EVIDENCE—ATTORNEY-CLIENT RELATIONSHIP—CLIENT'S IDENTITY PRIVILEGED

The United States Court of Appeals for the Fifth Circuit in *In re Grand Jury Proceedings*[1] held that a client's identity, fee and bonding arrangements may be privileged from disclosure by his attorney to the grand jury when such protection is necessary to preserve the client's privileged motive.[2]

The appellants, all duly-licensed Texas attorneys, were served with subpoenas commanding them to appear and testify before the grand jury, and to produce the records of fees believed to have been paid by undisclosed parties, who the appellants claimed to represent in a professional capacity on behalf of specified named clients.[3] The Government sought the identities of these undisclosed clients in order to corroborate and supplement existing information connecting them with possible income tax violations. The Government suspected that the alleged payment of fees to these attorneys was far in excess of their clients' reported income for the year in question.

The appellants filed motions to quash the subpoenas, asserting that compulsion of their testimony as to the identities of the individuals who retained them and paid their fees would require disclosure of privileged communications.[4] The motion to quash was denied and the appellants appeared before the grand jury, but refused to answer the questions relating to the fees and identities of the third parties, asserting the claimed privilege of an unidentified client. Following another hearing in which the appellants again refused to testify, the district court cited the attorneys for contempt[5] and they appealed to the Fifth Circuit.

The attorney-client privilege is essentially a right which belongs to the client to prevent disclosure of confidential information which the individual has communicated in seeking professional advice.[6] The ultimate aim of the privilege is protecting such communications from compelled disclosure by the attorney, and thus promoting freedom of consultation between legal advisers and clients.[7] Less apprehension of compelled disclosure of

1. 517 F.2d 666 (5th Cir. 1975).

2. *See* 8 WIGMORE, EVIDENCE § 2313, at 630 (McNaughton, 1961), wherein it is stated: "A communication as to . . . the ultimate motive of the litigation, is equally protected with others. . . ."

3. INT. REV. CODE OF 1954, § 7602 is the basic authority for Internal Revenue Service investigations, including the conferring of jurisdiction upon federal courts to enforce summons and subpoenas.

4. 517 F.2d at 669.

5. *See* Recalcitrant Witnesses, 28 U.S.C.A. § 1826 (Supp. 1976).

6. 8 WIGMORE, EVIDENCE § 2290 (McNaughton, 1961) surveys the history of this, the oldest of the common-law privileges.

7. *See* Note, *California Law as to Scope of Attorney-Client Privilege Held Applicable in*

confidential communications leads to more candid and useful information to the lawyer, and assures adequate representation of the client. Freedom of consultation, as a fundamental policy consideration underlying the privilege, however, necessarily conflicts with the countervailing policy of full disclosure of all relevant evidence which is also one of the fundamental policies of the law of evidence.[8] Thus, it is quite apparent that the application of the privilege, founded primarily upon public policy considerations, is subject to the limitations and restraints imposed by public interest in full disclosure.

Although none of the circuits has established a clear standard for determining the scope of the attorney-client privilege,[9] a general rule is discernible against any privilege as applied to the identity of the client,[10] or to the receipt of fees.[11] In most ordinary cases, the retention of counsel and the payment of fees is not confidential and the client's identity presents no problem.[12] These acts rarely have any relationship to private professional communications involving the rendering of legal advice and, thus, the identity of an undisclosed client normally is not the proper subject matter for a confidential communication.[13] The general rule is also supported by the fact that the policy of full disclosure is believed to be fundamental in our legal system, and consequently the privilege is narrowly construed.[14]

Perhaps the leading federal case following the general rule in holding that the identity of the client is not generally within the privilege is *United States v. Pape*.[15] It involved a prosecution under the White Slave Traffic

Federal Non-Diversity Proceeding, 49 CALIF. L. REV. 382 (1961). *See also* 8 WIGMORE, EVIDENCE 2291 (McNaughton, 1961).

8. *See, e.g.*, 8 WIGMORE, EVIDENCE § 2291, at 554 (McNaughton, 1961), wherein he discusses the speculative benefits of the privilege as opposed to its concrete obstruction to the investigation of truth: "Nevertheless, the privilege remains an exception to the general duty to disclose. . . . It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." *See also* United States v. Goldfarb, 328 F.2d 280 (6th Cir. 1964), *cert. denied*, 377 U.S. 976, 84 S. Ct. 1883, 12 L.Ed. 2d 746 (1964).

9. FED. R. EVID. 501 authorizes the circuits to use a federal common law of criminal evidence rather than state law in all criminal cases involving the attorney-client privilege.

10. *See* Frank v. Tomlinson, 351 F.2d 384 (5th Cir. 1965), *cert. denied*, 382 U.S. 1028, 86 S. Ct. 648, 15 L. Ed. 2d 540 (1966); Colton v. United States, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951, 83 S. Ct. 505, 9 L. Ed. 2d 499 (1963); United States v. Pape, 144 F.2d 778 (2d Cir.), *cert. denied*, 323 U.S. 752, 65 S. Ct. 86, 89 L.Ed. 602 (1944).

11. United States v. Finley, 434 F.2d 596 (5th Cir. 1970). *See also* 8 WIGMORE, EVIDENCE § 2292 (McNaughton, 1961) for a good summary enumerating the elements comprising the scope of the privilege.

12. Behrens v. Hironimus, 170 F.2d 627 (4th Cir. 1948).

13. *See, e.g.*, Banks v. United States, 204 F.2d 666 (8th Cir. 1953); McFee v. United States, 206 F. 2d 872 (9th Cir. 1953). For a glimpse at various rationales advanced in support of the general rules, see MCCORMICK, EVIDENCE § 90 (2d ed. 1972).

14. *See In re* Richardson, 31 N.J. 391, 157 A. 2d 695 (1960). *See also* WIGMORE, EVIDENCE § 2292 (McNaughton 1961).

15. 144 F.2d 778 (2d Cir. 1944), *cert. denied*, 323 U.S. 752, 65 S.Ct. 86, 89 L.Ed. 602 (1944).

Act.[16] There, an attorney was compelled to testify that the defendant had retained him to defend, against a prostitution charge, a woman whom the defendant was accused of transporting.[17] The court followed the general rule, holding that the fact of retainer or identity of the client was not within the privilege, while nevertheless recognizing that "there may be situations in which so much has already appeared of the actual communications . . . that the disclosure of the client will result in a breach of the privilege."[18] The *Pape* decision was obviously the result of a court straining to give complete deference to the "more general and pervasive rule of free disclosure to ascertain the truth and prevent the guilty from escaping. . . ."[19]

An examination of recent cases discloses increasing recognition that situations giving rise to an exception may exist.[20] In the absence of any definitive rule of law in this area, these cases, necessarily, have been resolved only after consideration of the particular factual circumstances which gave rise to the controversy[21] and upon weighing the conflicting policy considerations.[22] Following this procedure, courts have shown less reluctance to deviate from the general rule and more concern for protecting the client's identity if disclosure would seriously inhibit freedom of consultation—a fundamental policy consideration upon which the privilege is based.[23] The argument for witholding the privilege loses its force in circumstances where so much of the confidential communications has already been revealed that disclosure of the client's identity would be tantamount to making disclosure of his confidential communications.[24] The undermining effect upon the privilege becomes even more pronounced where "disclosure of the identity of the client would have the effect of circumventing the client's privilege against self-incrimination."[25]

The most significant federal decision holding that the identification of a client is privileged is *Baird v. Koerner*.[26] There, a client, dilatory in his

16. 18 U.S.C.A. § 398 (1910), *as amended*, 18 U.S.C.A. §§ 2421-24 (Rev. 1949).

17. "[T]hat it was an important step in connecting him with the woman's prostitution, admits of no debate." 144 F.2d at 783-84 (Hand, L., dissenting).

18. *Id.* at 783.

19. *Id.*

20. *See, e.g.*, United States v. Hodgson, 492 F.2d 1175 (10th Cir. 1974); *In Re* Semel, 411 F.2d 195 (3d Cir. 1969), *cert. denied* , 396 U.S. 905 (1969).

21. 8 WIGMORE, EVIDENCE § 2313 at 608 (McNaughton, 1961) provides: "There is not entire harmony in the ruling, but no doubt much ought to depend upon the circumstances of each case." *See also* Note, *Evidence—Attorney-Client Privilege—Identity of Client*, 46 IOWA L. REV. 904 (1961).

22. *See* Mauch v. Commissioner, 113 F.2d 555 (3d Cir. 1940).

23. *See* NLRB v. Harvey, 349 F.2d 900 (4th Cir. 1965); *In Re* Kaplan, 8 N.Y. 2d 214, 168 N.E. 2d 660 (1960); Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960). *See also* Note, *Assertion of Attorney-Client Privilege to Protect the Client's Identity*, 28 U. CHI. L. REV. 533 (1961).

24. For an excellent discussion of the judicial trend away from the general rule in the context of tax investigations see Lofts, *The Attorney-Client Privilege in Federal Tax Investigations*, 19 TAX L. REV. 405 (1964).

25. 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 503-31 (1975).

26. 279 F.2d 623 (9th Cir. 1960).

tax payments for prior years, acted upon the advice of a tax attorney consulted by the client's attorney. Without disclosing the client's identity, the tax attorney transacted the payment to the Internal Revenue Service. The Ninth Circuit subscribed to Wigmore's admonition that "much ought to depend upon the circumstances of each case"[27] in holding that disclosing the client's identity would be tantamount to the disclosure of the client's ultimate motive in seeking legal advice.[28] Although the holding was based on state precedent,[29] the principles expounded in *Baird* have been followed in federal courts.[30]

In *NLRB v. Harvey*,[31] the Fourth Circuit held that the identity of the client need not be disclosed since it was evident that a confidential communication would be disclosed by revealing his name. There, upon identification of the client, it would have been known that the client wanted information about a representative of the United Mine Workers who was put under surveillance by private detectives hired by the attorney. The Fourth Circuit was not only reaffirming the exception relied upon in *Baird*, but refining it another degree as it stated quite succinctly the foundation upon which the exception may be predicated.

> The privilege may be recognized when so much of actual communication has already been disclosed that identification of the client amounts to disclosure of a confidential communication.[32]

The Fifth Circuit, in *In re Grand Jury Proceedings*,[33] held that the exception to the general rule shall be applied when, in the totality of the circumstances, such protection is necessary to preserve the privileged motive. Prior to *In re Grand Jury Proceedings*, the exception announced in *Baird* had never been expressly ruled upon in the Fifth Circuit. However, it had been recognized by way of dicta.[34] The court was particularly impressed with the analysis demonstrated in *Baird*, and focused on that court's rationale regarding the relevancy of what has already been disclosed. This test of "logical relevance and probative value"[35] in conjunction with the facts of each case was very persuasive and appealing to the Fifth Circuit. The court stated: "The exception announced in *Baird*, where applicable, is as much a part of this circuit's federal law of evidence as is the normal rule of no privilege."[36] The court further noted that to disclose the clients'

27. 8 WIGMORE, EVIDENCE §2313, at 608 (McNaughton, 1961).
28. 279 F.2d at 630.
29. *See Ex Parte* McDonough, 170 Cal. 230, 149 P. 566 (1915).
30. *See, e.g.*, Tillotson v. Boughner, 350 F. 2d 663 (7th Cir. 1965); NLRB v. Harvey, 349 F.2d 900 (4th Cir. 1965).
31. 349 F.2d 900 (4th Cir. 1965).
32. *Id.* at 905.
33. 517 F.2d 666, 674-76 (5th Cir. 1975).
34. *See* American Can Co. v. Citrus Feed Co., 436 F.2d 1125 (5th Cir. 1971).
35. 517 F.2d at 672.
36. *Id.* at 671.

identities would corroborate already existent incriminating information about certain persons suspected of income tax offenses.[37] The court reasoned that this circumstance demonstrated a privileged motive giving rise to the protection of their identities, ostensibly basing its rationale on the possible inculpatory effect of the disclosure upon the clients, rather than focusing its attention upon policy considerations.

The Fifth Circuit, in *In re Grand Jury Proceedings*, reached the correct result, but through questionable analysis. In upholding the privilege, the court succeeded in further delimiting, if not implicity overruling, the *Pape* decision. The court, however, opted to analyze the facts solely in light of *Baird* and cases following its precedent, without ever addressing itself to, or in any way distinguishing, its facts vis-a-vis *Pape*. In *Pape*, the attorney was forced to disclose that the defendant retained him on behalf of a prostitute. This incriminated the defendant by connecting him to the woman, and thereby sealed his conviction under the White Slave Traffic Act.[38] Similarly in *In re Grand Jury Proceedings*, the attorney's compelled disclosure regarding their clients' identities would have incriminated their clients in connection with their payment of fees on behalf of third parties, which the I.R.S. believed to be in excess of their reported income. The attorneys in both cases rendered professional services based on frank, confidential communications. In both cases, disclosure of the sought after information, the client's identity, would result in the incrimination of the client.[39] In *Baird*, a persuasive and highly regarded decision, the rationale focused upon not the policy aspects, which are the foundation of the privilege, but upon the motives of the client in seeking professional advice - two closely related, yet independent considerations. The ultimate motive in seeking legal advice was clearly based on the client's desire to vindicate himself from possible prosecution by the I.R.S. Conversely, in *In re Grand Jury Proceedings*, the determination of the ultimate motive for retaining counsel, which the court heavily stressed by its strict adherence to *Baird*, was hampered by the addition of third parties absent in *Baird*. This fact arguably makes it increasingly difficult to resolve the ultimate motive issue, a concern which unfortunately the court failed to address. Indeed, the rationale of *Baird* seems questionable when an anonymous client becomes insulated from possible prosecution because his attorney transacts

37. *Id.* at 674.

38. 18 U.S.C.A. § 398 (1910), *as amended*, 18 U.S.C.A. §§ 2421-24 (Rev. 1949). This act prohibited the transportation of a woman in interstate commerce for the purpose of prostitution or other immoral purposes.

39. Learned Hand's dissent in *Pape* reflected new insight in the need for broadening the heretofore restricted parameters of the attorney-client privilege, and emphasized the manifest need to analyze carefully the facts before applying the privilege. He felt that retainer was a communication between attorney and client, a step in his own defense, a privileged communication. 144 F.2d at 783 (Hand, J., dissenting).

the essentially ministerial function of mailing his overdue payment to the I.R.S.[40]

The court's treatment of the rationale underlying the privilege is demonstrative of the trend[41] away from the mechanical application of the general rule of no privilege as exemplified by *Pape*. But mere acknowledgement of the need for a case-by-case methodology before asserting the privilege does not go far enough. In an area of law where inconsistency and lack of uniformity prevail in the decision making process, the courts must strive to avoid further confusion by structuring their analysis around the fundamental policies at stake, and in light of the unique fact situations before them. The fact that the court in *In re Grand Jury Proceedings* lost sight of these considerations is evident in their total reliance on *Baird*. The decision leaves the lower courts with minimal, if any, guidance for future cases. An unqualified acceptance of the *Baird* exception does little to fill the gaps of uncertainty all too prevalent in the privilege area.

ROBERT B. LIPMAN

40. *See, e.g.*, United States v. Brickey, 426 F.2d 680 (8th Cir. 1970), *cert. denied*, 400 U.S. 828, 91 S.Ct. 55, 27 L.Ed.2d 57 (1970); United States v. Bartone, 400 F.2d 459 (6th Cir. 1968), *cert. denied*, 393 U.S. 1027, 89 S.Ct. 631, 21 L.Ed.2d 571 (1969). In both Brickey and Bartone, evidence that the attorneys performed only ministerial functions was strong, and evidence of an attorney-client relationship based on legal advise was weak or nonexistent. Thus, both attorneys were compelled to testify regarding their clients' tax evasion. *See also* MCCORMICK, EVIDENCE § 90 at 187 (2d ed. 1972): "In these cases it may well be questioned whether the attorney was in fact merely purveying anonymity, scarcely a professional legal service."

41. See Comment, *Assertion of the Attorney-Client Privilege to Protect the Client's Identity*, 28 U. CHI. L. REV. at 542-43 (1961), wherein it is stated: "The cases collectively represent a shift in judicial attitude towards protecting the client's identity when under the same circumstances other communications to an attorney would be protected."