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IRS Form 8300: The Attorney-Client Privilege and Tax Policy Become Casualties in the War Against Money Laundering

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IRS FORM 8300: THE ATTORNEY-CLIENT PRIVILEGE AND TAX POLICY BECOME CASUALTIES IN THE WAR AGAINST MONEY LAUNDERING

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[A]n underground economy has developed. It is these big cash spenders that IRS should prosecute quickly, with a vengeance, and be certain that they are behind bars where they won’t need to worry about spending tens of thousands of dollars anymore. We frequently hear from taxpayers that IRS is relentlessly pursuing them without listening to the whole story. Well, here is one bunch that IRS should relentlessly pursue because there is no other side to the story. The IRS must be vigilant in prosecuting those operating in the underground economy because the stakes are so high. We cannot afford to lose the confidence of hard-working, taxpaying people in our Federal tax system. We must do everything possible to ensure that everyone pays their fair share of taxes.1

This controversy features an old-fashioned tug of war. Pulling in one direction is the Internal Revenue Service which, for easily understandable reasons, is intent on learning the identity of persons who pay large legal fees in cash. Pulling in the opposite direction is a consortium consisting of two lawyers and three bar associations (appearing as amici curiae) which, for equally understandable reasons (fearing inter alia that disclosure may spur prosecution), is intent on safeguarding the identity of clients who pay in cash.2

I. INTRODUCTION

In an attempt to unearth and tax the "underground economy," Congress has enacted a number of laws that focus on identifying large commercial cash transactions. This legislation resulted from well-publicized accounts of drug dealers and other tax scofflaws who paid no income tax yet lived luxurious lifestyles often complete with expensive automobiles and yachts. These reporting provisions have become part of this nation's so-called "war on drugs." While the goal of eliminating drugs from our streets is unquestionably laudable, the reporting provisions have cast such a wide net that their enforcement has raised serious ethical and policy issues.

The legislative efforts to combat money laundering turn on identifying suspicious financial transactions and following the trail of money. Thus, the Bank Secrecy Act requires banks and other financial institutions to report cash deposits or withdrawals of over $10,000. Moreover, those engaged in a trade or business must provide the Internal Revenue Service ("IRS") with the name, address, and taxpayer identification number of any person who engages in a cash transaction in an amount exceeding $10,000. The latter disclosure must be filed on Form 8300, which has recently engendered a great deal of controversy in the legal profession. Because lawyers are engaged in a "trade or business" and therefore within the literal scope of the provisions, the IRS has consistently taken the position that lawyers are required to report the names of clients who pay their legal fees in cash. Many lawyers, fearing that reporting such information would expose their clients to both criminal and civil prosecutions, have filed incomplete Forms 8300; they report the receipt of cash, but refuse to provide the payors' names. These


4. The authors join others who have criticized the reporting provisions, not for their policy goals, but rather the means by which the goals are achieved. See, e.g., Patricia T. Morgan, Money Laundering, The Internal Revenue Service, and Enforcement Priorities, 43 FLA. L. REV. 939, 940 (1991) ("At a time in our history when the war on drugs and those who launder the proceeds of illegal activity capture international attention, one hesitates to suggest that aggressive enforcement of laws designed to thwart such illegal activities is inappropriate." (footnote omitted)).


lawyers argue that disclosing such information would both violate the attorney-client privilege and interfere with their clients' Sixth Amendment right to counsel. As the IRS and the Department of Justice have pursued these cases through summons enforcement actions, trial courts have differed as to whether disclosure of the information is required. Some have required full disclosure of client names, while others have held that attorneys have an ethical obligation to withhold client identity as long as the fact of payment is reported. The issue awaits possible resolution by the Supreme Court or perhaps Congress.

Until the controversy is ultimately resolved, however, attorneys may now be subject to differing ethical obligations depending on the jurisdiction in which they practice. More importantly, in those jurisdictions requiring disclosure, the attorney-client privilege has become something of a casualty in the drive to attack money laundering. Attorneys are forced to provide information which will in all likelihood lead to the indictment of their own clients. In a sense, lawyers are now being drafted as informants against clients who pay in cash. The pervasive nature of this issue was recently demonstrated in the case of a newly appointed federal district court judge who successfully defended her refusal to disclose the name and social security number of her client.

This Article examines the current controversy surrounding the use of IRS Form 8300 in the context of the attorney-client privilege. It argues that there is no justification in the case law for permitting attorneys to avoid disclosing client identity or fee information. It also shows that the IRS's regulations promulgated pursuant to the statute are generally consistent with the statutory language, even if they are not fully in accord with congressional intent. It is argued, therefore, that while section 6050I has a detrimental effect on attorney-client relations, the only available remedy at this point is for Congress to reconsider the statute with an eye toward providing an exclusion for attorneys.

Part I begins by discussing the money laundering provisions which


10. Joseph Wharton, Form 8300 Exception, A.B.A. J., April 1995, at 28; see also Sheryl Stratton, Lawyer Cash Reporting, Tolled Statutes of Limitations Top Recent Litigation Overview, 95 TAX NOTES TODAY 42-6 (March 2, 1995).

11. Wharton, supra note 10, at 28 (detailing the case involving Judge Nancy Gertner of the United States District Court for the District of Massachusetts); see also Gertner, 65 F.3d 963.
preceded section 6050I and then focuses on the reporting provisions of that section. Part II examines the conflicting opinions rendered by the various federal courts and the implications for attorneys who refuse to disclose client identity. Part III presents a tax analysis of section 6050I, with a particular focus on the IRS’s administration of the reporting provisions. It is clear that the focus of these provisions seems to have drifted from attacking the underground economy to becoming a primary tool in the war against money laundering and criminal activity in general. Part III also considers whether section 6050I’s use for purposes other than uncovering unreported income is legitimate. The Article concludes by suggesting a means by which the provisions of the statute might be interpreted and amended to avoid doing damage to the principles underlying the attorney-client privilege.

II. LEGISLATIVE ATTACK ON MONEY LAUNDERING AND UNREPORTED INCOME

A. Money Laundering Provisions

"‘Money laundering’ is the process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate.” Laundered money may originate as illegal or “dirty” money, such as drug trafficking proceeds. Money may also start out clean and later become dirty as a result of tax evasion. For example, the worker who receives money “under the table” has earned it through legal means, although the failure to report the income for tax purposes constitutes a crime. Notwithstanding the legality of the funds’ source, the money launderer seeks to

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14. The Internal Revenue Code imposes imprisonment of up to five years and a fine up to $100,000 upon “[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by [the Internal Revenue Code].” I.R.C. § 7201 (1994); see also id. § 7203 (willful failure to file return or pay tax).
hide the money from the taxing authorities and to transform it into a usable form of currency.

Because criminals need to launder their illicit gains in order to enjoy them, money-laundering often becomes a symbiotic component of the underlying criminal activity:

[L]aundering is harmful because it allows the underlying criminal activity to thrive. Drug sales, gambling, or other crimes that generate cash are pointless if the cash cannot be invested or spent. . . . Thus, success of the criminal venture depends on laundering. Efficient laundering renders the underlying crime lucrative, and therefore perpetuates it.15

In enacting its first anti-money laundering provision in 1970, Congress focussed on this connection between money laundering and criminal activity:

Criminals deal in money—cash or its equivalent. The deposit and withdrawal of large amounts of currency or its equivalent (monetary instruments) under unusual circumstances may betray a criminal activity. The money in many of these transactions may represent anything from the proceeds of a lottery racket to money for the bribery of public officials.

Law enforcement agency representatives have strongly urged legislation which would require reports of such transactions by the institution involved as well as the individuals concerned. . . . These reports may be of considerable value to law enforcement agencies in criminal investigations and prosecutions.16

The ensuing legislation centered on identifying large cash transactions that flowed through banks and other financial institutions. The Bank Secrecy Act requires banks and other domestic financial institutions to report financial transactions involving more than $10,000 in currency on a Currency Transaction Report ("CTR").17 Failure to comply with the provisions of the Act carries civil and criminal sanctions.18

15. Welling, supra note 13, at 291 (footnote omitted).
17. Act of Oct. 26, 1970, Pub. L. No. 91-508, §§ 121(b), 123(a), 84 Stat. 1114, 1116-17 (1970) (codified as amended at 31 U.S.C. § 5311 (1994)). "It is the purpose of this section to require the maintenance of appropriate types of records by insured banks in the United States where such records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." Id. § 101(a)(2), 84 Stat. at 1115.
The Bank Secrecy Act's money laundering provisions initially proved ineffective because of poor compliance and enforcement.\(^{19}\) A large number of transactions escaped detection because money launderers were able to "structure" transactions to fall under the $10,000 threshold. The most common method of structuring was by "smurfing," which involved having one or more couriers make deposits to numerous banks of less than $10,000 each.\(^{20}\) The structuring possibilities could be increased by using a number of banks, branches, and teller stations.\(^{21}\)

The response to the problems of structuring was twofold. First, the Treasury amended its reporting regulations to address problems of aggregating branches of banks.\(^{22}\) In addition, Congress enacted the so-called "anti-smurfing" statute which criminalized structured transactions.\(^{23}\) Violations of the anti-structuring provisions are now punished by civil and criminal fines, imprisonment, and forfeiture.\(^{24}\)

**B. The Underground Economy and the Tax Gap**

Money laundering is not the only problem that the currency reporting legislation sought to attack. Congress also saw the need to combat the growth of the "underground economy," which is comprised of "those persons outside the tax system who deal in currency."\(^{25}\) While money launderers are certainly participants in the underground economy, the term is also used to describe other citizens who earn money legally but do not file tax returns. The integrity of the United States' tax system depends on the voluntary compliance of its citizens. The underground economy, whether it be a drug dealer or a construction worker working "under the table," threatens the integrity of the system because it puts increased pressure on those who comply with the tax laws.

The underground economy is also one of the major contributors to

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20. The term "smurfing" refers to the popular blue cartoon characters, to whom the depositors were likened. *Id.* at 297.
21. *Id.*
22. 31 C.F.R. § 103.22(a) (1995).
24. *Id.* §§ 5321-5322.
the "tax gap." The tax gap is defined as "the difference between what taxpayers owe and what they do not voluntarily pay."26 Although the tax gap is difficult to measure with precision, recent estimates place the gap at approximately seventeen percent of the federal income taxes due annually, or between $110 billion and $127 billion for 1992.27 Because the increasing emphasis on deficit reduction results in lower tax revenues, closing the tax gap assumes greater importance.28 Congress is currently reluctant to either increase tax rates or increase the types of activities subject to taxation; thus, finding additional revenues is of great importance.

Congress' attempts to close the tax gap include programs that seek to increase the accuracy of both reported income as well as unreported income through document reporting and matching programs. For example, interest and dividend income received by taxpayers is reported by the payor banks and corporations, respectively, and is compared by the IRS with the amounts reported on taxpayer returns. Moreover, "backup withholding" is required in certain circumstances to assure tax collection. These types of reporting and withholding systems are not effective with the underground economy, however, because the unreported income is not invested in legal, income producing vehicles.

C. The Enactment of Section 6050I

With the burgeoning budget deficit of the 1980's, Congress sought increased tax revenues to help reduce the deficit.29 At the same time, Congress continued to be concerned with the underground economy and its effect on the tax system:

[A]pproximately 80 percent of the revenue lost through noncompliance is attributable to the underreporting of income. For 1981, the IRS estimates that taxpayers filing returns failed to report $134 billion of income and nonfilers failed to report $115 billion. This $250 billion of

27. Id. In contrast, the GAO approximated that the tax gap for 1973 was between $28 billion and $32 billion. Id.
28. Arguably, compliance would increase if the citizenry perceived the tax system as fairer. Moreover, compliance would also increase under a European styled value added tax ("VAT") because tax would be collected on all purchases of consumables. Alan Schenk, Choosing the Form of a Federal Value-Added Tax: Implications for State and Local Retail Sales Taxes, 22 CAP. U. L. REV. 291, 296 (1993).
29. Morgan, supra note 4, at 953-55.
underreporting reduced tax receipts by an estimated $55 billion. Unreported income connected with illegal activities was estimated to result in an additional $9 billion of lost revenue. *The committee believes that reporting on the spending of large amounts of cash will enable the Internal Revenue Service to identify taxpayers with large cash incomes.*

As part of the Deficit Reduction Act of 1984, therefore, Congress enacted section 6050I of the Internal Revenue Code ("Code"), which provides, in part, as follows:

§ 6050I. Returns relating to cash received in trade or business, etc.
(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 [taxpayer identification
           number] 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 pre-
          scribe.

This provision originated from a recommendation by the American Institute of Certified Public Accountants and was clearly modeled after the Bank Secrecy Act provisions. Given the current turmoil surround-

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31. I.R.C. § 6050I(a), (b) (1994).
32. Morgan, supra note 4, at 941. The AICPA’s report reflected the ineffectiveness of the then currency reporting provisions:
   The Federal Reserve Board requires that banks report certain large deposit or withdrawals
   of cash, but it is our understanding that this requirement is generally ignored. The tax
   authorities should either initiate their own reporting requirement or prevail upon the
   Federal Reserve Board to enforce the current requirement more vigorously. *All businesses
   should be required to report cash transactions in excess of some reasonable threshold,
   such as $3,000 or $5,000.*
ing the enforcement of section 6050I, remarkably little fanfare attended its enactment.33

D. Operation of Section 6050I

Section 6050I requires that any person engaged in a trade or business make a report to the IRS of any cash transaction that exceeds $10,000.34 This provision also requires that the IRS be furnished with payor's name, address, and taxpayer identification number, as well as a description of the nature of the transaction. The required return under section 6050I is made on "Form 8300."35 Completion of Form 8300 requires extensive information about the payor, including name, address, and taxpayer identification number.36

The recipient of the cash must also verify the payor's identity by examining a driver's license or other form of identification "normally acceptable as a means of identification when cashing or accepting checks."37 In the case of an alien, this would require the examination of a passport or alien identification card.38

IRS regulations broadly set forth transactions subject to the section 6050I reporting provisions. These "include (but are not limited to) a sale of goods or services; a sale of real property; a sale of intangible property; ... the establishment or maintenance of or contribution to a custodial, trust, or escrow arrangement; a payment of a preexisting debt; ... or the making or repayment of a loan."39 "Cash" is to be construed to encompass coin and currency, as well as cashier's checks (whether they are called "treasurer's checks" or "bank checks"), bank


33. Professor Morgan has noted:

Until recently, little attention has been paid to section 6050I outside the criminal defense bar. In hindsight, it may seem odd that the organized bar did not mount opposition to the original enactment of section 6050I. The reasons for the lack of opposition are the relatively obscure genesis of the statute and the apparent failure of all involved in its passage to foresee the problems the statute would create for the defense bar.

Morgan, supra note 4, at 942.

34. I.R.C. § 6050I(a) (1994). Businesses subject to the Bank Secrecy Act, e.g., banks and other financial institutions, are excepted from section 6050I's reporting provisions. Id. § 6050I(c)(1)(B).


36. Id.

37. Id. § 1.6050I-1(e)(3)(ii).

38. Id.

39. Id. § 1.6050I-1(e)(7)(i).
drafts, or travelers’ checks. The expansive definition of the terms “cash” and “transaction” is designed to cast a wide net, bringing a greater number of transactions within the scope of review. Thus, any combination of cash or monetary instruments totaling $10,000 in almost any type of commercial exchange will trigger an obligation to make a report to the IRS.

The regulations also address the problem of structuring transactions. Thus, a series of payments, which in themselves do not total $10,000, are reportable if they amount to $10,000 in the aggregate and are made pursuant to a single transaction within one year. The regulations further prevent parties from breaking a deal down into several smaller transactions in an attempt to avoid the reporting requirements; a recipient is required to report “related transactions” if he “knows or has reason to know that each transaction is one of a series of connected transactions.” Engaging in a series of “related transactions” without filing Form 8300 would not only run afoul of section 6050I’s reporting requirements, but might also violate statutes prohibiting the “structuring” of transactions in an attempt to willfully cause a business to fail to file a currency transaction report.

40. Id. § 1.6050I-1(c)(1)(ii)(A), (B). Travelers’ checks are considered cash only in what is defined as a “designated reporting transaction,” i.e., a transaction involving the sale of a consumer durable, a collectible, or a travel or entertainment activity. Id. § 1.6050I-1(c)(1)(iii). For transactions occurring prior to February 3, 1992, the definition of “cash” was limited to “coin and currency of the United States or of any other country.” Id. § 1.6050I-1(c)(1)(i). The change in definition was designed to expand the number and types of reportable transactions, thus allowing the IRS to cast a wider net.

41. The regulations do provide for a number of important exceptions, however. Thus, a cashier’s check or money order is not treated as cash if it constitutes the proceeds of a loan from a bank. Id. § 1.6050I-1(c)(1)(iv). Similar exceptions apply in certain installment sales contracts or down payment plans. Id. § 1.6050I-1(c)(1)(v), (vi).

42. Id. § 1.6050I-1(b).

43. Id. § 1.6050I-1(c)(7)(ii).

Failure to make a proper return subjects a non-filer to severe penalties.\textsuperscript{45} Section 6721 provides for two types of penalties for a party failing to properly file Form 8300. A recipient is subject to a $50 fine for each return where the failure to file was negligent, or where the return either omitted required information or contained incorrect data.\textsuperscript{46} Where the failure to make a proper return was due to "intentional disregard of the filing requirement," however, the recipient may be subject to a fine of at least $25,000 or the amount of cash received to the extent the amount of such cash does not exceed $100,000.\textsuperscript{47}

\section*{E. Application of Section 6050I to Attorneys}

Section 6050I's reporting requirements directly impact the way in which some lawyers receive fees from clients. Because lawyers have long been considered to be engaged in a "trade or business"\textsuperscript{48} for purposes of the Internal Revenue Code,\textsuperscript{49} attorneys appear to be covered by the literal terms of the statute. Nevertheless, in promulgating temporary regulations under section 6050I, the IRS initially contemplated the possibility that the attorney-client privilege might prevent attorneys from making the required disclosures.\textsuperscript{50} Rather than promulgating an attorney-client exception, however, the IRS flatly rejected any idea that

\begin{footnotesize}
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\item[\textsuperscript{45}] A cash recipient has a number of other responsibilities besides verifying the identity of the payor and making a proper return. A recipient must also retain a copy of the return for five years from the date of filing and provide a person identified as a payor with an annual written statement notifying the payor of the filing. Treas. Reg. \S 1.6050I-1(e)(3)(iii), (f) (as amended in 1993).
\item[\textsuperscript{46}] I.R.C. \S 6721(a) (1994). The maximum amount that can be assessed in any calendar year under this subsection is $250,000. \textit{Id.} \S 6721(a)(1).
\item[\textsuperscript{47}] \textit{Id.} \S 6721(e). The $250,000 annual limit does not apply to penalties assessed under this subsection. \textit{Id.} \S 6721(e)(3)(A). I.R.C. \S 6722 provides for a $50 penalty for failure to file a correct statement for persons identified as payees in a Form 8300. \textit{Id.} \S 6722(a), (b). I.R.C. \S 6723 provides an identical set of penalties for failing to file on time. \textit{Id.} \S 6723.
\item[\textsuperscript{48}] I.R.C. \S 162.
\item[\textsuperscript{49}] \textit{See}, e.g., United States v. Goldberger & Dubin, P.C., 935 F.2d 501, 506 (2d Cir. 1991) ("The practice of law is treated as a 'trade or business' under both the income tax laws and the Sherman Act." (citations omitted)).
\item[\textsuperscript{50}] In contemplating an exception, the IRS stated that:
Although these temporary regulations require attorneys to report with respect to the receipt of cash in excess of $10,000, the Service will entertain comments from the legal community concerning the possibility of developing an exception to the reporting requirement for information on transactions \textit{which might fall within the scope of the attorney-client privilege}.
\end{itemize}
\end{footnotesize}
lawyers should be treated differently than others subject to section 6050I. As a result, the final regulations included within the scope of the reporting provision the following example:

An attorney agrees to represent a client in a criminal case with the attorney's fee to be determined on an hourly basis. In the first month in which the attorney represents the client, the bill for the attorney's services comes to $8,000 which the client pays in cash. In the second month in which the attorney represents the client, the bill for the attorney's services comes to $4,000, which the client again pays in cash. The aggregate amount of cash paid ($12,000) relates to a single transaction and the receipt of cash must be reported under this section.

Thus, an attorney would be required to file Form 8300 whenever he or she has received cash or other monetary instruments in amounts exceeding $10,000. This would include payments made over a period of time, even though no single payment itself exceeds the $10,000 limit.

The IRS's rejection of the attorney-client privilege led the American Bar Association Grand Jury Committee to seek relief from the Tax Division of the Department of Justice, which represents the Commissioner of Internal Revenue in the federal courts. The Department of Justice took the position that it was not empowered to provide an attorney-client exception, although it would proceed cautiously in pursuing summons enforcement actions against attorneys.

51. In the preamble, the IRS firmly closed the door on an attorney exception:

Another commentator recommended that a criminal defense attorney who knows that a specified monetary instrument received from a client is being used in an attempt to avoid the reporting of the transaction should be excepted from reporting where the attorney's knowledge is derived from communications with the client. The Service is concerned that such a regulatory exception, however limited in scope, would have the effect of encouraging the use of monetary instruments in lieu of currency to avoid the currency reporting rules. Therefore, no exception is provided in the final regulations.


52. Treas. Reg. § 1.6050I-1(c)(7)(iii) (example 2) (as amended in 1993).

53. The Justice Department responded to the ABA as follows:

Because Congress expressly delegated authority to the Treasury Department to promulgate regulations delineating the statute's reporting requirements and the statutory exceptions, these regulations are not simply one agency's interpretation of what Congress intended the statute to mean. They are legislative regulations entitled to considerable weight in the courts, and, unless inconsistent with the statute, have the "force and effect of law."

The Justice Department, on the other hand, is not mentioned in Section 6050I as having authority to create exceptions to the statute's reporting requirements. Nevertheless, your Committee's guideline proposal calls upon the Department to delineate cases in
F. Compliance Problems

As with the Bank Secrecy Act's reporting provisions, section 6050I was plagued from its outset with poor compliance. In 1990, the Treasury Department and the IRS acknowledged severe compliance problems, similar to those encountered with CTRs. In addition, the Treasury Department found that section 6050I presented different problems because it applied to all trades and businesses compared with the limited number of regulated businesses subject to the CTR requirements. Furthermore, the IRS was only able to measure compliance by small corporate taxpayers; large corporations, partnerships, and sole proprietorships escaped scrutiny altogether. Examination of the sample returns showed that small corporations complied with the filing requirements only forty-two percent of the time.

which the reporting requirements would effectively be abrogated through a lack of enforcement. But we agree with the conclusions reached by the Treasury Department in the final regulations and are not persuaded that formulating cash reporting exemptions for certain classes of lawyers would be a good policy or fair to others covered by the statute [sic]. We do not, therefore, believe it appropriate to attempt to create reporting exceptions by doing indirectly what the statute and the regulations so plainly decline to do.

Although we decline to adopt guidelines along the lines your Committee has suggested, we nevertheless intend carefully to evaluate and exercise sound judgement in determining which cases should be selected for summons enforcement actions.


54. See supra text accompanying notes 17-21.
56. The IRS gathered its data from the most recent Taxpayer Compliance Measurement Program ("TCMP"), which was composed of 19,000 small corporate tax returns (less than $10 million in assets). Id.
57. The congressionally mandated study set out the following results: The number of Forms 8300 filed voluntarily by the corporations in the sample [out of 19,000] was 2,728. The results of the examinations of the sampled corporations indicated that the number of Forms 8300 that were required to be filed was 6,437. Therefore, the rate of compliance for filing Forms 8300 was 42 percent.
The amount of currency reported on the Forms 8300 filed by corporations in the sample population was $97,365,674. The results of the examinations revealed that the amount required to be reported was $259,304,815. Therefore, the compliance rate for dollar amounts was 38 percent.
G. Use of Section 6050I in Law Enforcement

The currency reporting provisions of section 6050I have undergone a "metamorphosis from the section's original purpose of correcting the increased occurrence of unreported income to its current status as a monitoring mechanism for drug control enforcement." Indeed, Form 8300 has simply become one more tool in the federal assault on illegal activity of all types, not just unreported income. According to a report by the General Accounting Office, Form 8300 seems to be of interest to federal authorities primarily for its use in combating money laundering. The government currently devotes vast resources to identifying and locating income derived from criminal activity, and while precise figures are not available, federal law enforcement officials estimate that between $100 billion and $300 billion is laundered each year. Narcotics and drug traffickers are the largest utilizers of money laundering schemes; but illegal activities, such as gambling and prostitution, also make use of money laundering. The desire to hide the source of large amounts of illegally obtained cash inevitably leads to multiple violations of the tax laws.

Many criminals face a common problem: How to dispose of large amounts of cash without drawing attention to themselves. Consequently, the methods used to launder funds can vary from extremely complex schemes involving sham corporations to something as simple as purchasing expensive commodities with cash in an attempt to legitimize illicit proceeds.

The government seeks to attack money laundering through currency reporting for a variety of reasons. First, the larger the income from illegal activity, the more vulnerable it will be to detection when attempts are

The number of forms 8300 filed in the three years subsequent to this survey has increased. In 1988, 18,694 Forms 8300 were filed. In 1989, 23,835 were filed. And in 1990, 30,778 were filed.

Id. at 6.


59. UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, COMMITTEE ON GOVERNMENTAL AFFAIRS, U.S. SENATE, MONEY LAUNDERING: STATE EFFORTS TO FIGHT IT ARE INCREASING BUT MORE FEDERAL HELP IS NEEDED (GAO/GGD-93-1 1992) [hereinafter GAO REPORT].

60. Id. at 8.

61. Id.
made to spend the money or deposit it in a bank. Second, statutes penalizing money laundering also attack those who profit from criminal activity but are not themselves directly involved in the criminal enterprise. Finally—and in some ways most importantly—"[m]oney laundering investigations often identify other types of crimes that have generated large amounts of cash."62

The reports required by section 6050I and the Bank Secrecy Act are kept in two different computer databases. One is used by the IRS to evaluate tax fraud and evasion, while the other is maintained by the Treasury Department’s Financial Crimes Enforcement Network ("FinCEN"), and is used by a variety of federal law enforcement agencies for criminal investigations. These investigations go far beyond attempting to attack the underground economy. Instead, they are used to identify suspicious transactions that might indicate other possible criminal activity.63 The reports are also used to "evaluat[e] the merits" of potential criminal cases, which presumably means that FinCEN data is culled for evidence needed to support already-pending criminal prosecutions.64

Federal officials clearly view section 6050I as much more than a tool to attack unreported income. Unlike currency transaction reports filed pursuant to the Bank Secrecy Act, Forms 8300 are considered tax returns, and thus, the information contained in these returns is subject to restrictions on their release. Under current law, tax returns filed with the IRS may only be released to federal law enforcement agencies, although state revenue agencies may obtain Form 8300 information for use in tax

62. Id. Federal efforts to track the flow of large cash transactions are primarily dependent on five types of currency reporting. In addition to the filing requirements of 26 U.S.C. § 6050I, the implementing regulations of the Bank Secrecy Act of 1970 require the filing of four different reports. These include: (1) the Currency Transaction Report (IRS Form 4789), which is filed by a financial institution whenever it handles a deposit or withdrawal in excess of $10,000; (2) the Currency Transaction Report by Casino (IRS Form 8362), which requires reporting of cash transactions over $10,000 by any licensed casino; (3) the Report of International Transportation of Currency or Monetary Instruments (U.S. Customs Form 4790), which is required to be filed by any person transporting currency or monetary instruments over $10,000 from or into the United States; and (4) the Report of Foreign Bank and Financial Accounts (U.S. Treasury Form TDF-90-22.1), which requires U.S. citizens to report any financial interest in foreign bank accounts with a combined value of over $10,000. See generally Mark F. Sommer, Disclosure of Currency Transaction Violations: When, How, and What if You Don’t?, 47 TAX LAW. 139 (1993) (providing a description of the currency transactions disclosure laws and addressing the issues that arise pursuant to these laws).

63. Sommer, supra note 62, at 147.

64. GAO REPORT, supra note 59, at 12.
investigations. In recent years, however, both the GAO and the Treasury have called for wider dissemination of completed Forms 8300 for use in both state and federal law enforcement investigations.

Financial transaction reports required by the Bank Secrecy Act and the Internal Revenue Code are a major part of the federal government’s strategy to combat money laundering. Increasing and facilitating the sharing of this data with the states could greatly enhance the utility of the data as well as have a marked impact on the effectiveness of state efforts against money laundering.

Wider dissemination of the information contained in Forms 8300 will likely result in their use by a variety of both state and federal agencies for purposes wholly unrelated to the collection of revenues from unreported income. Instead, tax returns will likely become the first link in a criminal investigative chain. As a result, it seems appropriate to question whether attorneys should be entitled to some exception for filing so as to prevent the possibility that compliance with the terms of section 6050I will lead to an attorney becoming a witness against his client.

III. DOES SECTION 6050I VIOLATE THE ATTORNEY-CLIENT PRIVILEGE?

The IRS generally considers the currency reporting provisions of section 6050I “invaluable” in combating money laundering. As a result, enforcement and audit activities have been increased in an effort to encourage compliance. Lawyers and law firms appear to be among the main targets of this activity. At the same time, lawyers have not

65. I.R.C. § 6050I(8) (1994) provides that: “The Secretary may, upon written request, disclose returns filed under section 6050I to officers and employees of any Federal agency whose official duties require such disclosure for the administration of Federal criminal statutes not related to tax administration.”

66. GAO REPORT, supra note 59, at 23. Indeed, the Treasury’s call for wider dissemination is a repeat from its 1991 request. See IRS SECTION 6050I REPORT, supra note 55, at 15-16.


68. I.R.S. News Release IR-95-37 (May 3, 1995) (reporting IRS “consolidated compliance effort” consisting of unannounced visits to antique and art dealers, auction houses, and law firms to ensure they are complying with currency transaction rules).

been lax in fighting back. In an increasing number of cases, lawyers have refused to fully complete Forms 8300 when reporting large cash fees received from clients. These attorneys usually fill out the Form 8300, but exclude the name and address of the payor/client along with a description of the transaction. They argue that disclosure of this information violates their ethical duty not to reveal confidential communications between attorneys and clients, or that divulging this information violates their clients’ Sixth Amendment right to counsel or the Fifth Amendment right against self-incrimination.

When faced with a refusal to supply all the required information, the IRS frequently issues a summons to the lawyer to compel production of the client identity. Law suits arising from this enforcement activity

72. The Internal Revenue Code provides the IRS with extensive information-gathering powers in seeking to determine whether a taxpayer has complied with his obligations. Id. at 596. In the first instance, the Code permits the IRS to summon a taxpayer to produce “any books, papers, records, or other data” necessary to permit it to determine whether any tax due is payable or owed. I.R.C. § 7602(a)(1) (1994). In other cases, the IRS might seek information from third party record-keepers, it must comply with the provisions of I.R.C. § 7609. This section governs the issuance of summonses served on a third party recordkeeper, rather than the taxpayer personally. Where the identity of the taxpayer is known, the IRS must give that person notice that a summons has been served to the recordkeeper. Id. § 7609(a)(1)(B). However, if the identity of the party under investigation is not known, the IRS must comply with the provisions governing what is commonly called a “John Doe” summons. Id. § 7609(f). In this case, the Government must obtain judicial approval prior to the issuance of a John Doe summons because the unnamed taxpayer will not be notified that he is under investigation, and thus, cannot object to the summons himself. Id.

Therefore, a challenge to an IRS summons may take several distinct forms. Where the subject of the investigation receives the summons himself, the taxpayer may challenge the summons before an IRS hearing officer. Ritchie, 15 F.3d at 597. If this challenge is unsuccessful, the taxpayer may contest the validity of the summons in district court if the IRS brings an enforcement action. Id. Where the summons is issued to a third party recordkeeper, two additional possibilities exist. Where the identity of the taxpayer is known, the taxpayer may begin a proceeding to quash the summons after issuance and may intervene in any suit brought by the IRS for enforcement. I.R.C. § 7609(b) (1994). However, where the taxpayer is not identified, he may not seek to have the summons quashed, but may intervene in an enforcement action. Id. § 7609(b)(2)(A); Ritchie, 15 F.3d at 596-97.

As a result, where the IRS seeks information from attorneys or law firms about client identity or fee arrangements, it must satisfy the requirements of 26 U.S.C. § 7609. If the client who is the target of the investigation is already known to the IRS, that client will be entitled to separate notice of the summons’ issuance and have the right to file suit to quash or intervene in an enforcement action. On the other hand, where no client is named on the summons, lawyers have often sought to have such summonses quashed where the IRS has not sought judicial approval for issuance. Ritchie, 15 F.3d at 597. In general, such challenges have not met with much success. Courts have repeatedly overlooked the requirement that the IRS obtain court approval prior to the issuance of a John Doe summons and granted enforcement. Thus, in United States v. Ritchie, the
have resulted in varying interpretations of the duty of lawyers to provide information about their clients' fee arrangements. While the majority of courts have held that client fee information is not protected by the attorney-client privilege, more recent cases have questioned this result and have held that attorneys may have a duty to withhold client identity and fee information in certain circumstances. Adding to the judicial confusion is a series of ethical opinions published by various bar groups and state bar associations that also take differing positions on the lawyer's ethical duties.  

Much of this disagreement, however, results from an incomplete analysis of the purposes underlying the attorney-client privilege and the types of cases in which the privilege ought to give way. Moreover, the courts have been especially lax in distinguishing between the different situations in which the question of client identity arises. Instead, they have generally treated the cases wherein client identity is requested as monolithic, failing to note that client identity may be privileged in some instances, but not in others. Thus, before proceeding to analyze the recent judicial treatment of the controversy surrounding client disclosure in the context of Form 8300, it is necessary to briefly examine the reasoning behind—and the limits of—the attorney-client privilege. An examination of the policy choices underlying the privilege will permit a more principled analysis of the situations in which the attorney-client privilege should give way to other, more compelling, governmental interests.  

The primary effect of the attorney-client privilege is to prevent the disclosure of confidential communications. The legal system appears

Sixth Circuit noted that a hearing held after the issuance of a John Doe summons satisfied the requirements of the statute, "in spirit, even if not by compliance with the letter of the law." 15 F.3d at 600. In other cases, the IRS has sought to avoid the problem of failing to seek prior judicial approval for issuance of a John Doe summons by arguing that the law firm itself, in addition to the unnamed taxpayer, is a target of the investigation. See Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 324 (1985) (holding that a "dual purpose summons" seeking information about taxpayer and recordkeeper need only comply with requirements of I.R.C. § 7602); United States v. Blackman, 72 F.3d 1418 (9th Cir. 1995); United States v. Sepenuk, 864 F. Supp. 1002 (D. Or. 1994) (finding that where the IRS has a dual motive, i.e., investigating affairs of attorney and client, John Doe summons requirements are not triggered). But cf. Gertner, 873 F. Supp. at 734 (holding that the IRS's claimed investigation of law firm merely "pretextual" and mandating compliance with John Doe summons requirements in future such cases, but refusing to require reissuance because summons not valid in any event).  

willing to bear the cost of doing without such disclosures in at least some circumstances. In others, however, the law has crafted exceptions or limitations to the privilege. These are usually based upon some jurisprudential or public policy ground and have the effect of limiting the assertion of the attorney-client privilege where it would otherwise apply. These limitations exist in those cases where it is thought that society’s interest would be better served by requiring disclosure of otherwise privileged information.

To determine whether the attorney-client privilege or an exception will apply, courts have been forced to balance the competing interests of society against the right of a party to engage in a confidential relationship with his attorney. It is exactly this type of balancing process that must be undertaken in any analysis of the controversy surrounding the use of section 6050I. Before determining whether the information required by Form 8300 is protected by the attorney-client privilege, it is necessary to first determine whether the information sought by the IRS rises to the level of confidential communication. Even assuming payment and fee information is privileged, it is then necessary to analyze the types of situations in which the privilege has been held not to apply in the past. Only by comparing the pre-existing exceptions with the type of disclosure demanded by section 6050I can we begin to come to any conclusions about the legitimacy of requiring attorneys to accurately complete Form 8300.

A. Justifications for the Attorney-Client Privilege

The attorney-client privilege as a rule of evidence has a long and venerable history.74 In its most basic form, it prevents the disclosure of communications made between client and attorney:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his

74. The privilege may be traced at least as far back as the reign of Elizabeth I and can rightly be considered the oldest of the privileges for confidential communications. Berd v. Lovelace, 21 Eng. Rep. 33 (Ch. 1577). The earliest justification for the privilege was based on “a consideration for the oath and the honor of the attorney rather than for the apprehensions of his client.” 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 543 (John T. McNaughton rev. ed. 1961). Eventually, however, this justification gave way, because “[t]he judicial search for truth could not endure to be obstructed by a voluntary pledge of secrecy.” Id. Before the privilege could be extinguished entirely, however, a new justification premised on protecting the client’s apprehensions in consulting an attorney was developed. Id.
instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.75

Yet, the desirability of retaining the privilege has been subject to debate for some time. Commentators simply disagree about the relative value of using the privilege to prevent courts from obtaining information about matters in hearing.76 The primary justification for retaining the privilege derives from its supposed role in increasing the free flow of information between lawyers and their clients.77 Only by protecting client confidences, it is said, can we be certain that lawyers will receive complete information and thus provide fully-informed advice: Clients will be more willing to confide in their lawyers if they are assured that what they say will remain confidential. Lawyers will then have all the facts before them before rendering advice. Both lawyer and client benefit from a legal opinion that is truly informed.78

The legal system also benefits when clients are encouraged to

75. 8 WIGMORE, supra note 74, § 2292, at 554 (footnotes omitted).


77. Jeremy Bentham summed up the modern justification for the privilege in this way:

When, in consulting with a law adviser, attorney or advocate, a man has confessed his delinquency, or disclosed some fact which, if stated in court, might tend to operate in proof of it, such law adviser is not to be suffered to be examined as to any such point. The law adviser is neither to be compelled, nor so much as suffered, to betray the trust thus reposed in him... because to betray a trust is treachery; and an act of treachery is an immoral act.

...

But if such confidence, when reposed, is permitted to be violated, and if this be known... the consequence will be, that no such confidence will be reposed.


78. The Ninth Circuit has noted:

The doctrine [of attorney-client privilege] is based on public policy. While it is the great purpose of law to ascertain the truth, there is the countervailing necessity of insuring the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense. This assistance can be made safely and readily available only when the client is free from the consequences of apprehension of disclosure by reason of the subsequent statements of the skilled lawyer.

Baird v. Koerner, 279 F.2d 623, 629-30 (9th Cir. 1960).
confide in their legal representatives. Ensuring the free flow of information allows attorneys to make reasoned litigation decisions. Claims and defenses can be fully evaluated; and, having all the facts in hand, the possibility of ambush is reduced. More importantly, encouraging the client to provide even the most unfavorable information permits a lawyer to make a full assessment of the strengths and weaknesses of a client's case. Needless trials can be avoided where client information indicates that settlement is a more prudent course of action.79

A number of other, more philosophical justifications exist for the privilege as well. Some argue that the attorney client privilege is important to protecting the "zone of privacy" that is a basic concomitant of individual freedom.80 Others claim that the privilege promotes a client's sense of human dignity. That is to say, if the client cannot confide in a lawyer without confidences being revealed, the client will run the risk of incriminating himself—effectively denying adequate representation by counsel.81 Still others assert that the privilege is necessary to encourage a relationship of trust between the lawyer and client.82

B. Limitations on the Privilege

Like most legal rules, there are exceptions to the attorney-client privilege. While a client's confidential statements to an attorney regarding the client's past misconduct are generally privileged, statements made while seeking the services of an attorney with respect to ongoing or future crimes or frauds are not.83 The rationale for this exception is

83. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 195, at 367 (2d ed. 1994) (noting that all "reasons for the attorney-client privilege 'are completely eviscerated when a client consults an attorney not for advice on past misconduct, but for legal assistance in carrying out a contemplated or ongoing crime or fraud'" (quoting In re Antitrust Grand Jury, 805 F.2d 155, 162 (6th Cir. 1986))); see also Commodity Futures Trading Com'n v. Weintraub, 471 U.S. 343, 354 (1985) (holding that attorney-client privilege "does not shield the disclosure of communications relating to the planning or commission of ongoing fraud, crimes, and ordinary torts"); Clark v. United States, 289 U.S. 1, 15 (1933) (stating that privilege "takes flight if the relation is abused").
that "clients are not entitled to use lawyers to help them in pursuing unlawful or fraudulent objectives."84 Society's interest in crime prevention is simply greater than a party's right use to an attorney's services to avoid his legal obligations.85 "If the privilege were to cloak such activity, the result would be loss of public confidence and corruption of the profession."86

A second exception exists for communications relevant to an alleged breach of duty by the lawyer to the client.87 Thus, where a party contends that his lawyer has acted negligently or improperly, the attorney is entitled to reveal otherwise confidential communications in an effort to vindicate the representation.88 However, the exception to the privilege exists only to the extent necessary to defend against the client's charges.89 The justification for this exception is that the client has impliedly waived the privilege by making allegations of breach of duty against the attorney.90

Courts have also found exceptions to the attorney-client privilege in situations where the attorney is uniquely possessed of information necessary to an accurate resolution of the case. Thus, where two parties each claim an inheritance from the same decedent, an attorney may reveal information communicated to him by the deceased where necessary to determine the testator's intentions. The attorney may be the only living person able to step into the shoes of the deceased client and give evidence about the deceased's intentions.91 In addition, commun-
cations relevant to the validity of an attested document may be revealed where the lawyer served as an attesting witness. In this case, the lawyer is not only uniquely possessed of valuable information obtainable from no other source, it is often assumed that an attorney who acts as an attester is not actually providing professional legal services. He is, instead, providing services that others, such as notaries, judicial clerks, or even military officers may provide. More importantly, it is apparent that attesting witnesses are expected to be able to testify about the relevant facts concerning the document in question.

The law thus recognizes a number of exceptions to the attorney-client privilege. In creating these exceptions, courts have balanced the interests of the judicial system in obtaining the most accurate information against the need to protect the flow of information exchanged between lawyer and client. Therefore, where clients seek out attorneys to assist in the preparation or commission of a crime, courts have found that society's interest in crime prevention outweighs the client's interest in confidentiality. Similarly, the need to determine a testator's intentions with respect to the disposal of an estate requires that confidentiality give way. Public policy determines the ultimate validity of any claimed right to confidentiality.

It is in cases where clients seek to keep their identities or fee arrangements secret that other considerations arise. In these instances, the balancing test is not solely focused on the need to protect existing clients, but also on the impact that the denial of confidentiality will have on encouraging others to seek legal advice. If client identity and fee arrangements are not protected, some clients might be discouraged from seeking counsel. The question then arises as to whether the value of the information gained outweighs the cost of discouraging potential clients from consulting attorneys. It is this balancing test that lies at the heart of the controversy surrounding the use of IRS Form 8300.

C. Client Identity and Fee Arrangements

The case law concerning the confidentiality of client identity and fee arrangements may appear hopelessly confusing at first glance. This is other similar document, are not privileged.

93. Some assert that this is not actually an “exception” to the privilege at all because the lawyer is not providing legal services and thus no confidential relationship arises. Id.
94. Id.
95. Goode, supra note 79, at 320.
because courts have generally not been careful in making distinctions between those situations wherein the government seeks to learn information about a client already suspected of wrongdoing, and those wherein the government is attempting to cast a wide net, bringing heretofore unknown individuals under investigation. In the first instance, the government may already have indicted a client for some crime, such as drug trafficking. In such cases, the government often issues a subpoena to that person's attorney seeking information about fee arrangements. The issue here is not client identity *per se* since the client is already a target of investigation; rather the concern is the level of confidentiality that is to be afforded to the client's fee arrangement, especially where payment in cash may further implicate the client in the alleged crime.96 In the second instance, the government seeks the identity of previously-unknown individuals who have paid in cash. Here, the government has no reason to suspect these individuals unless their cash transactions are reported. In these cases, an attorney's report of a large currency transaction sets the investigative wheels in motion, perhaps providing the first link in a future evidentiary chain.

Thus, arguments concerning attorney-client privilege are directed at two very different situations, those where the government seeks payment information about known individuals (fee arrangement cases) and those where the individual paying in cash is not yet a target of investigation (client identity cases). Section 6050I is more often implicated in the second type of dispute, the client identity case, than the first. The cases which have reached the courts usually result from an attorney's unwillingness to provide client names to the IRS via Form 8300.97 Disputes about the fee arrangements often arise when the attorney has received a subpoena from a grand jury in connection with an already-pending criminal investigation. In these instances, attorneys resist revealing fee arrangements because such disclosure may provide part of the evidence needed to convict their client.98

The problem with many of the opinions dealing with the confidentiality of client identity and fee information is that judges frequently fail

96. *See, e.g.*, United States v. Gertner, 873 F. Supp. 729, 735 (D. Mass.) ("[T]here is a ‘strong probability’ that disclosure of a large unexplained cash income could certainly be incriminating evidence in [a] pending narcotics prosecution."); *aff’d in part*, 65 F.3d 963 (1st Cir. 1995).

97. *United States v. Sindel*, 53 F.3d 874 (8th Cir. 1995) (attorney refused to complete IRS Form 8300 on grounds that revealing client identity would violate attorney’s ethical duties).

98. *See, e.g.*, *In re Grand Jury Subpoenas (Anderson)*, 906 F.2d 1485 (10th Cir. 1990) (attorneys held in contempt and placed in jail because they refused to reveal the source of payment of their fees incurred during their representation of four defendants on drug charges).
to take note of the distinctions between situations wherein the government seeks client identity and those where it is attempting to force an attorney to reveal fee payment arrangements.\(^99\) By and large, courts usually start their analysis of the issue of client confidentiality by repeating the blanket assertion that "client identity and payment of fees is not privileged information."\(^{100}\) This is because client identity is not normally considered a confidential communication necessary to the representation, but is rather a "preliminary matter bearing on the formation and existence of the attorney-client relationship."\(^{101}\) Identity is simply a matter of "business necessity," not a fact crucial to the legal advice or issues.\(^{102}\) In repeating this basic proposition, however, courts have not made distinctions between the various types of cases in which client identity or fee information is sought.\(^{103}\) The courts have, however, recognized at least three different exceptions to the general rule that client identity and fee information are not privileged. These include the "legal advice," "last link," and "confidential communication" exceptions

\(^99\). Goode, \textit{supra} note 79, at 320 (asserting that courts not only ignore the differences, but actually "appear oblivious to them"). Professor Goode notes that there are actually five different types of cases wherein client identity or fee information is sought: (1) those where someone hires a lawyer to make restitution anonymously, Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960); (2) where someone hires a lawyer to reveal the wrongdoing of others, i.e., an anonymous informer, \textit{In re Kozlov}, 398 A.2d 882 (N.J. 1979); (3) where a person has hired a lawyer to represent or post bail for another, \textit{In re Grand Jury Subpoenas (Anderson)}, 906 F.2d 1485 (10th Cir. 1990); (4) where clients are already targets of investigation and the government seeks to know how the client paid the lawyer's fees, Tomay v. United States, 840 F.2d 1424 (9th Cir. 1988); and (5) where the lawyer is asked to reveal the names of clients who received a particular kind of advice, \textit{In re Grand Jury Proceedings (Fine)}, 641 F.2d 199 (5th Cir. 1981). Goode, \textit{supra} note 79, at 322-24; see also \textit{Mueller & Kirkpatrick, supra} note 83, § 192.

\(^{100}\). United States v. Ritchie, 15 F.3d 592, 602 (6th Cir.), \textit{cert. denied}, 115 S. Ct. 188 (1994); see also United States v. Sindel, 53 F.3d 874, 876 (8th Cir. 1995) (attorney-client privilege "ordinarily does not apply to client identity and fee information"); \textit{Anderson}, 906 F.2d at 1488 ("It is well recognized in every circuit, including our own, that the identity of an attorney's client and the source of payment for legal fees are not normally protected by the attorney-client privilege."); \textit{In re Grand Jury Proceedings 88-9 (Newton)}, 899 F.2d 1039, 1042 (11th Cir. 1990) ("The identity of a client and the receipt of fees from a client normally are not privileged.").

\(^{101}\). \textit{Mueller & Kirkpatrick, supra} note 83, § 192, at 353.

\(^{102}\). \textit{Id.; see also In re Grand Jury Proceeding (Cherney)}, 898 F.2d 565, 567 (7th Cir. 1990) ("Payment of fees is incidental to the attorney client relationship and does not usually involve the disclosure of confidential communications arising from the professional relationship.").

\(^{103}\). Cf. \textit{Ritchie}, 15 F.3d 592 (IRS summons directed to attorney demanding names of individuals paying in cash); \textit{Cherney}, 898 F.2d 565 (grand jury subpoena to attorney requiring identity of person who paid attorney to represent third party in drug trial); \textit{In re Grand Jury Proceedings (Rabin)}, 896 F. 2d 1267 (11th Cir.) (grand jury subpoena directed to attorney seeking information on how client paid fees for use in tax evasion prosecution), \textit{vacated}, 904 F.2d 1498 (11th Cir. 1990) (en banc).
and are derived from the Ninth Circuit’s decision in *Baird v. Koerner.*

The legal advice exception applies “where there is a strong probability that disclosure would implicate the client in the very criminal activity for which legal advice was sought.” However, this exception applies only where the person seeking the legal advice is the client of the attorney involved. Thus, where the government seeks information about client identity or fee payment, the attorney is required to allege that the person paying the fees was actually the client. This exception enjoys widespread support, but at the same time has been the subject of extensive criticism.

The last link exception was largely formulated by the Fifth Circuit. It applies “when so much of the substance of the communications is already in the government’s possession that additional disclosures would yield substantially probative links in an existing chain.

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104. 279 F.2d 623, 632-33 (9th Cir. 1960). Baird was a tax lawyer retained by a general practitioner to provide advice concerning certain clients’ failure to remit taxes to the IRS. Baird advised the general practitioner that the clients would be in a better position with respect to a criminal tax prosecution if they remitted the past due taxes. In order to keep the payment of the late taxes from being a signal to the IRS, the attorneys developed a plan whereby the general practitioner forwarded checks to Baird, the tax lawyer, who then made payment to the IRS anonymously. On receipt of the payment, the IRS issued a summons to Baird demanding that he produce the names of the taxpayers involved. When Baird replied that he did not know the names of the taxpayers, the IRS demanded to know the name of the attorney who retained him on the taxpayers’ behalf. Baird refused to comply. The IRS then moved to enforce the summons and the district court found Baird in contempt. He appealed to the Ninth Circuit. *Id.* at 625-27.

105. *In re Grand Jury Subpoenas (Anderson),* 906 F.2d 1485, 1488 (10th Cir. 1990); *see also In re Grand Jury Subpoenas Duces Tecum (Marger),* 695 F.2d 363, 365 (9th Cir. 1982).

106. The exception is inapplicable, therefore, to those cases wherein the government seeks to determine the identity of a third party who paid fees for the named client. *See, e.g., In re Grand Jury Investigation (Tinari),* 631 F.2d 17, 19 (3d Cir. 1980), *cert. denied,* 449 U.S. 1083 (1981).

107. *See, e.g., In re Grand Jury Investigation (Durant),* 723 F.2d 447 (6th Cir. 1983), *cert. denied,* 467 U.S. 1246 (1984); *In re Grand Jury Proceedings (Gordon),* 722 F.2d 303 (6th Cir. 1983); *In re Grand Jury Proceedings (Fine),* 641 F.2d 199 (5th Cir. 1981); *Tinari, 631 F.2d 17; United States v. Strahl,* 590 F.2d 10 (1st Cir. 1978), *cert. denied,* 440 U.S. 918 (1979). The legal advice exception was the primary basis for the decision in *Baird* itself, where the Ninth Circuit held that an attorney was not required to disclose the identity of a client who consulted him regarding improperly paid taxes when such disclosure would be tantamount to an admission that the client, in fact, failed to pay all the taxes due. *Baird, 279 F.2d at 630-31.*

108. *See, e.g., Tornay v. United States,* 840 F.2d 1424 (9th Cir. 1988); *In re Grand Jury Subpoena (Slotnick),* 781 F.2d 238 (2d Cir. 1985) (en banc), *cert. denied,* 475 U.S. 1108 (1986); *United States v. Liebman,* 742 F.2d 807 (3d Cir. 1984), *application denied,* 770 F.2d 1076 (3d Cir. 1985).

109. *See In re Grand Jury Proceedings (Pavlick),* 680 F.2d 1026 (Former 5th Cir. 1982); *In re Grand Jury Proceedings (Jones),* 517 F.2d 666 (5th Cir. 1975).
of inculpatory events or transactions.” Put another way, the last link doctrine extends the protection of the attorney-client privilege to nonprivileged information—the identity of the client—when “disclosure of that identity would disclose other, privileged communications (e.g., motive or strategy) and when the incriminating nature of the privileged communications has created in the client a reasonable expectation that the information would be kept confidential.”

The last link exception has less support than the legal advice or confidential communication exceptions. It has been explicitly rejected by at least one circuit and implicitly rejected by others when applied to the question of whether fee payment information is protected by the attorney-client privilege. Moreover, at least one circuit has limited the last link exception only to those cases where disclosure of client identity would result in the disclosure of other privileged communications, such as motive or strategy.

The difficulties in applying the last link and legal advice exceptions have prompted the creation of a third approach, somewhat vaguely titled, “the confidential communications exception.” This exception protects client identity and fee arrangements when disclosure would “reveal information that is tantamount to a confidential professional communication.” A majority of the circuits have upheld the application of the confidential communications exception. The confidential communication exception is narrower in both scope and effect than the last link and legal advice exceptions, and only applies when revealing client data would be the equivalent of revealing the substance of confidential

110. Jones, 517 F.2d at 674.
111. In re Grand Jury Proceedings (Newton), 899 F.2d 1039, 1043 (11th Cir. 1990) (quoting In re Grand Jury Proceedings (Rabin), 896 F.2d 1267, 1273 (11th Cir.), vacated, 904 F.2d 1498 (11th Cir. 1990) (en banc)).
112. See In re Grand Jury Subpoenas (Anderson), 906 F.2d 1485, 1492 (10th Cir. 1990); In re Shargel, 742 F.2d 61, 64-65 (2d Cir. 1984) (questioning validity of last link doctrine); United States v. Liebman, 742 F.2d 807, 810 n.2 (3d Cir. 1984) (same); In re Grand Jury Investigation (Durant), 723 F.2d 447, 453-54 (6th Cir. 1983) (specifically rejecting last link exception), cert. denied, 467 U.S. 1246 (1984); In re Osterhoudt, 722 F.2d 591, 593 (9th Cir. 1983) (same).
113. Rabin, 896 F.2d 1267.
114. Tornay v. United States, 840 F.2d 1424, 1428 (9th Cir. 1988).
115. Anderson, 906 F.2d at 1488-89; In re Grand Jury Proceeding (Cherney), 898 F.2d 565, 568 (7th Cir. 1990); Tornay, 840 F.2d at 1427-28; In re Two Grand Jury Subpoenas Duces Tecum (Doe), 793 F.2d 69, 71 (2d Cir. 1986); In re Grand Jury Proceedings (Doe II), 791 F.2d 663, 665 (8th Cir. 1986); Shargel, 742 F.2d at 64; Durant, 723 F.2d at 453; Osterhoudt, 722 F.2d at 594; United States v. Strahl, 590 F.2d 10, 11-12 (1st Cir. 1978), cert. denied, 440 U.S. 918 (1979).
discussions. Thus, the Third Circuit upheld the exception in *United States v. Liebman*, 116 where the IRS sought to force an attorney to reveal the names of all clients to whom he had given specific tax advice. The court reasoned that revealing the names of the clients would be equivalent to revealing the content of the discussions between the attorney and the clients.

One commentator has correctly noted that the three judicially-fashionated exceptions to the general rule of non-confidentiality are based on flawed assumptions. In the case of both the legal advice and last link exceptions, the focus seems to be whether the disclosure of information would incriminate the client. 117 This justification for protecting the confidentiality of client identity or fee arrangements is fundamentally incorrect. Lawyers are required to disclose client confidences in other cases even though the likely result is to incriminate the client. 118 The result is that the legal advice and last link exceptions "seek to protect what are presumptively unprivileged matters, solely because of incriminatory effect." 119 There is, however, no justification in either the case law or commentaries for such a distinction.

Although subject to some criticism, 120 the confidential communications exception seems to provide the soundest argument for protecting client identity and fee payment information. Rather than concentrating on

116. 742 F.2d 807.
117. Goode, supra note 79, at 328.
118. Id. at 329.
119. Id.
120. Professor Goode has noted:

[T]he communication exception is circular. It applies only if "disclosure of the client's identity . . . would reveal information that is tantamount to a confidential professional communication." Implicit in this statement is the assumption that client identity is not a "professional communication." . . . Identity is said not to be privileged because clients do not reveal it to lawyers for the purpose of facilitating the rendition of legal services. This, however, is probably untrue . . . .

. . . 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. Thus, the assumption that client identity is not a professional communication, and therefore falls outside the scope of the attorney-client privilege as a definitional matter, is mistaken.

Id. at 333-34 (footnotes omitted) (quoting Tornay v. United States, 840 F.2d 1424, 1428 (9th Cir. 1988)).
the ultimate effect of the revelation, as the last link and legal advice exceptions do, the confidential communication exception goes to the essence of the attorney-client privilege: Only those communications actually necessary to facilitate the rendition of legal services are presumptively privileged. Thus, where a client sees an attorney after having already been served or where he himself seeks to institute suit, the exception would obviously not apply. But, where a client consults an attorney to obtain advice about past criminal or legal difficulties, the confidential communication exception ought to apply if revealing client identity or fee information would have the effect of revealing the nature of the matter for which the advice was sought. For example, a client who believes he may have underpaid taxes might consult an attorney to determine (1) whether he has, in fact, underpaid and (2) what should be done about it. Were the attorney to receive a subpoena from the IRS demanding the identities of all individuals who sought advice on underpayment of taxes, the attorney would be justified in refusing to comply. The client’s identity should be protected because there would be no way to reveal the client’s name without also revealing the substance of the representation.

Moreover, the assumption that a client who gives his real name to an attorney when seeking advice implicitly waives any right to remain anonymous is flawed. Most people who consult attorneys on such matters would probably prefer to remain anonymous even to the lawyer. They most likely reveal their identity only because the attorney insists upon disclosure for administrative purposes; the lawyer wants to know where to send the bill. Where client identity is concerned, the confidential communication exception applies with even greater force. This may be particularly true where the subpoena is designed to cast a wide net and is not specifically targeted at a named individual. Thus, a summons directed to an attorney seeking fee information about a client already under indictment for drug trafficking poses less of a dilemma for the lawyer’s ethical duty than a summons asking the lawyer to provide the IRS with the names of all clients who have paid in cash. This is the situation essentially presented by IRS Form 8300. Attorneys who have refused to fully complete the form argue that revealing the requested information would be tantamount to revealing the substance of a confidential communication, especially where the client involved is already suspected of being involved in drug trafficking or money

121. See id. at 333.
laundering. Where the client is not under current suspicion, revealing fee information may provide the impetus for an investigation. Federal courts have been inconsistent in their approaches to this problem.

D. The Cases

The most widely cited case dealing with the confidentiality of fee payment and client identity in the context of section 6050I is United States v. Goldberger & Dubin. This case involved a number of lawyers who failed to reveal the names of clients from whom they had received large fees in cash. The attorneys filed the appropriate Forms 8300, but noted that their refusal to disclose client identity was justified by the attorney-client privilege. The IRS issued summonses requesting the production of the lawyers' records, but the lawyers refused to comply. The IRS then moved for enforcement in the district court, at which time the attorneys objected to issuance of the summonses on both constitutional and ethical grounds. Specifically, they asserted that requiring them to disclose client identity would be a violation of their clients' Fourth, Fifth, and Sixth Amendment rights. After a hearing, the district court issued an order enforcing the summonses.

On appeal, the Second Circuit noted at the outset that "[f]inancial-reporting legislation plays an important role in the economic life of our country" and this legislation has a "high degree of usefulness in criminal, tax, and regulatory investigations or proceedings." The court also stated that although lawyers attempted to have Congress create an exception to the reporting requirements of section 6050I for fee payments when the statute was being considered, Congress refused to do so. As a result, the Second Circuit was quite hostile to what it perceived as an attempt to "secure from the judiciary what their [attorney] lobbyists were unable to get from Congress."

The court then dismissed the Fourth and Fifth Amendment arguments out of hand. Relying on a number of earlier Supreme Court cases involving the Bank Secrecy Act, the court stated that the

122. 935 F.2d 501 (2d Cir. 1991).
123. Id. at 503.
124. Id. at 502-03.
125. Id. at 503.
126. Id. In fact, however, there is no evidence that the organized bar sought an exemption to the cash reporting requirements when the original bill was before the Congress. See Podgor, supra note 58, at 505 n.143.
protections of these two Amendments were not implicated because the reporting requirement of section 6050I, like those in the Bank Secrecy Act, “target transactions without regard to the purposes underlying them and do not require reporting of information that necessarily would be criminal.”

The defendant lawyers also argued that section 6050I resulted in a deprivation of their clients’ Sixth Amendment right to counsel. This argument is grounded in the idea that forcing attorneys to reveal client fee information would unduly interfere with the lawyer-client relationship and, in some cases at least, cause the lawyer to become a witness against his client. The Second Circuit rejected these assertions noting that the Sixth Amendment is intended “simply to ensure that criminal defendants receive a fair trial” and that in evaluating Sixth Amendment claims, “the appropriate inquiry focuses on the adversarial process, not on the accused’s relationship with his lawyer as such.” The “essential aim” of the Amendment is to ensure that the criminal defendant is provided with an effective advocate, not to ensure that he will be represented by the counsel of his choice. Thus, if the attorney-client relationship is damaged as a result of the disclosures required by section 6050I, the damage is self-inflicted.

Section 6050-I does not preclude would-be clients from using their own funds to hire whomever they choose. To avoid disclosure... they need only pay counsel in some other manner than with cash. The choice is theirs. None of the appellants has advanced a legitimate reason why payment other than in cash cannot be made.

The lawyers also argued that requiring disclosure of client identity under section 6050I would conflict with the attorney-client privilege. The Second Circuit dismissed this argument as well, first noting that “[t]he doctrine protects only those disclosures that are necessary to obtain informed legal advice and that would not be made without the privilege.” The court recognized that in “special circumstances” a claim of privilege might be upheld sufficient to bar disclosure, but it did not specify the types of situations that would meet this test. Although it made reference to cases wherein incrimination would be a “direct and

128. Goldberger, 935 F.2d at 503.
129. Id. at 504 (quoting Wheat v. United States, 486 U.S. 153, 159 (1988)) (citations omitted).
130. Id. at 504.
131. Id.
132. Id.
133. Id. at 505.
unmistakable consequence' of the disclosure requirements,” it did not elaborate further. Thus, it is unclear from the opinion the extent to which forced disclosure of identity or fee information could ever impinge upon the attorney-client privilege. This impression is buttressed by the court's subsequent observation that “even where the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case, where strong public policy requires disclosure.” Given that the claim of privilege in this case collides ‘head on’ with a federal statute, it must give way. It therefore seems that, in the Second Circuit at least, the attorney-client privilege is abrogated simply by the presence of a statute, regardless of whether the implications of the statute on the privilege were ever considered in the first place.

What is most interesting about the Goldberger opinion is that it never discusses the three common exceptions to the general rule of disclosure. No specific mention is ever made of the legal advice, last link, or confidential communication exceptions, issues which other courts have wrestled with in a variety of contexts. Although the Second Circuit did hint at the possibility that disclosure might provide a direct link to incrimination, it did not really consider whether this “direct link” is similar or identical to the last link doctrine discussed by other courts. The initial effect of the Goldberger decision, therefore, is to entirely foreclose any claim of attorney-client privilege.

The Second Circuit’s reasoning has been adopted by other circuits as well. In United States v. Leventhal, the Eleventh Circuit held that the attorney-client privilege did not prevent an attorney from revealing the names of clients who paid in cash even though the clients were currently under indictment for drug trafficking. The court noted that the last link doctrine would prevent disclosure in cases where “the incriminating nature of the privileged communications has created in the client a reasonable expectation that the information would be kept confidential.” However, the court rejected application of the last link exception to the general rule of non-confidentiality on the grounds that the pending indictments signified that prosecutors were already aware of

134. Id. (quoting Marchetti v. United States, 390 U.S. 39, 48-49 (1968)).
135. Id. (quoting Priest v. Hennessy, 409 N.E.2d 983, 986 (N.Y. 1980)).
136. See supra text accompanying notes 104-16.
137. Goldberger, 935 F.2d at 505.
138. 961 F.2d 936 (11th Cir. 1992).
139. Id. at 940 (quoting In re Grand Jury Proceedings 88-9 (Newton), 899 F.2d 1039, 1043 (11th Cir. 1990) (quoting In re Grand Jury Proceedings (Rabin) 896 F.2d 1267, 1273 (11th Cir.), vacated, 904 F.2d 1498 (1990) (en banc))).
the clients’ illegal activities. Disclosure of the names would not, therefore, provide the “last link” in an evidentiary chain leading to the incrimination of the clients.140

More recently, however, other courts have permitted attorneys to refuse to comply with IRS subpoenas issued in response to the filing of incomplete Forms 8300. In United States v. Sindel,141 the Eighth Circuit held that an attorney might refrain from disclosing client identity because such disclosure would result in revealing the substance of a confidential communication. The court adhered to the basic reasoning set forth in Goldberger, but examined the attorney’s testimony about his dealings with one of his clients in camera and concluded that the confidential communication exception would apply to prevent disclosure.142 While the specific grounds of the decision are masked by the fact that the court took testimony in camera, the case provides some evidence that the confidential communications exception is alive, if only applicable in rare circumstances.

The most recent case addressing this problem was decided by the Ninth Circuit in United States v. Blackman.143 The IRS served a summons on Blackman, an attorney, requesting information necessary to complete several Forms 8300. Blackman filed the forms indicating the receipt of large amounts of cash from clients, but refused to provide the clients’ identities. When the attorney refused to comply with the summons, the IRS sought enforcement in the district court. The lower court issued an order enforcing the summons, and Blackman appealed.144

The Ninth Circuit affirmed the district court’s order observing at the outset that “[a]s a general rule, client identity and the nature of the fee arrangement between attorney and client are not protected from disclosure by the attorney-client privilege.”145 It then recognized the continuing existence of the confidential communication and last link

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140. Id. at 940-41 (citing Newton, 899 F.2d at 1043).
141. 53 F.3d 874 (8th Cir. 1995).
142. Id. at 876. The court also held that disclosure of another client’s identity was proper since no special circumstances existed. Id. at 877; see also In re Grand Jury Proceedings (Cheney), 898 F.2d 565, 568 (7th Cir. 1990) (disclosure of client identity in response to grand jury subpoena not required because of “special circumstances”).
143. 72 F.3d 1418 (9th Cir. 1995).
144. Id. at 1421.
145. Id. at 1424.
exceptions to the general rule. The court held that the last link exception did not apply in the case at bar because "there is no evidence that any of Blackman's clients who are implicated in this dispute are currently the subject of ongoing investigation." In so doing, the court followed the same line of reasoning as earlier cases in recognizing the validity of an exception to the attorney-client privilege that is based exclusively on an incrimination rationale.

The only basis for an exception available to Blackman, therefore, was the confidential communications exception. Under this test, an attorney may refuse to provide information only when "the fee-payer's identity and the fee arrangements are so intertwined with confidential communications that revealing either... would be tantamount to revealing a privileged communication." Unable to meet this test, Blackman's claim of privilege failed.

Some lower courts seem even more willing to adopt a broader interpretation of an attorney's duties in these cases. In United States v. Monnat, a district court in Kansas concluded that it was bound to follow the reasoning laid down by other federal courts when presented with cases where attorneys seek to avoid disclosing the names of clients paying in cash. The court reluctantly agreed that the caselaw to date did not permit the attorney to refuse to disclose client identity, but it was troubled by the implications for the attorney-client relationship if client identity could not be protected:

The problem here is with the court's own perceptions as to what is...
expected of the attorney in the exercise of his professional role. In the court's view, this Act [section 6050I], these decisions, and the reasoning therefore fly in the face of what an attorney's role is all about. The attorney is not expected to confer with a client as in a commercial venture. The client's role is more than that; indeed, it is more than even a fiduciary relationship in its highest mode. It is a relationship different from any other in our society, save for the confessor or physician. In the court's view, it is a sacred trust and should not be intruded in. In this regard, it seems that lawyers, unlike any others, are duty-bound to preserve that trust, as they, unlike others, are bound by canons of ethics geared to preservation of that trust. Given such perceptions, this court is troubled with these decisions. The attorney's ethical responsibilities are at risk. It is clear to this court that if and when a client consults with an attorney, retaining him for whatever purpose, the canons mandate that the client's very identity must be preserved.152

The court then stayed the matter and referred the case to the Federal Court Committee on Attorney Conduct, seeking an opinion on the ethical issues implicated in the disclosure required by Form 8300. The Committee prepared a report for the court and concluded that "[a] lawyer does not act unethically by complying with section 6050I or an order of court directing compliance because he is permitted to disclose otherwise confidential information when he reasonably believes disclosure is required by law or order of court."153 Before the report could be considered further, however, the parties reported to the court that the matter had become moot.154 As a result, we do not have any idea how the judge would have dealt with this difference of opinion. Nonetheless, the opinion does raise some important concerns about the role of attorneys that seem to have been overlooked in earlier cases.

A court in Massachusetts has expressed similar concerns.155 Nancy Gertner was nominated by President Clinton to be a judge of the United States District Court for the District of Massachusetts. Prior to her nomination, however, she was a prominent criminal defense attorney in Boston. In 1991 and 1992, she represented a criminal defendant who paid

152. Id. at 1303.
154. Id.
his fees in cash. Gertner filed Forms 8300 with the IRS, but omitted any identifying information. The IRS eventually issued a summons demanding the payor’s identity. Gertner refused to comply because the client was under indictment for various criminal offenses. She claimed that revealing the information sought by the IRS would serve to further incriminate him. An enforcement action was then initiated by the IRS.\(^\text{156}\)

Gertner made several challenges to the validity of the summons. As an initial matter, she contended that the issuance of the summons was improper because the government failed to obtain prior court permission before issuing what was in effect a “John Doe” summons.\(^\text{157}\) The district court agreed. It found that the IRS failed to comply with the provisions of the law governing the issuance of John Does summons-es,\(^\text{158}\) but held that forcing the IRS to reissue the summons would be a fruitless exercise because Gertner had no obligation to reveal the identity of her client in any event.\(^\text{159}\) While recognizing that most other courts had held that section 6050I did not pose an undue burden on the attorney-client privilege,\(^\text{160}\) the district court here held that the attorney-client privilege prevented Gertner from complying with the summons and revealing her client’s identity. The court first noted that section 6050I was “an important tool for the IRS to investigate cash transactions and to uncover tax evasion,” but then declared that an attorney may assert the attorney-client privilege “when the IRS seeks disclosures regarding a client who is being represented on currently pending criminal charges and the disclosures are likely to incriminate the client in that very proceeding.”\(^\text{161}\)

More than just lost tax revenues or the method of paying one’s attorney is at stake. The attorney-client relationship, during a pending criminal

\(^{156}\) Id. at 731-32.

\(^{157}\) See supra note 72.

\(^{158}\) Gertner, 873 F. Supp. at 733-34. Relying on I.R.C. § 7609(f), Gertner argued that the IRS was required to seek prior court permission before issuing a summons to a third party recordkeeper. The government, on the other hand, contended that the summonses in question were not directed to a third party, but were actually directed to the taxpayer in question—Gertner and her law firm. The IRS claimed that it was primarily interested in determining whether the firm was properly reporting its income. The court held that the summonses were really “John Doe” summonses and that any claim that the IRS was interested in Gertner’s income was “clearly pretextual.” Id.

\(^{159}\) Id. at 734.


\(^{161}\) Gertner, 873 F. Supp. at 736-37.
prosecution, implicates bedrock constitutional protections such as the right against self-incrimination and the right to be represented by counsel of one's choice. While the Court does not consider the constitutionality of § 6050I, these fundamental precepts must not be ignored when deciding how public policy impacts the application of the attorney-client privilege.

... On balance, the Court is satisfied that, given the specific facts of this case, neither the plain language of § 6050I nor public policy weigh against the application of the attorney-client privilege. 162

The Gertner opinion raises several interesting issues. First, it is clear that the primary factor behind the decision to protect the client’s identity was the fact that he was under indictment at the time. The court was concerned to prevent the disclosure from incriminating the client. The basis of this objection is not at all clear, however. As noted above, there are three generally recognized exceptions to the rule of disclosure of client identity, the legal advice exception, the last link exception, and the confidential communications exception. 163 Preventing disclosure on the grounds that it would further incriminate the client in a pending prosecution does not seem to fit any of the exceptions. Instead, the focus on incrimination seems misplaced; the Gertner court does not anywhere explain why the mere fact that information in the hands of an attorney having an incriminatory effect is privileged. 164 Attorneys are required to reveal a great deal of information about their clients even when such revelations will have an incriminatory effect. 165

The Gertner court’s emphasis on the fact that an indictment was currently pending also seems strange. Rather than being concerned to prevent the government from using an IRS summons to obtain the last link in an evidentiary chain, the court seems to be creating a “further link” exception. That is to say, the court appears only to concern itself with the current indictment to ensure that the government does not obtain further evidence against an accused. What is overlooked is the arguably more meritorious claim of the person who is not yet under any suspicion. Forcing the revelation of client identity in this type of case would create the situation where the summons becomes the “first link” in the incriminatory chain.

Finally, Gertner treads very close to the idea that the attorney-client

162. Id. at 737.
163. See supra text accompanying notes 83-94.
165. See Goode, supra note 79, at 329.
The attorney-client privilege is somehow imbedded in the Constitution itself. Some have argued that the Sixth Amendment right to counsel combined with the Fifth Amendment’s protections against self-incrimination make the attorney-client privilege a “constitutional imperative.” While not adopting these assertions, the Gertner court implies that the relationship between the Fifth and Sixth Amendments and the attorney-client privilege is sufficiently close that constitutional protections must be taken into account when determining how far a particular statute, such as the one at issue here, may impinge on the privilege.

It should be apparent that the case law on the subject has been something less than clear. Not only do courts confuse the types of cases in which fee information and client identity are sought, they have failed to adequately explain the applicability of the various exceptions they purport to adopt. That is to say, while almost all the circuits have adopted one or more of the three exceptions to the general rule requiring disclosure of client identity or fee information, none seem to go beyond the mere statement of the exception and provide guidance to lower courts or the bar about what the exception entails. For example, while the Eighth Circuit’s decision in Sindel asserts that the client’s identity was privileged by virtue of the confidential communications exception, it did not state exactly why that was the case. Granted, the testimony was necessarily taken in camera, but the court still did not give any hint

168. Gertner, 873 F. Supp. at 737. On appeal, the First Circuit affirmed, but only with respect to the holding that the IRS had not followed the proper procedures in issuing the summons. United States v. Gertner, 65 F.3d 963 (1995). The court of appeals made clear that it did not adopt any portion of the lower court opinion discussing the applicability of the attorney-client privilege: It is not entirely clear why the [district] court chose to grapple with these issues. . . . If the court extended its journey merely to memorialize a further basis for its decision, the additional holdings are surplusage and can be disregarded. On the other hand, if the court ventured afield because it concluded that the government’s bevue was harmless, the court miscalculated . . . . Any way we look at the situation, the district court’s views as to the applicability vel non of the attorney-client privilege are not necessary to the result. Consequently, we have no occasion to consider the correctness of the court’s conclusions on those issues.

Id. at 971, 972-73 (citation omitted).
about what standards it thought applicable to determine when revealing client identity would disclose confidential communications.169

In Blackman, the Ninth Circuit went further and argued that it need not go beyond merely stating the rule:

Our case law spells out the narrow circumstances under which fee-payer identity and fee arrangements may be protected by the attorney-client privilege. Only in the extremely rare case will the receipt of cash for fees be so intertwined with the subject of representation as to obviate compliance with § 6050I. We are hard pressed to imagine such a case, and decline to provide an illustration.170

The result is a body of case law that is both confusing and incomplete. Not content to hold that section 6050I requires disclosure of client identity and fee information in all cases, the courts have attempted to craft nice exceptions. They state broad rules, without providing any standard by which such rules are to be applied. The result is certain to be continued litigation with decisions being made on a case-by-case basis.

IV. TAX ANALYSIS OF SECTION 6050I

Although section 6050I is a tax provision, none of the cases involving attorneys and Form 8300 have analyzed the issue from a tax qua tax standpoint, or the IRS’s power and actions in these cases.171 Rather, the emphasis has been on the attorney-client privilege. This part of the Article presents a tax analysis as an alternative to that articulated by the courts and commentators. In addition, it examines whether section 6050I and Form 8300 represent good tax policy.

169. 53 F.3d at 874.
170. 72 F.3d 1418, 1426 (9th Cir. 1995).
171. See supra part III.D. Perhaps this has been a case of segregating tax issues as a “self-contained body of law.” Paul L. Caron, Tax Myopia, or Mamas Don’t Let Your Babies Grow Up to be Tax Lawyers, 13 Va. Tax Rev. 517, 518 (1994). Professor Caron argues that this view has impaired the development of the tax code by excluding helpful sources from outside the tax law. Moreover, the development of non-tax law has suffered as well by not always considering tax issues. Id.
A. Section 6050I as a Tax Provision

The provisions of the Internal Revenue Code fulfill various functions. Some define the tax base, while other provisions are designed to ensure compliance with the substantive Code sections. Section 6050I fulfills a compliance role. As such, it should be subject to the same analysis as other provisions of the Code.

As noted above, most Form 8300 cases arise as a result of Justice Department efforts to enforce summonses against attorneys who refuse to disclose the names and social security numbers of their clients. These actions should be distinguished from the more familiar cases arising from IRS audits of taxpayer returns, in which the taxpayer has the opportunity to petition the Tax Court to determine any deficiency claimed by the IRS.

The analysis begins first by examining whether section 6050I passes constitutional muster. It next discusses the role of congressional purpose in interpreting section 6050I. Finally, it analyzes the validity of the IRS’s actions with respect to section 6050I and Form 8300.

1. Constitutionality of Section 6050I

Any inquiry into the validity of section 6050I must begin with the question of whether the provision is constitutional. The Constitution grants Congress broad power to levy and collect income taxes without apportionment. The Supreme Court has consistently upheld the constitutionality of most tax provisions and has never required a direct

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173. Subtitle F of the Code generally provides the procedural and administrative rules which ensure that taxpayers comply with the substantive tax provisions. Included within Subtitle F is Subpart B, which requires that certain informational returns be filed. See id. §§ 6041-6050N. Penalty provisions for non-compliance are sometimes contained in the reporting provisions themselves, in addition to the general penalty provisions contained in the Code for failure to file returns. See, e.g., id. § 6050I(f)(2) (providing criminal and civil penalties for structuring transactions); see also id. §§ 6651-6658 (containing general penalties for non-compliance).

174. See id. § 6215 (providing for deficiency proceedings before the Tax Court). Taxpayers may instead choose to pay the asserted deficiency and sue for a refund in either a U.S. district court or the U.S. Claims Court.

175. U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.").
revenue raising purpose.\textsuperscript{176} Thus, while section 6050I is currently primarily used as a law enforcement tool, and has a rather tenuous revenue raising purpose, it nonetheless seems to satisfy the minimal constitutional threshold imposed by the Sixteenth Amendment.

Although a tax provision passes general constitutional muster under the Sixteenth Amendment, it will still be invalid if it conflicts with another provision of the Constitution.\textsuperscript{177} Attorneys challenging section 6050I and Form 8300 have raised Fifth\textsuperscript{178} and Sixth\textsuperscript{179} Amendment arguments. These arguments have been rejected without exception.\textsuperscript{180}

Section 6050I, therefore, seems to pass the minimal constitutional inquiry for valid taxing power. Moreover, section 6050I and Form 8300, as applied to attorneys, may not infringe upon clients' Fifth and Sixth Amendment rights.

2. Congressional Purpose and Legislative History

Congress enacted section 6050I to attack and unearth the underground economy. As enforced, however, section 6050I has been used as a weapon in the IRS's criminal arsenal. This section considers the extent to which this deviation from section 6050I's stated purpose should affect the validity of the provision, particularly whether such deviation would allow a court to graft an attorney-client exception onto the statute. It also discusses the relevance of the legislative history leading to the enactment of section 6050I.

Traditional rules of statutory construction of tax statutes dictate that where a code section is clear on its face there is generally no need to turn to the legislative history.\textsuperscript{181} Notwithstanding this traditional view,
many courts rely in part on legislative history.

A huge number of tax cases make some reference to legislative history. Most do so as part of a broader contextual analysis. This approach treats legislative history as one aspect—albeit sometimes an important aspect—of context, together with previous judicial decisions, Treasury regulations and rulings, and the overall statutory structure. Legislative history is used to support a result that could very possibly have been reached in its absence, by establishing the congressional purpose in enacting a given provision. Often the argument is not that Congress considered the specific issue in question, but that had it considered the issue it would have decided it in the indicated way because any other result would be inconsistent with the statutory purpose.\textsuperscript{182}

From a textualist approach, section 6050I is clear and unambiguous; the statute plainly applies to all trades and businesses and clearly sets forth the types of transactions that are covered. Moreover, the statute provides no exceptions for either trades or transactions. Thus, application of the section to attorneys is completely consistent with the text or plain language of the Code.

However, the statute was not intended as a criminal statute, and its use as such, without satisfactory safeguards like a provision for attorney-client privilege, is problematic. The IRS clearly seeks to use section 6050I for purposes other than those envisioned by Congress. The Service believes that section 6050I has some usefulness in ferreting out other types of illegal activity, and it has sought to allow dissemination of Forms 8300 to other law enforcement agencies.\textsuperscript{183} Therefore, there appears to be some tension between the plain words of the text and the purpose for which the statute is now being used. The contrast between textualism and purposivism is commonly viewed as follows:

In the tax world, most see the tension between textualism and purposivism as arising when a taxpayer wants a textualist approach and the IRS wants to deviate from the textual, form-conscious approach in


\textsuperscript{183} See supra part II.G.
favor of a purposive approach. This perception is exemplified by the hoary substance-over-form doctrine . . . under which the IRS challenges the taxation of a transaction according to its form in favor of taxation according to the transaction's underlying substance. 184

While section 6050I is a tax provision, it does not directly raise revenue. Yet, its non-tax character does not suggest the argument that courts should interpret the statute any narrower than other tax provisions. 185 Indeed, a stronger argument can be made that courts should leave Congress to undo any mischief it has wrought. It has been argued that courts should not lightly deviate from the plain words of a tax statute simply because it has unintended consequences.

The Code includes many provisions intended to induce changes in behavior, or effect wealth transfers, for nontax reasons based on economic or social policy. There are times when courts are asked to deviate from the plain meaning of the Code, by either the taxpayer or the IRS, because the requesting party thinks the literal interpretation is bad policy, even though not inconsistent with any structural attribute of the Code. Because policy choices in a statute are the province of Congress, courts should not . . . deviate from a textualist approach to statutory language when no structural value is implicated. A textualist approach effectuates the policy choice made by Congress or forces Congress to amend the statute if its terms lead to results inconsistent with the intended policy. 186

Even if a court were willing to consider legislative history and to go beyond the text of section 6050I, it would still have to determine that the purpose for which the provision was intended differs enough from the IRS's application to support such a departure. As administered by the IRS, section 6050I is used to pursue money launderers, who are also likely to be part of the underground economy. Thus, there is at least a reasonable—if only attenuated—relationship between the provision's stated purpose and the IRS's application. Moreover, lawyers present a rather unsympathetic group of complainants, especially since the IRS has

184. Deborah A. Geier, Interpreting Tax Legislation: The Role of Purpose, 2 FLA. TAX REV. 493, 495 (1995). Unlike the typical situation, however, it is the IRS that would argue for a textual approach to section 6050I.
185. The Code has long been used to regulate behavior in addition to raise revenue. See infra notes 199-205 and accompanying text.
186. Geier, supra note 184, at 502.
found lawyers in general to be poor candidates for compliance with the tax laws.\textsuperscript{187}

In sum, the fact that section 6050I's application differs from its intended purpose is not likely to help in invalidating or interpreting the statute. While courts have at times been willing to look to the legislative history and purpose of tax provisions and deviate from the text, such deviations have been rare.\textsuperscript{188} Moreover, non-tax provisions, such as section 6050I, are less likely to be judicially overruled.

\subsection*{B. Internal Revenue Service's Regulatory Actions}

Because section 6050I is a tax provision, the IRS is authorized to administer and enforce the provision.\textsuperscript{189} The IRS has promulgated regulations, which are clearly consistent with the statutory language of section 6050I. Moreover, these regulations are "legislative regulations" because Congress has specifically authorized the Treasury to promulgate them.\textsuperscript{190} This section examines the validity of the IRS's actions in promulgating the regulations as well as administering the enforcement of section 6050I and Form 8300.

\subsubsection*{1. Validity of the Regulations}

The courts that have held against attorneys challenging the validity of section 6050I's reporting requirements have done so by rejecting the asserted attorney-client privilege. Although no court has addressed the validity of the regulations under section 6050I, it appears the courts might reach the same result by upholding the validity of the IRS's regulations, which plainly provide no exceptions for attorney-client privilege. Legislative regulations receive great judicial deference because

\begin{itemize}
\item \textsuperscript{187} Sheryl Stratton, \textit{Attorney Non-Filers Still Targets in Service's "Project Esquire"}, 66 \textit{TAX NOTES} 1596, 1597-98 (1995).
\item \textsuperscript{188} Lawrence Zelenak, \textit{Thinking About Nonliteral Interpretations of the Internal Revenue Code}, 64 \textit{N.C. L. REV.} 623, 624 (1986).
\item \textsuperscript{189} The Secretary of Treasury, and by delegation the Commissioner of Internal Revenue are given broad authority to administer the federal tax law:
\begin{quote}
Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.
\end{quote}
I.R.C. § 7805(a) (1994). The Justice Department represents the Commissioner of the Internal Revenue Service in Article III Courts.
\item \textsuperscript{190} I.R.C. § 6050I(a)(2) (1994) requires that returns be made "at such time as the Secretary may by regulations prescribe."
\end{itemize}
they are specifically delegated power.\textsuperscript{191} Accordingly, legislative regulations are generally held valid so long as they implement the congressional mandate in "some reasonable manner,"\textsuperscript{192} and are not arbitrary and capricious.\textsuperscript{193}

The regulations promulgated under section 6050I are plainly consistent with the statute. Moreover, the lack of an exception for attorney-client privilege is not at odds with the statute. Neither the statute nor the legislative history indicate any congressional mandate for attorney-client privilege. Indeed, the problem is not that the regulations are inconsistent with section 6050I; rather, the genesis of the problem is with the statute itself. In enacting section 6050I, Congress gave no indication that it intended to create any exceptions to the reporting requirements. The regulations under section 6050I surely are valid as legislative regulations primarily because they track the language of the statute quite closely. The failure to provide for an exception for attorneys does not make the regulations invalid. On the contrary, it might be argued that including such an exception would require the IRS to overstep the limited authority given it by the text of section 6050I.

2. IRS Actions

Assuming, arguendo, that the regulations are valid, the question becomes whether the IRS's administration of the provision is arbitrary and capricious.\textsuperscript{194} This is especially important given that the provision is now used primarily for criminal enforcement purposes. An agency acts unlawfully when it acts without considering a significant aspect of the problem in the administration of the agency's program.\textsuperscript{195} As a federal agency, the IRS is subject to administrative law, and its action is invalid

\textsuperscript{191} Comm'r v. Portland Cement Co., 450 U.S. 156, 169 (1981); see also 1 MERTENS, supra note 176, § 3.70.

\textsuperscript{192} 1 MERTENS, supra note 176, § 3.70 (citing United States v. Correll, 389 U.S. 299, 307 (1967)); see also Long v. United States, 652 F.2d 675 (6th Cir. 1981); Siller Bros., Inc. v. Comm'r, 89 T.C. 256 (1987).

\textsuperscript{193} Interpretive regulations, on the other hand, are given less deference and must be reasonable interpretations of the statute. See 1 MERTENS, supra note 176, § 3.72.


\textsuperscript{195} Id.; see also Cerrillo-Perez v. INS, 809 F.2d 1419, 1422 (9th Cir. 1987); Natural Resources Defense Council, Inc. v. EPA, 824 F.2d 1258, 1282 (1st Cir. 1987); Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737, 744 (D.C. Cir. 1986); Menorah Medical Ctr. v. Heckler, 768 F.2d 292, 295-96 (8th Cir. 1985).
if arbitrary or capricious.\textsuperscript{196}

It seems, however, that the IRS has not acted in an arbitrary or capricious manner in its use of section 6050I as a criminal enforcement weapon. In fact, the IRS’s actions have been fully supported by Congress.\textsuperscript{197} But notwithstanding congressional approval of its actions, the IRS’s refusal to provide an exception for attorneys as provided in the criminal money laundering statutes\textsuperscript{198} presents a serious inconsistency at the very least.

**C. Tax Policy**

As discussed above, the IRS’s use of section 6050I, while problematic, is almost certainly valid. The ultimate issue, however, is whether section 6050I represents good tax policy. While section 6050I is designed to raise additional revenues by tapping into the underground economy, it has clearly become something else—a criminal enforcement tool with respect to money laundering and drug dealers. As such, its revenue raising aspects have become far more attenuated.

The Internal Revenue Code has long been used for non-tax reasons.\textsuperscript{199} Economically and socially desirable conduct is encouraged through exclusions from tax and an allowance of deductions. For example, the Code encourages donations to charity by providing for charitable deductions.\textsuperscript{200} It encourages employers to provide fringe benefits to employees, such as health insurance, by excluding the cost of premiums from employee income.\textsuperscript{201} At the same time, the Code discourages certain consumption through disallowed deductions\textsuperscript{202} and excise taxes.\textsuperscript{203}

Yet, the use of the Code for non-tax purposes necessarily affects the vitality of the Code for its primary purpose of raising revenue:

\begin{itemize}
\item \textsuperscript{196} See generally 14 MERTENS, supra note 176, § 50.103 at 333-34.
\item \textsuperscript{197} See Hearing: Effectiveness of Treasury Programs, supra note 1; Hearing: Business Community’s Compliance, supra note 53.
\item \textsuperscript{198} 18 U.S.C. § 1957(b)(1) (1994) provides that “the term ‘monetary transaction’ means the deposit, withdrawal, transfer, or exchange . . . of funds or a monetary instrument . . . but such term does not include any transaction necessary to preserve a person’s right to representation as guaranteed by the sixth amendment to the Constitution.”
\item \textsuperscript{199} 1 DEPARTMENT OF THE TREASURY, TAX REFORM FOR FAIRNESS, SIMPLICITY, AND ECONOMIC GROWTH 1 (1984).
\item \textsuperscript{200} I.R.C. § 170 (1994) (charitable deductions).
\item \textsuperscript{201} Id. § 106 (exclusion of employer-paid health insurance).
\item \textsuperscript{202} Id. § 162(e) (denial of exclusion for lobbying expenses).
\item \textsuperscript{203} Id. § 5881 (excise tax on corporate “greenmailers”).
\end{itemize}
If all of the proposals to encourage some worthwhile social activity through the tax system were adopted, the tax system would be left a shambles, incapable of performing its primary function of financing government equitably and with healthy economic growth. Yet the tax system now contains many provisions that have little to do with raising revenue and little to do with measuring income.  

The government has long used the tax laws to pursue notorious criminals. Moreover, the underground economy and the problems resulting from drug trafficking and money laundering present major problems for the country. Perhaps what is different in the cases involving section 6050I and criminal tax statutes is that the former are criminal statutes, per se, while section 6050I follows the pretext of being a taxing statute and not a criminal statute. It seems to attack criminal activity without affording those affected the rights and protections that usually attend criminal sanctions. In overlooking the impact of section 6050I on the attorney-client privilege, Congress has created many more problems that it has been able to solve. Not only has there been poor compliance, requiring a great number of enforcement actions, but it is also likely that the financial impact of the legislation is a net loss. The government is quite likely spending far more of its resources on enforcing compliance with section 6050I than the provision is achieving for the Treasury. This result is not dissimilar to Congress’ attempts to regulate the corporate behavior and the securities markets through the Internal Revenue Code, which regulation has been roundly criticized. Just as the Code and IRS serve as poor regulators of the securities markets and corporate laws, they are ill-equipped to curtail drug dealing and money laundering.

V. CONCLUSION

The underground economy and money laundering present serious social problems. But, in addressing these problems, Congress has cast a wide net, including section 6050I of the Internal Revenue Code. Section 6050I has clearly become a major source of contention between the

defense bar and the government. Federal officials view section 6050I as much more than a tool to attack unreported income. They seek dissemination of Form 8300 to a wide variety of law enforcement agencies on the grounds that such distribution would have a "marked impact on the effectiveness of . . . efforts against money laundering."207

The use of section 6050I as a tool in the war against drugs seems like an expansion of its original purpose. This may account for the more aggressive posture taken by the Justice Department in Form 8300 cases. While this alone presents difficulties from a tax policy standpoint, the problem greatly intensifies when the IRS pursues attorneys who refuse to disclose their cash paying clients' identities. Despite the obvious harm to attorney-client relations, most courts have refused to extend the attorney-client privilege to section 6050I. The resulting case law reflects a confused and uneven state of the law.

Any consideration of the validity of Form 8300 must take into account both the purposes underlying the attorney-client privilege and the costs to the attorney-client relationship if the privilege is abrogated. As noted above, the purpose of the privilege is to increase the flow of communication between a lawyer and the client; and in order to accomplish this purpose, some communications between the two are protected from disclosure.208 The tension between "full disclosure" and "privileged communication" can only be resolved when courts balance the interests of the judicial system in obtaining the most accurate information against the right of the individual to retain some measure of confidentiality.209 One court summed up the issue quite succinctly as follows:

Throughout their judicial endeavors courts seek truth and justice and their search is aided significantly by the fundamental principle of full disclosure. When that principle conflicts with the attorney-client privilege it must, of course, give way but only to the extent necessary to vindicate the privilege and its underlying purposes. The matter is truly one of balance . . . 210

207. GAO REPORT, supra note 59, at 23.
208. See supra text accompanying notes 74-82; see also Baird v. Koemer, 279 F.2d 623, 629-30 (9th Cir. 1960).
209. Baird, 279 F.2d at 631; see also United States v. Saccoccia, 898 F. Supp. 53, 57 (D. R.I. 1995) ("Although the privilege occasionally may deprive the Government of evidence necessary to convict a criminal, that is the price extracted by a system of justice that places a premium on an individual's right to the effective assistance of counsel.").
Starting from the premise that the purpose of the attorney-client privilege is to promote open communication, a resolution of the problems posed by IRC § 60501 can only be achieved by considering the extent to which leaving fee arrangements and client identity unprivileged would deter clients from seeking counsel. If clients would still continue to seek counsel notwithstanding the fact that their identity would not be protected, then there should be no privilege. But, if disclosure would prevent individuals from consulting lawyers, then the damage to the attorney-client privilege caused by this disclosure must be measured against the gain to the judicial process.

The case law is rather consistent in recognizing that the attorney-client privilege does not extend to all communications between an attorney and client. Instead, it "protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege." The general rule requiring disclosure of client identity is limited by the attorney-client privilege where fee information is "so intertwined with the matter about which counsel is consulted that the threat of disclosure would deter the client from communicating information necessary to obtain informed legal advice." Cases relying on an "incrimination rationale," and which prevent disclosure simply because revealing the client's identity or fee information would serve to incriminate the client are fundamentally flawed, if in fact, incrimination is to be the sole basis for preventing disclosure. The focus, instead, should be on whether the information, if disclosed, would reveal other confidential attorney-client communications. The

211. Goode, supra note 79, at 336.
212. Id.

This exception to the no-privilege rule does not operate in every instance where disclosure of the client's identity would incriminate the client or lead to indictment. "In order to qualify for the protection afforded by the attorney-client privilege, information regarding client identity or legal fees must be "in substance a disclosure of the confidential communication in the professional relationship between the client and the attorney.""

Id. (quoting In re Grand Jury Subpoena (Horn), 976 F.2d 1314, 1317 (9th Cir. 1992) (quoting In re Grand Jury Subpoena (Osterhoudt), 722 F.2d 591, 593 (9th Cir. 1983))); see also In re Grand Jury Proceeding (Cherney), 898 F.2d 565, 568 (7th Cir. 1990) ("[T]he fact that fee information may tend to incriminate a client does not transform the information into a confidential communication, and incriminating information which is not part of a confidential communication falls outside the ambit
problem with the attorney-client privilege in the context of section 6050I is that there seem to be few situations wherein the revelation of client identity or fee information really results in the disclosure of a confidential communication. The majority of courts that have considered the question have simply determined that in the balancing test between requiring disclosure and the need to protect client confidences, the government's right to disclosure outweighs the client's right to keep his identity secret. Thus, an attorney does not violate the attorney-client privilege by providing fee information to the IRS via Form 8300.

In so holding, however, it appears that these courts have overlooked the special relationship that exists between the lawyer and client. But, given the limited nature of the exceptions to the disclosure rule, the only avenue available would seem to be a complete rethinking of the exceptions themselves. A number of commentators have analyzed the problem from this point of view and have concluded that some special consideration ought to be given to the attorney-client relationship. Indeed, the Gertner and Monnat courts seem to argue this as well. Thus far, two different options have been proposed: One focuses on the way in which Form 8300 "undermine[s] the relationship of trust and confidence that is essential between an attorney and client" and argues that attorneys should be exempt from the reporting provisions. The other concludes that section 6050I does not impose a terribly large burden on the attorney-client privilege and asserts that no special exception to the reporting requirements need be created for attorneys.

Neither option appears to address the interests of both sides, however. Exempting attorneys from the reporting requirements fails to take into consideration the government's justifiable interest in uncovering the source of unexplained cash transactions. Continuing the present situation, on the other hand, does nothing more than ensure that attorneys refuse to fully complete Form 8300, producing a steady stream of cases of the privilege... ([The privilege is limited to confidential communications.]).


217. Podgor, supra note 58, at 488.

218. Id. Professor Podgor argues that attorneys are exempt from the reporting requirements because Form 8300 "requires the attorney to provide information on a specific client, thus entering the sphere of the attorney-client relationship." Id. at 532; see also Earl, supra note 216.

219. See, e.g., Gaetke & Welling, supra note 216, at 1241-43; Goode, supra note 79, at 355.
wherein courts are asked to determine whether the requested disclosure is prevented by the three exemptions.

There may, however, be a two-fold solution: The first, and perhaps least likely, possibility would be for the courts to create a "first link" exception. While some courts have severely criticized the last link exception, they usually focus on the concept of "incrimination" as a justification for the exception. But, the real concern with the disclosures required by Form 8300 is not that more evidence will be produced to further incriminate the client. Rather, the primary concern should be those situations wherein the disclosure will produce the first link in the evidentiary chain. Given that Form 8300 is designed to initiate criminal and tax investigations, the attorney who fully completes it actually jump-starts an investigation of his own client. Courts could, therefore, limit disclosures required by Form 8300 to those situations where the client is already under indictment. That is to say, Gertner has it backwards. Lawyers should not be exempt from revealing information about clients simply because the information serves to further implicate them in certain crimes of which they are already suspected. Instead, the courts should review the implications of the Fifth Amendment on the attorney-client relationship: Where the client is currently unknown to law enforcement authorities, the lawyer should not be required to serve as an informant. This analysis is, of course, based on the proposition that requiring disclosures by attorneys is tantamount to coercing incriminating statements from an accused. Admittedly, this solution will have the effect of increasing, rather than decreasing, the litigation surrounding Form 8300 disclosures because instead of litigating three exceptions to disclosure, lawyers would have four to litigate.

A second solution might be to craft a legislative exception to section 6050I. This could be modeled on a similar exception in the money laundering statutes, where Congress has already provided an exception for "transactions necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution."Thus, lawyers receiving fees in cash from clients may escape liability for money laundering offenses even though the funds received were the proceeds of illegal activity. A similar exception in section 6050I might have the effect of reducing many of the difficulties facing lawyers and the courts. Such an exception might be structured with an eye toward

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reliance on the Fifth Amendment. That is to say, disclosure would not be required where completing Form 8300 would likely result in a criminal investigation. Thus, section 6050I might include language to the effect that “no return need be filed by a licensed attorney where disclosures required by this section would infringe a person’s Fifth Amendment right against self-incrimination.” One problem that arises even with this solution, however, is that litigation may not be decreased in the short term. Attorneys who fail to file Forms 8300 might still find themselves subject to investigation by the IRS. Courts will then still be burdened with having to determine whether disclosure would, in actuality, result in the incrimination of a client.

Perhaps, the real problem with section 6050I is that it is misguided as tax policy. A provision designed to capture a part of the underground economy has become a tool in the war against a wide variety of crimes. One problem that seems overlooked, however, is that the amount of effort expended on enforcing section 6050I against attorneys vastly exceeds the amount of revenue recovered through its provisions. It is also unlikely that section 6050I has a significant detrimental effect on other types of crime. In reports to Congress, the Treasury admits that there are “substantial” cash dealings in the marketplace which are not reflected on Forms 8300. In fact, both the Treasury and Congress acknowledge that most merchants appear quite willing to not only accept cash without complying with the reporting requirements, but go “out of their way to suggest ways to structure anticipated transactions to avoid the reporting requirements.”\(^{221}\)

In the end, the legacy of section 6050I is one of unnecessary confusion and waste. The government is devoting resources to force attorneys to comply with the reporting provisions in cases which together amount to no more than the tip of the iceberg. By the government’s own measure, compliance with section 6050I is abysmal. The section should be drastically amended—or repealed altogether—so that federal law enforcement resources might be deployed more efficiently.
