WILL THIS BE CASH? THE VALIDITY OF INTERNAL REVENUE CODE SECTION 6050I AND THE ATTORNEY-CLIENT RELATIONSHIP

INTRODUCTION

Congress, under the Deficit Reduction Act of 1984,1 enacted section 6050I which requires every trade or business to report to the Internal Revenue Service any cash payment in excess of $10,000.2 The

2. 26 U.S.C. § 6050I (Supp. 1987). This section provides:

SEC. 6050I. RETURNS RELATING TO CASH RECEIVED IN TRADE OR BUSINESS.
(a) Cash Receipts of More Than $10,000.—Any person—
(1) who is engaged in a trade or business, and
(2) who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions), shall make the return described in subsection (b) with respect to such transaction (or related transactions) at such time as the Secretary may by regulations prescribe.
(b) Form and Manner of Returns.—A return is described in this subsection if such return—
(1) is in such form as the Secretary may prescribe,
(2) contains—
(A) the name, address, and TIN of the person from whom the cash was received,
(B) the amount of cash received,
(C) the date and nature of the transaction, and
(D) such other information as the Secretary may prescribe.
(c) Exceptions.—
(1) Cash Received by Financial Institutions.—
Subsection (a) shall not apply to—
(A) cash received in a transaction reported under title 31, United States Code, if the Secretary determines that reporting under this section would duplicate the reporting to the Treasury under title 31, United States Code, or
(B) cash received by any financial institution (as defined in subparagraphs (A), (B), (C), (D), (E), (F), (G), (J), (K), (R), and (S) of section 5312(a)(2) of title 31, United States Code).
(2) Transactions occurring outside the United States.—Except to the extent provided in regulations prescribed by the Secretary, subsection (a) shall not apply to any transaction if the entire transaction occurs outside the United States.
(d) Cash Includes Foreign Currency.—For purposes of this section, the term “cash” includes foreign currency.
(e) Statements to be Furnished to Persons With Respect to Whom Information is Required.—Every person required to make a return under subsection (a) shall furnish to each person whose name is required to be set forth in such return a written statement showing—
(1) the name and address of the person required to make such return, and
(2) the aggregate amount of cash described in subsection (a) received by the person making such return.
The written statement required under the preceding sentence shall be furnished to the person on or before January 31 of the year following the calendar year for which the return under subsection (a) was required to be made.

Id.
reporting requirement is implemented by the IRS through Form 8300.\(^3\) Form 8300 requires the trade or business receiving the cash payment to divulge information such as the identity of the source of the payment,\(^4\) the amount of cash received,\(^5\) and the method of payment.\(^6\) Section 6050I and the accompanying Form 8300 were patterned after the currency transaction provisions\(^7\) for financial institutions which require similar reporting of large cash deposits.\(^8\)

The stated purpose of section 6050I, as found in the General Instructions accompanying Form 8300,\(^9\) is to "ensure that taxpayers are complying with these laws and to allow us to figure and collect the right amount of tax."\(^10\) The provision is the result of Congressional concern over lost tax revenue due to the underreporting of income.\(^11\) Despite the good intentions behind section 6050I, the implications of its enforcement within the realm of the attorney-client relationship have produced controversy and debate between the legal profession and the Internal Revenue Service.\(^12\)

This Comment examines the implications that section 6050I has on the attorney-client privilege.\(^13\) Next, this Comment discusses the validity of the reporting provision under the fifth amendment's protection against self-incrimination.\(^14\) Further, this Comment addresses the sixth amendment's right to counsel clause in light of section 6050I.\(^15\) Additionally, this Comment explores the ethical considerations under the Model Code of Professional Responsibility.\(^16\) Finally, this Comment presents several alternatives to section 6050I as advocated by the legal community\(^17\) and proposes its own solution in terms of a qualified exemption for attorneys.

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3. See Appendix A to this Comment (IRS Form 8300).
4. See supra note 3.
5. Id.
6. Id.
7. 31 U.S.C. §§ 5311 to 5322 (1983); IRS Form 4789.
9. See Appendix A to this Comment.
10. See Appendix A to this Comment (General Instructions to IRS Form 8300 (rev. 1986)).
11. Harris, 63 J. TAX'N at 138.
13. See infra notes 18-79 and accompanying text.
14. See infra notes 80-102 and accompanying text.
15. See infra notes 103-17 and accompanying text.
16. See infra notes 118-34 and accompanying text.
17. See infra notes 163-81 and accompanying text.
BACKGROUND

ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is a state-created privilege that is implemented in federal court through Federal Rule of Evidence 501. The privilege protects communications between an attorney and a client and thus encourages free, open, explicit and candid disclosure. In United States v. United Shoe Machinery Corp., the case often cited for initially setting forth the elements that are required for the privilege to exist, the court held that the privilege only applies if:

1. the asserted holder of the privilege is or sought to become a client;
2. the person to whom the communication was made (a) is a 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 relates 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 by the client.

Although the rules for the application of the attorney-client privilege are generally well established, there is conflict among the courts as to whether the client’s identity and fee arrangements should be considered privileged information. As a general rule, information regarding the client’s identity and fees does not fall within the scope of the attorney-client privilege. Therefore, the privilege pertains to the subject matter and not to the creation of the relationship.

Despite the general rule that the identity of a client and fee arrangements are unprivileged information, two exceptions have been recognized by the courts. First, the information is confidential if

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19. 2 D. LOUISELL & C. MUELLER, supra note 18, at § 208.
21. Id. at 358-59.
22. Harris, 63 J. TAX’N at 140-41.
23. In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026, 1027 (5th Cir. 1982).
25. Id.
"disclosure of the client's identity would supply the last link in an existing chain of incriminating evidence that would likely lead to the client's indictment."\textsuperscript{27} Second, the attorney-client privilege may be recognized when so much of the actual communication has been disclosed that identification of the client amounts to a disclosure of a confidential communication.\textsuperscript{28}

\section*{Last Link Analysis}

\textit{In re Grand Jury Proceedings (Jones),}\textsuperscript{29} is a case in which the United States Court of Appeals for the Fifth Circuit adopted the "last link" analysis.\textsuperscript{30} In Jones, a federal grand jury was investigating possible narcotics and income tax violations of certain individuals.\textsuperscript{31} Attorneys involved in related investigations were served with subpoenas compelling each attorney to appear and testify in front of the grand jury.\textsuperscript{32} The subpoenas also directed the attorneys to supply all information regarding payment of attorneys fees for the accounts of named clients who had either been convicted, indicted or arrested for marijuana offenses.\textsuperscript{33} The attorneys filed motions to quash on the basis that the compulsion of their testimony would disclose confidential communications of unidentified individuals they represented.\textsuperscript{34}

The lower court ordered the attorneys to testify and held them in contempt when the lawyers refused to answer questions regarding the identities of third parties who might have provided bond money or paid attorneys fees for other clients.\textsuperscript{35} The attorneys' basis for refusal was the attorney-client privilege involving an unidentified client.\textsuperscript{36} The prosecutor countered with the argument that "identities of unknown clients and information about legal fee and bonding arrangements in behalf of known clients was not privileged."\textsuperscript{37}

On appeal, the Fifth Circuit recognized the "last link" exception.\textsuperscript{38} The court stated, however, that the application of the exception must be considered on a case-by-case basis.\textsuperscript{39} In rejecting the lower court's position that a client's identity and fee arrangements

\begin{itemize}
\item \textsuperscript{27} \textit{In re Grand Jury Proceedings (Twist)}, 689 F.2d 1351, 1352-53 (11th Cir. 1982).
\item \textsuperscript{28} NLRB v. Harvey, 349 F.2d 900, 905 (4th Cir. 1965).
\item \textsuperscript{29} 517 F.2d 666 (5th Cir. 1975).
\item \textsuperscript{30} See id. at 673-74.
\item \textsuperscript{31} Id. at 668. The attorneys involved were prosecutors engaged in related investigations ancillary to the grand jury proceeding. \textit{Id}.
\item \textsuperscript{32} \textit{Id}.
\item \textsuperscript{33} \textit{Id}.
\item \textsuperscript{34} \textit{Id}. at 668-69.
\item \textsuperscript{35} \textit{Id}. at 669.
\item \textsuperscript{36} \textit{Id}.
\item \textsuperscript{37} \textit{Id}.
\item \textsuperscript{38} See \textit{id}. at 671 (citing Baird v. Koerner, 279 F.2d 623, 635 (9th Cir. 1960)).
\item \textsuperscript{39} Jones, 517 F.2d at 671.
\end{itemize}
can never be privileged unless disclosure would lead automatically to a criminal conviction, the court held that the correct statement of the exception involved a determination of whether so much of the substance of the communications was already in the prosecutor's possession that “additional disclosures would yield substantially probative links in an existing chain of inculpatory events or transactions.” Applying the facts to the above test, the court noted that if the attorneys were required to disclose the names of the unidentified clients who had paid legal fees or bond money in excess of their reported income, these clients might very well be indicted.

The United States Court of Appeals for the Eleventh Circuit has adopted the “last link” analysis in cases involving a grand jury subpoena compelling an attorney to disclose the identity of the client or matters involving the receipt of fees. In recognizing the narrow exception that disclosure is precluded when the identity of the client would supply the last link in an existing chain of incriminating evidence, the Eleventh Circuit has expressly followed the Fifth Circuit’s reasoning and analysis.

CONFIDENTIAL COMMUNICATION ANALYSIS

The attorney-client privilege may be claimed when so much of the actual communication has been disclosed that identification of the client amounts to a disclosure of an actual communication. Several of the federal circuit courts have adopted the second exception stated above, including the Second, Third, Fourth, Seventh, Eighth.
In United States v. Liebman,52 the United States Court of Appeals for the Third Circuit considered a case involving an Internal Revenue Service summons that had sought the names of all clients who had paid fees in connection with legal advice concerning certain tax shelters.53 The attorneys specialized in tax law and evaluated real estate partnerships for persons who wanted to invest in tax shelters.54 Only those clients that actually had invested in the partnerships were charged legal fees.55 The lawyers had advised their clients that the fees were deductible as a legal expense.56 The IRS contended that the fees were not legal fees but rather brokerage charges and thus not deductible.57 As a result, the IRS sought a John Doe summons to compel the attorneys to identify all clients who had paid the fees in question.58

The attorneys claimed that the summons violated the attorney-client privilege,60 but the district court rejected the attorneys' contention and ordered that a list of those clients' names requested be produced.61 On appeal, the Third Circuit reversed the lower court's order on the basis that the disclosure of the clients' identities would

no special circumstances existed to constitute client's identity and fee arrangements as confidential).

49. NLRB v. Harvey, 349 F.2d 900, 907 (4th Cir. 1965) (stating that the confidential communication exception applied but remanded case to determine whether the lawyer was engaged to render legal advice, services or representation to constitute the communication privileged).
50. United States v. Jeffers, 532 F.2d 1101, 1115 (7th Cir. 1976) (stating that the exception applies when so much of the actual communication had already been established that to disclose the client's name would disclose the essence of a confidential communication but holding that this had not happened in the case).
51. Phaksuan v. United States (In re Grand Jury Subpoena for Osterhoudt), 722 F.2d 591 (9th Cir. 1983) (holding that disclosure of the client's identity would not disclose the substance of a confidential communication).
52. 742 F.2d 807 (3d Cir. 1984).
53. Id. at 808.
54. Id.
55. Id.
56. Id. This fact was conceded by the attorneys. Id.
57. Id.
58. Id. The John Doe summons requested "books, records, papers, billing ledgers and any other data which contains, reflects, or evidences the names, addresses and/or social security numbers of clients who had paid fees in connection with the acquisition of real estate partnership interests." Id.
59. Id. The IRS could not readily obtain this information from the returns of other investors because taxpayers who deduct legal fees are not required to identify the recipients of the fees. Id.
60. Id.
61. Id.
be a disclosure of a confidential communication. The court noted that if the attorneys were required to name the clients, then that identity along with the facts already known concerning deductibility would provide all the confidential information that is privileged between the attorneys and their clients.

In Phaksuan v. United States (In Re Grand Jury Subpoena for Osterhoudt), the United States Court of Appeals for the Ninth Circuit expressly rejected the "last link" analysis and adhered to the second exception that disclosure of the client's identity may be a disclosure of the confidential communication in the professional relationship between the client and the attorney. In this grand jury investigation involving possible tax and controlled substance violations, the government subpoenaed the attorney to produce the date, the amount, and form of the payment that had been given to the attorney by the client. The district court denied the client's motion to quash the subpoena, and the client appealed to the Ninth Circuit. The client argued that the nature of the fee arrangements was privileged information which fell within an exception to the general rule that the client's identity and fees are not confidential communications. The exception relied upon by the client was that the disclosure of such information would result in the incrimination of the person in the very criminal activity for which he sought legal advice.

The Ninth Circuit rejected the client's formulation of the exception to the general rule. The court held that the correct statement of the exception was that a client's identity and fee arrangements were privileged only if they constituted a disclosure of a confidential communication. In fact, the court stated that this rule should not

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62. Id. at 810-11.
63. Id. at 810. The court rejected the IRS' argument as unduly narrow that the "identity of a client would fall within the attorney-client privilege only when the disclosure of a client's identity would implicate the client in the matter for which he or she sought advice." Id.
64. 722 F.2d 591 (9th Cir. 1983).
65. Id. at 593.
66. Id. at 592.
67. Id.
68. Id.
69. Id. The court summarily dismissed the client's other arguments that disclosure would violate the fifth and sixth amendments. Id. at 594.
70. Id. at 592-93.
71. Id. at 593.
72. Id. at 593. The court noted that other courts have misstated the exception in terms of the circumstances in which the principle applied. The court went on to hold that the privilege does not apply just because the identity of the client is incriminating. Id.
73. Id. at 593 (citing Baird v. Koerner, 279 F.2d 623, 632 (9th Cir. 1960)).
be viewed as an exception to the general rule but rather as an extension of the attorney-client privilege. Based on the facts that the information could be produced without the attorney's testimony and that the information was relevant and not available from another source, the court held that the information regarding fees was not privileged.

THE CRIME OR FRAUD EXCEPTION

Although the last link exception and confidential communication exception have emerged, the courts have universally refused to apply the attorney-client privilege in cases where the attorney was retained in order to continue criminal activity. Clients have not been allowed to claim the attorney-client privilege if the attorneys' skills, even without the attorneys' knowledge, are used in furthering crime. The general test requires the party opposing the privilege to make a prima facie showing that an attorney was retained in order to promote present or continuing criminal activity even if the lawyer was unaware of the improper arrangement. Therefore, the crime or fraud exception eliminates the protection of the attorney-client privilege even where the information is found to be the "last link" in an existing chain of incriminating evidence or where the information is construed as a confidential communication.

CONSTITUTIONAL CONSIDERATIONS - THE FIFTH AND SIXTH AMENDMENTS

Attorneys who have been subpoenaed to disclose their clients' names or fee arrangements have resisted such disclosure on the basis that their clients' constitutional rights will be violated. Attorneys cite the fifth and sixth amendments in particular when raising the constitutional arguments. The fifth amendment to the United States Constitution guarantees that no person "shall be compelled in

74. Id. at 594 (citing Ex parte McDonough, 170 Cal. 230, 149 P. 566 (1915)).
75. Id. at 594. The court held that the fee information was not a confidential communication in this case and affirmed the lower court's decision to deny the motion to quash. Id. at 595.
76. United States v. Hodge and Zweig, 548 F.2d 1347, 1353 (9th Cir. 1977).
77. Pavlick, 680 F.2d at 1028-29.
78. Hodge and Zweig, 548 F.2d at 1354. The court held in this case that an agreement to furnish bail and legal expenses by co-conspirators was designed to hinder any further criminal drug prosecution. Id. at 1354-55.
79. Id. at 1353-55.
80. Harris, 63 J. TAX'N at 140.
81. U.S. CONST. amend V, cl. 3.
82. U.S. CONST. amend VI, cl. 3.
any criminal case to be a witness against himself."\textsuperscript{84} Even though courts have been presented with the issue of whether the disclosure of information such as the person's name and financial transactions would constitute a violation of the fifth amendment,\textsuperscript{85} section 6050I has not yet been constitutionally tested in the federal courts.\textsuperscript{86}

In \textit{United States v. Hodge and Zweig},\textsuperscript{87} the Ninth Circuit considered a case involving an Internal Revenue Service summons directing the attorneys to produce various financial records pertaining to one named client.\textsuperscript{88} The summons requested information regarding payments received from the client himself for the client's legal representation, payments received from the client for the legal representation of other named persons, and payments received from third parties on behalf of the client.\textsuperscript{89} The client argued that disclosure of the information to the IRS would incriminate him for drug violations that were being investigated at the time the IRS summons was issued.\textsuperscript{90}

The Ninth Circuit affirmed the lower court's holding that disclosure of the financial information regarding payment of legal fees would not violate the client's fifth amendment rights.\textsuperscript{91} The court based its holding on the fact that the client had already been sentenced for drug conspiracy, and it did not appear that any other charges were pending or anticipated.\textsuperscript{92} The court then concluded that the client could not raise the fifth amendment defense because the client was no longer in danger of incriminating himself.\textsuperscript{93}

\textsuperscript{84} U.S. \textit{CONST. amend VI}, cl. 3.
\textsuperscript{85} See, \textit{e.g.}, \textit{United States v. Kaatz}, 705 F.2d 1237, 1242 (10th Cir. 1983) (involving the contention by the defendants that the currency transaction report was unconstitutional because the information required violated his right to protection against self-incrimination); \textit{United States v. Dichne}, 612 F.2d 632, 638-41 (2d Cir. 1979) (involving a claim by the defendant that disclosure under 31 U.S.C. § 1101 requiring the reporting of the transportation of over $5,000 in monetary instruments into or out of the United States would be a violation of his fifth amendment rights); \textit{United States v. Hodge and Zweig}, 548 F.2d 1347, 1352 (9th Cir. 1977) (involving a fifth amendment argument that disclosure of fee arrangements of a particular client would violate the client's constitutional rights).
\textsuperscript{86} Harris, 63 J. \textit{TAX'N} at 138; \textit{see also} \textit{Saint-Veltri v. Dept. of the Treasury}, No. 85-K-501, order at 2 (D. Colo. Feb. 21, 1986) (involving a declaratory relief action challenging the constitutionality of § 6050I that was later dismissed on a standing issue).
\textsuperscript{87} 548 F.2d 1347 (9th Cir. 1977).
\textsuperscript{88} \textit{Id.} at 1349. At the same time the IRS investigation was proceeding, a grand jury investigation regarding alleged drug activities of the client was in progress. \textit{Id.} at 1350.
\textsuperscript{89} \textit{Id.} at 1349. The Internal Revenue Service petitioned the district court for enforcement of the summons and the court ordered compliance. \textit{Id.} at 1349-50.
\textsuperscript{90} \textit{Id.} at 1352.
\textsuperscript{91} \textit{Id.} The court did not address the issue of whether disclosure of information regarding payment of legal fees for the unnamed clients would violate the fifth amendment rights of the clients not specifically named on the summons. \textit{Id.} at 1352 n.7.
\textsuperscript{92} \textit{Id.} at 1352.
\textsuperscript{93} \textit{Id.} The court stated that the client's argument was not that the requested dis-
The Tenth Circuit addressed the self-incrimination claim in *United States v. Kaatz.* 94 In this case, the defendants were convicted of tax evasion and filing false tax returns. 95 The defendants appealed and alleged as one of their arguments for reversal that their fifth amendment rights were violated by the execution and receipt of the currency transaction reports, 96 which were used against them. 97 The Tenth Circuit rejected the self-incrimination claim on the basis that there was no compulsion to engage in the financial transactions because the individuals were not forced to engage in the deposit triggering the use of the currency transaction report. 98

Despite the lack of judicial authority for a fifth amendment constitutional challenge to the disclosure of the client's identity and fee arrangements, it has been vigorously asserted that reporting of a cash payment under Form 8300 in some circumstances will rise to a constitutional level of self-incrimination. 99 The National Association of Criminal Defense Lawyers advocates, as evidenced by an amicus brief filed in a case challenging the validity of section 6050I, 100 that a person who makes a cash payment should have a protectable fifth amendment self-incrimination interest to some or even all of the information requested by Form 8300. 101 Another view takes the position that although the fifth amendment does not exempt criminals from reporting their income, the Constitution does not require criminals to file returns which would incriminate themselves by revealing the source of the income. 102

In addition to the fifth amendment challenges raised where the identity of a client and matters regarding fees were being compelled, parties opposing such disclosure also claim a violation of their sixth amendment rights as a defense. 103 The sixth amendment guarantees closure would incriminate himself in income tax violations, but if this was the client's contention, the court did not think that the argument would be successful. *Id.* at 1352 n.8.

94. 705 F.2d 1237 (10th Cir. 1983).
95. *Id.* at 1239.
96. *Id.* at 1241. The currency transaction report under 31 U.S.C. § 1081 requires domestic financial institutions to report transactions involving $10,000 or more. *Id.*
97. *Id.* The defendants also alleged that their fourth amendment rights were violated in that the currency transaction report violated the defendants' right to privacy in the conduct of their financial affairs. *Id.* at 1242.
98. *Id.*
100. *Id.* The case was later dismissed on the basis that the party challenging § 6050I had no standing. Saint-Veltri v. Dep't of the Treasury, No. 85-K-501, order at 2 (D. Colo. Feb. 21, 1986).
102. Sheppard, 30 TAX NOTES at 716 (citing Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968)).
that the accused will "have the assistance of Counsel for his defense." The leading case addressing the issue of whether the compelled testimony of the attorney violates the sixth amendment is Roe v. United States (In re Grand Jury Subpoena Upon Doe). The United States Court of Appeals for the Second Circuit dealt with this question in the context of a grand jury subpoena served upon a lawyer to determine whether the client paid for the legal representation of certain persons apprehended for illegal activity.

On appeal from an order denying a motion to quash the subpoena, the client contended that if the subpoena was upheld, his attorney would have been disqualified as counsel. Even though the government had made a showing that the evidence was relevant, the district court rejected the contention that the government should also be required to make a showing that the materials sought by the government are needed for the investigation. The lower court based its holding on the premise that the importance of presenting the evidence to the grand jury far outweighed the possibility of the attorney being disqualified from representation if required to present the evidence against his own client.

The Second Circuit recognized the general rule that an accused has the fundamental right to be represented by counsel "of his own choice." In addition, the Model Code of Professional Responsibility provides that an attorney must withdraw if called on to be a witness other than on behalf of the client. The court stated that a balancing of interests was required—the interest in presenting all information to the grand jury and the interest of maintaining the attorney-client relationship. As a result, the Second Circuit held that when an attorney is served with a subpoena to testify before a grand jury investigating his client and where the lawyer will be disqualified if he complies with the subpoena, the government will be required to

104. U.S. CONST. amend VI, cl. 3.
105. 759 F.2d 968 (2d Cir. 1985).
106. Id. at 970. The case involved an investigation of an organized crime family to determine whether a faction of the family constituted an enterprise within the meaning of the RICO statute. Id.
107. Id. The subpoena requested records of "fees, monies, property or other things of value received, accepted, transferred or held by [him] . . . on his behalf, from, on account of, or on behalf of" several individuals of which many were members of the client's crime organization. Id.
108. Id. The court was not concerned with the sixth amendment rights as they applied at the grand jury stage, but rather the client's right to counsel in the event an indictment was returned against the client. Id. at 972.
109. Id. at 970.
110. Id.
111. Id. at 972 (quoting Powell v. Alabama, 287 U.S. 45, 53 (1932)).
112. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102(B) (1979).
113. Roe, 759 F.2d at 974.
make a showing of relevance and need.\textsuperscript{114}

The court further noted that two additional considerations supported protecting the attorney-client relationship.\textsuperscript{115} First, the unrestricted use of the subpoena would allow the government to determine if any attorney will or will not represent a particular client.\textsuperscript{116} Second, the right to one’s own counsel is a right of constitutional dimensions, and the interference of this right should be allowed only as a last resort.\textsuperscript{117}

\textbf{ETHICAL CONSIDERATIONS—CONFIDENCES AND SECRETS OF THE CLIENT}

Canon 4 of the Model Code of Professional Responsibility provides that “a lawyer should preserve the confidences and secrets of a client.”\textsuperscript{118} The relevant disciplinary rule is DR 4-101(B)(1) which states that a lawyer shall not knowingly “reveal a confidence or secret of his client.”\textsuperscript{119} The definition of “confidence” and “secret” is provided for in DR 4-101(A).\textsuperscript{120} A confidence refers to any information that would be protected under the attorney-client privilege whereas a secret refers to other information that is requested by the client to be held inviolate, which is embarrassing upon disclosure, or detrimental to the client.\textsuperscript{121}

The ethical responsibility of the lawyer to preserve the client’s confidences and secrets under Canon 4 encompasses a wider scope of information than does the attorney-client privilege.\textsuperscript{122} Thus, a wider zone of privacy is established under the Model Code.\textsuperscript{123} As a result, section 60501 must pass a stricter scrutiny with regard to a lawyer’s ethical obligations than would be required under the attorney-client

\textsuperscript{114} Id. at 975.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id. The court went on to hold that the government had made a showing of relevance but not a showing of need, and as a result the court reversed and remanded with respect to the need issue. \textit{Id.} at 976-77. \textit{Accord In re Special Grand Jury (Harvey),} 676 F.2d 1005, 1009 (4th Cir. 1982) (quashing a subpoena issued to an attorney requesting records of fee payments and stating that the sixth amendment is violated where there is a strong possibility that a wedge will be driven between the attorney and the client and the relationship will be destroyed); United States v. Rogers, 602 F. Supp. 1332, 1349 (D. Colo. 1985) (stating that the “threat of an attorney having to disclose information obtained from his client will chill the openness of those communications, thereby impinging on the right to counsel”).
\textsuperscript{118} MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1981).
\textsuperscript{119} MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B)(1) (1981).
\textsuperscript{120} MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1981).
\textsuperscript{121} Id.
\textsuperscript{122} MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1981).
\textsuperscript{123} United States v. Kasmir, 499 F.2d 444, 453 (5th Cir. 1974).
privilege. In addition, even though the disciplinary rules allow an attorney to reveal confidences or secrets "required by law or court order," it is not mandatory for the attorney to reveal under the ethical rules. In fact, in some circumstances disclosure would require that the attorney disqualify himself from the case because the attorney would be acting as a witness against the client.

State bar associations have drafted opinions to answer the question of whether section 60501, if complied with, impedes the ethical obligations of attorneys to their clients. Two states in particular, Georgia and Arizona, have reached somewhat different results. The Georgia State Bar stated that a client's identity is protected by the attorney-client privilege, unless the attorney obtains the client's consent after full disclosure. The state bar association went on to hold that "[a] lawyer should resist disclosure until a court orders it and thereafter should pursue all reasonable avenues of appeal."

The Arizona State Bar addressed the question under the Model Rules of Professional Conduct. The bar association decided that even though disclosure of the information requested by section 60501 is required by law, the ethics rules do not mandate either nondisclosure or complete reporting when an attorney may be faced with revealing information relating to the representation of a client. As a result, the Arizona State Bar believed that the only relevant consideration would be whether the attorney could be compelled to reveal under a legal rule such as the attorney-client privilege.

ANALYSIS

A client walks into an attorney's office and requests legal repre-

124. Amicus Brief, supra note 26, at 29.
128. See supra note 127.
130. Id.
133. Id. (citing ABA Comm. on Professional Ethics and Grievances, Informal Op. 1141 (1984)).
134. Id.
sentation. In the initial interview, the client tells the attorney that the IRS is conducting an audit of his financial affairs. During the audit process, a special agent for the IRS informs the client that the client is under investigation for suspected criminal violations of the Internal Revenue laws. The client now duly alarmed seeks the attorney's legal expertise in these matters. As with most representations of potential criminal defendants, the attorney requests payment of legal fees up front. The client pays the attorney cash in one lump sum in accordance with the fee arrangement. The attorney is now faced with a legal dilemma.

THE VALIDITY OF SECTION 6050I IN THE CRIMINAL TAX CASE

The attorney's legal dilemma involves the implications of section 6050I and the representation of the client who has come to the attorney for advice regarding the criminal tax investigation. The attorney has several possible options. First, the attorney could decline representation. Second, the attorney could refuse to accept cash as payment for the legal fees. Third, the attorney could accept the cash, and if the payment was over $10,000, advise the client that the attorney is obligated to file an information form under section 6050I. Fourth, the attorney could accept the cash payment for legal fees and advise the client that he is not filing the form required under section 6050I. Finally, the attorney could accept the cash but only complete Form 8300 in part.

The two most troublesome options that the attorney could pursue involve the acceptance of the cash payment and the determination of whether the attorney should complete the information form.

135. A well-known treatise on IRS practice and procedure defines the functions of a special agent:

Every [Criminal Investigation Division] investigation is a potential criminal prosecution. That this possibility is of paramount importance to the Service is dramatically demonstrated by IRS policy in criminal tax cases. . . . (T)he CID special agent neither determines the correct tax owed by a taxpayer nor collects that tax, except insofar as this determination may incidentally be related to proof that a tax crime has been committed, although the evidence the agent gathers may support a civil fraud or other penalty whether or not a prosecution is actually instituted. The special agent's function is primarily to gather evidence for use in a successful criminal prosecution.

M. SALTZMAN, IRS PRACTICE AND PROCEDURE § 12.01, at 12-3 (1981).

136. This scenario consists of a hypothetical set of facts. The hypothetical fact situation will enable the reader to understand more readily the implications of § 6050I.

137. See supra note 2.

138. The lawyer would decline representation because the lawyer would be facing a possible violation of the Model Code of Professional Responsibility.

139. Treas. Reg. § 1.6050I-1 (1986). If the initial payment does not exceed $10,000, the attorney must aggregate this payment with subsequent payments made within one year. Id.

140. See Appendix A to this Comment.
Assuming the attorney decides not to complete in full Form 8300, the attorney has four grounds upon which to support his actions if the IRS challenges his decision: the attorney-client privilege, the constitutional protection against self-incrimination, the constitutional guarantee of the right to counsel, and finally, the ethical obligation to protect the client’s confidences and secrets.

Under the fact scenario outlined above, the attorney could refuse to complete Form 8300 on the basis that such disclosure would violate the attorney-client privilege. The attorney could support his contention with the “last link” argument or the “confidential communication” analysis. If the attorney was required to disclose his client’s identity and fee arrangements, then under the Jones case, the disclosures would constitute probative links in an existing chain of incriminating events. The client’s purpose in retaining an attorney is to receive the best legal representation for his defense against the criminal allegations. If the attorney reports the cash payment, then the IRS has the probative link needed to incriminate the client in a criminal tax violation. As a result, the attorney could refuse to disclose the client’s identity and information regarding fees because such disclosure would violate the attorney-client privilege.

Similarly, the attorney could refuse to complete Form 8300 on the basis of the confidential communication analysis utilized by the court in Liebman. In view of Liebman, if the attorney was required to name the client and divulge information with regard to the cash payment of legal fees, the information would constitute a confidential communication. The attorney-client privilege protects confidential communications between the attorney and the client. In the hypothetical fact situation concerning legal representation for possible criminal violations, disclosure of the client’s identity and fee arrangements would constitute a disclosure of a confidential communication because the confidential nature of the payment of legal fees under these circumstances would go to the very heart of the legal representation.

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141. See supra notes 18-79 and accompanying text.
142. See supra notes 80-98 and accompanying text.
143. See supra notes 99-117 and accompanying text.
144. See supra notes 118-34 and accompanying text.
145. See supra notes 135-36 and accompanying text.
146. See supra notes 29-45 and accompanying text.
147. See supra notes 46-75 and accompanying text.
149. Id. at 674.
151. Id. at 810.
The fifth amendment protection against self-incrimination provides little support for the attorney's refusal to complete Form 8300.\textsuperscript{153} If, however, the attorney could prove that the client had a present danger of incriminating himself because the attorney was compelled to complete the information form, then the client should not be denied his constitutional rights under the fifth amendment.\textsuperscript{154} It would not be very difficult to prove that charges for tax violations were presently pending or anticipated, as required by the court in \textit{Hodge and Zweig}.\textsuperscript{155} Nevertheless, the client is not compelled to pay in cash and thus has alternative means of payment available. The non-compulsion factor was the distinguishing factor relied upon by the court in \textit{Kaatz}.\textsuperscript{156}

Despite the doubtful strength of the fifth amendment argument, the attorney seems to stand on a stronger ground if he asserts that disclosure would violate the client's sixth amendment right to counsel.\textsuperscript{157} Relying on the \textit{Roe} analysis,\textsuperscript{158} the attorney could require that the IRS make a showing of relevance and need before disclosure could be compelled under section 6050I.\textsuperscript{159} A balancing of interests is necessary to determine whether a showing of relevance and need is required—the interest of the IRS in discovering the underreporting of cash income and the interest of the client in obtaining the particular counsel he desires for representation.\textsuperscript{160}

The last ground upon which the attorney could refuse to complete Form 8300 would be the ethical obligations that an attorney owes to his client.\textsuperscript{161} The attorney would most definitely be revealing a confidence or secret of his client because if the attorney reveals to the IRS through Form 8300 that the client has cash income of at least $10,000, then the IRS may have the crucial confidential information it needs to pursue a criminal tax case. Such disclosure would impede or destroy the attorney-client relationship unless the attorney obtains the client's consent to reveal the client's name and the nature of the fee arrangements.\textsuperscript{162}

\textsuperscript{153} See supra notes 84-86 and accompanying text.
\textsuperscript{154} United States v. Hodge and Zweig, 548 F.2d 1347, 1352 (9th Cir. 1977).
\textsuperscript{155} Id.
\textsuperscript{156} United States v. Kaatz, 705 F.2d 1237, 1242 (10th Cir. 1983).
\textsuperscript{157} See supra notes 103-117 and accompanying text.
\textsuperscript{158} Roe v. United States (In re Grand Jury Subpoena Upon Doe), 759 F.2d 968 (2d Cir. 1985).
\textsuperscript{159} Id. at 975.
\textsuperscript{160} Id. at 974.
\textsuperscript{161} See supra notes 118-34 and accompanying text.
\textsuperscript{162} See supra notes 129-30 and accompanying text.
The Internal Revenue Service has expressly stated in the Regulations that section 6050I applies directly to attorneys and their clients. Nevertheless, the Internal Revenue Service has also acknowledged that application to the legal profession might have an adverse effect on the attorney-client relationship. Along with the regulations that make it clear that an attorney is not exempt from the reporting requirement under section 6050I, the IRS has asked for guidance in drafting a possible exception for the legal profession by accepting comments from the legal community.

As a result of the concern over the adverse effects from the application of the cash reporting requirement as applied to attorneys, several solutions have been proposed. E.E. Edwards, III, former Chairperson of the ABA Criminal Justice Section's Defense Function Committee, explained his ideas in a congressional hearing. His compromise consists of the IRS allowing attorneys that would be required to report under section 6050I to file an annual certification stating that all cash payments received had been reported under the currency transaction reporting provision for financial institutions. Edwards stated that in this way the client's name and nature of the representation would not be revealed, and the IRS would receive the financial information it wants through the currency transactions report.

Edwards acknowledged that the compromise lacks an enforcement mechanism for attorneys because the financial institutions would be penalized if there was a failure to report whereas attorneys would suffer no consequences if they failed to file the annual certification. However, Edwards emphasizes that in view of the IRS' stated purpose behind section 6050I, his compromise would aid the IRS in discovering unreported income and would decrease the amount of litigation over the scope of the attorney-client relationship.

164. 1 Current Reports 38, Law. Man. on Prof. Conduct (ABA/BNA) 834 (June 26, 1985).
165. Id.
166. See infra notes 167-81 and accompanying text.
170. Id. at 989.
171. Id.
172. Id.
Deputy Attorney General D. Lowell Jensen advocates a solution for lawyers that would take affirmative action on the part of the legal community by refusing to accept large cash payments.\textsuperscript{173} As a spokesperson for the Justice Department, Jensen cannot justify excluding only the legal profession and not other professionals from the requirements of section 6050I.\textsuperscript{174} As the basis for his stance, Jensen quotes the general rule that client's identity and fees do not fall within the attorney-client privilege.\textsuperscript{175} In addition, Jensen believes that judges might reject the IRS' definition of the attorney-client privilege.\textsuperscript{176} Therefore, Jensen proposes that lawyers should refuse large cash payments to avoid falling within the realm of section 6050I.\textsuperscript{177}

The ABA Tax Section Civil and Criminal Tax Penalties Committee drafted a resolution concerning the tax provision.\textsuperscript{178} The committee advocates an exemption that would cover only cash received by

\begin{itemize}
\item[173.] Wolf, 72 A.B.A.J. at 19.
\item[174.] Id.
\item[175.] 1 Current Reports 45, Law. Man. on Prof. Conduct (ABA/BNA) 988 (Oct. 2, 1985).
\item[176.] Id.
\item[177.] Wolf, 72 A.B.A.J. at 19.
\item[178.] Sheppard, 30 TAX NOTES at 716. The resolution states:
\end{itemize}
attorneys for legal fees and expenses but any other cash received for other purposes would still be required to be reported. The Criminal Justice Section of the ABA proposes that lawyers should only be required to file an annual Form 8300 for a total cash amount received from clients without having to identify the source of the payment.

Although the solutions that have been proposed range from a blanket exemption for attorneys to requiring attorneys to refuse cash payments, the best solution lies in between these two extremes. It would be unrealistic to expect the IRS to accept a blanket exemption for the legal profession. It would be even more unrealistic for an attorney to refuse cash for payment of legal fees. Furthermore, the attorney's refusal of the cash payment could possibly violate a client's right to representation, if the client insists that retention of the attorney's services be paid for only in cash. A better proposal would be to advocate a qualified exemption.

The qualified exemption would involve a step-by-step procedure requiring participation by the attorney, the IRS, and the court system. First, if the attorney believed that disclosure of the client's identity and other information as required by Form 8300 would violate the attorney-client privilege, or the constitutional rights of the client, or the attorney's ethical responsibilities, the attorney could refuse to complete the form in full. Second, if the IRS believed that such information was necessary to further the purpose behind the tax provision, the IRS could then file an action requiring that such information be revealed. However, the burden of proof that the IRS would have to meet would be difficult to carry. The IRS would have to prove that failure to file a Form 8300 would substantially impede the administration of the tax law.

In the qualified exemption, the attorney's burden of proof would consist of claiming what constitutional right, privilege, or ethical obli-

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subject to the regulate reporting requirements applicable to non-lawyers under section 6050.

BE IT FURTHER RESOLVED, that any disclosure of client information pertaining to fees, retainers and expenses for bona fide legal services be made only in response to a summons or subpoena and only under the supervision of a court having jurisdiction over the matter.

Id. (quoting Resolution of Civil and Criminal Tax Penalties Committee, ABA Tax Section midyear meeting in San Diego, CA, Feb. 1, 1986).

179. Id. at 717.

180. Id. (stating that "[s]uch an exemption would protect the peculiar services rendered by the organized crime lawyer and money launderman"). Id.

181. Id.

182. Wolf, 72 A.B.A.J. at 197.

183. See Appendix A to this Comment. The attorney could complete Form 8300 in part, for example, by completing all parts except the client's identity or completing all parts except Part III entitled "Description of Transaction and Method of Payment."
gation would be violated by compelling compliance with the tax law. After both parties have met their respective burdens of proof, the court in an in camera proceeding would determine if such information should be disclosed. The court would take into account such factors as whether the information could be obtained elsewhere, whether the disclosure would convey the substance of a confidential professional communication or would supply the last link in an existing chain of incriminating evidence. In addition, the court could also consider whether the attorney would be forced to withdraw from representation, whether the disclosure would incriminate the client himself, or whether the attorney would be disclosing a confidence or secret of the client.

The IRS' high standard of proof would deter the practice of bringing an action every time an attorney refused to file or fully complete a Form 8300. Nevertheless, once the IRS met its burden of proof, the attorney would be required to prove that disclosure of the client's identity and cash received would impair the attorney-client relationship. This would likely be a heavy burden to fulfill in view of the limited case law holding that the identity of a client and fee arrangements is privileged information or that disclosure of such information constitutes a constitutional violation. The court's role would then be to balance the substantial impediment to the IRS against the violation of the attorney-client privilege or other such defense raised by the attorney. Again, the court's review of the evidence would take place in an in camera proceeding to preserve the confidentiality of the information.

CONCLUSION

Congressional concern with the underreporting of taxable income is legitimate. Section 6050I, however, is creating more problems than the provision was originally intended to solve. In view of the potential legal defenses against section 6050I, it is likely that the provision will be the subject of a large amount of litigation. Furthermore, there remains the question of continued compliance by the legal profession. Until attorneys feel secure in completing Form 8300, the legal profession will undoubtedly refuse to complete the information form because of the possible infringements the provision will have on the law and the attorney's code of ethics.

Attorneys and their clients are in need of remedial legislation. Section 6050I cannot remain in its present form despite Congress' correct assertion that too much income is unreported. Congress has taken an aggressive position through section 6050I, but new legislation is needed before the provision is entirely struck down by the
courts as unconstitutional or before bar associations chose to ignore section 6050I, rendering it a paper tiger.

Catherine A. Earl — ’88
Form 8300
Department of the Treasury
Internal Revenue Service

Please type or print.

OMB No. 1545-0025
Expires: 9-30-88

Identity of Individual Conducting the Transaction

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<th>First name</th>
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Number and street

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<th>Alien registration number</th>
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City | State | ZIP code | Country (if not U.S.) | Other identifying data (Specify)

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Name of organization

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City | State | ZIP code | Country (if not U.S.) | Other identifying data (Specify)

Description of Transaction and Method of Payment

1 Amount of cash received . . . $ 2 Amount in item 1 in $100 bills . . . $ 3 Nature of transaction:
   a. [ ] personal property purchased    b. [ ] real property purchased
   c. [ ] personal services provided    d. [ ] business services provided
   e. [ ] intangible property purchased e. [ ] debt obligation paid
   f. [ ] exchange of cash              g. [ ] escrow or trust funds
   h. [ ] other (specify)              i. [ ] other (specify)  4 Method of payment by customer:
   a. [ ] Paid with U.S. currency or coin  b. [ ] Paid with foreign currency (describe)

5 Date paid

Business Reporting This Transaction

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<th>Identification number (EIN or SSN)</th>
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<table>
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<tr>
<th>Street address</th>
<th>Nature of your business</th>
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City | State | ZIP code

Under penalties of perjury, I declare that the information I have furnished above, to the best of my knowledge, is true, correct, and complete.

Sign Here

__________________________ (Authorized signature—See Instructions) (Title) (Date)

For Paperwork Reduction Act Notice, see page 2.

Form 8300 (Rev. 1 86)
General Instructions

Paperwork Reduction Act Notice.—We ask this information to carry out the Internal Revenue laws of the United States. We need it to ensure that taxpayers are complying with these laws and to allow us to figure and collect the right amount of tax. You are required to give us this information.

Who Must File.—Each person engaged in a trade or business, or a partner in a partnership which is engaged in a trade or business who, in the course of such trade or business, (1) a business dealer in currency or negotiable instruments having cash in excess of $10,000 in cash in one transaction, or two or more related transactions, must file Form 8300. Any transactions conducted between a payer (or its agent) and the recipient in a 24-hour period are related transactions, and must be aggregated and reported as a single transaction if the total amount exceeds $10,000. For other transactions that may be related and require filing requirements for instalment payments, see section 1.6050-1 of the regulations.

Certain precious metals dealers, precious stones dealers, jewelry dealers, pawnbrokers, loan or finance companies, insurance companies, and travel agencies must file Form 8300 when they receive reportable cash transactions. To the extent that the Assistant Secretary of the Treasury (Enforcement and Operations) requires these financial institutions to file Form 4789, Currency Transaction Report, Form 8300 is not required to be filed for the same transaction(s).

Exceptions.—Financial institutions required to file Form 4789 under Section 5312 of the CFC Act include banks, building and loan associations, and savings and loan associations organized under the laws of any state or of the United States of any person doing business in one or more of the capacities listed below:

(1) a bank (see Definitions);
(2) a broker or dealer in securities, registered or required to be registered with the Securities Exchange Act of 1934;
(3) a person engaged as a business in dealing in or exchanging currency; for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks;
(4) a person who engages as a business in issuing, selling, or redeeming traveler’s checks, money orders, or similar instruments, except one who does so as a selling agent exclusively, or as an incidental part of another business;
(5) a licensed transmitter of funds, or other person engaged in the business of transmitting funds, including transmiters of transfer checks, or other person engaged in the business of transmitting funds;

Transactions entirely occurring outside the United States are excepted from these reporting requirements, except as provided in section 1.6050-1 of the regulations. The United States includes the 50 states and the District of Columbia.

When and Where To File.—File this form by the 15th day after the date of the transaction with the Internal Revenue Service Data Center, P.O. Box 32621, Detroit, MI 48232. ACP or hand carry it to your local IRS office. Keep a copy of each Form 8300 for your records.

CASH FEES: TAX & ETHICS