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## §5.19 Client Identity; Fee Arrangements

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## §5.19 Client Identity; Fee Arrangements

The general rule is that the attorney-client privilege does not shield the identity of the client.<sup>1</sup> Under the traditional view, a client's identity is not covered by the privilege because it is not a confidential communication made to facilitate the rendition of legal services, but rather a preliminary matter bearing on the formation and existence of the attorney-client relationship. Knowledge of the client's identity is more a matter of interpersonal and business necessity than a fact critical to the giving of legal advice.

In most instances the client does not intend her identity to be confidential. A lawyer commonly acts as the client's spokesperson, and visits to a lawyer's office are usually not made surreptitiously. Moreover, many types of legal representation require disclosure of the client's identity. In litigation, for example, parties are entitled to know their opponents, and the client's identity normally must be stated in the pleadings.<sup>2</sup>

### Client's intent

There are cases, however, where a client wants to have her identity kept confidential and reasonably claims that the identifying information she gave to her lawyer is itself a confidential communication made to help obtain legal services.<sup>3</sup> The client's interests or wishes cannot be controlling, and the privilege should be recognized only where justified by its underlying policies.<sup>4</sup> Courts are understandably suspicious of the motives of a client who retains a lawyer to act on her behalf under a cloak of anonymity, and in some cases a claim of privilege for a client's identity can be defeated by showing that the attorney's services were employed to assist the client in committing a crime or fraud.<sup>5</sup>

### Three lines of cases

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§5.19 1. *In re Shargel*, 742 F.2d 61, 62-64 (2d Cir. 1984) (disclosure of identity of client stands "on a footing different from communications intended by the client to explain a problem to a lawyer in order to obtain legal advice").

2. *But see* *Southern Methodist Univ. Assn. of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 712-713 (5th Cir. 1979) (under special circumstances "where the issues involved are matters of sensitive and highly personal nature," courts allow parties to use fictitious names).

3. *See* Goode, *Identity, Fees, and the Attorney-Client Privilege*, 59 *Geo. Wash. L. Rev.* 307, 334 (1991) ("If a client reasonably believes that he must identify himself to a lawyer when he initiates the relationship, it is difficult to see how this would not be a communication made for the purpose of facilitating the rendition of legal services.").

4. *See generally* Glanzer & Taskier, *Attorneys Before the Grand Jury: Assertion of the Attorney-Client Privilege to Protect a Client's Identity*, 75 *J. Crim. L. & Criminology* 1070, 1071-1074 (1984).

5. *See* §5.22, *infra*.

Courts have recognized three exceptions to the general rule that a client's identity is not within the attorney-client privilege—the legal advice exception, the last link exception, and the confidential communications exception, although the modern trend is toward recognition only of the third.

All of these exceptions are derived from the seminal decision of the Ninth Circuit in *Baird v. Koerner*.<sup>6</sup> Baird, a tax attorney, was retained to give advice to accountants and attorneys representing unidentified taxpayers who had probable tax liabilities. To put the taxpayers in a more favorable position, Baird transmitted to the IRS a cashier's check for a substantial amount on the taxpayers' behalf. In a summons enforcement proceeding, the IRS sought to compel Baird to reveal the "identity and addresses of each and every person" who employed Baird in connection with his transmittal of the check to the IRS. The court held the identity of such persons to be within the attorney-client privilege.

Three lines of cases have evolved from *Baird*, each relying on different language of the opinion. Since *Baird* says identity is privileged if the circumstances are such that the name of the client is important to show "an acknowledgment of guilt" of the offenses "on account of which the attorney was employed," some courts read the opinion to establish a legal advice exception whereby identity is privileged if there is a strong probability that disclosure would implicate the client in the very matter about which he consulted the lawyer.<sup>7</sup> Other courts have interpreted *Baird* as establishing a last link exception, building on language in the case indicating that the government wanted to learn the identity of the client there as a "link that could form the chain of testimony" needed to convict for a federal crime.<sup>8</sup> Finally, virtually all courts read *Baird* as establishing a confidential communications exception, building on language in the case indicating that identity is protected if disclosure "conveys information" that would normally be confidential, in substance revealing the true confidences that the client shared with counsel.<sup>9</sup>

The trend of recent decisions is away from recognizing the first two exceptions, and several circuits have expressly rejected the last link exception,<sup>10</sup> noting that the fact that a client's identity

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6. 279 F.2d 623, 632-633 (9th Cir. 1960) (ensuing paragraphs of text quote these pages).

7. *See, e.g.*, In re Grand Jury Investigation No. 83-2-35 (Durant), 723 F.2d 447, 452-454 (6th Cir. 1983), *cert. denied*, 467 U.S. 1246.

8. *See, e.g.*, In re Grand Jury Proceedings (Twist), 689 F.2d 1351, 1352-1353 (11th Cir. 1982) (recognizing narrow exception where "disclosure of the client's identity by his attorney would supply the last link in an existing chain of incriminating evidence likely to lead to the client's indictment").

9. *See, e.g.*, In re Grand Jury Matter No. 91-01386, 969 F.2d 995, 998 n.2 (11th Cir. 1992) (*Baird* based on fact that attorney "had already disclosed the motive for his client's retaining his legal services and the substance of his legal advice to him" and therefore disclosing the client's name would reveal "those confidential communications pertaining to the matter of representation").

10. *See, e.g.*, In re Grand Jury Investigation No. 83-2-35 (Durant), 723 F.2d 447, 453-454 (6th Cir. 1983) (although last link exception "may promote concepts of fundamental fairness against self-incrimination, these concepts are not proper considerations to invoke the attorney-client privilege"; focus of inquiry "is whether disclosure of the identity would adversely implicate the confidentiality of communications" and therefore court "rejects the last link exception"), *cert. denied*, 467 U.S. 1246.

may be incriminating is not a sufficient justification for making it privileged.<sup>11</sup> There is an emerging consensus that the “confidential communications” exception is the only exception consistent with the policies and purposes underlying the attorney-client privilege.<sup>12</sup>

### **Confidential communications exception**

The Ninth Circuit has explicitly held that the confidential communications exception is the only legitimate progeny of *Baird*, stating that “[a] careful reading of *Baird*, and close examination of subsequent cases, indicates that *Baird* applies only when it is shown that, because of exceptional circumstances, disclosure of the client’s identity or the existence of a fee arrangement would reveal information that is tantamount to a confidential professional communication.”<sup>13</sup> Those courts that continue to recognize the “legal advice” and “last link” exceptions have generally reformulated them to apply only where revelation of the client’s identity or related information would result in disclosure of a confidential communication.<sup>14</sup>

### **Five recurring patterns**

There are five recurring situations where lawyers have claimed the identity of their client is protected: (1) the attorney was hired to make restitution or other payment for the client; (2) the attorney was hired as an intermediary to report illegal or improper conduct by a third person; (3) the attorney was hired by an undisclosed person to represent another in a criminal case; (4) the government seeks to learn the identity of clients paying more than \$10,000 cash for legal services, by use of a cash reporting form; (5) the attorney is asked to name clients to whom he gave particular legal advice.

In the first two situations, the critical question is whether an attorney hired to transmit payment

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11. In re Grand Jury Matter No. 91-01386, 969 F.2d 995, 998 (11th Cir. 1992) (merely because matter disclosed “may incriminate the client” does not make it privileged).

12. See, e.g., *Vingelli v. U.S. Drug Enforcement Agency*, 992 F.2d 449, 453 (2d Cir. 1993) (noting agreement of circuits on “confidential communications” exception). *But see* In re Grand Jury Subpoena, 204 F.3d 516 (4th Cir. 2000) (court “does not recognize an exception that protects the client’s identity because the client has authorized the disclosure of information that he could have kept confidential”).

13. *Tornay v. United States*, 840 F.2d 1424, 1428 (9th Cir. 1988). See also In re *Osterhoudt*, 722 F.2d 591, 593 (9th Cir. 1983) (privilege recognized in *Baird* only 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”).

14. See, e.g., In re Grand Jury Subpoenas, 906 F.2d 1485, 1492 (10th Cir. 1990) (applying legal advice exception, but requiring that advice sought “must have concerned the case then under investigation and disclosure of the client’s identity would now be, in substance, the disclosure of a confidential communication by the client, such as establishing the identity of the client as the perpetrator of the alleged crime at issue”).

or report information on behalf of an anonymous client is providing professional legal services.<sup>15</sup> If the attorney is acting merely as a messenger or transmitting agent, no privilege arises.<sup>16</sup> In *Baird*, the court relied on the fact that Baird was a tax lawyer who was consulted regarding “defenses and steps to be taken to place the undisclosed taxpayers in the most favorable position in the event criminal charges were to be brought against them by the Internal Revenue Service.”<sup>17</sup> Nonetheless, commentators have questioned whether mailing a check on behalf of a client constitutes professional legal services or the lease of a privilege.<sup>18</sup> If the transmitting of restitution or information on behalf of a client is found to qualify as professional legal services, the privilege should apply if disclosure of the client’s identity would reveal the confidential lawyer-client communications.<sup>19</sup>

### **Identity of fee payer**

In the third situation, where the prosecutor seeks to learn the identity of the person paying the defendant’s legal fees, it must first be determined whether the fee payer is also a client of the attorney. If the fee payer is not a client, most courts hold that no privileged relationship exists, and therefore disclosure of his identity can be compelled.<sup>20</sup> A fee payer does not become a client merely by paying the legal fees of another.<sup>21</sup> Even where the fee payer is a current or former client, most courts hold that the privilege does not shield his identity as the fee payer<sup>22</sup> except where disclosure

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15. See generally §5.11, *supra*.

16. See *Vingelli v. United States Drug Enforcement Agency*, 992 F.2d 449, 454 (2d Cir. 1993) (it is “not fitting for lawyers to serve as conduits of information or money essential to the success of a criminal scheme” and “proper administration of criminal justice will be advanced by the bar becoming aware that its members may not provide clients with a safe haven from disclosure of such service”); *Hughes v. Meade*, 453 S.W.2d 538, 542 (Ky. Ct. App. 1970) (attorney-client privilege inapplicable to identity of client who hired attorney to return a stolen typewriter).

17. *Baird*, 279 F.2d at 626.

18. See *Goode*, *supra* note 3, at 339 (Baird was not “exercising any legal skills when he procured a cashier’s check for them and mailed it to the IRS”; knowing that “friends, bankers, or other agents could be forced to disclose their identity,” the taxpayers “chose to employ a lawyer instead”).

19. See *In re Kozlov*, 79 N.J. 232, 398 A.2d 882, 887 (1979) (privilege applies where lawyer reports misconduct on behalf of anonymous client); *In re Kaplan*, 8 N.Y.2d 214, 168 N.E.2d 660, 661 (1960) (privilege held to protect identity of client who confided in his lawyer to have lawyer disclose certain wrongdoings to public officials).

20. *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 913 F.2d 1118, 1123 (5th Cir. 1990) (privilege denied where no contention made that fee payer was a current or former client), *cert. denied*, 499 U.S. 959.

21. See §5.9, *supra*.

22. *Vingelli v. United States Drug Enforcement Agency*, 992 F.2d 449, 453 (2d Cir. 1993) (where unidentified client

would reveal confidential communications made for the purpose of facilitating legal services to the fee payer.<sup>23</sup> Where payment of legal fees is shown to be an element of a criminal conspiracy, some courts have required disclosure of the identity of the fee payer on the theory that such payment falls within the ongoing or future crime-fraud exception to the attorney-client privilege.<sup>24</sup>

In the fourth situation, where the government seeks to learn the identity of clients paying more than \$10,000 cash for legal services, the privilege claim is weak and has been rejected. Congress enacted 26 U.S.C. §6050I, which requires disclosure to the IRS of the identity of persons paying more than \$10,000 in cash for goods or services. Congress rejected lobbying efforts to exempt the legal profession from the reporting requirement.<sup>25</sup> The courts have upheld this disclosure obligation against claims that it invades the attorney-client privilege.<sup>26</sup>

### **To whom advice given**

In the fifth situation, where the lawyer is asked to identify a client to whom he gave certain advice, it seems clear that giving the name would in substance uncover a confidence thereby violating the *Baird* doctrine. Thus where the government sought the identity of clients investing in a tax shelter after learning that a law firm advised such clients that legal fees for the arrangement were deductible, the court held that their identities were privileged because disclosure “would

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hired Arizona attorney to transmit fee to Vermont attorney representing a drug defendant, identity of client not privileged because it would reveal neither a confidential communication nor client’s motive for paying fee; client’s concern that he will be “tarnished by guilt by association” insufficient to prevent disclosure); *In re Grand Jury Subpoenas*, 803 F.2d 493, 498 (9th Cir. 1986) (privilege denied even though fee payer was a “long-time client,” because he was not seeking legal representation in the instant case).

23. *In re Subpoenaed Grand Jury Witness*, 171 F.3d 511, 514 (7th Cir. 1999) (identity of person who paid attorney’s legal fees to represent certain clients was privileged; information would identify client as potentially involved in targeted criminal activity giving rise to motive to pay legal bills for some other clients); *Ralls v. United States*, 52 F.3d 223, 226 (9th Cir. 1995) (fee payer was previous client in same matter and his identity and fee arrangements were “intertwined” with confidential communications made for purpose of obtaining legal advice for fee payer himself).

24. *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026, 1029 (5th Cir. 1982) (where government makes prima facie showing that agreement to furnish legal assistance was part of a conspiracy, crime-fraud exception applies “to deny a privilege to the identity of him who foots the bill—and this even though he be a client of the attorney and the attorney unaware of the improper arrangement”).

25. *See United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 506 (2d Cir. 1991).

26. *United States v. Blackman*, 72 F.3d 1418, 1424-1426 (9th Cir. 1995) (absent extraordinary circumstances, §6050I reporting requirement does not violate attorney-client privilege; “there is no reason to grant law firms a potential monopoly on money laundering simply because their services are personal and confidential”). *But see United States v. Sindel*, 53 F.3d 874, 876 (8th Cir. 1995) (privilege prevails over reporting requirement where disclosure of client identity would reveal substance of confidential communication).

provide all there is to know about a confidential communication between the taxpayer-client and the attorney.”<sup>27</sup> And in a case where the NLRB learned that a law firm hired a detective to investigate a union organizer, the court held that the client’s identity was protected (assuming the lawyer was providing professional legal services) since so much of the communication had been learned that disclosing the name would amount to disclosure of a confidential communication.<sup>28</sup>

## Fee arrangements

The fee arrangements between the client and attorney are also generally outside the attorney-client privilege.<sup>29</sup> Courts have ordered attorneys to divulge the fee agreement,<sup>30</sup> the identity of the fee payer,<sup>31</sup> the amounts billed to the client,<sup>32</sup> the dates or duration of consultation,<sup>33</sup> records of money received from the client,<sup>34</sup> and the form or manner of payment,<sup>35</sup> even where such information is incriminating to the client.<sup>36</sup> The bank records or other financial records of the

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27. *United States v. Liebman*, 742 F.2d 807, 809-810 (3d Cir. 1984).

28. *NLRB v. Harvey*, 349 F.2d 900, 905 (4th Cir. 1965) (remanding for further evidence on the nature of attorney’s services). *Cf. Note*, Public Assault on the Attorney-Client Privilege: Ramifications of *Baltes v. Does*, 3 *Geo. J. Legal Ethics* 351 (1989) (approving Florida trial court ruling that attorney-client privilege prevented disclosure of identity of client who admitted to attorney that he was involved in hit-and-run auto accident and asked attorney to negotiate plea bargain with prosecutor).

29. *In re Grand Jury Subpoenas*, 906 F.2d 1485, 1492 (10th Cir. 1990) (privilege does not apply to “the amount of the fees, the manner of payment, the date of payment, the name of any others partially responsible for payment of the fee, and whether any part of the fee came from the client or his family”).

30. *In re Shargel*, 742 F.2d 61, 65 (2d Cir. 1984).

31. *Vingelli v. United States Drug Enforcement Agency*, 992 F.2d 449, 453 (2d Cir. 1993) (even where fee transmitted by an out-of-state lawyer acting on behalf of fee-payer client, identity of fee payer required to be disclosed).

32. *Clarke v. American Commerce Natl. Bank*, 974 F.2d 127, 130 (9th Cir. 1992) (attorney billing statement that identified client and the general nature of services performed held not to be privileged).

33. *Condon v. Petacque*, 90 F.R.D. 53, 54 (N.D. Ill. 1981) (dates on which services performed are not privileged).

34. *In re Witnesses Before the Special March 1980 Grand Jury*, 729 F.2d 489, 494-495 (7th Cir. 1984).

35. *In re Two Grand Jury Subpoenas Duces Tecum Dated August 21, 1985*, 793 F.2d 69, 71-72 (2d Cir. 1986).

36. *In re Grand Jury Matter No. 91-01386*, 969 F.2d 995, 999 (11th Cir. 1992) (privilege does not prevent disclosure of identity of client who paid fee with counterfeit currency); *In re Grand Jury Investigation No. 83-2-35 (Durant)*, 723 F.2d 447, 453-454 (6th Cir. 1983) (no privilege as to identity of client who paid fee with stolen check), *cert. denied*, 467 U.S. 1246.

attorney are also subject to disclosure.<sup>37</sup>

The general rule that fee arrangements are outside the privilege is subject to the same exceptions applicable to client identity. Thus fee information is protected where disclosure of retainer agreements, time records, billing documents, and similar matters would reveal confidential attorney-client communications.<sup>38</sup> Courts may require fee documents to be produced for *in camera* inspection before ordering disclosure to assure that no privileged material is contained therein.<sup>39</sup>

### **Fact of consultation**

The fact that the client consulted an attorney, and the identity of the attorney, are matters generally outside the privilege<sup>40</sup> although the jury is not permitted to draw an adverse inference of guilt from the fact of consultation.<sup>41</sup> While inquiry is usually allowed into the general nature of the attorney's employment,<sup>42</sup> any details on the nature of the services provided or the client's specific motive for seeking legal advice are privileged, at least if they would tend to reveal client confidences.<sup>43</sup>

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37. *Gannet v. First Natl. State Bank*, 546 F.2d 1072, 1076 (3d Cir. 1976) (attorney-client privilege does not apply to bank records "merely because they derive from transactions involving an attorney's trust account"; otherwise attorneys would have "discretion to insulate certain transactions from investigation by employing their trust accounts"), *cert. denied*, 431 U.S. 954.

38. *See, e.g., In re Grand Jury Subpoenas*, 906 F.2d 1485, 1492 (10th Cir. 1990) (no disclosure required where revealing "the actual fee contracts has the potential for revealing confidential information along with unprotected fee information").

39. *Clarke v. American Commerce Natl. Bank*, 974 F.2d 127, 129 (9th Cir. 1992) (district court may conduct line-by-line *in camera* inspection of billing statement to determine whether privilege applies).

40. *Howell v. Jones*, 516 F.2d 53, 58 (5th Cir. 1975) (client can be required to identify attorney he consulted; fact of consultation not privileged), *cert. denied*, 424 U.S. 916.

41. *See United States v. Liddy*, 509 F.2d 428, 442-445 (D.C. Cir. 1974) (error to instruct jury that an inference could be drawn regarding defendant's guilty knowledge from the fact that he sought legal counsel soon after the crime for which he was later charged), *cert. denied*, 420 U.S. 911.

42. *Clarke v. American Commerce Natl. Bank*, 974 F.2d 127, 130 (9th Cir. 1992) (attorney billing statement that identified client and the general nature of services performed but did not reveal specific research or litigation strategy held not to be privileged).

43. *See In re Grand Jury Witness*, 695 F.2d 359, 361-362 (9th Cir. 1982) (correspondence revealing the client's "motivation" or "litigation strategy" ought to be protected, as should "bills, ledgers, statements, time records and the like which also reveal the nature of the services provided, such as researching particular areas of law").



## Client's whereabouts

Most decisions hold that the privilege does not protect the attorney's knowledge of the whereabouts of the client<sup>44</sup> except where such information is closely intertwined with the purpose of the client in seeking legal assistance<sup>45</sup> or where nondisclosure is necessary to protect the safety or other legitimate interests of the client or a third person.<sup>46</sup> Occasionally the crime-fraud exception is held applicable to communications from a fugitive client as to his whereabouts.<sup>47</sup>

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44. *Litton Indus. v. Lehman Bros. Kuhn Loeb*, 130 F.R.D. 25, 26 (S.D.N.Y. 1990) (no privilege where client's address not related to legal advice requested); *Burden v. Church of Scientology*, 526 F. Supp. 44, 45-46 (M.D. Fla. 1981) (requiring lawyer to disclose client's whereabouts so that service of process could be made; applying Florida law); *Dike v. Dike*, 75 Wash. 2d 1, 448 P.2d 490, 497-498 (1968) (disclosure required when client disappeared with children in alleged violation of custody decree). *See generally* Przepyszny, *Asserting the Attorney-Client Privilege: Client Identity, Fee Information, Whereabouts, and Documents*, 3 *Geo. J. Legal Ethics* 113, 120-121 (1989).

45. *See In re Grand Jury Subpoena (Stolar)*, 397 F. Supp. 520, 523-524 (S.D.N.Y. 1975) (where client sought legal advice regarding his obligation to be interviewed by FBI, attorney not required to disclose client's address and phone number).

46. *Taylor v. Taylor*, 45 Ill. App. 3d 352, 359 N.E.2d 820, 824 (1977) (attorney need not disclose whereabouts of wife who feared injury from husband).

47. *In re Grand Jury Proceedings (Doe)*, 602 F. Supp. 603, 608-609 (D.R.I. 1985) (lawyer's services were in furtherance of a criminal conspiracy).