

3-15-1986

The Grand Jury Subpoena: Is It the Prosecutor's "Ultimate Weapon" Against Defense Attorneys and Their Clients?

Tara A. Flanagan

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Constitutional Law Commons](#), [Criminal Procedure Commons](#), [Legal Ethics and Professional Responsibility Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Tara A. Flanagan *The Grand Jury Subpoena: Is It the Prosecutor's "Ultimate Weapon" Against Defense Attorneys and Their Clients?*, 13 Pepp. L. Rev. Iss. 3 (1986)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol13/iss3/6>

This Comment is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

The Grand Jury Subpoena: Is It the Prosecutor's "Ultimate Weapon" Against Defense Attorneys and Their Clients?

I. INTRODUCTION

Imagine yourself as a defense attorney representing a client who is under criminal investigation by a federal grand jury. The grand jury serves you with a subpoena requiring you to appear before it and to bring with you all records concerning any legal fees, expenses, or other monies you have received from or on behalf of your client. Or as a second possibility, imagine that you are requested to testify before the grand jury as to the identity of your client. You anticipate that by revealing your client's name, you may, in fact, be implicating the client in criminal conduct. For instance, the disclosure of the fact that your client has paid you a large fee in cash could be incriminating if the client was prosecuted for tax evasion or for other criminal offenses under the Racketeer Influenced and Corrupt Organizations Act ("RICO").¹ If you were in these two situations, what would you do? If you comply with the subpoena in either scenario, would you be breaching the attorney-client privilege? Will your client have been denied his sixth amendment right to counsel of his own choice if you testify and thereafter withdraw from the case? Lastly, if your client is subsequently indicted upon criminal charges, will your attorney fees, which you testified as having been received from your client, become subject to a government-initiated forfeiture action?

These questions are not of recent origin. In fact, they have been the subject of much concern by defense counsel for at least ten years.² Today, however, these questions have gained renewed interest. They have emerged at the center of a growing and heated debate between prosecutors and defense counsel.³ The debate may have

1. 18 U.S.C.A. § 1961 (West Supp. 1985).

2. For early cases, see *United States v. Jones*, 517 F.2d 666 (5th Cir. 1975) (grand jury subpoena to attorneys to testify as to the names of persons who had paid their client fees); *In re Michaelson*, 511 F.2d 882 (9th Cir. 1973), (grand jury subpoena to attorney to testify as to his fee arrangement with his client) *cert. denied*, 421 U.S. 978 (1975); *In re Stolar*, 397 F. Supp. 520 (S.D.N.Y. 1975) (grand jury subpoena to attorney to testify as to his client's home and work address and telephone numbers).

3. See, e.g., Moscarino & Merkle, *Are Prosecutors Invading the Attorney-Client Relationship?*, A.B.A. J., Sept. 1985, at 38.

been sparked by a recent increase in the number of attorneys who have been subpoenaed to appear before the grand jury.⁴ The increase in the use of the subpoena in turn can be attributed to three main factors. First, a "high priority" of the United States Department of Justice is the prosecution of drug dealers and organized crime figures.⁵ A second factor is the Comprehensive Crime Control Act of 1984⁶ which "increased the government's power to seek forfeiture of attorneys' fees and all other assets received from illegal acts."⁷ The third factor is a provision of the Tax Reform Act of 1984⁸ which requires all attorneys to report to the Internal Revenue Service the name and social security number of any client whose payment to an attorney is more than ten thousand dollars in cash.⁹

The use of the grand jury subpoena, as directed to defense counsel, has been defended on the grounds that requiring an attorney to re-

4. *Id.* at 39.

5. *Id.* at 38. See also Robinson, *Targeting Lawyers*, 7 NAT'L. L.J. 1 (1985).

6. Pub. L. No. 98-473, 1984 U.S. CODE & AD. NEWS (98 Stat.) 1837.

7. Moscarino & Merkle, *supra* note 3, at 38. But see *United States v. Rogers*, 602 F. Supp. 1332 (D. Colo. 1985) (attorney who received funds in return for services legitimately rendered and not as part of sham or fraud to avoid forfeiture was not subject to forfeiture provisions of the Racketeer Influenced and Corrupt Organizations Act as amended by the Comprehensive Forfeiture Act of 1984); *United States v. Ianniello*, 621 F. Supp. 1455 (S.D.N.Y. 1985) (similar ruling as in *Rogers*, that the forfeiture statutes must be construed to exempt legitimate attorney fees from forfeiture to avoid a violation of a defendant's sixth amendment rights).

8. 26 U.S.C.A. § 6050I (West Supp. 1985). This section was one of the tax reform changes included in the Comprehensive Deficit Reduction Act of 1984. This statute has attracted considerable attention from the legal community. The National Association of Criminal Defense Lawyers [hereinafter referred to as NACDL] believes the provision is a serious threat to the attorney-client privilege as well as the attorney-client relationship. See Department of the Treasury, Internal Revenue Serv., Comments on Regulations Implementing the Currency Transaction Reporting Law (July 19, 1985) (unpublished manuscript) (available through the National Ass'n of Crim. Defense Lawyers, Washington, D.C.) [hereinafter cited as Comments on Regulations].

The American Bar Association has also expressed the "deepest concern" with regards to this regulation. A resolution proposed by the sections of criminal justice and taxation and approved by the House of Delegates of the American Bar Association on February 18, 1985, called for a delay by the Department of Treasury in implementing the regulation with respect to cash fees received by attorneys for legal services. Numerous other state bar associations throughout the country have expressed similar concerns. See Comments on Regulations at Exhibits 1-17.

9. 26 U.S.C.A. § 6050I (West Supp. 1985). Any person who receives more than ten thousand dollars in cash in connection with his business must file a return with the IRS. The reporting requirement applies if the cash is received in one or more transactions. The IRS has established form 8300 for reporting these transactions. The form requires the receiver of the funds to give the following information about the payor: (1) full name; (2) address; (3) employee identification number; (4) passport number and country of issuance; (5) alien registration number and country of issuance; (6) amount of cash received; (7) amount of cash received in the form of \$100 bills; (8) nature of the transaction by general category (i.e., "business services provided"); (9) description of the property or service involved in the transaction; and (10) method of payment. Department of the Treasury, Internal Revenue Serv., Tax Form 8300 (rev. Jan. 1985).

The recipient of cash must also disclose his or her own name, address, and social se-

veal a client's identity and/or the legal fee arrangements in most cases does not violate any attorney-client privilege.¹⁰ As additional argument, the sixth amendment is not infringed if the subpoenaed attorney resigns from the case because a defendant is always entitled to appointed counsel. With regard to the forfeiture of attorney fees, a prosecutor would claim that since "a defendant cannot obtain a Rolls-Royce with the fruits of a crime, he cannot be permitted to obtain the services of the Rolls-Royce of attorneys from these same tainted funds."¹¹ In other words, when a defendant has no legal assets from which to pay an attorney, the defendant is entitled only to court-appointed counsel, not counsel of his own choice.

Furthermore, a form of "subtle" corruption is at play when a defense attorney accepts "hundreds of thousands of dollars from a client who assuredly did not earn the money punching a time clock on the 9-to-5 shift."¹² An attorney should not be allowed to act as a "dirty money launderer."¹³ Nor should a lawyer simply close his eyes to the "probable origin [i.e. criminal conduct] of the astronomical retainer paid. . . ."¹⁴ The seduction of a defense attorney by the "narco-dollar"¹⁵ will erode the integrity of both the defense bar and the criminal justice system as a whole.

Defense attorneys agree that the attorney-client privilege should never be used to promote or further criminal activity. However, they argue that in many cases, the subpoena directed to defense counsel is used as a form of intimidation. It is this type of intimidation that jeopardizes the attorney-client relationship.¹⁶ The defense bar has repeatedly argued that the lack of United States Justice Department

curity or employee identification number and must sign the form under the penalty of perjury. *Id.*

Finally, the IRS has issued a press release stating that a willful failure to file a return or form 8300 may result in criminal prosecution for a misdemeanor. Department of the Treasury, Internal Revenue Serv., Public Affairs Department News Release No. IR-84-132, Dec. 20, 1984.

10. Moscarino & Merkle, *supra* note 3, at 39. Merkle is the United States Attorney for the Middle District of Florida.

11. *Lawyers Called Organized Crime 'Life Support,'* N.Y.L.J., March 11, 1985, at 1, col. 2, quoted in *In re Grand Jury Subpoena* Dated Jan. 2, 1985 (Payden v. United States), 605 F. Supp. 839, 850 n.14 (S.D.N.Y. 1985).

12. Moscarino & Merkle, *supra* note 3, at 39.

13. *Id.*

14. *Id.*

15. *Id.* at 40.

16. *Id.* at 39. Moscarino is the Chairperson of the Grand Jury Committee of the ABA Criminal Justice Section.

guidelines¹⁷ and a general insensitivity by prosecutors toward the defendant's attorney-client privilege are seeds for potential prosecutorial abuse. Additionally, the fear of the forfeiture of attor-

17. Guidelines on the issuance of subpoenas to attorneys were established by the United States Attorney's Office for the Southern District of New York in 1985. The full text of the guidelines reads:

Because the attorney-client relationship is an important public interest, the prosecutorial power of the government should not be used in such a way that it unnecessarily impairs that relationship. In balancing the concern that the United States Attorney's Office for the Southern District of New York has for the integrity of the attorney-client relationship and the office's obligation to the fair administration of justice, the following guidelines shall be adhered to by the United States Attorney's Office for the Southern District of New York.

(a) In determining whether to request issuance of a subpoena to an attorney, the approach in every case must be to strike the proper balance between the public's interest in the attorney-client relationship, and the public's interest in effective law enforcement and the fair administration of justice.

(b) All reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the bar.

(c) Negotiations with the attorney shall be pursued in all cases in which a subpoena to a member of the bar is contemplated. These negotiations should attempt to accommodate the interests of the trial or grand jury with the interests of the attorney and client. Where the nature of the investigation permits, the government should make clear what its needs are in a particular case as well as its willingness to respond to particular problems of the subpoenaed party.

(d) No subpoena may be issued to a member of the bar without the approval of the United States Attorney for the Southern District of New York.

(e) In requesting the United States Attorney's authorization for a subpoena to a member of the bar, the following principles will apply:

1. In criminal cases, there should be reasonable grounds to believe that a crime has occurred or is about to occur, and that the information sought is necessary to a successful investigation or prosecution. The subpoena should not be used to obtain peripheral, nonessential, or speculative information.

2. In civil cases there should be reasonable grounds, to believe that the information sought is necessary to the successful completion of the litigation. The subpoena should not be used to obtain peripheral, nonessential, or speculative information.

3. Unless it would compromise the investigation, the government should have unsuccessfully attempted to obtain the information from alternative sources.

4. Even subpoena authorization requests for publicly disclosed information should be treated with care to avoid claims of harassment.

5. Subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonable limited period of time, and should avoid requiring production of a large volume of material. They should give reasonable and timely notice of the demand for documents.

(f) Failure to obtain the prior approval of the United States Attorney may constitute grounds for an administrative reprimand or other appropriate disciplinary action. The principles set forth in this section are not intended to create or recognize any legally enforceable right in any person.

U.S. Attorney's Office Sets Lawyer-Subpoena Guidelines, CRIM. L. REP., May 1, 1985, at 2100.

The United States Department of Justice has recently established guidelines on forfeiting attorney's fees. See *Justice Department Guidelines on Forfeiture of Attorney's Fees*, CRIM. L. REP., Oct. 2, 1985, at 3001, 3001-08 [hereinafter cited as *Justice Department Guidelines*].

ney fees may itself chill a defendant's right to effective counsel.¹⁸ The possibility that attorneys' fees may be forfeited may also discourage attorneys from taking criminal cases where a forfeiture action under the Racketeer Influenced and Corrupt Organizations Act seems likely.¹⁹ The open communication between attorney and client would likely become threatened by the fear that a subpoena may be directed at the attorney. The client might even become inherently more distrustful of his attorney. Such distrust may prohibit the attorney from effective fact-finding.²⁰

How the courts have resolved these conflicting interests may, at first glance, seem of little interest to a reader not engaged in a criminal practice. However, any government-imposed limitations upon the attorney-client privilege, the right to counsel, or attorney fees should be of concern to all attorneys.²¹ This comment will examine the recent federal court decisions regarding grand jury subpoenas directed to defense counsel and the important legal issues raised therein.²²

II. THE GRAND JURY SUBPOENA: A GENERAL OVERVIEW

The federal grand jury exists pursuant to the fifth amendment of the United States Constitution.²³ The grand jury has been granted broad powers to fulfill its constitutional role of investigating crime

18. Moscarino & Merkle, *supra* note 3, at 40.

19. Robinson notes that:

One of the results of the new scrutiny of lawyers has been an unwillingness on the part of some attorneys to continue to get involved in the defense of criminal cases. . . . 'Representing people under investigation is becoming a difficult problem,' said New York attorney Gerald B. Lefcourt, who says he knows lawyers who have turned down cases because they are afraid they will work for several months and then lose their fees.

Robinson, *supra* note 5, at 27.

20. Moscarino & Merkle, *supra* note 3, at 40.

21. It is apparent that, at least with respect to the Currency Transaction Reporting Law, counsel other than the criminal defense bar have expressed strong opposition to the law. For instance, the Board of Directors of the Academy of Florida Trial Lawyers, by an overwhelming vote, adopted a resolution on June 14, 1985, that recognized the "devastating effect" of the new reporting requirement upon the attorney-client relationship. The adoption of such a resolution was deemed "significant" since most of the 2,665 members were civil plaintiff's lawyers. See Comments on Regulations, *supra* note 8, at Exhibit 4. The Association's position was that such a requirement would "effectively require the attorney to become an informant against his own client by divulging client secrets in violation of state and national codes of ethics." *Id.*

22. This comment is not, however, intended to be an in-depth analysis of the current federal forfeiture provisions.

23. U.S. CONST. amend. V. The applicable portion of the fifth amendment reads: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ." *Id.*

and filing indictments when warranted.²⁴ The subpoena is perhaps the grand jury's most effective investigative tool. Pursuant to Federal Rule of Criminal Procedure 17(a), the court clerk issues subpoenas to any requesting party without prior court approval or control. Before the subpoena is served, the requesting party fills in the name of the person to whom the subpoena is addressed.²⁵

Courts have accepted grand jury subpoenas to be the "instrumentalities of the United States Attorney's Office or of some other investigative or prosecutorial department of the executive branch."²⁶ In reality, it is the prosecutor who fills in the subpoena forms without the actual assistance of the grand jury.²⁷ There is a limit, however, beyond which a prosecutor cannot venture. He may not use the subpoena power to gather evidence without the participation of the grand jury.²⁸

Although the grand jury has the "right and duty to procure every man's evidence, the grand jury's powers are not limitless."²⁹ To protect a subpoenaed party from any misuse, Federal Rule of Criminal Procedure 17(c) provides that a party may motion the court "to quash or modify the subpoena when compliance would be unreasonable or oppressive."³⁰ A motion to quash can also be brought on the grounds that enforcement of the subpoena would conflict with a privilege or

24. The broad investigative powers of a grand jury were confirmed by the Supreme Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972) (holding that newsmen enjoy no privilege not to give their testimony to a grand jury). The *Branzburg* court noted an early decision which ruled:

Because [the grand jury's] task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad. 'It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual, will be found properly subject to an accusation of crime.'

Id. at 688 (quoting *Blair v. United States*, 250 U.S. 273, 282 (1919)). For a lengthy discussion of the grand jury's history and general powers, see David, Lengyel, Manuelian & Sutko, *The Federal Grand Jury: Practice & Procedure*, 5 CRIM. L. REV. 177 (1983).

25. FED. R. CRIM. P. 17(a). It should be clarified that the subpoenas are issued under the district court's name and for the grand jury.

26. *In re Grand Jury Subpoena Served Upon Doe* (Roe v. United States), 759 F.2d 968, 971 (2d Cir. 1985) (quoting *In re Grand Jury Proceedings* (Schofield), 486 F.2d 85, 90 (3d Cir. 1973)).

27. See 8 J. MOORE, W. TAGGERT & J. WICKER, *MOORE'S FEDERAL PRACTICE* §§ 6.02[2], 17.06 (2d ed. 1985).

28. See, e.g., *In re Melvin*, 546 F.2d 1, 5 (1st Cir. 1976).

29. *Doe*, 759 F.2d at 971 (quoting *United States v. Dionisio*, 410 U.S. 1, 9-10 (1973)).

30. FED. R. CRIM. P. 17(a). In determining whether a particular subpoena is unreasonable or oppressive, the courts generally consider five factors: 1) the relevance of the subpoenaed documents to the grand jury's investigation; 2) the particularity of the request; 3) the length of time covered by the request; 4) the expense of compliance in light of the size and resources of the subpoenaed party; and 5) the "collateral consequences" of compliance. David, *supra* note 24, at 224-25.

constitutional right.³¹

When a subpoena is directed to an attorney, his client may move to intervene³² and pursue the motion to quash. In the past, the client often challenged the subpoena on the grounds that it invaded the attorney-client privilege. As will be discussed below, most courts have rejected such challenges.

III. THE ATTORNEY-CLIENT PRIVILEGE

A grand jury subpoena, directed to an attorney and requesting the identity of a client or fee information, has been challenged by the attorney and/or the intervenor-client on the ground that such disclosure would violate the attorney-client privilege.³³ Without doubt, the invocation of this privilege has been troublesome for the courts. The attorney-client privilege is a four hundred year old common law right deemed fundamental to our adversarial process.³⁴ The privilege serves to promote complete disclosure by the client without the fear that the information may be used against him.³⁵ This freedom of consultation is necessary to secure competent legal advice.³⁶

When the privilege is asserted in the grand jury setting, a specific conflict of interest problem arises. "Since the attorney-client privilege may serve as a mechanism to frustrate the investigative or fact-finding process, it creates an inherent tension with society's need for

31. David, *supra* note 24, at 224-25.

32. A client's motion to intervene is brought under Federal Rule of Civil Procedure 24(a), which provides:

Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

FED. R. CIV. P. 24(a). The Fifth and Eleventh Circuits have held that a client should be allowed to intervene when the attorney asserts the attorney-client privilege. *See, e.g., In re Grand Jury Proceedings (Fine)*, 641 F.2d 199 (5th Cir. 1981); *In re Grand Jury Proceedings (Freeman)*, 708 F.2d 1571, 1575 (11th Cir. 1983)).

33. *See, e.g., In re Grand Jury Proceedings Doe v. United States*, 754 F.2d 154 (6th Cir. 1985); *In re Shargel*, 742 F.2d 61 (2d Cir. 1984).

34. *In re Grand Jury Proceedings Doe*, 575 F. Supp. 197, 199-200 (N.D. Ohio 1983), *aff'd*, 754 F.2d 154 (6th Cir. 1985).

35. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2291 (McNaughton rev. 1961). *See also* C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 87 (2d ed. 1972).

36. For a detailed discussion of the history and purpose of the attorney-client privilege, see Zverling, *Federal Grand Juries v. Attorney Independence and Attorney-Client Privilege*, 27 HASTINGS L.J. 1263, 1280 (1976).

full and complete disclosure of all relevant evidence. . . ."³⁷ The privilege may thwart or hamper the grand jury's duty to search for the truth. For this reason, the courts have been given broad discretion to define and shape the privilege.³⁸ Furthermore, since the privilege can be misused, for example, to cloak an illegal or fraudulent act, a general rule has emerged that a party invoking the privilege has the burden of proving the existence of the privilege.³⁹ An attorney-client relationship will not automatically activate the privilege. Certain criteria must be fulfilled.⁴⁰

IV. THE IDENTITY OF A CLIENT

In the case of *In re Grand Jury Investigation No. 83-2-35*,⁴¹ an attorney refused to disclose to the FBI the name of a client suspected of stealing checks from a corporation.⁴² The attorney, Durant, was

37. *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 451 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 3524 (1984).

38. Federal Rule of Evidence 501 provides in relevant part:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in the rules prescribed by the Supreme Court pursuant to statutory authority, the *privilege* of a witness . . . shall be governed by the principles of the *common law* as they may be *interpreted by the courts* of the United States in light of reason and experience.

FED. R. EVID. 501 (emphasis added).

Wigmore has commented that "the privilege must be strictly confined within the narrowest possible limits consistent with the logic of its principle." J. WIGMORE, *supra* note 35, at § 2291.

39. See, e.g., *In re Walsh*, 623 F.2d 489, 493 (7th Cir.), *cert. denied*, 449 U.S. 994 (1980); *United States v. Bartone*, 400 F.2d 459, 461 (6th Cir. 1968), *cert. denied*, 393 U.S. 1027 (1969). Also, it is well-established that the privilege does not apply where legal representation was secured in furtherance of intended, present, or continuing illegality. See, e.g., *United States v. Friedman*, 445 F.2d 1076, 1086 (9th Cir.) *cert. denied sub nom.*, *Jacobs v. United States*, 404 U.S. 958 (1971); *Clark v. United States*, 289 U.S. 1, 15 (1933).

40. The criteria most commonly cited is as follows:

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

United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950). See also J. WIGMORE, *supra* note 35, at § 2292, which states that:

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

Id.

41. 723 F.2d 447 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 3524 (1984).

42. *Id.* at 448. An FBI agent visited the attorney, Durant, and explained that the

subpoenaed to appear before the grand jury. Durant again refused to name his client and the government immediately moved to have the district court order Durant to reveal the client's name. Durant argued: first, that the disclosure would incriminate the client in criminal conduct; second, that he had no knowledge of the alleged theft of the checks; and third, that the information could be obtained through other sources.⁴³ The court did not find Durant's arguments persuasive and ordered him to identify the client. When Durant refused to comply with the order, he was held in contempt of court.

While further contempt proceedings were stayed, the prosecutor issued a second subpoena to Durant to appear before the grand jury with certain documents.⁴⁴ Durant then moved to quash the subpoena. He alleged that if he revealed the identity of his client, the government would have its "last link of evidence necessary to effect an indictment"⁴⁵ of his client. In fact, the attorney specified that not only would he be implicating his client in criminal conduct, but he

FBI was investigating the theft of several checks made payable to IBM Corporation. The FBI traced some of the stolen checks to various bank accounts listed under the names of non-existing organizations. One of the checks deposited was initialed "IBM." The agent then showed Durant a photocopy of a check drawn upon one of the fictitious accounts. The copy was of a check for fifteen thousand dollars made payable to the attorney's law firm. Upon FBI inquiry, the attorney conceded that the check was, in fact, received and endorsed by his firm from a client for legal services. *Id.*

43. 723 F.2d at 449. Durant stated:

I should add . . . there is a substantial number of checks flowing around the city, all those checks come back to the drawee bank with bank endorsements on the back. It should be . . . equally possible, without violating the attorney-client privilege, for the agents to find out who presented, who cashed and to trace the money through normal commercial channels, to say nothing of the fact that who opens the mail at IBM now obviously becomes of significant importance.

Id. at 449 n.1.

44. *Id.* at 449. The second subpoena read:

A listing of all clients of the law firm of Durant & Durant, P.C., and Richard Durant . . . including all clients with active cases and clients who owe fees or have provided a retainer to the firm and all client ledger cards and other books, records and documents reflecting or recording payments to the law firm for the period. . . .

Id.

45. *Id.* At the second hearing on Durant's motion, the court was also informed by Durant that at the first hearing, "the FBI requested, under threat of harassment, that Durant 'breach' the attorney-client privilege and identify his client without informing the client." *Id.* Footnote 3 explains:

[T]he FBI agent . . . and I, the U.S. Attorney were outside, and I was given the proposition that I should tell the FBI the identity of my client, but not tell my client that I had done so, so that the FBI presumably could move in. When I rejected what was propositioned . . . it was pointed out that I could be printed and held incommunicado for six or seven hours while the circuit was . . . [hidden] with me, and I implied it was a good thing that I had instructed

would be implicating him in "the very criminal activity for which legal advice had been sought."⁴⁶ The lower court withheld judgment as to both subpoenas until the appeals court resolved the contempt order.

The Sixth Circuit Court of Appeals began its analysis by recognizing that federal courts "unanimously"⁴⁷ agree that the identity of a client generally is not privileged information.⁴⁸ However, the court's discussion did not end there. The court explored several exceptions to this general "rule."⁴⁹

The first exception is known as the "*Baird* rule,"⁵⁰ which is also known as the "legal advice" exception. *Baird* originally stood for the

my office that if they hadn't heard from me by 3:30, to come over here [to court] with a writ of habeas corpus. I made a phone call.

Id. at 449-50 n.3.

46. *Id.* at 450. The government had contested the attorney's last assertion by introducing the check into evidence. The notation "corporate legal services" was on the check which, the prosecutor argued, did not suggest any criminally-related legal services. Also, the government pointed out that the check was received by Durant two weeks before the FBI began its investigation into the stolen checks. Durant rebutted the government's argument by stating his client did, in fact, discuss the IBM checks with him. Furthermore, he claimed that the alleged corporations did not exist, and the notation on the check was a misnomer. *Id.*

47. *Id.* at 451.

48. There are three main reasons why client names are not privileged. The first is that an opposing litigant should not have to "struggle in the dark against unknown forces." J. WIGMORE, *supra* note 35, at § 2313. Second, "the privilege presupposes the attorney-client relationship; therefore, it does not attach to its creation; [and third,] the court has the right to know that there actually is a client." Comment, *Evidence — Attorney-Client Privilege — The Identity of the Client*, 59 KY. L.J. 229, 233 (1970).

49. Using the word "rule" may actually be incorrect. See, e.g., *In re Ousterhoudt*, 722 F.2d 591, 594 (9th Cir. 1983). The term is used here only to identify caselaw which stands for the general proposition that client identity is *not* privileged.

Two cases most often cited for this general rule are *United States v. Pape*, 144 F.2d 778 (2d Cir. 1944), and *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963). In *Pape*, a defendant was convicted for transporting a woman in interstate commerce for immoral purposes. On appeal, Pape claimed the trial court erred in compelling his attorney to disclose at trial that Pape had retained the attorney to appear for the prostitute and had paid his fee. In confirming the conviction, the court held that a retainer was not a confidential communication and that "the prosecutor was entitled to ascertain the full scope of the attorney's employment." *Pape*, 144 F.2d at 782-83. *But see id.* at 783-84 (Hand, J., dissenting).

In *Colton*, a tax attorney refused to answer certain questions propounded by the IRS as to a client's tax liability. The client's identity was not an issue. The court affirmed an order compelling counsel to answer questions pertaining to the date and general nature of legal services performed. In so doing, the court held "the identity of a client, or the fact that a given individual has become a client, are matters which an attorney normally may not refuse to disclose, even though the fact of having retained counsel may be used as evidence against the client." *Colton*, 306 F.2d at 637.

50. *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960). In *Baird*, an attorney sent to the IRS a cashier's check along with a letter requesting that money be deposited in the IRS fund for unidentified collection. The IRS then summoned the attorney and demanded that he reveal the names of his unidentified taxpayer clients. Baird refused and was later found in contempt. The appeals court reversed because in this situation "a disclosure of the persons employing the attorney . . . would disclose the persons paying the tax. . . ." *Id.* at 630.

proposition that a client's name was privileged when the name was used only to prove "an acknowledgement of guilt [by the client] . . . of the very offenses on account of which the attorney was employed."⁵¹ The *Baird* rule was later narrowed. A person claiming the privilege had to show by a "*strong probability* . . . that disclosure of such information would implicate that client in the very criminal activity for which legal advice was sought."⁵² The exception has been logically confined to protect the identity of clients who sought legal counsel as to *past* activities that might result in a criminal indictment.⁵³

In decisions subsequent to *Baird*, the Ninth Circuit misconstrued the rule⁵⁴ and caused general confusion as to the exception's true meaning. Finally, in the case of *In re Ousterhoudt*,⁵⁵ the Ninth Circuit clarified the rule. Under *Baird*, the privilege applied not because the identity of the client was incriminating. Instead, the privilege applied in *Baird* because "disclosure of the identity of the client was in substance a disclosure of the confidential communication in the professional relationship between the client and the attorney."⁵⁶

The Sixth Circuit in *In re Grand Jury Investigation No. 83-2-35* recognized the *Baird* exception. However, the court found the exception inapplicable since attorney Durant failed to meet the "strong probability" test.⁵⁷ Durant failed to meet this test because he relied solely upon "blanket assertion[s] that his client had initially sought legal advice related to" the theft of corporate checks.⁵⁸ The court strongly disfavored such an unsupported assertion. Also, Durant's credibility was diminished by his own testimony. First, he contended that he did not know anything about the theft of the checks. Later,

51. *Id.* at 633 (quoting 97 C.J.S., *Witnesses* § 283e (1957)). Note that the *Baird* exception actually originated in the California state courts. See, e.g., *Ex parte McDonough*, 170 Cal. 230, 149 P. 566 (1915).

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

53. Obviously, no social interest is served by protecting the name of a client if the attorney-client relationship leads to subsequent, unrelated criminal conduct.

54. See, e.g., *Hodge & Zweig*, 548 F.2d 1347 (9th Cir. 1977).

55. 722 F.2d 591 (9th Cir. 1983).

56. *Id.* at 593.

57. *Grand Jury Investigation No. 83-2-35*, 723 F.2d at 454. Both the first and second exceptions were reaffirmed by the Sixth Circuit in *In re Grand Jury Proceedings (Gordon)*, 722 F.2d 303 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 3524 (1984).

It is interesting to note that the "strong probability" test was rejected 19 days later by the Ninth Circuit in *In re Ousterhoudt*, 722 F.2d at 592.

58. *Grand Jury Investigation No. 83-2-35*, 723 F.2d at 454.

at a second hearing, he claimed his client hired Durant for services connected with the stolen checks.

The court next considered a second exception formulated by the Fourth Circuit.⁵⁹ Under the so-called *Harvey* exception, the privilege is recognized "when so much of the actual communication has already been disclosed that identification of the client amounts to a disclosure of a confidential communication."⁶⁰ Although the court accepted this exception in theory, it summarily dismissed it here simply because Durant failed to raise it.

The third and final exception considered by the court originated in the Fifth Circuit.⁶¹ Under this final exception, known as the "incrimination rationale" or "last link" exception, the privilege is recognized when disclosure would provide the "last link" of evidence which would lead to the client's indictment. The Sixth Circuit declined to adopt this exception based on the reasoning that the exception was "not grounded upon the preservation of confidential communications and, not justifiable to support the attorney-client privilege."⁶² Although the exception might serve "fundamental fairness against self-incrimination,"⁶³ such a policy was not a "proper consideration"⁶⁴ for asserting the privilege. Durant had argued that once he revealed his client's name, his client would be arrested. Because the court rejected the incrimination rationale, Durant's claim was also repudiated and, consequently, the contempt order was affirmed.

The Sixth Circuit's refusal to follow the incrimination rationale finds support from the Second Circuit. For instance, in *In re*

59. *NLRB v. Harvey*, 349 F.2d 900 (4th Cir. 1965). Attorney Harvey hired a private investigator (as requested by Harvey's client) to investigate a union organizer. The NLRB suspected a furniture manufacturer, the employer of the labor organizer, was the client. If that were true, the investigation would be contrary to labor law. The NLRB subpoenaed Harvey to name his client. Harvey responded by affidavit that the furniture manufacturer was not the client. He refused, however, to specify who his client was. The court of appeals found that the client's communications, including those related to hiring the detective, were within the attorney-client privilege if Harvey was retained by the client for legal services. But if Harvey was not hired for legal work, the privilege did not apply. The case was remanded to determine which scenario was present. *Id.*

60. *Id.* at 905.

61. *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026 (5th Cir. 1982). See also Note, *The Attorney-Client Privilege as a Protection of Client Identity: Can Defense Attorneys be the Prosecutor's Best Witness?*, 21 AM. CRIM. L. REV. 81 (1983).

In *Pavlick*, an attorney refused to disclose to a grand jury the name of a client who paid his fee for representing three defendants in a drug conspiracy case. The court held that the client, the "benefactor," could not be concealed since his identity was not a last link in any chain of inculpatory events. 680 F.2d at 1029.

62. *Grand Jury Investigation No. 83-2-35*, 723 F.2d at 454 (emphasis in original).

63. *Id.*

64. *Id.*

Shargel,⁶⁵ attorney Shargel claimed that he was a "prominent criminal law specialist" and that revealing those clients who consulted with him would cause him, in effect, to divulge the communication: "I have a criminal problem."⁶⁶ The court flatly rejected this argument. A consultation with a criminal law specialist does not by itself implicate a client in past criminal conduct. Furthermore, even if such an inference could be made, "that alone says nothing about guilt or innocence, about past or future acts, or even about the reasonableness of the [client's] apprehension [about a criminal law problem]."⁶⁷ However, this rationale is weakened by the fact that attorney Shargel stated in his motion to quash the subpoena that he provided representation for clients both before and after the clients were indicted. These consultations with his clients were also related to the criminal indictments.

Perhaps by mistake, Shargel volunteered "a connection between [the] . . . clients and the subsequent RICO proceedings"⁶⁸ However, at oral argument, Shargel did clarify that he had only consulted each client individually. Nevertheless, the court recognized that if the clients had consulted Shargel as a group, a possible inference of concerted activity amongst the clients could be drawn. Thus, the court directed the lower court to hold an *in camera* inspection of any documents that would support such an inference of group activity. Shargel was thereafter required to identify his client.⁶⁹

If nothing more, *In re Grand Jury Investigation No. 83-2-35* and *In re Shargel* illustrate some practical problems an attorney must face if he chooses to contest a grand jury subpoena. First, the attorney must be careful in drafting his supporting affidavits for the motion to quash. A court may not find an argument credible if the attorney presents two conflicting sets of facts.⁷⁰ Also, if an attorney is representing more than one client, and if the clients may be, or have been, indicted upon the same criminal charges, the attorney must take caution not to create "an inference of confidential communications indicating concerted activity among several clients. . . ."⁷¹

Secondly, an attorney cannot rely upon "blanket assertions" to sup-

65. 742 F.2d 61 (2d Cir. 1984).

66. *Id.* at 62.

67. *Id.* at 64 n.4.

68. *Id.* at 64.

69. *Id.* at 65.

70. See, e.g., *Grand Jury Investigation No. 83-2-35*, 723 F.2d at 455.

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

port his claim of the attorney-client privilege. Instead, the attorney has the burden of establishing the existence of the privilege. It is his duty to move for an *ex parte*, *in camera* hearing. Thirdly, each circuit embraces some, or perhaps even none,⁷² of the three exceptions discussed above. The attorney must be aware of which exceptions will be considered in his particular circuit.

Criminal attorneys are not the only lawyers subject to subpoenas requiring them to reveal their client's identity. For instance, in *United States v. Liebman*,⁷³ the Internal Revenue Service issued a "John Doe summons" to a law firm. The summons required the firm to produce documents containing the names of clients who had participated in a real estate partnership for tax purposes.⁷⁴ The lower court ordered the attorneys to provide a list of client names to the IRS.⁷⁵ The attorneys appealed on the ground that revealing their clients' names breached the attorney-client privilege.

The Third Circuit Court of Appeals agreed with the tax attorneys and reversed the lower court's order enforcing the IRS summons.⁷⁶ The court explained that if the summons had asked only for the names of the clients the privilege would have been inapplicable. But the summons described the actual content of the communication between the attorney and the clients. Specifically, the summons stated that the "taxpayers . . . were advised by . . . [the attorneys] that the fee was deductible for income tax purposes."⁷⁷ Thus, the case here fell within the *Harvey* exception. In this instance, the actual communication had already been disclosed. Thus, requiring further disclosure of the clients' names would have completely unfolded the confidential communication. The court found the tax deduction of a fee was a "legal matter," and therefore, subject to the attorney-client privilege.⁷⁸

The IRS had argued that the privilege should be available only when the "disclosure of a client's identity would implicate the client in the matter for which he or she sought advice."⁷⁹ The IRS claimed

72. See, e.g., *In re Grand Jury Subpoena Served Upon Doe* (Roe v. United States), 759 F.2d 968, 971 (2d Cir. 1985) (holding the attorney-client privilege not applicable to information relating to fee or fee sources). The *Doe* court found the case of *United States v. Liebman*, 742 F.2d 807 (3d Cir. 1984), to present "special circumstances." *Doe*, 759 F.2d at 971 n.3.

73. 742 F.2d 807 (3d Cir. 1984).

74. *Id.* at 808. The tax attorneys admitted that they told their clients the investment fee was deductible as a legal expense. The IRS claimed otherwise, and wanted to find out which client-investors inappropriately deducted the investment fee as a legal expense. *Id.*

75. *Id.* at 808.

76. *Id.* at 810-11.

77. *Id.* at 809.

78. *Id.* at 810.

79. *Id.*

the privilege was invalid since the client was not being implicated in the matter for which he sought legal advice, i.e., the participation in the real estate partnership. To the contrary, the IRS alleged that it was investigating the legality of the deductions.

The court pronounced the IRS argument as "unduly narrow."⁸⁰ It then commented: "All legal communications entered into with the expectation of privacy are privileged whatever the initial purpose of the consultation."⁸¹ This broad language suggests that if *In re Shargel* and *In re Grand Jury Investigation No. 83-2-35* had been decided in the Third Circuit, the results may have been quite different.

In many instances, revealing a client's name may lead to the client's subsequent indictment. However, in one instance, an attorney's refusal to identify his client caused the attorney to lose what he claimed to be a one hundred and fifty thousand dollar retainer fee. In *United States v. \$149,345 United States Currency*,⁸² attorney Alonso brought a civil action for return of money seized by the government. However, Alonso refused to disclose the name of his client, claiming the disclosure might result in the criminal prosecution of his client "of the very matter for which . . . [the client] had sought advice."⁸³ The trial court found the client's identity material to Alonso's claim and ordered discovery. When Alonso still refused to name his client, his case was dismissed as a sanction. Alonso then appealed.

While the appeal of *Alonso I* was pending, the government initiated a money forfeiture action.⁸⁴ The trial court took judicial notice of *Alonso I* and held that Alonso had no standing in the second action to contest the forfeiture since he did not meet a "threshold requirement that he ha[d] an interest in the seized property."⁸⁵ The attorney's

80. *Id.*

81. *Id.*

82. 747 F.2d 1278 (9th Cir. 1984) [hereinafter referred to as *Alonso II*]. In an earlier action, *Alonso v. United States*, No. 82-0898-FW (C.D. Cal. Oct. 29, 1982), 718 F.2d 1109 (9th Cir. 1983), *cert. denied*, 102 S. Ct. 1121 (1984), an airplane passenger from Florida was stopped by FBI agents at Los Angeles Airport. The passenger consented to a search and two envelopes were uncovered. The envelopes had inscriptions in Spanish indicating they were for an attorney named Alonso. When Alonso was later contacted by the FBI, he informed the FBI that the money was a retainer from a client. However, he refused to reveal the client. The money was then seized by the government. *Id.* at 1279.

83. *Id.*

84. *Id.*

85. *Id.* at 1280. See also *Alonso v. United States*, No. 82-6017 (C.D. Cal., Oct. 29, 1982), *aff'd*, 718 F.2d 1109 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 3509 (1984).

claim to the money in *Alonso II* was then dismissed as precluded by *Alonso I*.

The court of appeals held that the dismissal of Alonso's claim in the second action was proper. However, the court recognized Alonso's "uncomfortable dilemma"⁸⁶ when *Alonso I* was dismissed. The court explained that Alonso had a right to appeal *Alonso I* upon the privilege claim, which the court did not find frivolous.⁸⁷ However, by appealing the dismissal sanction, Alonso gave up his right to proceed on the merits if he lost.

As an alternative, Alonso could have disclosed his client's identity and proceeded on the merits. But, by doing so, he would have surrendered the privilege claim and may have exposed his client to criminal liability. Alonso was faced with "Hobson's choice." He was denied the right to try his case on the merits "unless he foreswore what he saw as his duty to his client."⁸⁸ Furthermore, when the forfeiture action was instituted, Alonso had to disclose his client's identity so as not to be dismissed from the forfeiture action and, by such disclosure, would effectively be abandoning his appeal in *Alonso I*.

From this procedural nightmare, the appeals court ultimately concluded that it was only fair to allow Alonso an opportunity to vacate the *Alonso I* judgment⁸⁹ if Alonso would reveal the name of his client. However, in the end, Alonso stood firm; he still refused to name his client and forever lost his attorneys' fees.⁹⁰

V. DISCLOSURE OF ATTORNEYS' FEES

As with the name of a client, attorneys' fee arrangements generally have not been interpreted by the courts to be privileged. For example, in the case of *In re Shargel*,⁹¹ the Second Circuit compelled the attorney to produce "records of any monies or property" which he re-

86. *Alonso I*, 747 F.2d at 1280-81.

87. *Id.*

88. *Id.* The term "Hobson's choice" is commonly used by the courts to explain this particularly unique situation.

89. This procedure is allowed under Federal Rule of Civil Procedure 60(b), which provides in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), or (3) not more than one year after judgment, order, or proceeding was entered or taken.

FED. R. CIV. P. 60(b).

90. *Galante*, 9th Circuit Upholds Seizure of Legal Fee, 7 NAT. L.J. 3 (1984).

91. 742 F.2d 61 (2d Cir. 1984).

ceived from his clients.⁹² The government sought this information to prove the clients' "unexplained wealth," tax law violations, and payments of legal fees by 'benefactors.'"⁹³

The *Shargel* court distinguished legal fees and the identity of a client "from communications intended by a client to explain a problem . . . in order to obtain legal advice."⁹⁴ In other words, the disclosure of any legal payments or other transfers of property from the client to the attorney did not hinder the "attorney's ability to give informed legal advice."⁹⁵ Also, any fees paid by a third party "benefactor" were subject to disclosure under the *Pape* ruling.⁹⁶

Any broad privilege against the disclosure of attorney fees was explicitly rejected by the court in *Shargel*. The privilege could "easily become an immunity for corrupt or criminal acts. . . . Such a shield would create unnecessary but considerable temptations to use lawyers as conduits of information or of commodities necessary to criminal schemes or as launderers of money."⁹⁷ The court was primarily concerned with the potential corruption of attorneys. It therefore believed that full disclosure might deter attorneys from taking a bite from forbidden fruit.⁹⁸

A similar ruling to *In re Shargel* was reached by the Ninth Circuit in *In re Ousterhoudt*.⁹⁹ There, an attorney represented a client in connection with a grand jury investigation of possible controlled substance and income tax violations. The government claimed the date and amount of legal fees paid by the client was information necessary to complete their investigation. The attorney relied upon the *Baird* rule and invoked the attorney-client privilege. But, the court found the attorney's reliance upon *Baird* was misplaced. The court's rationale mirrors that of the *Shargel* court. The disclosure of the fees did not "convey the substance of confidential professional communications"¹⁰⁰ between the attorney and his client. The information was

92. *Id.* at 62.

93. *Id.*

94. *Id.* at 63.

95. *Id.* at 64.

96. *United States v. Pape*, 144 F.2d 778 (2d Cir.), *cert. denied*, 323 U.S. 752 (1944). See *supra* note 49 and accompanying text.

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

98. U.S. District Judge Marvin E. Frankel expressed a comparable concern: "[W]e manage as counsel to avoid too much knowledge. The sharp eye of the cynical lawyer becomes at strategic moments a demurely averted and filmy gaze." Moscarino & Merkle, *supra* note 3, at 39.

99. 722 F.2d 591 (9th Cir. 1983).

100. *Id.* at 594.

not privileged even though it was possibly incriminating.

In re Ousterhoudt and *In re Shargel* represent a "hard line" approach to the disclosure of attorneys' fees and client identity. After these decisions, it is difficult to imagine a situation where *Baird* or any other exception might apply. The question then becomes how much information regarding attorneys' fees the government may be able to discover. The Ninth Circuit has indicated that a subpoena requesting "attorney time records describing the services performed by the attorney, retainer agreements, contracts, letters of agreement, and related correspondence,"¹⁰¹ will be struck down. In *In re Grand Jury Witness*,¹⁰² decided a year before *Ousterhoudt*, the court held that the client's ultimate motive for hiring an attorney was privileged, and any documents indicating the client's motivation were privileged. However, a simple invoice that only indicated the amount of the fee was not privileged.¹⁰³

VI. ETHICAL CONSIDERATIONS REGARDING THE DISCLOSURE OF CLIENT IDENTITY AND LEGAL FEES

The courts have not been alone in deciding whether the disclosure of client identity and fee arrangements violates the attorney-client privilege. Various ethics committees have also considered the issue.¹⁰⁴ Under Canon 4 of the ABA Model Code of Professional Responsibility, an attorney should not reveal client "confidences" or "secrets."¹⁰⁵ Thus, the disclosure of a client's identity and/or fee in-

101. *In re Grand Jury Witness* (Salas v. United States), 695 F.2d 359, 362 (9th Cir. 1982).

102. *Id.* Privileged documents were held to include: "[B]ills, ledger, statements, time records and the like which also reveal the nature of the services provided, such as researching particular areas of law. . . ." *Id.* at 362.

103. *Id.* at 362.

104. See, e.g., Philadelphia Bar Association Opinion No. 81-95 (holding that a law firm could not voluntarily provide the IRS with a list of its clients and the amount paid by each if the firm validly believed that disclosure would be embarrassing or potentially detrimental to the clients); Connecticut Bar Association Committee on Professional Ethics, Informal Opinion No. 81-3 (Oct. 9, 1980) (holding that disclosure of a client's fund ledgers to an IRS agent auditing a law firm would violate the Code of Professional Responsibility); Kentucky Bar Association Opinion KBA E-253 (Sept. 1981) (holding that Canon 4's prohibition against the disclosure of client secrets and confidences extends to the very existence of the attorney-client relationship when the subject matter of the relationship involves advice about potential criminal liability or other matters not of public record); Florida Bar Committee on Professional Ethics, Opinion 62-24 (holding that a lawyer is not permitted to disclose the name and address of a client to the IRS where the client had the lawyer obtain an IRS ruling on a hypothetical question); Florida Bar Staff Opinion TEO85429 (May 15, 1985) (holding that a real estate lawyer who obtained title to property on behalf of his clients is precluded from identifying those clients to the IRS in the absence of consent). See also Comments on Regulations, *supra* note 8, at 33-34.

105. The related Disciplinary Rule 4-101 (B) states:

Except when permitted under DR 4-101 (C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

formation may directly conflict with the attorney's ethical duty to his client. The Committee on Legal Ethics for the District of Columbia Bar has interpreted this canon in light of the problem concerning disclosure of the client's identity.¹⁰⁶ The Committee found that "when-ever a client requests nondisclosure of the fact of representation, or circumstances suggest that such disclosure would embarrass or detrimentally affect any client, the fact of the firm's representation of that client is a client 'confidence' or 'secret' subject to the protections accorded by . . . Canon 4."¹⁰⁷ Other state committees have reached similar conclusions.¹⁰⁸

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B) (1979). Disciplinary Rule 4-101 (A) defines "confidence" and "secret" as follows:

'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 embarrass or would be likely to be detrimental to the client.

Id. DR 4-101(A).

Another applicable ethical consideration is that:

A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client:

The use of the word 'information' in these Ethical Considerations, as opposed to 'confidence' or 'secret,' is particularly revealing of the drafters' intent to protect all knowledge acquired for a client, since the latter two are defined terms. . . . Information so acquired is sheltered from use by the attorney against his client by virtue of the existence of the attorney-client relationship. This is true without regard to whether someone else may be privy to it. . . . The obligation of an attorney not to misuse information acquired in the course of representation serves to vindicate the trust and reliance that clients place in their attorneys. A client would feel wronged if an opponent prevailed against him with the aid of an attorney who formerly represented the client in the same matter.

Brennan's Inc. v. Brennan's Restaurant, Inc., 590 F.2d 168, 172 (5th Cir. 1979) (interpreting MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canons 4-5 (1979)).

106. In Opinion No. 124 (Mar. 22, 1984), the Committee ruled that a law firm should not voluntarily disclose the firm's clients to IRS auditors. *See* Comments on Regulations, *supra* note 8, at 31-32 for a full discussion of the Committee's opinion.

107. Comments on Regulations, *supra* note 8, at 4.

108. *See supra* note 104 and accompanying text. *See also* Disciplinary Board of the State Bar of Georgia, Advisory Opinion No. 41 (Sept. 24, 1984), holding that an attorney should not voluntarily reveal his client's identity to the state revenue department without the client's consent. Here the state tax authorities tried to obtain the information from a criminal attorney who received cash fees over ten thousand dollars on several occasions over a three year period. *See* Comments on Regulations, *supra* note 8, at 32-33.

VII. THE FUTURE OF THE ATTORNEY-CLIENT PRIVILEGE

There is little doubt that requesting an attorney to testify against his client before the grand jury raises some serious questions. Besides practical procedural technicalities, an attorney must consider caselaw, which generally stands for the proposition that client identity and fee information are not privileged. Two main cases cited for this proposition, *United States v. Pape*¹⁰⁹ and *Colton v. United States*,¹¹⁰ hold that there may be occasions when this "rule" should not be followed. Some courts have developed exceptions. Recently, the trend has been to withdraw from or to simply reject these exceptions. Most courts continue to narrowly construe the privilege concept to accommodate the important investigative function of the grand jury. But is this approach overinclusive? In other words, are there other means by which the grand jury's powers can be preserved without jeopardizing the attorney-client relationship? To date, most courts have answered this question in the negative.

In many instances, the fee information will later become the basis for a government forfeiture action against the attorneys' fees. However, no court has considered the forfeiture problem when deciding the scope of the attorney-client privilege and how it relates to fee information and forfeiture actions at the grand jury stage. Undoubtedly, the criminal defense bar would welcome such an examination by the courts.¹¹¹ Although information concerning attorneys' fees may not technically be a "communication" necessary to render legal advice, an attorney may be unwilling or unable to render any legal advice without receiving a fee. In this respect, requiring an attorney to reveal fee information may discourage "full and frank communica-

109. 144 F.2d 778 (2d Cir. 1944). *Pape* indicated that there might "be situations in which so much has already appeared of the actual communications between an attorney and a client, that the disclosure of the client will result in a breach of the privilege." *Id.* at 783.

110. 306 F.2d 633 (2d Cir. 1961), *cert. denied*, 371 U.S. 951 (1963). In *Colton*, it was suggested that the privilege may be warranted where "the substance of a disclosure has already been revealed but not its source." 306 F.2d at 637.

111. The NACDA found *Ousterhoudt*, in particular, to be "unrealistic." For instance,

Ousterhoudt's rejection of the 'incrimination standard' is predicated on the assumption that '[i]nformation regarding the fee arrangement ordinarily is not part of the subject matter of the professional consultation. . . .' [citation omitted] This assertion ignores the Justice Department's contention that attorney fee payments constitute forfeitable proceeds of illegal activity. In every RICO and Title 21 case in which legal advice is sought, the amount and method of payment of attorneys' fees is inextricably intertwined with forfeiture issues and is quite properly the subject of discussion and consultation. Moreover, since prosecutors have claimed that the payment of attorneys' fees is relevant to establish substantive elements of various federal offenses, it is clear that there is a direct nexus between the amount and form of attorney fee payments and the subject matter of the professional consultation.

Comments on Regulations, *supra* note 8, at 26-27.

tion between attorneys and their clients."¹¹²

VIII. THE APPEALABILITY OF A MOTION TO QUASH

The appealability of a motion to quash may be the determinative factor for an attorney in deciding whether to contest a grand jury subpoena. The general rule is that a court order denying a motion to quash a subpoena is not appealable.¹¹³ Such an order is not considered "final" within the meaning of the final judgment rule.¹¹⁴ Nevertheless, a party challenging the subpoena can resist the subpoena and be found in contempt of court. A contempt citation will provide an immediate appeal and thereby furnish an opportunity for review of the lower court's order.¹¹⁵

When a subpoena is directed to an attorney, often the client will intervene and move or join in the attorney's motion to quash the subpoena. The motion may be based upon the contention that the enforcement of the subpoena will violate the attorney-client privilege or a constitutional right. A majority of the circuits have found that in this unusual attorney-client scenario, the general rule does not apply.¹¹⁶ Under the *Perlman* exception,¹¹⁷ the client can seek an im-

112. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

113. *Cobbledick v. United States*, 309 U.S. 323 (1940). See also 9 J. MOORE, FEDERAL PRACTICE § 110.13[2] (Ward ed. 1975); C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3914 (1976).

114. The policy behind the final judgment rule was explained in *Cobbledick*:

Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. . . . To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice.

309 U.S. at 324-25.

115. *United States v. Ryan*, 402 U.S. 530, 532 (1971).

116. See, e.g., *In re Grand Jury Proceedings (Gordon)*, 722 F.2d 303 (6th Cir. 1983); *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 105 (4th Cir.), vacated and withdrawn, 697 F.2d 112 (4th Cir. 1982); *In re Grand Jury Subpoena Duces Tecum (Lahodny v. United States)*, 695 F.2d 363 (9th Cir. 1982); *In re Grand Jury Proceedings (Lamore)*, 689 F.2d 1351 (11th Cir. 1982); *In re Grand Jury Proceedings (Malone)*, 655 F.2d 881 (8th Cir. 1981); *In re Grand Jury Proceedings (Fine)*, 641 F.2d 199 (5th Cir. 1981); *In re Grand Jury Proceedings (Katz)*, 623 F.2d 122 (2d Cir. 1980); *In re November 1979 Grand Jury (Velsicol Chem. Co. v. United States)*, 616 F.2d 1021 (7th Cir. 1980); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798 (3d Cir. 1979).

117. *Perlman v. United States*, 247 U.S. 7 (1917). Perlman was the inventor of a demountable rim used on automobile tires. His company brought a patent infringement action against Firestone Tire Company. At trial, Perlman was a witness for his plaintiff-corporation. Some of his personal property related to the invention was entered into evidence as exhibits. The case was later dismissed without prejudice upon

mediate appeal of an order without his attorney first placing himself in contempt. The primary reason for this exception is that an attorney cannot be "expected to risk a contempt citation in order to protect the interests of a powerless third party [i.e., his client]."¹¹⁸ Perhaps a more compelling rationale is that once an attorney testifies, the "cat is out-of-the-bag"; that is, the information has been revealed and the client will be denied effective appellate review at a later date.

Three circuit courts have not found the majority's logic compelling. These courts have declined to extend *Perlman* to the attorney-client scenario where the client asserts only the attorney-client privilege, as opposed to a constitutional claim.¹¹⁹ The minority finds any application of *Perlman* misplaced. First, *Perlman* involved constitutional rights.¹²⁰ Second, *Perlman* did not consider the administrative impact of interlocutory appeals upon today's already overcrowded appellate dockets.¹²¹ Third, *Perlman* can be restricted to its own "unique" set of facts.¹²²

The minority argues that "[a]n attorney, in his client's interest and as proof of his own stout-heartedness, might be willing to defy a testimonial order and run the risk of a contempt proceeding."¹²³ Attorneys have been the subject of contempt citations on behalf of their clients.¹²⁴ The minority suggests that an attorney risks a contempt citation to protect his own pecuniary interests.¹²⁵ As one commentator stated, "prospective clients will not flock to an attorney who is

the condition that the exhibits be impounded, sealed, and kept in the court clerk's custody. Later a court order was served upon counsel for both *Perlman* and *Firestone*. The order required the attorneys to appear before the court and to show cause why the United States Attorney should not take custody of the exhibits. The government claimed the exhibits were required in order for a grand jury to indict *Perlman* for perjury. *Perlman*, claiming fourth and fifth amendment privileges, independently petitioned the court to restrain the clerk from releasing the exhibits. The petition was denied, and *Perlman* appealed. The government moved to dismiss the appeal contending the order to be interlocutory. The Supreme Court rejected this argument and held that *Perlman* could intervene to appeal the order. The Court later ruled against *Perlman* on the merits of his claim. *Id.* at 14-15.

118. *In re Grand Jury Proceedings (Fine)*, 641 F.2d 199, 202 (5th Cir. 1981).

119. See, e.g., *In re Grand Jury Proceedings (Vargas)*, 723 F.2d 1461 (10th Cir. 1983); *In re Sealed Case*, 655 F.2d 1298 (D.C. Cir. 1981); *In re Oberkoetter*, 612 F.2d 15 (1st Cir. 1980).

120. *Perlman*, 247 U.S. at 13.

121. *Oberkoetter*, 612 F.2d at 18.

122. See *supra* note 117 for a discussion of the facts of *Perlman*. For instance, in *Perlman*, it was the court clerk, as opposed to an attorney, who actually possessed the exhibits. Since no court clerk would ever risk contempt for a litigant, *Perlman* was truly "powerless to avert the mischief of the order." *Perlman*, 247 U.S. at 13.

123. *In re Oberkoetter*, 612 F.2d at 18.

124. See, e.g., *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447 (6th Cir. 1983); *In re Grand Jury Proceedings (Freeman)*, 708 F.2d 1571 (11th Cir. 1983); *In re Grand Jury Witness (Salas v. United States)*, 695 F.2d 359 (9th Cir. 1982).

125. See, e.g., *Sealed Case*, 655 F.2d at 1301.

known to surrender confidential information without a fight."¹²⁶ This particular economic-based interest becomes even more persuasive in light of the existing forfeiture statutes now used to seize attorney fees. Many attorneys might prefer to risk contempt rather than risk the loss of their fees. Whether an attorney will protect his client's interests when faced with the possibility of contempt is an open question. However, this inquiry should not form the basis upon which an appeal will or will not be granted. As the majority suggests, the attorney's willingness to defend may depend upon the value of the client's business and the client's power vis-a-vis the attorney.¹²⁷

The minority contends that the client will not suffer any irreparable harm if the attorney complies with the subpoena as the client can still object at trial to the introduction of any evidence that might violate the attorney-client privilege.¹²⁸ The minority believes that an attorney or his client can obtain a review of the subpoena by petition for writ of mandamus or prohibition.¹²⁹ However, one of the courts which has adopted the minority position and considered such review has also summarily denied the attorney's petition, even in light of a fifth amendment claim.¹³⁰

Since many subpoena challenges are likely to be based upon both constitutional claims and claims of the attorney-client privilege, the majority position should prevail. Requiring an attorney to be found in contempt raises a conflict of interest problem with the client. The attorney's interest is to avoid a potential contempt citation. Thus, he will be compelled either to comply with the subpoena or to expend the fewest resources to resist it. In direct conflict with such action is the client's interest in combating a possible indictment. It is within the client's interest for his attorney to do his utmost to resist the subpoena.¹³¹ Thus, the *Perlman* exception should prevent the attorney from being confronted with this unpleasant dilemma, even at the cost of some unworthy appeals.

126. Comment, *The Perlman Exception: Limitations Required By The Final Decision Rule*, 49 U. CHI. L. REV. 798, 813 (1982).

127. See, e.g., *Grand Jury Proceedings (Fine)*, 641 F.2d at 202.

128. *Oberkoetter*, 612 F.2d at 17.

129. The minority concedes that such writs are a drastic remedy and should be granted only by an appellate court upon a clear showing of abuse or judicial usurpation by the lower court. See, e.g., *In re Grand Jury Proceedings (Vargas)*, 723 F.2d 1461, 1466-67 (10th Cir. 1983).

130. See, e.g., *Grand Jury Proceedings (Vargas)*, 723 F.2d at 1466-67.

131. *Id.*

IX. THE SIXTH AMENDMENT AND THE DISCLOSURE AND FORFEITURE OF ATTORNEY FEES

As previously discussed, an attorney who brings a motion to quash a grand jury subpoena upon the grounds that it violates the attorney-client privilege may ultimately find himself either in contempt or testifying before the grand jury. However, if an attorney brings a motion to quash upon the grounds that his client's sixth amendment right will be violated, he may successfully evade the subpoena. An attorney may argue three possible sixth amendment violations: "[1] the mere disclosure of the fee arrangement itself; [2] the effect of responding to the subpoena on the ability of counsel to prepare for trial; and [3] the effect of counsel testifying and the result of being forced to withdraw as trial counsel in th[e] case."¹³² The actual forfeiture of attorney fees may raise a fourth possible sixth amendment claim, i.e., the right to counsel of one's own choice.¹³³ It is not possible within the limits of this article to present the lengthy analysis re-

132. *In re Grand Jury Subpoena* Dated Jan. 2, 1985 (Payden v. United States), 605 F. Supp. 839, 845 (S.D.N.Y. 1985).

133. This argument has been recently raised in *United States v. Sheehan*, CR-F-84-198, a case currently filed in the federal district court in Fresno, California. In *Sheehan*, the government stated in the indictment that all attorney's fees would be forfeited. Later, after a hearing on the matter, the government withdrew this forfeiture of attorney's fees clause, but it replaced the clause with a "catch-all clause" that could include attorney's fees. This case goes beyond previous cases in that the government has requested attorneys to testify against their clients *at trial* about their fee arrangements. Brian Leighton, the United States Attorney working on the case, claims that the government is "not denying anybody the right to an attorney. We're just saying that a drug dealer should have to use his hard-earned money like anyone else to hire a lawyer. It's the attorneys who have priced themselves out of the market." See Eisler, *Court Test Looms on Federal Seizing of Lawyers' Fees*, L.A. Daily J., Apr. 5, 1985, at 1, col. 2.

Leighton filed the indictment against Sheehan and Broh, claiming both were partners in drug trafficking. The defendants retained two attorneys: Sonnett and Krieger. Sonnett was formerly a president of the Dade County Bar Association and a United States Attorney.

Sonnett claims that "the government is already a Goliath, choosing the venue of the trial and utilizing the unlimited resources of federal agencies. Now Goliath is moving to control and nationalize the sling in David's hands [i.e., the defense attorneys]." L.A. Daily J., Apr. 5, 1985, at 18.

Leighton has responded:

I wonder who Goliath is. We have to get search warrants, we can't invade the attorney-client privilege, the defendant has all these protections and now they are trying to use this fee mechanism to keep money that is made illegally. They aren't saying the government doesn't have the right to seize vehicles, boats, planes, just let the attorneys keep their money."

L.A. Daily J., Apr. 5, 1985, at 18.

Sonnett refutes this argument by finding that the prosecutor's logic "turns the presumption on its head. The allegation simply denies anybody accused of a drug crime the right to hire an attorney." L.A. Daily J., Apr. 5, 1985, at 18.

The *Sheehan* case is still pending before United States District Judge Coyle. The fee issue has temporarily been dropped. A former law clerk of Judge Coyle, Ms. Kay Shaffer, is currently preparing an extensive study of the sixth amendment as related

quired for each of these four areas. But, some of the current cases in this area will be explored in order to illustrate the scope of the issues and the important problems they raise.

If the Second Circuit's decision in the case of *In re Shargel* was a victory for prosecutors, then *In re Grand Jury Subpoena Served Upon Doe (Roe v. United States)*¹³⁴ was a triumph for the defense bar. The facts of *Doe* are similar to *Shargel*. In *Doe*, a member of an alleged New York organized crime family became the target of a grand jury investigation.¹³⁵ His attorney was summoned by the grand jury to produce records of fees and property received by counsel on behalf of twenty-one individuals who were "benefactees" and alleged members of the client's "crew." The attorney brought a motion to quash contesting the government's showing of relevance or need. He also claimed that the subpoena was being used as an "ultimate weapon" to disqualify him from the case.¹³⁶ The lower court denied his motion to quash. It found the information relevant and that the "possibility of the lawyer's eventual disqualification was far outweighed by the importance of presenting the evidence to the grand jury."¹³⁷

In reversing the lower court, the appeals court unequivocally rejected any claim to the attorney-client privilege.¹³⁸ Instead, the court addressed the issue of whether a prosecutor must make a "preliminary showing of relevance and need for the attorney's testimony and records."¹³⁹ In order to decide this question, the court addressed the sixth amendment claim that the client was entitled to counsel of his choice if he was ultimately indicted.

to the forfeiture of attorneys' fees, which will be published in the near future by the *Texas Law Review*. Telephone interview with Kay Shaffer (Oct. 16, 1985).

In *United States v. Badalamenti*, 614 F. Supp. 183 (D.C. Ill. 1985), the government also issued a trial subpoena *duces tecum* to a defense attorney. The subpoena requested the attorney to produce all documents related to his fee arrangement with his client. The subpoena was served ten months after the client's indictment and six months after his attorney appeared in the case. The court held the government failed to show the relevance and the need for the requested fee information. *Id.* at 188. Furthermore, if the attorney had been compelled to produce the records, he would have also been forced to withdraw from the matter. This threat of withdrawal at this stage in the case "would have a[n] . . . impact on [the client's] sixth amendment right." *Id.* at 187.

134. 759 F.2d 968 (2d Cir. 1985).

135. *Id.* at 970.

136. *Id.*

137. *Id.*

138. *Id.* at 975. In fact, the court explicitly distinguished the attorney-client privilege cases from *Doe*. *Id.*

139. *Id.* at 971-72.

The court found that when the attorney was called as a witness against his client, "the government [was] surely setting the stage for the attorney's ultimate disqualification."¹⁴⁰ Therefore, the government must make a preliminary showing of relevance and reasonable need. The court also recognized the competing interests of the grand jury and the attorney-client relationship. First, the court acknowledged that "the unbridled use of the subpoena would potentially allow the Government . . . to decide unilaterally that an attorney will not represent his client."¹⁴¹ It was this potential power of disqualification that disturbed the court. Without an independent defense bar, the adversarial system of criminal justice would collapse.

Secondly, the court determined that any potential infringement on the right to counsel "must only be as a last resort."¹⁴² The right to counsel precludes the arbitrary dismissal of one's attorney. Previous cases ruling that the party challenging the subpoena bore the initial burden were distinguished as not involving any constitutional rights or testimonial evidence. But, the court went even further to comment that "even where no constitutional rights are implicated, this circuit has no per se rule against placing the burden on the party seeking to enforce the subpoena."¹⁴³ Such language would suggest that where only the attorney-client privilege is raised, the prosecutor will carry the initial burden of showing relevance and need.

In one sense, *Doe* is a limited ruling since it pertained to a case where both the prosecutor and the defense attorney agreed that if the attorney who had served as the client's counsel for many years was compelled to go before the grand jury, he would, in fact, be ultimately disqualified. Nonetheless, *Doe* represents a major breakthrough for the defense bar.

The government's power to enforce a grand jury subpoena against an attorney was also circumscribed by the First Circuit in *In re Grand Jury Matters*.¹⁴⁴ In *Matters*, both federal and state authorities investigated certain persons who later were indicted for drug offenses. While the commencement of the state trial was pending, a federal grand jury issued subpoenas to the defendants' attorneys requiring them to produce information regarding their attorneys' fees. It should be noted that the federal grand jury was investigating the same activities for which the clients had been indicted in state court. The attorneys contested the subpoenas on the grounds that they vio-

140. *Id.* at 973.

141. *Id.* at 975.

142. *Id.*

143. Grand Jury Subpoena Served Upon Doe, 759 F.2d 968, 976 (1984). For an earlier ruling contrary in result, see *In re Grand Jury Subpoena* Dated Jan. 2, 1985 (Payden v. United States), 605 F. Supp. 839 (S.D.N.Y. 1985).

144. 751 F.2d 13 (1st Cir. 1984).

lated the attorney-client privilege and the sixth amendment right to counsel. Typically, the court found no infringement of the attorney-client privilege.¹⁴⁵ However, the court did find that the timing of these subpoenas could adversely affect the attorneys' "ability to prepare and present their clients' defense in the pending state criminal action."¹⁴⁶ The court affirmed the trial court's decision to quash the subpoenas upon the belief that the clients' sixth amendment rights would be jeopardized and that the timing of the subpoenas was burdensome.

Like the *Doe* court, the *Matters* court carefully limited its ruling to the "highly unusual"¹⁴⁷ facts presented therein. It was the use of the subpoenas as a form of "harassment" that influenced the court not to compel their enforcement. Nonetheless, the government was not prevented from later renewing the subpoenas upon a showing of relevance and need.

Both *Doe* and *Matters* indicate that where a constitutional right is implicated, the courts will review the subpoenas more carefully and may impose an initial, higher standard of need and relevancy upon the government.¹⁴⁸ Additionally, both courts perceived some conflict of interest problems between the attorney and his client. For instance, the Model Code of Professional Responsibility requires that if an attorney is called as a witness against his client, the attorney may continue to represent the client "until it appears that his testimony is

145. *Id.* at 17.

146. *Id.*

147. *Id.* at 18. The court remarked that the timing of these subpoenas "could be taken as a veiled threat" by the government, and there was a finding of harassment by the lower court. *Id.*

148. The circuits are in disagreement as to what the government's prima facie showing must be where the attorney-client privilege is at issue. At one point, the Third Circuit required the government to make an initial showing of relevancy and materiality. See, e.g., *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005 (4th Cir.), vacated, 697 F.2d 112 (4th Cir. 1982); *In re Grand Jury Proceedings (Schofield I)*, 486 F.2d 85 (3d Cir. 1973); *In re Grand Jury Proceedings (Schofield II)*, 507 F.2d 963 (3d Cir. 1973), cert. denied, 421 U.S. 1015 (1975). Note that *Schofield* was initially followed in the Fourth Circuit, but later abandoned.

Other circuits have rejected the *Schofield* test. For instance, the Sixth Circuit held that the government does not have to show the information sought is minimally relevant to the grand jury investigation until the party who seeks to quash the subpoena makes a showing of irrelevancy or prosecutorial abuse. See, e.g., *In re Grand Jury Subpoena 84-1-24 (Battle)*, 748 F.2d 327 (6th Cir. 1984).

The Ninth Circuit has also refused to require the government to make a showing of need. See, e.g., *In re Ousterhoudt*, 722 F.2d 591 (9th Cir. 1983). Instead, a legitimate purpose can be "derived from the fact that the subpoena is necessary to a legitimate pursuit and the presumption that the government obeys the law." *Hodge & Zweig*, 548 F.2d 1347, 1354 (9th Cir. 1977).

or may be prejudicial to his client.”¹⁴⁹ Since revealing fee information may lead to indictment of the client, it is certainly prejudicial and will require the attorney to withdraw from the case. Thus, when an attorney is compelled to become a witness against his client at the grand jury stage, an effective “wedge” is driven between the attorney and the client.¹⁵⁰

The government’s attempts to subject attorneys’ fees to forfeiture have caused a few district courts to consider a final sixth amendment issue regarding the seizure of these fees.¹⁵¹ For example, in *United States v. Rogers*,¹⁵² the government brought a thirty count indictment against certain defendants under the Racketeer Influenced and Corrupt Organizations Act. The indictment also alleged forfeiture under the Comprehensive Forfeiture Act of 1984.¹⁵³ At the same time the indictment was filed, the government filed a petition for an order restraining other property transfers. The defendants thereafter brought motions to protect attorneys’ fees from forfeiture. The court held that assets “legitimately transferred to attorneys in return for services rendered”¹⁵⁴ were not subject to forfeiture.

The defendants also claimed that the required “subsection (m)” hearing¹⁵⁵ threatened the attorney-client privilege. The hearing would chill communications between an attorney and his client. The court found that the hearing would require the attorney to disclose his “knowledge about the scope and source of the defendant’s assets.”¹⁵⁶ It was these particular disclosures that would become the heart of the government’s case. These disclosures had such a significant role in later proceedings that they went “far beyond the exception to [the] attorney client privilege. . . .”¹⁵⁷ The very threat of disclosure would chill communications between the attorney and his

149. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102(B)(1979). The full text of DR 5-102(B) reads:

If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

Id.

150. *Grand Jury Matters*, 751 F.2d at 19 (quoting *In re Special Grand Jury No. 81-1* (Harvey), 676 F.2d 1005, 1009 (4th Cir.), *vacated*, 697 F.2d 112 (4th Cir. 1982)).

151. See *United States v. Rogers*, 602 F. Supp. 1332 (D. Colo. 1985); *United States v. Ianniello*, 621 F. Supp. 1455 (S.D.N.Y. 1985).

152. 602 F. Supp. 1332 (D. Colo. 1985).

153. 18 U.S.C.A. § 1963 (West Supp. 1985).

154. *Rogers*, 602 F. Supp. at 1349.

155. Under a subsection (m) hearing, any person asserting a legal interest in the property which the government ordered to be forfeited has to show that he is “a bona fide purchaser for value of the right, title, or interest in the property and was at the time of the purchase reasonably without cause to believe that the property was subject to forfeiture. . . .” 18 U.S.C.A. § 1963(m) (West Supp. 1985).

156. *Rogers*, 602 F. Supp. at 1349.

157. *Id.*

client and would infringe the sixth amendment right to counsel.¹⁵⁸

Perhaps the court's primary concern was the general impact that the seizure of attorney fees would have upon the adversary process. The government contended that when a person had no legitimate assets and he could not afford counsel of his own choice, he would still be entitled to a court-appointed lawyer. The court dismissed this argument. The government expended

significant resources to prosecute these cases. Adequate defense . . . require[d] representation during grand jury investigations lasting as long as two or three years. Counsel appointed ninety or one hundred and twenty days before trial is patently inadequate. It is not consistent with due process to create a situation which eliminates the adversary from the adversary process.¹⁵⁹

Rogers was regarded as the first "major breakthrough" for lawyers who were having difficulty in keeping their fees. However, the United States Department of Justice maintains that this decision was wrong.¹⁶⁰ Jeffrey S. Gordon, the attorney who represented Rogers, commented that "lawyers would be defenseless to try to defend their fees, especially if you have the burden of proof [under RICO]. . . . It would completely destroy the attorney-client relationship."¹⁶¹ The government's position is that Gordon exaggerates. "I don't know of any case in which this office has attempted to use forfeiture provisions to remove a defense attorney from a case," explained Richard Drooyan, Chief Assistant U.S. Attorney in Los Angeles.¹⁶²

The rationale of *Rogers* (that the sixth amendment right to counsel would be violated if attorneys' fees were forfeitable) has been followed in another district court.¹⁶³ The Criminal Justice section of

158. *Id.* There is currently a lawsuit pending in the District of Colorado challenging the constitutionality of the currency reporting law as applied to attorneys. *Saint Velti v. Department of the Treasury*, No. 85-K-501. This case has been assigned to Judge Kane, author of the *Rogers* opinion. In *Saint Velti*, the Treasury Department moved to dismiss the declaratory relief action. The government argued the currency reporting requirement did not impinge upon the sixth amendment or other rights. The court has not yet ruled on the motion. Letter from Mark O. Heaney to Tara Flanagan (Oct. 16, 1985) (discussing the Currency Reporting Law). Mr. Heaney, an attorney in Los Angeles, is Co-Chairman of the Special Committee to Study the Currency Transaction Reporting Law of the National Association of Criminal Defense Lawyers.

159. *Rogers*, 602 F. Supp. at 1349-50.

160. *Justice Department Guidelines*, *supra* note 17, at 3002.

161. *Judge Bars Seizure of Attorney's Fees Under RICO Law*, L.A. Daily J., Feb. 20, 1985, at 1. Note that *Rogers* is not appealable. Telephone interview with Ms. Cathy Nulty, Law Clerk to District Court Judge Kane (Oct. 16, 1985).

162. L.A. Daily J., Feb. 20, 1985, at 1.

163. *United States v. Javello*, No. 585 CR 115 (S.D.N.Y. Sept. 4, 1985) (Chief Judge Motley) (slip opinion available on LEXIS, September 1985). See also, *United States v. Badalementi*, 614 F. Supp. 194 (S.D.N.Y. 1985). For a contrary view, see *United States*

the American Bar Association also disapproves of the use of the forfeiture provisions of the Comprehensive Crime Control Act of 1984 as used against attorneys' fees.¹⁶⁴ As to the opposition, recent guidelines issued by the United States Department of Justice regarding the forfeiture of attorney fees reemphasize the government's "hardline position concerning the government's right to all proceeds of racketeering and drug activity."¹⁶⁵

X. CONCLUSION

Has the grand jury subpoena, as addressed to defense counsel, become the prosecutor's ultimate weapon? Today the attorney-client privilege will not shield the attorney from being compelled to reveal both the identity of his clients and fee information. But the invocation of the sixth amendment right to counsel and to counsel of choice may in some limited circumstances exempt an attorney from testifying before the grand jury. If the very timing of the subpoena raises

v. *One Parcel of Land*, 614 F. Supp. 183 (D.C. Ill. 1985) (attorney fees/costs of litigation incurred by criminal defendant involved in drug activities could not be excluded from forfeiture under Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 881).

164. Criminal Justice Section, American Bar Association, *Report to the House of Delegates*, submitted by Chairperson Paul L. Smith, July, 1985.

165. See *Justice Department Guidelines*, *supra* note 17, at 3001. These new guidelines provide that any grand jury or trial subpoena issued to an attorney for information relating to the representation of a client must be authorized by the Assistant Attorney General, Criminal Division. The government guidelines state that, with regard to the issuance of a subpoena, certain requirements for fee information can be easily met. First, the information is relevant. *Id.* at 3007. The information is relevant because:

[i]t may prove unexplained wealth which is relevant to show that a defendant obtained substantial income from his illegal activities. It may show that the fee for one or more alleged conspirators was paid by another co-conspirator which is relevant to prove 'association in fact' or may lead to the discovery of other co-conspirators. Finally, it may show the disposition of forfeitable assets or lead to the discovery of forfeitable assets which have been hidden by a defendant.

Id.

A second requirement is that reasonable attempts must be made to obtain the information from other sources.

A third requirement is that there exist reasonable grounds to believe the information is reasonably needed. With regard to forfeiture, the government concludes "that there must be a basis to conclude that there are assets subject to forfeiture which have not been identified or located." *Id.* Such a basis would exist where the defendant probably obtained his income from illegal sources "and he had no substantial legitimate income at the time the fee was paid." *Id.*

The fourth, and final requirement, is that "the need for the information must outweigh the potential adverse effects on the attorney-client relationship." *Id.*

With regard to the forfeiture of attorneys' fees, the guidelines do allow for agreements to exempt fees from forfeiture. *Id.* at 3008. The amount of the fee alone will not determine if it will be exempt. "The focus must be on whether it is a legitimate transaction or a sham transaction designed to shield assets from forfeiture. If the transaction is legitimate, the fee, even if it appears exorbitant, may be exempted if it is paid from a source that meets the first requirement." *Id.*

issues regarding effective counsel, an attorney may not be compelled to comply with a grand jury subpoena.

There are numerous ethical considerations which pose a dilemma for an attorney served with a grand jury subpoena. Generally, the various state bar associations have maintained that revealing fee information seriously jeopardizes the attorney-client relationship. And, although an attorney must vigorously represent his client's interests, he may be unwilling to suffer contempt in order to have an immediate appeal of a denial of a motion to quash.

Finally, the courts have only begun to address the complex question of whether the actual forfeiture of attorneys' fees conflicts with the defendant's sixth amendment right.¹⁶⁶ As a practical matter, if the attorneys' fees become subject to forfeiture in the early or middle stage of criminal proceedings and the attorney withdraws, undue delay may result and the system may incur additional expenses in finding qualified, court-appointed counsel. Such administrative concerns cannot be lightly dismissed in a system already plagued with case backlogs and delays. Whether these administrative and constitutional concerns will ultimately prevail over the government's interest in the enforcement of the forfeiture statutes remains to be seen.

TARA A. FLANAGAN

166. For a concise article on this topic, see Weintraub, *Forfeiture of Attorneys' Fees Under the 1984 Comprehensive Crime Control Act*, 22 GA. ST. B.J. 67 (Nov. 1985).

