supported by the "substantially link" language of *Jones*.

54. 680 F.2d 1026 (5th Cir. 1982).

evidence likely to lead to the client's indictment."[55] As courts continue to narrow and expand the original *Baird* last-link exception, it grows increasingly difficult for attorneys to conclude how a court will define the last-link exception in any given case.

b) Confidential-Communication Exception

The Ninth Circuit intertwined the last-link exception with the confidential-communication exception in *In re Subpoena to Testify Before Grand Jury (Alexiou).*[56] In *Alexiou*, an attorney deposited money in his law firm's bank account.[57] The deposit included a $100 counterfeit bill.[58] The Secret Service, investigating an ongoing counterfeit scheme, contacted the attorney and requested the name of the person who gave the attorney the counterfeit bill.[59]

The attorney stated, in a letter to the Assistant United States Attorney, that the client who gave him the $100 bill had retained him for services relating to several traffic violations and a misdemeanor assault charge.[60] The attorney further explained that while the client had made no disclosure as to the source of the money, the attorney could not disclose the identity of his client because the state bar association informed him that such disclosure would violate the attorney's duties under the rules of professional conduct.[61]

Refusing to protect the client's identity, the *Alexiou* court stated that to qualify for the protection of the attorney-client privilege, the client's identity must be "'in substance a disclosure of the confidential communication in the professional relationship between the client and the attorney.'"[62] The *Alexiou* court further explained that the exception might operate to protect a client's identity "if the disclosure were the last link in the chain of testimony necessary to convict the client."[63]

The court noted that the exception did not apply in the case at bar because the attorney was not representing the client on the counterfeiting matter.[64] The court also noted that the client's identity was not the last link in the chain necessary to indict the client, because the government still had to prove that the client used the counterfeit bill with knowledge that it was fake and with the intent to defraud.[65] The *Alexiou* court stated that many innocent people pass counterfeit bills without their knowledge, and it indicated that the client who paid the attorney might be such a

55. *Id.* at 1027 (emphasis added).
56. 39 F.3d 973 (9th Cir. 1994).
57. *Id.* at 974.
58. *Id.*
59. *Id.*
60. *Id.*
61. *See id.*
62. *Id.* at 976 (quoting *In re* Osterhoudt, 722 F.2d 591, 593 (9th Cir. 1983)).
63. *Id.*
64. *See id.*
65. *Id.* at 975.

person.[66] As such, the court found no reason to protect the client's identity from disclosure.[67]

In *Colton v. United States*,[68] the Second Circuit noted that the attorney-client privilege extends only to the substance of the matters communicated to the attorney in his professional capacity.[69] The court stated that an attorney must disclose a client's identity, even if the fact that the individual retained counsel may be used against the client.[70] Although the court did not adopt a version of the last-link exception, it did cite *Baird* when it noted that an exception should be made when there are "*circumstances under which the identification of a client may amount to the prejudicial disclosure of a confidential communication, as where the substance of a disclosure has already been revealed but not its source.*"[71]

In 1984, in *In re Shargel*,[72] the Second Circuit foreshadowed its future jurisprudence regarding the confidentiality of a client's identity. The court, in deciding not to expand the exception beyond the previously recognized confidential-communication exception, noted that a broad privilege against the disclosure of a client's identity would provide a shield for criminal acts.[73] In *Shargel*, a federal grand jury subpoenaed an attorney to produce records of any monies or property transferred to him by or on behalf of individuals who had been indicted for violating the Racketeering Influenced and Corrupt Organizations Act (RICO).[74] The government sought the information to use as evidence of "unexplained wealth," tax law violations, and payments of illegal fees by "benefactors."[75] The attorney argued that revealing the information requested would entail divulging communications that would indicate that his client had a criminal problem.[76] In the case, each client contacted the attorney shortly after the alleged events underlying the RICO indictment.[77]

The court noted that the attorney-client privilege encompasses only the communications made in confidence that are necessary to obtain legal advice.[78] The court stated that the attorney-client privilege historically arose at the same time as the privilege against self-incrimination.[79] The court emphasized that during the "point-

66. *Id.* at 976.
67. *Id.* at 977.
68. 306 F.2d 633 (2d Cir. 1962).
69. *Id.* at 637.
70. *Id.*
71. *Id.* (emphasis added). Although *Colton* states the general exception for a confidential communication, in *Vingelli v. United States*, 992 F.2d 449 (2d Cir. 1993), the court described *Colton* as an example of the substantial-disclosure exception. *Id.* at 453.
72. 742 F.2d 61 (2d Cir. 1984).
73. *See id.* at 64.
74. *Id.* at 62.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 63.
79. *Id.*

of-honor" period[80] of history the reluctance of an attorney to incriminate his client was never a valid reason to invoke the attorney-client privilege.[81]

The *Shargel* court also discussed several reasons not to protect a client's identity. The court viewed the disclosure of the client's identity in a different light from communications made by the client to explain a problem and seek legal advice.[82] The court noted that while some clients may avoid seeking legal advice for fear that their identity would not be protected, requiring an attorney to disclose his client's identity would not prevent the person from obtaining competent legal representation.[83] The court noted that not protecting a client's identity prevents individuals from hiding behind the shield of the attorney-client privilege once they have confessed to a crime and revealed their identity to the attorney.

Over ten years later, in *Vingelli v. United States*,[84] the Second Circuit limited the protection of the client's identity "to those circumstances where its disclosure would in substance be a disclosure of the confidential communication between the attorney and client."[85] In *Vingelli*, the court refused to protect the identity of a client who gave his attorney money to send to a second attorney to defend an individual on drug charges.[86] The court stated that revealing the client's name did not reveal his purpose for hiring the attorney.[87] The court reasoned that because clients may have several reasons for hiring attorneys, the client's fear of guilt by association did not show that revealing the information would be detrimental to the client.[88]

In *In re Grand Jury Subpoena*,[89] a community organization retained a law firm to help stop drug activity on certain property within the community.[90] The law firm sent two letters to the recorded property owner threatening litigation if the owner did not stop the drug activity occurring on the property.[91] In response, the firm received an unexpected letter from a previously uninvolved attorney.[92] The letter stated that the attorney's client was not the current owner of the property, but that the client would try to retitle the land in his name and deal with the drug activity problems.[93]

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80. *See supra* Part II.A and accompanying notes.

81. *Shargel*, 742 F.2d at 63.

82. *See id.* at 63-64. The court explained that while the attorney's affidavit to the court volunteered a connection between his six clients and the subsequent RICO proceedings, the connection could not have been inferred from a mere disclosure of the clients' identities and fee information. The court did suggest, however, that if any or all of the clients had met with the attorney as a group instead of having individual consultations, the inference would have been greater that their names were confidential communications. *See id.* at 64.

83. *See id.* at 63.

84. 992 F.2d 449 (2d Cir. 1993).

85. *Id.* at 453.

86. *Id.* at 451, 454.

87. *See id.* at 453

88. *Id.*

89. 204 F.3d 516 (4th Cir. 2000).

90. *Id.* at 518.

91. *Id.*

92. *Id.*

93. *Id.*

The government, in connection with an ongoing investigation of the activities on the property, subpoenaed the attorney, seeking the identity of his client involved with the potential acquisition of the property.[94] The attorney moved to quash the subpoena, arguing that disclosure of his client's identity would reveal his client's purposes for hiring the attorney and would, as a result, disclose confidential attorney-client communications.[95] The attorney further indicated that the client requested that the attorney not reveal the client's identity without first obtaining consent.[96]

The Fourth Circuit found that a client's identity is only privileged if its disclosure would reveal a confidential communication.[97] The court explained, however, that when a client authorizes disclosure, such communications are no longer confidential.[98] The court found that the client requested that the attorney send the letter to the law firm indicating the client's plans for the property in order to postpone litigation so that the client could complete his objectives.[99] The court further noted that, to the extent the letter indicated the client's motives or purposes in relation to the property, these communications ceased to be privileged once the attorney sent the letter at the client's request.[100] The court held that the client's identity was not protected under the confidential-communication exception because the client authorized the attorney to reveal his motives and purposes behind the confidential communication when he instructed the attorney to send the letter.[101]

c) Legal-Advice Exception

In *D'Alessio v. Gilberg*,[102] a New York court held that the client's identity constitutes a confidential communication, which is protected by the attorney-client privilege.[103] The court found that the identity was confidential because the disclosure would reveal the client's involvement in a previously committed crime, which was the reason he sought legal advice.[104]

In *D'Alessio*, a victim of a hit-and-run accident died of injures he sustained.[105] The administratrix of the decedent's estate learned that an individual who may have hit the deceased had contacted an attorney.[106] To obtain the name of the hit-and-run

94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 522.
98. *Id.*
99. *Id.*
100. *Id.* Here, the court noted that the attorney had, in part, been hired to convey information to a third party, rather than to provide legal advice to the client. *Id.* The court stated that "when a client hires an attorney to take public action[] on the client's behalf — [here by] sending [a] letter . . . in order to avoid a lawsuit — the [attorney-client] privilege does not extend to the client's identity once that . . . action [has] taken" place. *Id.*
101. *Id.* at 523.
102. 617 N.Y.S.2d 484 (N.Y. App. Div. 1994).
103. *Id.* at 486.
104. *Id.*
105. *Id.* at 484.
106. *Id.* at 485.

driver, the administratrix applied to the court for permission to depose the attorney.[107] The court ordered the attorney to appear at trial for examination of his client's identity.[108] The attorney appealed.[109]

Reversing the lower court's holding, the New York Supreme Court, Appellate Division, noted that while a client's identity is generally not protected, it may qualify as privileged information "'where disclosure might be inappropriate because inconsistent with the trust and duty assumed by an attorney.'"[110] The court noted that in the current case the client's identity was a confidential communication because his possible involvement in a crime was the reason he sought legal advice.[111]

The court concluded by acknowledging that allowing the attorney-client privilege in such situations may allow the guilty party to escape unpunished.[112] However, it stated, "'[This] is an evil . . . which is considered to be outweighed by the benefit which results to the administration of justice generally.'"[113] This conclusion stands in sharp contrast to the *Shargel* court, which opted against providing a shield to such a client.

The New York Supreme Court recognized the legal-advice exception in *Neugass v. Terminal Cab Corp.*[114] In *Neugass*, a passenger in a taxicab was injured when the cab collided with another cab.[115] At the time of the accident, the passenger did not obtain enough information to identify the second cab. However, the passenger later obtained an order from the court for the pre-trial examination of the defendant — the driver of the taxicab in which she was riding — for the purpose of filing a complaint against the second taxicab owner.[116] The order required the defendant's attorney to reveal the name and address of the owner of the second cab involved in the accident.[117] The attorney, hired by an insurance company to defend suits against its insured, claimed that the attorney-client privilege protected the requested information.[118] He claimed the privilege because the second cab owner, also a policyholder of the insurance company, had contacted the attorney about the policyholder's involvement in the accident.[119]

The injured passenger claimed that this disclosure was made to the attorney as an employee of the insurance company and not as a communication between the attorney and his client.[120] The court stated that the fact that the insurance company

107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* (quoting *In re* Jacqueline F., 397 N.E.2d 967, 971 (N.Y. 1979)).
111. *Id.* at 486.
112. *Id.*
113. *Id.* (quoting People *ex rel.* Vogelstein v. Warden of County Jail, 270 N.Y.S. 362, 367 (N.Y. Sup. Ct. 1934))
114. 249 N.Y.S. 631 (N.Y. Sup. Ct. 1931).
115. *Id.* at 631.
116. *Id.* at 631-32.
117. *Id.* at 632.
118. *Id.*
119. *Id.*
120. *Id.*

had hired the attorney was immaterial because the attorney clearly acted as counsel for the policyholder.[121] Further, the court noted that the second cab owner reported his involvement to the attorney in the attorney's professional capacity, thus fulfilling the elements necessary for the attorney-client relationship.[122]

In protecting the identity of the second cab owner, the court stated:

> All communications made by a client to his counsel, for the purpose of professional advice or assistance, are privileged, whether they relate to a suit pending or contemplated, or to any other matter proper for such advice or aid: And whenever the communication made, relates to a matter so connected with the employment as attorney or counsel as to afford presumption that it was the ground of the address by the client, then it is privileged from disclosure.[123]

The Washington Supreme Court recognized the legal-advice exception in *Dietz v. Doe*.[124] In *Dietz*, an individual died when his car collided with a dump truck that was trying to avoid hitting a second car.[125] The driver of the second car never went to the authorities; however, a local newspaper reported that an attorney acknowledged that the motorist had retained his services.[126]

In denying a motion to compel disclosure of the client's identity, the trial court stated that identifying the individual would implicate him in the accident.[127] On appeal, the Washington Court of Appeals stated that the evidence showed that the client's identity was a confidential communication given to the attorney for the purpose of keeping such identity secret from all other parties connected with the accident.[128] The Washington Supreme Court noted that Rule 1.6(a) of the Rules of Professional Conduct requires an attorney to keep the confidences and secrets of his client.[129]

Recognizing an exception to the general rule of nonprotection, the *Dietz* court defined the legal-advice exception as one "which bars disclosure 'where the person invoking the privilege can show that a strong probability exists that disclosure of such information would implicate the client in the very criminal activity for which the legal advice was sought.'"[130]

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121. *Id.*
122. *Id.*
123. *Id.* at 634 (citations omitted) (quoting Bacon v. Frisbie, 80 N.Y. 394, 399 (1880)).
124. 935 P.2d 611 (Wash. 1997).
125. *Id.* at 613.
126. *Id.*
127. *Id.* at 614.
128. Dietz v. Doe, 911 P.2d 1025, 1029 (Wash. Ct. App. 1996).
129. *Dietz*, 935 P.2d at 614 n.3.
130. *Id.* at 617 (quoting United States v. Hodge & Zweig, 548 F.2d 1347, 1353 (9th Cir. 1977)). In *Dietz*, the Washington Supreme Court found that the trial court lacked adequate factual basis to determine whether an attorney-client relationship existed and remanded the case to the trial court for determination of the issue. *Id.* at 619.

d) Special Cases for Protection of Client Identity

Several courts have addressed the issue of the protection of the client's identity without specific reliance on one of the three exceptions to the general rule, but instead have granted an exception to the general rule on a case-by-case basis. In *Miller v. Begley*,[131] an attorney received a call from a man who thought he had been involved in an accident.[132] The man did not remember what he hit or where the accident took place.[133] The attorney investigated the matter but did not locate any reports of a hit-and-run accident occurring during the suspected period.[134] During a conversation with another individual, the attorney discovered the accident in which his client had been involved.[135]

The injured party learned that the attorney might have information of another vehicle involved in the accident.[136] During a deposition, the attorney refused to identify the individual who contacted him regarding possible involvement in the accident.[137]

The *Miller* court, in denying the motion to compel the disclosure of the client's identity, did not indicate that it was recognizing a specific exception to the general nonprivileged information rule. However, the court's decision can be read to recognize all three exceptions. In addressing the facts in *Miller*, the court stated,

> The reason a client would go to an attorney instead of the law enforcement authority for this information would be to protect his identity. If the attorney reveals the identity of his client, he would expose the client to both civil and criminal liability, regardless of any defense he might proffer at trial.[138]

This statement acknowledges the protection of the client's identity if such disclosure might link the client to the crime. The court further stated, "[when] the client's identity becomes integrally involved in the matter about which he seeks the attorney's advice . . . the identity is covered by the privilege."[139] This language acknowledges the legal-advice exception. Finally, the last paragraph of the opinion arguably recognizes the confidential-communication exception. The *Miller* court reasoned that "[u]nder the facts of this case . . . this court is . . . of the opinion that the confidential revelation of the client's identity to [the attorney] was a privileged com-

131. 639 N.E.2d 139 (Ohio Ct. App. 1994).
132. *Id.* at 139.
133. *Id.*
134. *Id.*
135. *Id.* at 140.
136. *Id.* Passenger (the injured party) named both the owner and the operator of the motorcycle as defendants in the lawsuit. *Id.* at 139.
137. *Id.* at 140.
138. *Id.*
139. *Id.*

munication."[140] Therefore, an attorney in Ohio might use this case as support for recognition of any of the three discussed exceptions.

In *Colman v. Heidenreich*,[141] a male client revealed to his attorney that one of the client's female friends was the hit-and-run driver who had injured a long-distance runner. The runner was in the process of suing an innocent individual.[142] The attorney informed the prosecuting attorney in the criminal trial that the accused individual was not the guilty party.[143] In rejecting a request for the identity of the guilty party, the attorney refused to disclose the information, claiming that the hit-and-run driver was also his client.[144] The attorney asserted the attorney-client privilege when the court ordered him to reveal the identities of both his male client and his client's female friend.[145]

The trial court first addressed whether the "female friend" was indeed a client of the attorney.[146] The attorney testified that he had represented the man and the woman both individually and in joint situations but that the man often acted on behalf of the woman.[147] He further testified that although this issue was not the central topic of the consultation with his male client, the attorney did give his male client general legal advice regarding the hit-and-run accident.[148] Further questioning of the attorney revealed that the attorney never spoke directly with the woman regarding the matter.[149] The trial court ordered the attorney to reveal the names of both his male client and the client's female friend.[150] The court of appeals reversed the trial court's decision and ordered the trial court to invoke the attorney's previously requested protective order for both of the individuals' identities.[151]

The Supreme Court of Indiana, while recognizing the confidential-communications exception, devoted much of its opinion to determining whether the elements necessary to establish the attorney-client privilege were present. In holding that the attorney must reveal the woman's identity only,[152] the court noted: (1) the woman had not asked the attorney for advice or legal assistance in the matter; (2) the woman did not ask her male friend to seek legal assistance on her behalf; (3) the male client was not acting as an agent of the female client; (4) there was no "confidential relationship" between the female and the attorney regarding the matter; (5) the male client made the remarks as an aside to the main purpose of the meeting with the attorney; and (6) because this communication "could not reasonably be intended to further the purpose of the conversation," the name of the woman revealed during the

140. *Id.*
141. 381 N.E.2d 866 (Ind. 1978).
142. *Id.* at 868.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 869-71.
147. *Id.* at 869.
148. *Id.* at 870.
149. *Id.*
150. *Id.* at 868.
151. *Id.*
152. *Id.* at 872.

conversation was not privileged.[153] The court further stated that when a client makes remarks that do not further the purpose of the conversation at hand, these aside communications are not privileged.[154]

In *In re Kozlov*,[155] a client contacted his attorney regarding the client's duty to reveal his knowledge of information that would affect the validity of a recent criminal conviction and the integrity of the administration of justice.[156] The evidence supplied by the client would have shown that an individual was deprived of his Sixth Amendment right to a fair trial.[157] The client shared his knowledge with his attorney under the stipulation that the attorney not disclose his identity.[158] The *Kozlov* court, in protecting the client's identity, noted that the attorney-client privilege only covers a client's identity when the privilege outweighs the public's interest in the search for truth.[159] The court emphasized that whether the client's identity should be protected is based on a balancing test weighing the client's interests in privacy against the public's interest in ensuring justice.[160] The court concluded that when there is a legitimate need to discover information a client desires to keep shielded, the party requesting the shielded information must show "by a fair preponderance of the evidence, including all reasonable inferences, that . . . the information . . . [c]ould not be secured from any less intrusive source."[161]

B. Rules of Professional Conduct

1. Judicial Commentary

As noted in *Alexiou*, attorneys are hesitant to reveal their clients' identities in many cases because of their duties under the rules of professional responsibility. Courts deal with the issue of an attorney's duty under these rules in varying ways. In *In re Burns*,[162] a man who raped one woman and exposed himself to another contacted an attorney.[163] The attorney checked with the local police department to determine if either woman had reported the incident.[164] Later, a grand jury asked on whose behalf the attorney made the inquiry to the police departments.[165] The attorney stated, "I must refuse to answer the question because I was acting on behalf of a client . . . and my client is asserting the attorney-client privilege."[166] The court ruled

153. *Id.* at 871-72.

154. *Id.* at 872. *But see id.* at 872-73 (DeBruler, J., dissenting) (stating that because neither the client nor the attorney considered the information as a "voluntary aside" and because the attorney provided legal advice, such information should be deemed a confidential communication).

155. 398 A.2d 882 (N.J. 1979).

156. *Id.* at 883.

157. *Id.*

158. *Id.*

159. *Id.* at 886.

160. *Id.* at 887.

161. *Id.*

162. 536 N.E.2d 1206 (Ohio Ct. Com. Pl. 1988).

163. *Id.* at 1206.

164. *Id.*

165. *Id.*

166. *Id.*

that the attorney could not be compelled to reveal his client's identity because the identity was a confidential communication.[167]

The court devoted a great deal of the decision to the rules of professional conduct.[168] The *Burns* court noted that a lawyer must always be sensitive to the rights and wishes of his client and must act carefully when making decisions that involve disclosing information obtained in his professional capacity.[169] The court further noted that "'[i]t is for the lawyer in his professional judgment to separate the relevant and important from the irrelevant and unimportant.'"[170]

The *Burns* court also indicated that portions of the Ohio Code of Professional Responsibility are mandatory, while other parts are aspirational in character and represent goals toward which "*every member of the profession should strive.*"[171] The court reasoned that because defense counsel should not be required to choose between violating his duty to his client and avoiding punishment for contempt, a trial court must take care to enforce ethical considerations in matters before it.[172] The policy behind these ethical considerations is to "'encourage[] laymen to seek early legal assistance.'"[173]

However, the Colorado Court of Appeals took a slightly different view in *People v. Salazar*.[174] In *Salazar*, a public defender withdrew from a case after receiving evidence that incriminated another client in the crime.[175] The public defender refused to give the incriminating evidence to his former client's new attorney, and the court ordered the public defender to disclose the nature of the information to the court in camera.[176] On appeal, the attorney contended that even private disclosure of the client's information would violate the attorney-client privilege.[177]

The *Salazar* court noted that when the policies underlying the attorney-client privilege conflict with other prevailing public policies, the attorney-client privilege must give way.[178] The attorney claimed that because the rule[179] was discretionary he had the option of deciding whether to reveal the information.[180] The court disagreed and stated that a discretionary interpretation would make a court order

167. *Id.* at 1209.
168. *Id.* at 1209-11.
169. *Id.* at 1209.
170. *Id.* (quoting MODEL CODE OF PROF'L RESPONSIBILITY EC 4-1 (1980)).
171. *Id.* at 1210 (emphasis added).
172. *Id.*
173. *Id.* at 1211 (quoting MODEL CODE OF PROF'L RESPONSIBILITY EC 4-1 (1980)).
174. 835 P.2d 592 (Colo. Ct. App. 1992).
175. *Id.* at 593.
176. *Id.*
177. *Id.*
178. *Id.* at 594.
179. *Id.* at 595 (citing MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(2) (1980), which states that "[a] lawyer may reveal . . . confidences or secrets when permitted under Disciplinary Rules or required by law or court order").
180. *Id.*

meaningless.[181] The court concluded that an attorney must disclose information in camera if ordered.[182]

2. Rule 1.6 of the Model Rules of Professional Conduct

Model Rule of Professional Conduct 1.6, entitled Confidentiality of Information, reads:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
>
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based on conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.[183]

The model rule seems to be straightforward and clear at first glance. So why are there so many cases in which one attorney seeks to obtain protected information from another? Further, why are so many attorneys held in contempt by lower courts for refusing to reveal such information? Perhaps part of the answer lies in the comments to Rule 1.6.

As noted in *Burns*, a lawyer has an ethical obligation to protect the confidential information of his client.[184] Comment 2 to Rule 1.6 states that this ethical obligation serves two purposes: (1) to ensure full development of the facts essential to proper representation and (2) to encourage people to seek early legal assistance.[185] Obviously, fewer people would take the opportunity to seek legal representation if they knew that their attorney could disclose confidential information.

Other than the mandatory requirement in part (a) stating that a lawyer *"shall* not disclose" certain information, Rule 1.6 allows broad discretion on the part of the attorney to decide when to reveal information. The discretion whether to reveal information includes the discretion to reveal the possible intent of the client to commit a crime, where the commission of such crime would likely result in the

181. *Id.*
182. *Id.*
183. MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983).
184. *See supra* text accompanying notes 162-73.
185. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (1983).

imminent death of another.[186] The comments suggest that because most clients follow the advice of their attorney, the law is usually upheld.[187]

The problem seems to arise from Comment 19 to Model Rule 1.6, which mandates that attorneys comply with the final orders of a court or other tribunal of competent jurisdiction.[188] Comment 19 seems to trump the general language and purpose behind the rule.

3. State Versions of the Confidentiality Rule

While most states have adopted some form of the Model Rules of Professional Conduct,[189] only five states have adopted Rule 1.6 verbatim.[190] Many of the changes made to Rule 1.6 indicate that the state bar associations have slightly different opinions as to how broad a lawyer's discretion should be in keeping information confidential. The state bar associations of Connecticut, Florida, Hawaii, Illinois, New Jersey, Virginia, and Arizona have adopted versions of the rule that indicate that an attorney should not have the broad discretion allowed in the model rule.[191]

These states require attorneys to reveal information that is generally revealable at the attorney's discretion. Five of these states mandate that the lawyer reveal the information he reasonably believes is necessary to prevent the client from committing a crime that might result in death or substantial bodily harm.[192] The Hawaii Code of Professional Responsibility requires an attorney to reveal information that establishes that the lawyer's services were used in the furtherance of a criminal or fraudulent act.[193] The New Jersey and Hawaii rules mandate that attorneys reveal the information necessary to rectify the consequences of a criminal or fraudulent act where substantial injury occurred to the financial interests or property of another.[194] The New Jersey Bar Association is the only bar to require specifically that information be revealed to prevent the client from committing a criminal, illegal, or fraudulent act that is likely to perpetrate a fraud on the tribunal.[195] Both Florida and

186. *Id.* at 1.6(b)(1).

187. *Id.* at 1.6 cmt. 3.

188. *Id.* at 1.6 cmt. 19.

189. *See* ABA/BNA MANUAL ON PROF'L CONDUCT 01:3 (1998) (State Ethics Rules). *But see* VA. RULES OF PROF'L CONDUCT (2000).

190. *See* ALA. RULES OF PROF'L CONDUCT R. 1.6 (1996); DEL. LAWYER'S RULES OF PROF'L CONDUCT R. 1.6 (2002); LA. RULES OF PROF'L CONDUCT R. 1.6 (2000); MO. RULES OF PROF'L CONDUCT R. 1.6 (2001); MONT. RULES OF PROF'L CONDUCT R. 1.6 (2001).

191. *See* ARIZ. RULES OF PROF'L CONDUCT R. 1.6 (1998); CONN. RULES OF PROF'L CONDUCT R. 1.6 (2001); FLA. RULES OF PROF'L CONDUCT R. 4-1.6 (1996); HAW. RULES OF PROF'L CONDUCT R. 1.6 (1994); ILL. RULES OF PROF'L CONDUCT R. 1.6 (1993); N.J. RULES OF PROF'L CONDUCT R. 1.6 (1996); VA. RULES OF PROF'L CONDUCT R. 1.6 (2001).

192. *See* CONN. RULES OF PROF'L CONDUCT R. 1.6(b) (2001); FLA. RULES OF PROF'L CONDUCT R. 4-1.6(b) (1998); HAW. RULES OF PROF'L CONDUCT R. 1.6(b) (1994); ILL. RULES OF PROF'L CONDUCT R. 1.6(b) (1993); N.J. RULES OF PROF'L CONDUCT R. 1.6(b) (1994).

193. *See* HAW. RULES OF PROF'L CONDUCT R. 1.6(b) (1994).

194. *See id.*; N.J. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (1994).

195. *See* N.J. RULES OF PROF'L CONDUCT R. 1.6(b)(2) (1994).

Virginia go one step further and require attorneys to reveal any information reasonably believed necessary to prevent a client from committing any crime.[196] Oklahoma is the only state in which the professional responsibility code specifically states that an attorney is required to reveal information when ordered by a court.[197]

The states that require a lawyer to reveal information limit an attorney's ability to weigh the confidential information of his clients and to protect the client in necessary situations. However, several states give attorneys more flexibility in their discretion to reveal information communicated in confidence. Arkansas, Colorado, Idaho, Indiana, Kansas, Michigan, Mississippi, North Dakota, Oklahoma, South Carolina, Texas, Washington, West Virginia, and Wyoming allow an attorney to reveal his client's intention to commit a crime even if there is no possibility of imminent death, physical harm, or financial injury.[198]

While the state versions of Rule 1.6 may explain certain judicial decisions, many attorneys continue to appeal their state court's rulings to disclose information that the attorney considers privileged. At least one state that has adopted Model Rule 1.6 has modified their version to specifically address this issue.[199] However, this may not end the controversy. Thirteen states have specifically addressed revealing information under court order.[200] In general, these states have added language to their rules indicating that any attorney has the ability to reveal information relating to the representation of his client to the extent the lawyer reasonably believes necessary to comply with law or other court order.[201] Why not simply make this a mandatory part of the rules? Possibly, it is because the state bar associations take the position that an attorney has the advantage of possessing the information and may need to make a judgment call as to whether to reveal the client's identity.

This subjective standard may well be the reason that trial court orders to reveal a client's identity are not readily followed by some attorneys. The individual lawyer

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196. *See* FLA. RULES OF PROF'L CONDUCT R. 4-1.6(b)(1) (1994); VA. RULES OF PROF'L CONDUCT R. 1.6 (2001).

197. *See* OKLA. RULES OF PROF'L CONDUCT R. 1.6 (2001).

198. *See* ARK. MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2001); COLO. RULES OF PROF'L CONDUCT R. 1.6(b) (2001); IDAHO RULES OF PROF'L CONDUCT R. 1.6(b) (2001); IND. RULES OF PROF'L CONDUCT R. 1.6(b) (1996); KAN. MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2001); MICH. RULES OF PROF'L CONDUCT R. 1.6(b) (2002); MISS. RULES OF PROF'L CONDUCT R. 1.6(b) (1999); N.D. RULES OF PROF'L CONDUCT R. 1.6(a), (d) (2001); OKLA. RULES OF PROF'L CONDUCT R. 1.6(b) (2001); S.C. RULES OF PROF'L CONDUCT R. 1.6(b) (1997); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.05 (1998); WASH. RULES OF PROF'L CONDUCT R. 1.6(b) (2000); W. VA. RULES OF PROF'L CONDUCT R. 1.6(b) (2000); WYO. RULES OF PROF'L CONDUCT R. 1.6(b) (2001).

199. *See* FLA. RULES OF PROF'L RESPONSIBILITY R. 4-1.6(d) (1998).

200. *See* HAW. RULES OF PROF'L CONDUCT R. 1.6 (1994); KAN. MODEL RULES OF PROF'L CONDUCT R. 1.6(c)(6) (2001); KY. RULES OF PROF'L CONDUCT R. 1.6(b)(3) (2001); MD. RULES OF PROF'L CONDUCT R. 1.6(b)(4) (2002); MASS. RULES OF PROF'L CONDUCT (1998); MICH. RULES OF PROF'L CONDUCT R. 1.6(c)(2) (2002); MINN. RULES OF PROF'L CONDUCT R. 1.6(b)(2) (1993); MISS. RULES OF PROF'L CONDUCT R. 1.6(c) (1999); N.J. RULES OF PROF'L CONDUCT R. 1.6(c)(3) (1994); N.D. RULES OF PROF'L CONDUCT R. 1.6(g) (2001); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.05(c)(4) (1998); UTAH RULES OF PROF'L CONDUCT R. 1.6(b)(4) (1999); VA. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2001).

201. *See* sources cited *supra* note 200.

may not believe that it is necessary to reveal his client's identity or may believe that disclosure would be harmful to the client. The philosophy behind the attorney-client privilege is to enable the attorney to have access to all relevant facts; the attorney is in the best position to determine whether or not the client's identity needs protection. If the lawyer indeed has all relevant information, he has the ability to determine whether the client's identity could be determined in another manner, by another source, or whether the client's identity is even necessary to ensure justice.

Florida makes the decision of whether to reveal a client's identity less burdensome on its attorneys. Florida's rule on confidentiality of information provides: "When required by a tribunal to reveal such [confidential] information, a lawyer may first exhaust all appellate remedies."[202] This approach allows attorneys the full opportunity to argue for protecting information before revealing it to the court.

4. States Not Adopting the Model Rules

Only nine states have not adopted the current version of the model rules.[203] These states have adopted a code of professional responsibility based on canons of ethics or another older version of the ABA rules. These codes are divided into three parts: (1) canons, (2) ethical considerations, and (3) disciplinary rules.[204] The canons are statements of norms that express the standard of professional conduct expected of lawyers in their relationships with the public, the legal system, and the legal profession.[205] Ethical considerations are guidelines that all attorneys should strive to follow.[206] The disciplinary rules state a minimum level of conduct below which an attorney may be subject to disciplinary action.[207]

Under the canon that "A Lawyer Should Preserve the Confidences and Secrets of a Client,"[208] the ethical considerations denote the prevailing policies for protection of the client information. These ethical considerations provide guidance and insight as to why the disciplinary rules are stated as they are. In this sense, they are much like the commentary section of the rules of the states adopting a version of the ABA model rules.

One of the main differences between the disciplinary rules and the model rules under the older Model Code is that the former protects the "confidences and secrets" of the client[209] while the latter protects "information relating to the representation" of the client.[210] In general, the disciplinary rule most similar to Model Rule 1.6 is

202. *See* FLA. RULES OF PROF'L RESPONSIBILITY R. 4-1.6(d) (1998).

203. *See* CAL. RULES OF PROF'L CONDUCT (2001); GA. CODE OF PROF'L RESPONSIBILITY (2001); IOWA CODE OF PROF'L RESPONSIBILITY (2002); NEB. CODE OF PROF'L RESPONSIBILITY (2002); N.Y. CODE OF PROF'L RESPONSIBILITY (2001); OHIO CODE OF PROF'L RESPONSIBILITY (2002); OR. CODE OF PROF'L RESPONSIBILITY (2001); TENN. CODE OF PROF'L RESPONSIBILITY (2001); VT. CODE OF PROF'L RESPONSIBILITY (2001).

204. *See, e.g.*, IOWA RULES OF PROF'L CONDUCT (2002).

205. *See* sources cited *supra* note 203.

206. *See* sources cited *supra* note 203.

207. *See* sources cited *supra* note 203.

208. *See* sources cited *supra* note 203.

209. *See* sources cited *supra* note 203.

210. MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983).

Rule 4-101, entitled Preservation of Confidences and Secrets of a Client, which reads:

> (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be likely to be detrimental to the client.
>
> (B) Except where permitted under DR 4-101(C), a lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client.
>
> (2) Use a confidence or secret of his client to the disadvantage of the client.
>
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.
>
> (C) A lawyer may reveal:
>
> (1) Confidences or secrets with consent of the client or clients affected, but only after a full disclosure to them.
>
> (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
>
> (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
>
> (4) Confidences and secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.
>
> (D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.[211]

Although the disciplinary rules allow for disclosure upon consent, court order, prevention of a crime, or collection of fees, they do mandate that the secrets of a client not be revealed. This restriction addresses a concern of many attorneys, especially those in a model state. Under Disciplinary Rule 4-101, an attorney is not required to reveal his client's secrets. Thus, if a client had a reason to protect his identity, then it would be secret and confidentially protected by the attorney. However, the privilege does not protect all secrets.

211. MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (1980).

IV. Alternative Ways to Decide Whether the Client's Identity Should Be Protected

A. Problems with the Recognized Exceptions

The attorney-client privilege encourages a client to fully disclose all information to his attorney. Because an attorney must be able to tell his client, with a reasonable degree of certainty, which information will be confidential under the attorney-client privilege, a test to determine when the privilege will attach must be very clear.[212] A major problem with the standards and exceptions currently used by courts is the confusion in application.

While *Baird v. Koerner* is often cited as precedent, there is a problem with citing *Baird*, especially if it is a case of first impression in a jurisdiction. Courts have used *Baird* to represent both the last-link and the confidential-communications exceptions. In *Baird*, the court stated that a client's identity should be protected when "it may . . . be the link that could form the chain of testimony necessary to convict an individual of a federal crime."[213] However, in *In re Grand Jury Proceedings 88-9 (MIA)*,[214] the Eleventh Circuit qualified the *Baird* rule by stating:

> [T]he last-link doctrine extends the protection of the attorney-client privilege to nonprivileged information — the identity of the client — when 'disclosure of that identity would disclose *other*, privileged communications . . . and when the incriminating nature of the privileged communications has created in the client a reasonable expectation that the information would be kept confidential.'[215]

After this qualification, the court applied the confidential-communication standard when it stated that "the client did not seek [the attorney's] legal advice reasonably anticipating that his name would be kept confidential."[216] The court then seemed to completely abandon the last-link exception when, in requiring disclosure of the client's identity, it stated that "[d]isclosure of the client's identity also will link the client to the unidentified third party who arranged for the payment of attorney's fees."[217] The attorney argued that disclosing his client's identity would provide the last link necessary to indict his client because it would reveal his client's relationship with the target of the government's money laundering investigation.[218] The court

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212. Ruth Lautt, *Does the Attorney Client Privilege Extend to Client Identity and Fee Arrangements?*, 1991 ANN. SURV. AM. L. 1047, 1069-70.

213. Baird v. Koerner, 279 F.2d 623, 633 (9th Cir. 1960).

214. 899 F.2d 1039 (11th Cir. 1990).

215. *Id.* at 1043 (quoting *In re* Grand Jury Proceedings (Rabin), 896 F.2d 1267, 1273 (11th Cir. 1990)).

216. *Id.*

217. *Id.* at 1043-44.

218. *Id.* at 1044.

contended, however, that disclosure of the client's identity would reveal nothing more than a name, which was not protected by the attorney-client privilege.[219]

In *In re Osterhoudt*,[220] the court read the exception in *Baird* to say that "the identification of the client [is] not within the privilege when the identification 'conveys information which ordinarily would be conceded to be part of the usual privileged communication between attorney and client.'"[221] However, the court then denied protection of the client's identity because it was not included in the substance of the confidential communications.[222] In *Osterhoudt*, the client intervened to argue that the requirements of the privilege are met whenever disclosure would provide the information necessary to implicate the client in a criminal offense that was the topic of the attorney's legal advice (i.e. last-link exception).[223] The court said, "That is not the law."[224]

Neither the last-link nor the confidential-communication exception promotes the underlying policy of the attorney-client privilege. As noted in an article promoting the extension of the privilege:

> An attorney could not credibly tell a client in an initial consultation, the time when the client normally reveals his identity and sets fee arrangements, that she can only avoid revealing that information if, in the future, it is the "last link" in a chain of inculpatory information leading to the client's prosecution. Nor can the attorney predict during initial consultation, whether revealing the client's name . . . will also reveal other, confidential information.[225]

Clients will be reluctant to seek early legal assistance if they are unsure as to how the attorney-client privilege will apply in their case.

B. Possible Protection Through the Fifth Amendment

The Fifth Amendment privilege against self-incrimination is well recognized as a personal privilege.[226] The rule that no man should be required to incriminate himself has substantial bearing on the attorney-client privilege. The Supreme Court addressed this issue in *Fisher v. United States*.[227] In *Fisher*, the Court reasoned 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.'"[228] The question is whether the attorney-client privilege protects confidential communications

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219. *Id.*
220. 722 F.2d 591 (9th Cir. 1983).
221. *Id.* at 593 (quoting Baird v. Koerner, 279 F.2d 623, 632 (9th Cir. 1960)).
222. *Id.* at 594.
223. *Id.* at 593.
224. *Id.*
225. Lautt, *supra* note 212, at 1072.
226. Fisher v. United States, 425 U.S. 391, 398 (1976).
227. *Id.*
228. *Id.* at 404 (quoting 8 WIGMORE, *supra* note 3, § 2307, at 592).

in which the client would not have to answer under his Fifth Amendment privilege. It seems that where the client can refuse to answer by claiming privilege from self-incrimination, the attorney should be able to claim a Fifth Amendment privilege through the attorney-client relationship. Additionally, the last-link exception gives some indication that this view might be acceptable because the exception would protect the client's identity if it would incriminate the client.

C. Client's Intent

Another alternative to using the traditional exceptions is to develop a test to determine whether the client intended his identity to be kept confidential. Such a test should be designed to avoid the misapplication of the exceptions. A set of factors could be developed to determine whether, on the facts of the case, it was clear that the client intended for his identity to be secret. Factors may include (1) statements made by the client; (2) circumstances under which legal advice was sought; (3) whether an attorney-client relationship existed; and (4) whether the client's intentions to keep his identity protected qualifies as a protected communication. Courts could then decide whether these factors should stand on their own or whether they should be weighed against the public interest, which would be served if the name were revealed.

D. Attorney Deference

Another possibility is to give greater deference to the attorney's professional judgment as to whether revealing his client's identity would harm the client or whether the client expected protection of his identity. When a decision in a case is appealed, the abundance of facts and relevant information dwindle. Consequently, much of the relevant information that the client reveals to the attorney is unavailable for appellate review. Given the freedom that most clients feel to share openly with their attorney, the attorney is in the best position to determine whether the client's identity should be disclosed. This is the prevailing view among the state bar associations as seen in the broad discretion available under the state rules of professional conduct.

V. Specific Implication for Oklahoma

A. The Rule in Oklahoma

Oklahoma has made several alterations in its version of the model rules. Oklahoma's Rule 1.6, entitled Confidentiality of Information, reads:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
>
> (b) A lawyer may reveal, to the extent the lawyer reasonably believes necessary, information relating to the representation of a client:
>
> (1) to disclose the intention of the client to commit a crime and the information necessary to prevent the crime;

> (2) to rectify the consequences of what the lawyer knows to be a client's criminal or fraudulent act in the commission of which the lawyer's services had been used, provided that the lawyer has first made reasonable efforts to contact the client but has been unable to do so, or that the lawyer has contacted and called upon the client to rectify such criminal or fraudulent act but the client has refused or is unable to do so;
>
> (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation or the client;
>
> (4) or as otherwise permitted under these Rules.
>
> (c) A lawyer shall reveal such information when required by law or court order.[229]

The Oklahoma version of Rule 1.6 differs from the model rule in several respects. First, the Oklahoma version gives the attorney the ability to reveal the intent of his client to commit a crime and the information necessary to prevent its occurrence.[230] Under the model rule, an attorney can only reveal such information that the lawyer believes is reasonably necessary to prevent his client from committing a criminal act that is likely to result in imminent death or substantial bodily harm.[231] Oklahoma's rule allows attorneys to intercept and prevent more crimes than does the model rule. Additionally, attorneys in Oklahoma can do so without violating their professional obligation to their client.

Second, a lawyer in Oklahoma can reveal information necessary to rectify consequences of his client's criminal or fraudulent acts if the attorney's services were used, provided that the attorney gives his client the opportunity to first rectify the situation.[232] This modification allows the attorney to correct the situations in which his services were used against society without his knowledge. Additionally, it is probable that fewer criminals will purposefully and wrongfully use the information acquired from their attorneys if they are aware that the attorney has the ability to disclose the information.

Finally, Oklahoma's rule provides that attorneys must reveal information when required by law or court order.[233] This last modification sheds light on why Oklahoma and the Tenth Circuit are not overflowing with attorneys claiming that the attorney-client privilege extends to their clients' identities.

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229. OKLA. RULES OF PROF'L CONDUCT R. 1.6 (2001).
230. *Id.*
231. MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983).
232. OKLA. RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2001).
233. *Id.* at 1.6(c).

B. Implications from Case Law

In 1990, the Tenth Circuit decided *In re Grand Jury Subpoenas (Anderson)*,[234] a case on appeal from the Northern District of Oklahoma. While *Anderson* dealt with the issue of protecting the identity of individuals who paid several attorneys' legal fees, it provides insight as to how Oklahoma courts and the Tenth Circuit might decide the issue of protection of a client's identity.

In *Anderson*, the trial court held the attorneys in contempt and placed them in jail because they refused to reveal the source of payment of legal fees incurred while representing clients on drug charges.[235] The attorneys claimed that the attorney-client privilege covered the information requested, even though the attorneys did not claim that the individuals paying their fees were clients.[236]

The court addressed the issue of the attorney-client privilege and the recognized exceptions in other jurisdictions.[237] The Tenth Circuit noted three exceptions to the general rule that the identity of a client and the source of payment for legal fees are not included in the attorney-client privilege.[238]

The court first noted a legal-advice exception, which protects client identity and fee information "where there is a strong probability that disclosure would implicate the client in the very criminal activity for which legal advice was sought."[239] While recognizing this exception, the *Anderson* court did not decide whether to adopt the exception because it did not apply to the case at bar.[240] The court stated that this exception did not apply because the attorneys did not claim that the individuals paying their fees were clients.[241]

The court next recognized the last-link exception.[242] The Tenth Circuit noted that the *Jones* court, in relying on *Baird*, developed a new form of the last-link exception, which was later refined in *Pavlick*.[243] The *Anderson* court stated that it believed the confidential-communication exception represents a more "disciplined interpretation" of *Baird* than does the last-link interpretation.[244] The court stated that it rejected the last-link exception where it departs from the holding in *Baird*.[245] The *Anderson* court did adopt the confidential-communication exception.[246] It held that "an exception to the general rule that a client's identity is not privileged exists in the

234. 906 F.2d 1485 (10th Cir. 1990).
235. *Id.* at 1487.
236. *Id.* at 1487, 1489.
237. *Id.* at 1488.
238. *Id.*
239. *Id.* The legal-advice exception is used interchangeably with the substantial-disclosure exception.
240. *Id.*
241. *Id.* at 1488-89.
242. *Id.* at 1489.
243. *Id.*
244. *Id.* at 1492.
245. *Id.*
246. *Id.* at 1491.

situation where the disclosure of the client's identity would be tantamount to disclosing an otherwise protected confidential communication."[247]

In *Anderson*, the attorneys also argued that the government must attempt to secure the information from alternative sources before issuing attorney subpoenas.[248] The court did not address this issue; instead, it relied on two previously decided cases to find that the government must show a proper purpose and relevance to a grand jury investigation before subpoenaing attorneys.[249]

Additionally, the court noted that it was not an abuse of discretion for the trial court to impose a maximum sentence for contempt when the attorneys refused to comply with the court order.[250] The court indicated that confinement in a contempt case is used to coerce testimony.[251] The court gave the attorneys the opportunity to comply with the court order, and they refused.[252] This case sheds light on the possible interpretation by Oklahoma courts. It is conceivable from *Anderson* that if confronted with the issue of protection of client identity in the future, an Oklahoma court relying on this Tenth Circuit case would at least recognize the confidential-communication exception.

In viewing Oklahoma's version of the model rules, it appears unquestioned that an attorney is required by Rule 1.6(c) to reveal his client's identity when ordered to do so by a court. It further appears that his only salvation on appeal may be to establish a confidential-communication exception to the rule. Additionally, the legal-advice exception may work if the attorney asserts that the information sought to be protected is that of a client. However, because the Tenth Circuit did not address the issue of whether it would adopt the legal-advice exception, uncertainty exists as to whether the client's identity would be protected under this exception in Oklahoma.

The possibility of protecting the client's identity through the Fifth Amendment's self-incrimination clause is unlikely in Oklahoma because the Tenth Circuit has rejected the part of the last-link doctrine in its application to the incrimination of a client. As such, it is doubtful that an Oklahoma court would hold that an attorney could claim the self-incrimination privilege on behalf of his client in the same way that he can currently claim the attorney-client privilege on his client's behalf. Practitioners should note that the decision in *Anderson* may set precedent for decisions regarding the disclosure of a client's identity. It appears that there will be very few circumstances in Oklahoma where a court will allow the protection of the client's identity. A court may require that the client specifically tell the attorney that he does not want his identity revealed. Such a statement may indicate that the client considers his identity part of the confidential communication he is revealing to his attorney.

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247. *Id.*

248. *Id.* at 1495.

249. *Id.* (citing *In re* Grand Jury Subpoena Duces Tecum (Dorokee), 697 F.2d 277 (10th Cir. 1983), and *In re* Grand Jury Proceedings (Schofield), 486 F.2d 85 (3d Cir. 1973)).

250. *Id.* at 1499.

251. *Id.* (citing 28 U.S.C. § 1826 (1982)).

252. *Id.*

However, even in this situation, a court may require the attorney to disclose his client's identity. The attorney must convince the court that the identity is at the core of the confidential information sought, and that, with its disclosure, the substance of the communication with the client would also be disclosed. Even if the attorney successfully presents his view to the court, the court may require him to reveal the information. Under the Oklahoma Rules of Professional Conduct, the attorney must disclose this information if ordered. An Oklahoma court may decide that the public interest served by discovering the client's identity outweighs the protection and, thus, requires disclosure, even if the situation appears to the attorney to require his complete silence on the matter. Because the court in *Anderson* saw no abuse of discretion in imposing heavy sanctions for contempt, the Oklahoma attorney should also keep this in mind when his conclusion is contrary to the court's decision.

VI. Conclusion

Generally, the attorney-client privilege does not protect a client's identity. The policy behind this rule is that the subject matter of the communications is to be protected and not the identity of the client. Public consensus indicates a desire for everyone to know who is acting in a way that is detrimental to him or to society. However, if an attorney is not allowed to use his professional judgment to determine whether the client's identity should be protected, clients might be less willing to communicate freely with their attorneys in fear that such communications will become public.

Open communication allows the attorney to better protect the interests of the public at large. It may be more dangerous for clients to keep information from their attorneys because they are not afforded the full protection of the law. This may motivate clients to take matters into their own hands instead of consulting an attorney to advise them of the correct (legal and moral) action to take. Protection of a client's identity is especially important when the client had no part in the alleged illegality but has relevant information. If these clients are concerned about possible harm to themselves or their families, they may not reveal the information to the attorney if the attorney cannot guarantee that the client's identity will remain undisclosed. Additionally, if criminal clients cannot rely on the privacy of attorney-client communication, few who are guilty of a crime will come forward if they have not yet been charged.

The attorney-client privilege is very important to ensure that everyone has an opportunity to receive competent representation. If an attorney is unsure as to which test a court will use in order to determine whether a client's identity may be concealed, how can the attorney provide his clients with complete information regarding his representation? State bar associations should consider alternative amendments to their version of Rule 1.6 to better inform attorneys of the nature of the protection allowed in their state.

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