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THE ATTORNEY-CLIENT PRIVILEGE AND
CLIENT'S CONSTITUTIONAL RIGHTS

David E. Seidelson*

No judge, lawyer, or law school professor can ever experience the unique vocational satisfaction which must flow from the discovery and accurate description of an immutable law. Pythagoras, Euclid, Newton, and Einstein must have known that feeling, even though, posthumously, some of Newton's concepts had to yield to Einstein's laws. Copernicus and Galileo must have experienced that feeling, although, especially in the case of Galileo, at the cost of awful social and sectarian sanctions. Pasteur, Salk, and Sabin must have realized that joy and its enhancement at the sight of every child alive and active notwithstanding the horrible threats of rabies and poliomyelitis. Mendel, contemplating his garden peas, and Darwin, reflecting on his Galapagos experiences, surely knew that pleasure. And Mendeleev, shuffling his element cards, and Watson and Crick, constructing their double helix model of DNA, must have savored that intense satisfaction. But for one in the legal profession, that particular satisfaction simply cannot be realized. Every law, whether legislatively or judicially fashioned, and irrespective of the brilliance and persuasiveness of its proponents, is vulnerable to subsequent modification or even outright rejection. As conditions change, as society's values shift, and as experience instructs, statutes and judicial conclusions must be amended, repealed, or overruled. Indeed, the principal consolation for those in the legal profession, who are therefore denied the opportunity to discover and describe laws which are constant, is the knowledge that the law's capacity for change is its inherent salvation. Should it ever become static and unchangeable, it would simultaneously become intolerable and certainly doomed to ultimate repudiation. In addition to that consolation, one in the legal profession should draw these inferences from the law's amenability to change: (1) what the law is may not be the ultimate description of what it should be,

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and (2) proposals for change may or may not be likely to effect improvement. Consequently, those comfortable with the existing law as well as those advocating change should be sensitive to the very real possibility that neither the existing law nor a suggested change may be quite as good as its supporters might believe.

I find myself uncomfortable with the existing law as it applies to certain aspects of the attorney-client privilege. At the same time, I recognize some of the goals sought to be achieved and some of the adverse consequences sought to be avoided by that law. I am inclined toward change and, at the same time, recognize that the changes I contemplate could very well generate consequences which many might find intolerable. I shall attempt to be candid in conceding those strengths inherent in the existing law; I hope the reader will be tolerant in reacting to the weaknesses in the changes I may consider.

What is the existing law regulating the attorney-client privilege and how does it affect client, counsel, and the law? We can begin an examination aimed at answering these questions with Genson v. United States.\(^1\) To analyze the case appropriately, we must set forth the facts with some specificity:

On December 30, 1975, between 9:00 and 9:30 A.M., the Bellwood Savings and Loan Association of Bellwood, Illinois, was robbed of approximately $6,120.00 by a man and a woman. Investigators from the Federal Bureau of Investigation uncovered information leading to the identification of two suspects, Paul Bijeol and Sharon Kay Holloway, and a complaint and warrant were sworn and issued on December 31, 1975, naming these two suspects.

Investigation and interview disclosed that Bijeol had been in the employ of Edward Genson, attorney at law, prior to the commission of the robbery. Investigation also disclosed that Bijeol and his alleged female accomplice were in the Chicago office of Mr. Genson and one of his associates, Mr. Barry Goodman, between 10:00 A.M. and 12:00 noon on December 30, 1975, approximately one to three hours after the commission of the robbery. Further, Government investigators learned that the male suspect had transferred $200.00 in cash to Mr. Goodman.

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1. 534 F.2d 719 (7th Cir. 1976).
2. Actually Bijeol gave Attorney Genson $2000. After the Seventh Circuit affirmed, Bijeol executed a waiver of the attorney-client privilege and Attorney Genson produced the $2000 before the grand jury. Both Bijeol and Holloway were indicted. Holloway entered a guilty plea and Bijeol went to trial represented by counsel other than Attorney Genson. United States v. Bijeol, No. 76 Cr. 756 (N.D. Ill. 1976). The

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At this time. It was also learned that Bijeol met with Genson at approximately 1:30 P.M. and again at approximately 5:30 P.M. on the day of the robbery.

At approximately 10:00 A.M. on December 31, 1975, Genson was notified by an agent of the FBI that any monies which he had received or would receive as fees for his legal services for the two suspects might constitute proceeds of the robbery. In response to an inquiry of an FBI agent, Genson stated that he received “something” from the male suspect, but he refrained from disclosing what the “something” was. In response to a subsequent inquiry whether he had in fact received any monies or any firearms from either of the two suspects at the time of or subsequent to their meetings on the day of the robbery, Genson asserted the attorney-client privilege as a basis for refusing to respond to the questions.

On January 7, 1976, Genson was served with a subpoena duces tecum requesting the production of an attorney-Client Privilege

"[a]ny and all monies paid or delivered to you or into your care, custody, and control by Paul Bijeol or Sharon K. Holloway, . . . or their agents, subsequent to 9:00 A.M. on Tuesday, December 30, 1975."

On January 9, 1976, Genson filed a motion to quash the subpoena. On January 15, 1976, after memoranda had been filed and arguments heard, Chief Judge Parsons denied the motion to quash and ordered Genson to appear before the grand jury and to comply with the subpoena. On that afternoon, Genson appeared before the grand jury and refused to comply with the subpoena or to answer a question pertaining to his receipt of monies from Bijeol.

The grounds for this refusal were [inter alia] the assertion of an attorney-client privilege, the Fifth Amendment privilege against self-incrimination on behalf of a client . . . and the Sixth Amendment right to counsel. The Government then petitioned for an order to compel testimony and to produce evidence. The witness again appeared before Chief Judge Parsons, who ordered him to proceed forthwith to the place of meeting of the Grand Jury, to answer the questions which he was asked in regard to the monies, and to produce said monies as required of him, if in

Government subpoenaed Genson as a trial witness to establish the chain of custody of the money. On cross-examination, Attorney Genson testified that Bijeol had given the money to Genson for use in defending Holloway. Only some $100 of the $2000 was money taken from the Bellwood Savings and Loan Association. Bijeol was found not guilty. Telephone conversations with Edward M. Genson, Esq. (Mar. 14 and Sept. 19, 1977). I wish to express my thanks to Attorney Genson for his kindness in providing me with the above information and in permitting me to include it herein.
his possession, without further assertion of the attorney-client privilege, the self-incrimination privilege of his client, or his client's Sixth Amendment right to counsel.

The appellant then returned to the grand jury, where he again refused to comply with the subpoena or the order of the court. After this second refusal, the Government moved for a rule to show cause why Genson should not be held in contempt. The court held a hearing, entered a finding of contempt, and ordered Genson confined. Execution of the sentence was first stayed until January 22, 1976, and a subsequent order stayed execution of the sentence pending this appeal.3

The Seventh Circuit affirmed the finding of contempt. Judge Pell, author of that court's opinion, focused careful attention upon the fifth amendment right against self-incrimination, the attorney-client privilege, and the sixth amendment right to counsel. The other two members of the panel, Judge Tone and Judge Bauer,

3. Genson v. United States, 534 F.2d 719, 720-21 (7th Cir. 1976) (footnotes omitted). In addition to the attorney-client privilege, the fifth amendment right against self-incrimination, and the sixth amendment right to counsel, Attorney Genson asserted on behalf of his clients "the Fifth Amendment right to due process, the Fourth and Ninth Amendment right to privacy, [and] the Fourth Amendment right prohibiting unlawful searches and seizures." Id. at 721.

We note that, by its terms, the order [of Chief Judge Parsons] to produce and to testify did not preclude the appellant from asserting Fourth and Ninth Amendment rights. At the hearing on the rule to show cause, however, the judge asked the appellant whether he believed that a truthful answer to the propounded question would deny the clients their right to privacy. Moreover, the oral argument before the judge clearly focused on the question whether an attorney, under circumstances such as were present, could claim Fourth Amendment rights. We interpret the judge's statement that "under the circumstances of this case it would be necessary for the attorney to answer" as an implicit ruling that the Fourth and Ninth Amendments provided no just cause for Genson's refusal to produce the monies and to answer the question. We do not think that the variance between the terms of the court order and the actual statement of reasons given by Genson for his action presents any significant problem.

Id. at 721 n.2.

We have also examined the appellant's arguments regarding the claim that the Fifth Amendment right to due process, the Fourth and Ninth Amendment right to privacy, and the Fourth Amendment right prohibiting unlawful searches and seizures justified his noncompliance with the subpoena and his refusal to testify. We agree with the district court's implied ruling that the Fourth and Ninth Amendments provided no just cause for noncompliance or for the refusal to answer the question. . . . Further, we are persuaded by the Government's argument that the subpoena does not violate the Fifth Amendment right to due process of the appellant's clients . . . .

Id. at 730. This article deals only with the fifth amendment right against self-incrimination, the attorney-client privilege, and the sixth amendment right to counsel.
concurred in the affirmance and found “it unnecessary to reach some of the questions discussed.”4 in Judge Pell’s opinion. Consequently, Judge Pell was careful to note that, “insofar as [the concurring opinion] is in conflict with Judge Pell’s opinion[,] [the concurring opinion] represents the majority view of the court.”5 Let’s look first at Judge Pell’s opinion.

Judge Pell recognized that the fifth amendment right against self-incrimination “does not merely encompass evidence which may lead to a criminal conviction, but also includes information which would furnish a ‘link in the chain of evidence’ that could lead to prosecution as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution.”6 At the same time, Judge Pell cited “[a] series of recent Supreme Court decisions [which] established . . . that compulsion which makes a suspect or accused the source of real or physical evidence does not violate the testimonial privilege.”7 Schmerber v. California8 was the earliest of the opinions cited. The distinction drawn by the Court in Schmerber between real or physical evidence on the one hand and testimonial or communicative evidence on the other, and the Court’s conclusion that the fifth amendment right against self-incrimination is applicable only to communicative evidence, was the basis of the Government’s assertion “that Genson’s production of the monies, which it characterizes as mere physical evidence, would not be equatable with any self-incriminatory disclosures of a testimonial or communicative nature.”9 Attorney Genson “argue[d] that because the wording of the subpoena contain[ed] references to the ‘who’ and the ‘when’ of the alleged transfer of monies, it necessarily involve[d] assertive conduct which, as such, might well be interpreted to constitute an admission by Genson’s clients.”10 In such circumstances, Judge Pell recognized that “[t]he question of whether the monies constitute[d] mere physical evidence or represent[ed] a testimonial utterance [was] not one to be categorically or

4. Id. (Tone, J., concurring).
5. Id. at 721.
6. Id. at 722. The issues will be discussed in this article in the same order in which they were considered by Judge Pell: (1) the fifth amendment right against self-incrimination; (2) the attorney-client privilege; and (3) the sixth amendment right to counsel. As the issues are examined, it becomes increasingly clear that they are intimately related.
7. Id.
10. Id. at 722-23.
easily answered.” He concluded, however, that the “question of testimonial dimension” need not be reached since the subpoena had been served on counsel and not on the clients. Thus, the issue was whether or not Attorney Genson had standing “to assert the Fifth Amendment claim on behalf of his clients.” Judge Pell resolved the issue of standing in this manner:

In this appeal, the court is concerned not with the compelled production, either by IRS summons or grand jury subpoena, of personal papers or documents but rather with the demand for monies which may have been stolen from a federally insured savings institution. The important testimonial communication in this case is that the suspects have had at a point in time subsequent to the armed robbery possession of the stolen monies. Such an evidentiary fact would appear to the author of this opinion to be an important link in the chain of evidence. . . .

In the judgment of the author of this opinion, it is unnecessary to reach the broader question of an attorney’s standing to assert his clients’ Fifth Amendment privilege under circumstances where tax records or work papers are demanded. . . .

The recognition that an attorney need not produce stolen monies in response to a subpoena would provide a mechanism by which a member of a learned profession could become the privileged repository of the fruits of a violent crime. There is no reason for thinking that the policy of respecting the private enclave of individual citizens reaches that far.

. . . The author of this opinion rests his opinion upon the lack of standing on the part of the lawyer to assert the Fifth Amendment claim on behalf of his clients. Whatever implied testimony arises from the act of production is that of the lawyer. This remains true even if the wording of the subpoena contains implied questions regarding the “who” and the “when” of the alleged transfer.

Judge Pell next turned his attention to the asserted attorney-client privilege, noting that “[a]nalytically, of course, this privilege is not identical with the Fifth Amendment right, even though

11. Id. at 723.
12. Id.
13. Id. at 727.
14. This statement represents an attempt by the court to distinguish Genson from Fisher v. United States, 425 U.S. 391 (1976), which was then pending before the Supreme Court. See text accompanying notes 65-77 infra.
closely-related concepts of privacy and confidentiality play an im-
portant role in determining the scope of the two privileges." 16

The basis for the [attorney-client] privilege is to afford the
client a reasonable expectation of privacy and confidentiality with
regard to disclosures made during the course of consultation with
his attorney. The general rule is that, barring unusual circum-
stances, matters involving the receipt of fees from a client are
not privileged. In Re Grand Jury Proceedings, 517 F.2d 666,
670-71 (5th Cir. 1975). That opinion, at n.2, contains an exten-
sive, albeit incomplete, collation of leading cases stating or ap-
plying the general rule. We find no basis for deviation here from
the general rule.

Assuming that the alleged transfer of monies represented a
retainer or a prepayment of fees, the fact of payment and the
money itself would fall outside the scope of the privilege. Assum-
ing that the monies were transferred not as a fee payment but as
a bailment for the purposes of safekeeping, the appellant finds
himself in a position closely analogous to the attorney in the case
of In re Ryder, 263 F. Supp. 360 (E.D. Va.) aff'd, 381 F.2d 713
(4th Cir. 1967).

We think that Genson cannot assert the attorney-client
privilege as a justification for taking possession of what may have
been the fruits of a violent crime. Even if the minority view
expressed in this opinion that the clients' personal response to a
subpoena duces tecum demanding production of the monies
would be testimonial were adopted, it would be questionable
whether the distinct act of transferring monies to the attorney
represents a substantive communication. It is not necessary to
resolve these doubts, for in any event, we are not persuaded
that the transfer of such monies represents a communication for
which the clients could legitimately anticipate confidentiality.

In Ryder, supra, an attorney secreted in his own safety de-
posit box the greater portion of the proceeds of a bank robbery
as well as the sawed-off shotgun used in the crime. When Ryder
asserted the attorney-client privilege in defense of his actions,
the Fourth Circuit, in affirming an 18-month suspension from
the practice of law, stated:

"Viewed in any light, the facts furnished no basis for
the assertion of an attorney-client privilege. It is an
abuse of a lawyer's professional responsibility knowingly
to take possession of and secrete the fruits and in-

16. Id. at 727.
instrumentalities of a crime. Ryder's acts bear no reason-
able relation to the privilege and duty to refuse to di-
 divulge a client's confidential communication.” 381 F.2d
at 714.

We are aware that the Ryder case was decided at a time
when an earlier formulation of the canons of legal ethics was in
force. The code of conduct then in force did not attempt to
distinguish between aspirational provisions labelled as Ethical
Considerations and minimum standards of conduct regulated by
Disciplinary Rules. We do not think that the format change ini-
tiated in 1969 has any bearing on the scope of the evidentiary
privilege.

Ethical Consideration 7-27 states that “[b]ecause it inter-
feres with the proper administration of justice, a lawyer should
not suppress evidence that he or his client has a legal obligation
to reveal or produce.” Our holding that Genson, under the cir-
cumstances of this case, cannot avoid compliance with the sub-
poena because of a claim of Fifth Amendment protection leads
us to conclude that he is under a legal obligation to reveal or
produce the monies which we have assumed arguendo that he
has. Failure to comply with the subpoena and the subsequent
court order to produce and testify effects the practical suppres-
sion of the sought after evidence.

We think that the Ryder conclusion is persuasive authority
that the appellant cannot assert the privilege. We hold that Gen-
son’s refusal to testify or to produce does not bear a reasonable
relation to the privilege and duty to refuse to divulge a client’s
confidential communications.17

This left for consideration only the asserted sixth amendment
right to counsel:

The appellant argues that the attempt of the Government to
subpoena the known attorney of the two suspects and to make
him the source of evidence against his clients impermissibly in-
fringes upon their right to counsel. The Government insists that
defendants have no right to particular counsel and that there is
no reason why appellant could not be replaced by equally able
counsel. The Government cites several cases from other circuits
in support of its assertion that the Sixth Amendment argument is
without merit.

It may well be that eventually the appellant’s compliance
with the subpoena duces tecum and his testimonial response to
questions regarding the alleged transfer of monies may place him

17. Id. at 728-29 (footnote omitted).
in the position of being a source of evidence against either or both of his clients. We express no opinion as to whether the suspects having chosen to make the appellant a witness to their crime, if such should subsequently prove to be the fact, may properly invoke the Sixth Amendment to bar his eyewitness testimony at trial. For the purposes of this appeal, we deem any reliance upon a claim of deprivation of right of counsel in violation of the Sixth Amendment is too premature to merit further consideration.\(^\text{18}\)

Judge Tone's concurring opinion, joined in by Judge Bauer, is sufficiently brief and relevant to our purpose that, with the reader's indulgence, it will be set forth in full:

I am unable to agree with all that is said in Judge Pell's thoughtful opinion and find it unnecessary to reach some of the questions discussed there. I therefore state my views separately.

We must assume for purposes of this appeal that shortly after robbing a savings and loan association, the robbers delivered money stolen in the robbery to appellant. If that occurred, the money was delivered either for safekeeping, with or without appellant's knowledge that it was stolen, or as an attorney's fee.

If it was the latter, the robbers voluntarily relinquished the money and with it any arguable claim that might have arisen from their possession or constructive possession. As Judge Pell points out, the payment of a fee is not a privileged communication. The money itself is non-testimonial and no plausible argument is left for resisting the subpoena.

If the money was not given as a fee but for safekeeping, the delivery of the money was an act in furtherance of the crime, regardless of whether appellant knew it was stolen. The delivery of the money was not assertive conduct and therefore was not a privileged communication, and, as we just observed, the money itself is non-testimonial. The attorney is simply a witness to a criminal act. The fact that he is also a participant in the act, presumably without knowledge of its criminal quality, is irrelevant since he is not asserting his own privilege against self-incrimination. There is no authority or reason, based on any constitutional provision or the attorney-client privilege, for shielding from judicial inquiry either the fruits of the robbery or the fact of the later criminal act of turning over the money to appellant. Accordingly, it is immaterial that in responding to the subpoena appellant will be making an assertion about who turned over the money and when.

\(^{18}\) Id. at 729-30 (footnote omitted).
Finally, the proceedings have not yet reached the point at which we must decide whether, when the robbers have chosen to make appellant a witness to their crime, they may invoke the Sixth Amendment to bar his eyewitness testimony at trial, although, for me, to ask that question is almost to answer it.19

Both opinions interpret the scope of the attorney-client privilege and the "closely related" fifth amendment right against self-incrimination narrowly enough so that their assertion will never serve as a successful means of making "a member of a learned profession . . . the privileged repository of the fruits of a violent crime."20 Moreover, the opinions interpret the scope of the attorney-client privilege narrowly enough to assure that physical evidence in the possession of client and amenable to production by client may not be immunized from production simply by the transfer of possession to counsel. Each of those inhibitions enjoys a facial propriety calculated to achieve general approbation. Few would argue that counsel should become "the privileged repository of the fruits of a violent crime," and equally few would assert that physical evidence in the possession of client and vulnerable to compelled production should become immune from such production simply because client manages to effect a transfer of possession to counsel before a production order can be served on client. To most, the first assertion would denigrate the role of counsel, and the second would frustrate the state's legitimate right to secure physical evidence.

Is it correct, however, to conclude that the money alleged to have been in the possession of Bijeol and Holloway was, while in their hands, vulnerable to subpoenas duces tecum? Let's assume that the FBI had probable cause to believe that Bijeol or Holloway or both had robbed the Bellwood Savings and Loan Association, and that one or both had possession of some or all of the stolen money. If Bijeol and Holloway were served with subpoenas duces tecum directing them to appear before the grand jury investigating the robbery and to produce "any and all monies" which had come into their hands "subsequent to 9 A.M. on Tuesday, December 30, 1975," would Bijeol and Holloway be required to comply or suffer either contempt sanctions21 or the subsequent admission in evi-

19. Id. at 730-31 (Tone, J., concurring).
20. Id. at 727.
21. Cf. United States v. Mara, 410 U.S. 19 (1973) (approving imposition of civil contempt sanction on witness who refused to comply with court order directing that
evidence of their refusal to comply,22 or both? Presumably, the answer to that question depends upon the characterization given to the evidence sought. If the evidence were nontestimonial, there would be no fifth amendment right to refuse to respond; Bijeol and Holloway would be required to produce the money or suffer the consequences of their refusal. If the subpoenaed evidence were communicative, there would be a fifth amendment right to refuse to respond, with knowledge that such refusal could not legally jeopardize Bijeol or Holloway. Since compliance with the subpoenas by Bijeol and Holloway would require them not only to produce the money but, in addition, to identify the money as cash which had come into their possession after the robbery, such compliance would seem to be violative of their fifth amendment right against self-incrimination, and therefore not compellable. Apparently, Bijeol and Holloway would have been able to avoid compliance with such subpoenas free from any contempt sanctions and without concern that their refusal to comply would be admissible evidence against them.

If that conclusion is indeed correct, should the fact that Bijeol or Holloway allegedly gave money to Attorney Genson sometime after the robbery make Genson vulnerable to the subpoena duces

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22. Cf. United States v. Stembridge, 477 F.2d 874 (5th Cir. 1973) (prosecution may introduce evidence of defendant’s effort to disguise his handwriting just as it could introduce evidence of refusal to provide an exemplar); United States v. Parhms, 424 F.2d 152 (9th Cir. 1970) (receiving evidence of defendant’s refusal to participate in line-up and permitting prosecution to comment thereon in summation not error); Higgins v. Wainwright, 424 F.2d 177, 178 (5th Cir. 1970) (citation omitted) (“The privilege against self-incrimination is not violated by compelling accused to speak the words allegedly uttered by the robber for purposes of identification... Thus, appellant’s refusal to speak for identification purposes was not an exercise of the privilege against self-incrimination and evidence of his refusal to speak did not violate any constitutional right.”).

I confess that I have continuing doubts about the propriety either of imposing contempt sanctions on the suspect who declines to produce physical evidence or of admitting evidence of that refusal. See Seidelson, The Right to Counsel: From Passive to Active Voice, 38 GEO. WASH. L. REV. 849, 862 (1970). But cf. United States v. Mara, 410 U.S. 19 (1973) (approving imposition of civil contempt sanction on witness who refused to comply with court order directing that he provide handwriting exemplars to grand jury).
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otecum actually served on him? To rephrase the question in the
terms used by Judge Pell, should counsel be deemed to have
standing to assert his clients' fifth amendment right against self-
incrimination? Judge Pell's conclusion that counsel lacks such
standing seems to me to penalize the clients for having retained
counsel or for having given money to retained counsel. By direct-
ing Attorney Genson to respond to the subpoena duces tecum or
suffer contempt sanctions, Judge Pell either made available to the
Government evidence which the Government could not have com-
pelled from Bijeol or Holloway, or subjected counsel to contempt
sanctions (not available against Bijeol or Holloway), thus at least
encouraging counsel to produce the evidence to the potential
jeopardy of his clients. What would lead a court to the implicit
imposition of such a penalty on suspects simply because they had
retained counsel or given money to retained counsel? There may
be subtle indicia in the language of Judge Pell's opinion which at
least imply an answer to that question. In characterizing the
evidence sought, Judge Pell noted that "the court is concerned not
with the compelled production, either by IRS summons or grand
jury subpoena, of personal papers or documents but rather with
the demand for monies which may have been stolen from a feder-
ally insured savings institution." 23 In the very next sentence, Judge
Pell wrote: "The important testimonial communication in this case
is that the suspects have had at a point in time subsequent to the
armed robbery possession of the stolen monies." 24 And in the next
paragraph, he stated: "The recognition that an attorney need not
produce stolen monies in response to a subpoena would provide a
mechanism by which a member of a learned profession could be-
come the privileged repository of the fruits of a violent crime." 25
These excerpts suggest that the presumption of innocence which

23. Genson v. United States, 534 F.2d 719, 726 (7th Cir. 1976) (emphasis
added).
24. Id. (emphasis added).
25. Id. at 727 (emphasis added). Judge Pell did state in a footnote:

Needless to say, we are assuming arguendo that Genson has possession
of the monies. Nothing in the record before us warrants an inference that he
does possess the monies or that any monies transferred, if indeed they were,
were taken by his clients from the Bellwood Savings and Loan Association.
Id. at 728 n.9. I fully appreciate the significance and the propriety of the second
sentence of this footnote in terms of a judicial sensitivity toward preserving the per-
sonal reputations of the clients and the personal and professional reputation of coun-
sel. However, it is the assumption in the first sentence which troubles me in terms of
its impact on the issues before the court. See text accompanying note 23 supra.
usually attaches to criminal suspects dwindled substantially in the course of two paragraphs of the opinion: "Monies which may have been stolen" became "stolen monies" and, in addition, "stolen monies" of which "the suspects . . . had [possession] at a point in time subsequent to the armed robbery." Of course, I realize that Judge Pell did not intend to and did not in fact prejudge the guilt or innocence of the suspects. I realize, too, that "[i]nvestigators from the Federal Bureau of Investigation uncovered information leading to the identification of two suspects, Paul Bijeol and Sharon Kay Holloway, and a complaint and warrant were sworn and issued"26 on the day following the robbery "naming these two suspects."27 I am willing to assume arguendo that probable cause existed for the issuance of the warrant. Nonetheless, I do not think that it necessarily follows that Bijeol or Holloway had possession of money stolen from the bank, nor do I think that such a conclusion necessarily follows from the fact that Bijeol and Holloway retained counsel on the very day of the bank robbery, indeed, within one to three hours after the robbery, or even from the fact that Bijeol and Holloway may have given money to counsel at that time.

Let me ask the reader to indulge temporarily in a "willing suspension of disbelief." Let's assume that a bank was robbed at 9 A.M. by a man and a woman and that within twenty-four hours the FBI had probable cause to believe that M and W were the robbers. M and W, wholly innocent of the bank robbery, retained counsel at noon on the day of the bank robbery for the purpose of establishing a trust fund for a child in whom they were both interested because the child was the progeny of their adulterous relationship. At their initial meeting with counsel, M and W gave him $10,000 to create the corpus of the trust. Within a week of his retention by M and W, counsel is served with a subpoena duces tecum directing him to appear before a grand jury investigating the bank robbery and to produce all money delivered to him by M and W subsequent to the time of the robbery. If counsel moves to quash the subpoena, asserting his clients' fifth amendment right against self-incrimination, how should the court respond?

If the court were to adopt Judge Pell's conclusion, it would decide that counsel lacked standing to assert the privilege. If the court were to embrace Judge Pell's reasoning, it would, for the purpose of ruling on the motion, indulge in the assumption that

27. Id.
any money given to counsel by M and W was money stolen from the bank and therefore not covered by the privilege. And, of course, the court's assumption would be dead wrong. How did Judge Pell know that our wholly hypothetical case was not in fact the situation which existed in Genson? I think the answer must be that he did not; he could not. Unless and until the confidential relationship between clients and counsel was breached, the court had no way of knowing the actual facts incident to the attorney-client relationship. Thus, the court had no way of knowing whether its assumption about the money was accurate or inaccurate. That assumption could have been correct, or our wholly hypothetical case—or an almost infinite variety of other factual arrangements—could have been the actual situation. In such circumstances, what is the most appropriate judicial posture? I think it should be one which, for the purpose of ruling on the asserted right, simultaneously assumes the applicability of the fifth amendment right against self-incrimination and rejects the assumption that clients committed the criminal act under investigation. In this manner, clients will not suffer the loss of their fifth amendment right against self-incrimination as a consequence of having retained counsel, and the presumed desire of the law that those in need of legal assistance should retain counsel will be furthered, not frustrated.

Confronted with our hypothetical case and Judge Pell's reasoning, how would a court respond to the asserted attorney-client privilege? On that point, Judge Pell indulged in two alternative assumptions: (1) clients gave money to counsel as "a retainer or a prepayment of fees," in which case the transfer "would fall outside the scope of the privilege," or (2) clients gave money to counsel which "may [have] be[en] the fruits of a violent crime," in which case "we are not persuaded that the transfer . . . represents a communication for which the clients could legitimately anticipate confidentiality." Again, still assuming our hypothetical situation, each of these alternative assumptions would be incorrect. And, again, there was no way for Judge Pell to know, short of intruding into the attorney-client relationship, whether the actual facts fell within either of his assumed situations, within our hypothetical situation, or within a nearly infinite variety of other

28. Id. at 728.
29. Id.
30. Id. (footnote omitted).
31. Id.
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situations. It seems to me that a court, in ruling on an asserted attorney-client privilege, should not permit a showing of probable cause to lead the court to indulge in an imperceptive assumption of guilt; rather, the court should assume the clients to be innocent of the suspected crime in every case in which such a benign assumption is within the realm of possibility. Only in that manner can the attorney-client privilege fulfill its apparently intended function of encouraging candor on the part of clients toward counsel without fear of resulting legal jeopardy. If that function is frustrated, either counsel's capacity to serve clients will be threatened or clients will abstain from retaining counsel; presumably, each of these consequences would be inconsistent with the rationale of the attorney-client privilege. Moreover, only by indulging in such an assumption of innocence can a court achieve an appropriate symmetry in determining the applicability of both the fifth amendment right against self-incrimination and the attorney-client privilege, each involving "closely-related concepts of privacy and confidentiality."\(^{32}\)

In rejecting the clients' asserted sixth amendment right to counsel, Judge Pell characterized the claim as "too premature to merit further consideration."\(^{33}\) Assume, however, our hypothetical situation. Once counsel produced the $10,000 given to him by M and W, even without revealing the reason for the transfer, it would become apparent that M and W had a joint interest in placing $10,000 in the hands of a lawyer. Anyone suspicious of the relationship between M and W or curious as to whether that relationship had resulted in progeny would find even that limited information uniquely revealing and, beyond that, a possible "link in the chain of evidence" which "could lead to prosecution" for adultery, fornication, or both. We have already noted that there was no way, short of violating the attorney-client privilege, for Judge Pell to know the precise relationship between the two clients or between the clients and counsel; it could have been our wholly hypothetical situation. To say to clients in these circumstances that their sixth amendment right to counsel has not been violated because they are able to acquire new counsel before trial hardly undoes the harm imposed by compelling original counsel to comply with the subpoena. There is, in fact, an intimate relationship not only between the fifth amendment right against self-incrimination and the attorney-client privilege, but also between both of those rights and

\(^{32}\) Id. at 727.  
\(^{33}\) Id. at 730.
the sixth amendment right to counsel. Surely the sixth amendment
does not require or even permit, as a condition precedent to the
right to counsel, that clients make potentially damaging revelations
to the prosecution through their first selected counsel. The imposi-
tion of that price would appear to be basically inconsistent with the
sixth amendment.

At what point would the sixth amendment assertion not be
premature, given Judge Pell's analysis? Still assuming our
hypothetical situation, the clients, M and W, after terminating their
attorney-client relationship with the first lawyer of their choice be-
cause of his compelled revelation inculpating them, presumably
would retain a second lawyer. Suppose that, in the course of their
discussions with him, they give him a certified copy of the birth
certificate of the child born of their meretricious relationship. If,
before trial, in fact, preindictment, that second lawyer is served
with a subpoena duces tecum directing him to produce before a
grand jury any birth certificate or copy thereof given him by M or
W, would compelled compliance with that subpoena violate clients' 
sixth amendment right to counsel? If one were to accept Judge
Pell's conclusion as to justiciability, one probably would conclude
that the sixth amendment assertion was still not ripe for decision.

34. It seems clear to me that the sixth amendment right to counsel would apply
to those who are the subjects of a grand jury investigation, notwithstanding that
counsel may be excluded from the grand jury room, since such proceedings would
constitute a critical stage of the criminal process to subjects of the investigation.
Certainly, the ability to consult with counsel prior to appearing before the grand
jury would be of critical significance to the client who is a subject of the investi-
gation.

In Kirby v. Illinois, 406 U.S. 682 (1972), the Court, although refusing to extend
the right to counsel at postindictment lineups to preindictment lineups, noted:

This is not to say that a defendant in a criminal case has a constitutional
right to counsel only at the trial itself . . . [Powell v. Alabama, 287 U.S. 45
(1932)] makes clear that the right attaches at the time of arraignment, and
the Court has recently held that it exists also at the time of a preliminary
hearing. Coleman v. Alabama, [399 U.S. 1 (1970)]. But the point is that,
while members of the Court have differed as to existence of the right to
counsel in the contexts of some of the above cases, all of those cases have
involved points of time at or after the initiation of adversary judicial criminal
proceedings—whether by way of formal charge, preliminary hearing, indict-
ment, information, or arraignment. Id. at 688-89 (footnote omitted).

The conclusion that Bijeol and Holloway should be deemed to have had a
preindictment right to counsel is corroborated by the facts in Genson: the grand jury
was inquiring into a particular savings and loan robbery, Bijeol and Holloway ap-
parently were the prime suspects, "and a complaint and warrant [had been] sworn
and issued [on the day following the robbery] naming these two suspects." Genson v.
United States, 534 F.2d 719, 720 (7th Cir. 1976).
After all, clients could sever their relationship with their second-choice lawyer after his compelled disclosure and secure a third lawyer prior to any trial. But think of the path that such a result fashions for clients seeking counsel. It permits the prosecution simultaneously to engage in a progressive course of securing potentially incriminating evidence from clients' counsel and to compel clients to relinquish repeatedly their selected counsel. That simply cannot be consonant with the sixth amendment right to counsel. Even accepting the Government's assertion in Genson "that defendants have no right to particular counsel," it would be intolerable to inhibit clients' selection of counsel by a series of prosecutorial moves having the capacity of converting each prospective lawyer for the potential defendants into a source of incriminating evidence for the prosecution and, thus, practically assuring the disqualification of counsel. Were that permitted, every potential criminal defendant would be substantially dissuaded from either retaining counsel or affording candor to counsel. That dissuasive impact, I believe, is inconsistent with the sixth amendment's assurance of counsel to the criminal defendant.

I would think that, in responding to an assertion that compelled production by counsel vitiates the sixth amendment right of representation for the benefit of clients, a court should indulge in the assumptions that counsel's disclosure could incriminate his client and that such inculpation probably would lead to a severance of the attorney-client relationship. The court would have to conclude, therefore, that such compelled production was violative of the sixth amendment. There is a surface inconsistency between these assumptions and the assumption of innocence which I would have a court accept in ruling on the self-incrimination and attorney-client privileges. But it is, I believe, only a surface inconsistency.

In discussing the fifth amendment right against self-incrimination and the attorney-client privilege, I suggested that a court, requested to enforce a subpoena duces tecum served on counsel, should assume the innocence of the client with regard to the criminal offense under investigation. In ruling on an asserted sixth amendment right to counsel in a similar context, the court should continue to indulge in this assumption of client's innocence of the offense under investigation. At the same time, the court should recognize that counsel's compelled production could incriminate a

35. Genson v. United States, 534 F.2d 719, 729 (7th Cir. 1976).
36. See text accompanying notes 31 & 32 supra.
client wholly innocent of the offense under investigation, or in-
criminate him in regard to a wholly unrelated offense, in the sense
that the evidence produced could be a "link in the chain of evi-
dence" with regard to either the offense under investigation or
some wholly unrelated offense. Assume that our wholly hypotheti-
cal situation had been the actual situation in Genson. Counsel's
production of the money received from his clients could have in-
criminated them with regard to the bank robbery under investiga-
tion because they had had such a substantial sum shortly after the
robbery, or it could have stimulated prosecutorial investigation into
the relationship between the clients themselves and, ultimately,
between the clients and the trust beneficiary. The variety of factual
situations in which similar consequences could occur is nearly end-
less. It seems fair to suggest that none of us is wholly without sin
or that even one wholly without sin may become the subject of a
criminal investigation. If each time a client retains counsel, counsel
becomes vulnerable to a compelled production order, clients,
whether or not wholly free from sin, may be dissuaded from retain-
ing counsel by the knowledge that, irrespective of guilt or inno-
cence, they may be incriminated with regard to an offense under
investigation or they may become the subjects of a new prosecutori-
al investigation. The existence of probable cause, in the sense of
justifying either a search or arrest warrant, does nothing to
ameliorate or justify that dissuasive effect on client's decision to
retain counsel if retention makes counsel vulnerable to a subpoena
duces tecum directing the production of evidence given by client
to counsel. Neither does it diminish the likely dissuasive effect on
client's decision to give counsel complete candor, should client re-
tain counsel. Because I believe that the sixth amendment right to
counsel is essentially inconsistent with a judicial determination
which has the capacity to discourage a prospective client from re-
taining counsel, or to dissuade a client from giving retained counsel
complete candor, I find it difficult to accept Judge Pell's conclusion
that the assertion of the right to counsel was premature.

In examining Judge Tone's concurring opinion, one needn't
look for subtle nuances of language to discern the fate of the pre-
sumption of innocence. Judge Tone wrote: "We must assume for
purposes of this appeal that shortly after robbing a savings and loan
association, the robbers delivered money stolen in the robbery to
appellant."37 I realize, of course, that Judge Tone did not intend

37. Genson v. United States, 534 F.2d 719, 730 (7th Cir. 1976) (Tone, J., con-
curring).
to, and did not in fact, prejudge the ultimate guilt or innocence of the clients. Still, his assumption had a devastating impact on the rights asserted in support of the motion to quash the subpoena. I can understand a court's indulging in such an assumption, after a showing of probable cause, for the purpose of determining the validity of a search warrant. I find it difficult to accept the assumption when the issues before the court are the fifth amendment right against self-incrimination, the attorney-client privilege, and the sixth amendment right to counsel. Even after a showing of probable cause and a resultant judicial determination that a search warrant had been properly issued, none of the three issues before the court in Genson would be mooted. Assuming the existence of probable cause justifying a search warrant, the suspect would still be able to assert his right against self-incrimination (assuming the evidence sought was communicative), the attorney-client privilege (assuming the existence of such a relationship and a subpoena served on counsel), and the sixth amendment right to counsel.38 However, having assumed that, "after robbing a savings and loan association, the robbers delivered money stolen in the robbery to appellant,"39 Judge Tone created but two alternatives: "the money was delivered either for safekeeping, with or without appellant's knowledge that it was stolen, or as an attorney's fee."40 If the latter, the attorney-client privilege would be inapplicable since "the payment of a fee is not a privileged communication;"41 if the former, the attorney-client privilege would be inapplicable since "[t]here is no authority or reason, based on any constitutional provision or the attorney-client privilege, for shielding from judicial inquiry either the fruits of the robbery or the fact of the later criminal act of turning over the money to appellant."42 And whether the former or the latter, the "money itself is non-testimonial,"43 and therefore unprotected by the clients' fifth amendment right against self-incrimination. Judge Tone's disposition of the asserted sixth amendment right to counsel was equally succinct:

Finally, the proceedings have not yet reached the point at which we must decide whether, when the robbers have chosen

40. Id. at 731.
41. Id.
42. Id.
43. Id.
to make appellant a witness to their crime, they may invoke the Sixth Amendment to bar his eyewitness testimony at trial, although, for me, to ask that question is almost to answer it.\textsuperscript{44}

There is an obvious internal consistency to Judge Tone's opinion. Accepting the assumption that clients robbed the savings and loan association and then delivered the stolen money to counsel, there is little left to be said with regard to the right against self-incrimination, the attorney-client privilege, or the right to counsel. And, of course, it is the acceptance of that assumption which troubles me. Notwithstanding the existence of probable cause to issue a search or arrest warrant, I believe the court should have continued to indulge in the presumption that the suspects were innocent of the crime under investigation in ruling on each of the three assertions before the court in \textit{Genson}. Only in this manner can the basic reasons for those important rights be preserved.

What are the potentially adverse consequences which would flow from a continuing judicial indulgence in the presumption of innocence? One, of course, is that identified by Judge Pell. If the court accepts the presumption of innocence but, in fact, the suspects are guilty, successful invocation of the fifth amendment right against self-incrimination could result in counsel's becoming "the privileged repository of the fruits of a violent crime." The issue to be resolved then is this: Which is the greater evil, imposing possible jeopardy on the client who may be innocent of the crime under investigation as the price to be paid for retaining counsel, or insulating the client guilty of the crime under investigation from inculpation by the transfer of evidence to counsel? For me, the choice is an easy one; the former is the greater evil. For others, the choice may be difficult, or as easy as it is for me but with the opposite conclusion. Subjective reactions are like that. There are, however, certain objective considerations which may be applicable.

The fifth amendment right against self-incrimination is intended to assure that one will not be compelled to be a witness against oneself, either in a particular ongoing investigation or prosecution or in any potential criminal investigation or prosecution. If a suspect retains counsel, and counsel's standing to assert that right on behalf of his client is lost because of the existence of probable cause, either the right is meaningless in the very circumstances in

\textsuperscript{44} \textit{Id.}
which it would be uniquely critical or, in such circumstances, the suspect dare not retain counsel. I cannot believe that the underlying intention of the fifth amendment is to dissuade a suspect from retaining counsel. To avoid this unacceptable consequence, probable cause should not be deemed to override the presumption of innocence for the purpose of determining counsel's standing to assert the fifth amendment right on behalf of his client.

The same considerations exist as to an asserted attorney-client privilege. If a court, compelled to rule on that privilege, indulges in the presumption of innocence, the potentially adverse consequence identified by Judge Pell will arise. If, in fact, the client is guilty, successful invocation of the attorney-client privilege could result in counsel's becoming "the privileged repository of the fruits of a violent crime." Once more, the basic issue is which is the greater evil: imposing possible jeopardy on the client who may be innocent of the crime under investigation as the price to be paid for retaining counsel, or insulating the client guilty of the crime under investigation from inculpation by the transfer of evidence to counsel? Presumably, the attorney-client privilege exists to encourage one in need of legal assistance to retain counsel and, after retention, to encourage him to offer counsel complete candor, thus enhancing the likelihood that counsel will be able to serve client efficiently. If probable cause is permitted to override the presumption of innocence, either the client will be dissuaded from offering candor or his candor may become self-jeopardizing. Either result would seem to be inconsistent with the rationale of the attorney-client privilege.

Rather clearly, the considerations affecting the availability of the fifth amendment right against self-incrimination and the attorney-client privilege, after client has retained counsel, are intimately related to client's sixth amendment right to counsel. If the retention of counsel and subsequent intercourse between client and counsel jeopardize client's fifth amendment right against self-incrimination or his privilege of confidentiality, client may be dissuaded from retaining counsel. This dissuasive effect would be in basic opposition to the suspect's right to counsel. 45

45. Cf. Simmons v. United States, 390 U.S. 377 (1968) (defendant's testimony in support of motion to suppress may not be received against him at trial over his objection; contrary result would force defendant to unacceptable position of choosing between fourth amendment prohibition of unreasonable searches and seizures and fifth amendment right against self-incrimination). "In these circumstances, we find it in-
It would seem, therefore, that to avoid frustrating the fifth amendment right against self-incrimination, the attorney-client privilege, and the sixth amendment right to counsel of a client who may be innocent of the offense under inquiry, courts should accept as a necessary cost of preserving these basic rights the fact that counsel may become “the privileged repository of the fruits of a violent crime” if, in fact, his client is guilty of the offense being investigated. If in some cases counsel assumes that role, and courts recognize that as a necessary price to pay for preserving basic rights, it seems fair to assume that ultimately the public will become aware of this potential role of counsel. It might well be asserted that such knowledge would diminish the public’s view of the legal profession and its members. Is this an acceptable consequence?

I have two reactions to that question, one personal, the other somewhat more objective. Let me get the personal reaction out of the way. For whatever the reasons, I have never shared the acute concern of some of my colleagues over the low esteem in which some of the public holds the bar. I think there are many reasons for that public image, some rational, some not quite so rational, some directly attributable to counsel’s insensitivity toward clients’ feelings, and some not so attributable. But whatever the reasons for it, the public image of the bar doesn’t concern me gravely so long as it does not adversely affect counsel’s ability to serve clients efficiently, and I think it does not, and so long as it does not dissuade those in need of legal assistance from seeking it, and I think it does not. Not many relish professional contact with the neurosurgeon or the bail bondsman, but those in need of the services of either seek him out and both are capable of providing the needed service.

Now the somewhat more objective reaction. However unattractive the role of counsel as “the privileged repository of the fruits of a violent crime” may be to a court, the court should endure that prospect if such toleration is essential to preserving the basic rights of clients. Similarly, whatever adverse impact this potential role of counsel may have on the already tarnished public image of the bar should be endured by lawyers if that toleration is essential to preserving those same basic rights. The public’s image of the bar should not be permitted to become of greater concern or significance than the preservation of basic rights of clients. Indeed, tolerable that one constitutional right should have to be surrendered in order to assert another.” Id. at 394.
it would be difficult to imagine anything which ultimately would be more detrimental to the profession's image—and its character—than eventual recognition by those it purports to serve that the bar is more sensitive to its public image than to the rights of its clients.

Now to an examination of *In re Ryder*, which, in *Genson*, Judge Pell found to be “persuasive authority that the appellant cannot assert the [attorney-client] privilege.” Let's examine *Ryder*:

On August 24, 1966 a man armed with a sawed-off shotgun robbed the Varina Branch of the Bank of Virginia of $7,583. Included in the currency taken were $10 bills known as ‘bait money,’ the serial numbers of which had been recorded.

On August 26, 1966 Charles Richard Cook rented safety deposit box 14 at a branch of the Richmond National Bank. Later in the day Cook was interviewed at his home by agents of the Federal Bureau of Investigation, who obtained $348 from him. Cook telephoned Ryder, who had represented him in civil litigation. Ryder came to the house and advised the agents that he represented Cook. He said that if Cook were not to be placed under arrest, he intended to take him to his office for an interview. The agents left. Cook insisted to Ryder that he had not robbed the bank. He told Ryder that he had won the money, which the agents had taken from him, in a crap game. At this time Ryder believed Cook.

Later that afternoon Ryder telephoned one of the agents and asked whether any of the bills obtained from Cook had been identified as a part of the money taken in the bank robbery. The agent told him that some bills had been identified. Ryder made inquiries about the number of bills taken and their denominations. The agent declined to give him specific information but indicated that several of the bills were recorded as bait money.

The next morning, Saturday, August 27, 1966, Ryder conferred with Cook again. He urged Cook to tell the truth, and Cook answered that a man, whose name he would not divulge, offered him $500 on the day of the robbery to put a package in a bank lockbox. Ryder did not believe this story. Ryder told Cook that if the government could trace the money in the box to him, it would be almost conclusive evidence of his guilt. He knew that Cook was under surveillance and he suspected that Cook might try to dispose of the money.

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46. 263 F. Supp. 360 (E.D. Va.), aff'd, 381 F.2d 713 (4th Cir. 1967).
47. *Genson v. United States*, 534 F.2d 719, 729 (7th Cir. 1976).
After a telephone consultation with "a former officer of the Richmond Bar Association," Ryder had Cook execute a power of attorney giving Ryder access to Cook’s safety deposit box.

Ryder took the power of attorney which Cook had signed to the Richmond National Bank. He rented box 13 in his name with his office address, presented the power of attorney, entered Cook’s box, took both boxes into a booth, where he found a bag of money and a sawed-off shotgun in Cook’s box. . . . He transferred the contents of Cook’s box to his own and returned the boxes to the vault. He left the bank, and neither he nor Cook returned.

Cook “was indicted for robbing the Varina Branch of the Bank of Virginia.” Five days later, the FBI “procured search warrants for Cook’s and Ryder’s safety deposit boxes in the Richmond National Bank. They found Cook’s box empty. In Ryder’s box they discovered $5,920 of the $7,583 taken in the robbery and the sawed-off shotgun used in the robbery.” Ryder filed a pretrial motion “to suppress the money obtained from Cook by the agents on August 26, 1966,” and “intended to file a motion with respect to the seizure of the contents of the lockbox.” However, before the first motion was decided and the second filed, Ryder became the subject of a suspension procedure. He asserted that his “conduct was no more than the exercise of the attorney-client privilege.” Ultimately, Ryder was “suspended from practice [at the bar of the United States District Court for the Eastern District of Virginia] for eighteen months.”

_Ryder_ is distinguishable from _Genson_ in at least two rather apparent aspects, each having its own significance. First, in _Ryder_ client apparently had placed the money and the shotgun in a safety deposit box before contact with counsel. By his conduct prior to any contact with counsel, client had made money and gun vulnerable to a search warrant. If the FBI had probable cause to believe that client was involved in the bank robbery and had secreted the

49. Id.
50. Id. at 363.
51. Id.
52. Id. at 364.
53. Id.
54. Id.
55. Id.
56. Id. at 365
57. Id. at 370.
fruit and the instrumentality of that offense in a safety deposit box, the agency would have had a right to search the box. The evidence sought would have been physical, not communicative, and therefore unprotected by client’s fifth amendment right against self-incrimination. Client’s postconcealment consultation with and revelation to counsel could do nothing legally to make the contents of the box less vulnerable to search and seizure. Such a postconcealment consultation with counsel would have had no potential for vitiating a fifth amendment right of client; the right did not exist before consultation.

Second, Ryder was a proceeding initiated to determine whether counsel should be suspended from practice, rather than one aimed directly at securing information about client. The significance of this distinction lies, I believe, in the judicial attitude and the attorney response which are likely to be generated in a proceeding focused upon a lawyer’s possible suspension from practice. In such a proceeding, the court’s concern inherently must be with the legitimacy of counsel’s conduct and the manner in which that conduct reflects upon the bar. That judicial concern is likely to be more significant than concern for the rights of a client; after all, in Ryder client’s rights were not directly before the court. And where counsel’s possible suspension from practice is the primary issue, there is likely to be a more complete revelation of

59. In Andresen v. Maryland, id., the Supreme Court distinguished the effect of a search warrant and that of a subpoena upon a defendant’s fifth amendment right concerning potentially incriminating evidence which is not, in and of itself, testimonial:

Thus, although the Fifth Amendment may protect an individual from complying with a subpoena for the production of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information . . . , a seizure of the same materials by law enforcement officers differs in a crucial respect—the individual against whom the search is directed is not required to aid in the discovery, production, or authentication of incriminating evidence.

Id. at 473-74 (citations omitted).

60. A recent decision of the Court of Appeals of New York dramatizes the distinction between a disciplinary proceeding and a criminal proceeding and, I believe, suggests the judicial attitude likely to exist in a disciplinary proceeding. In Anonymous Attorneys v. Bar Ass’n, 41 N.Y.2d 506, 362 N.E.2d 592, 393 N.Y.S.2d 961 (1977) (per curiam opinion concurred in by unanimous court), the court held that the grand jury and criminal trial testimony given by attorneys under a grant of transactional immunity in proceedings involving certain officials allegedly connected with the fixing of traffic tickets was admissible against those attorneys in disciplinary proceedings. The court concluded that disciplinary proceedings are not criminal proceedings and therefore the immunity granted did not apply.
counsel’s conduct than one would anticipate in a case concerned primarily with client’s rights. Attorney Ryder apprised the court of precisely what he had done; he did not (and, as a practical matter, probably could not) request the court to indulge in any assumptions with regard to his client’s status or conduct. Consequently, in Ryder the court’s attention was directed to the propriety of counsel’s conduct under circumstances in which the court was informed completely about that conduct because of counsel’s candid revelations.

To bring Ryder more in line with Genson and, thereby, to better determine the propriety of Judge Pell’s reliance on Ryder in Genson, the two distinguishing characteristics should be excised. Let’s assume that client had not segregated gun and money before retaining counsel and that the judicial proceeding was one directed at compelling counsel to produce before a grand jury investigating the bank robbery any shotgun and money he may have received from client subsequent to the time of the robbery. Should such a subpoena duces tecum be enforceable?

Let’s retain the conclusion that the FBI had probable cause to believe that client had robbed the bank. In these circumstances, could client be compelled by subpoena to appear before the grand jury and to produce any shotgun which had been in his possession at the time of the robbery? I think the answer must be no. Such evidence would be communicative; after all, its production by client would reveal to the grand jury that he had possession of the shotgun at a time corresponding with the bank robbery. As communicative evidence, the gun would be protected by client’s fifth amendment right against self-incrimination and thus would not be an appropriate object of a subpoena duces tecum served on him. How about the money? A subpoena duces tecum directing client to produce before the grand jury any money which had come into his possession at or after the time of the bank robbery would likewise require communicative evidence from client and, therefore, would violate his fifth amendment right against self-incrimination. Apparently, client could not be compelled by subpoena to produce either shotgun or money before the grand jury.

Let’s assume that the FBI had probable cause to believe not only that client had committed the robbery, but also that he had subsequently transferred to counsel both gun and money at the time he retained counsel. In these circumstances, would a subpoena duces tecum served on counsel directing him to produce before the grand jury any shotgun and money he may have re-
ceived from client subsequent to the robbery be enforceable? I think the answer should be no, for a couple of reasons.

Were such a subpoena deemed enforceable, client would be jeopardized as a result of having retained counsel and having complied with counsel's advice. Such a consequence would seem to be basically inconsistent with the sixth amendment right to counsel and with the attorney-client privilege. It would confront the suspect with this choice: forego the benefit of counsel in order to retain the fifth amendment right to resist a subpoena compelling production of gun and money, or retain counsel, thus securing the presumed benefits of learned representation, and forego the capacity to prevent compelled production of gun and money. I think neither the sixth amendment right to counsel nor the attorney-client privilege permits imposing such a choice upon client. In addition, judicial conversion of probable cause that client robbed the bank and transferred gun and money to counsel into judicial compulsion requiring counsel to produce both continues to have a unique potential of vitiating client's right to be presumed innocent of the offense under investigation and of impairing counsel's standing to assert the fifth amendment right against self-incrimination on behalf of his client.

Let me invite the reader to engage again in a willing suspension of disbelief. Let's assume that client was wholly innocent of the bank robbery but that, sometime after the robbery, he won a substantial amount of money and a sawed-off shotgun in a crap game. Aware of the illegality of gambling and dubious about the legality of possessing a sawed-off shotgun, client retained counsel to secure legal advice. Counsel advised client to give counsel temporary possession of gun and money and client acquiesced. Counsel was then served with a subpoena duces tecum directing him to produce before the grand jury any money or gun he received from client subsequent to the time of the bank robbery. If the court, following the lead of Judge Pell, indulged in the assumption that the gun given to counsel by his client had been used by client in the commission of a violent crime, and that the money given to counsel by client was the fruit of that crime, the court would be incorrect. And, of course, without violating the attorney-client privilege, the court could not know if the actual facts were consistent with the assumption of guilt of the offense under investigation, or with our hypothetical case, or with a nearly endless variety of other factual situations. If counsel were compelled to produce money and gun before the grand jury investigating the bank rob-
bery, client would be inculpated as a potential bank robber or an illegal gambler and possessor of an illicit weapon. And those inculpating consequences would have resulted not only from client’s decision to secure and comply with legal advice, but also from the court’s indulgence in an assumption which may have been wholly incorrect. Consequently, when the actual facts of Ryder are recast in a hypothetical mold closely analogous to Genson, the product is one which suggests the impropriety of the compelled production ordered in Genson.

Let’s reinsert one of Ryder’s actual characteristics—that the proceeding is aimed at counsel’s possible suspension from practice—but retain one of our hypothetical considerations: client had not segregated gun and money prior to consultation with counsel in such a way as to make either vulnerable to a search warrant served on client. And let’s continue to assume that: (1) the FBI has probable cause to believe that client robbed the bank and then transferred gun and money to counsel, and (2) client had no part in the robbery but had won gun and money in a crap game and, after consultation with counsel, had acquiesced in counsel’s advice to give counsel possession of both. If counsel then finds himself the subject of a suspension proceeding on the ground that he has withheld evidence of a crime, how is counsel likely to react?

Without imputing to counsel either undue heroics or untoward self-interest, it seems fair to assume that counsel will be acutely aware that his professional reputation and his capacity to earn his livelihood are in jeopardy. That awareness is likely to impel counsel toward offering the court complete candor, knowing, as he does, that any assertions of his client’s rights may induce the court to believe that counsel is simply attempting to avoid revelation of his own conduct, and that any assertions of his own rights (for example, his right against self-incrimination) may be even more likely to induce such a belief on the part of the court. At the same time, counsel will recognize that complete candor on his part will necessarily reveal that his client had possession of a sawed-off shotgun and a substantial amount of money subsequent to the bank robbery and that such revelations are likely to inculpate client in the bank robbery (irrespective of client’s innocence) or incriminate client in unrelated criminal activity (gambling and possession of an

61. The district court opinion in Ryder is illustrative of the candor counsel is likely to afford the court in a disciplinary proceeding. See In re Ryder, 263 F. Supp. 360 (E.D. Va.), aff’d, 381 F.2d 713 (4th Cir. 1967).
illicit weapon). What is counsel to do? Practicality and self-interest at least imply that counsel may give the court complete candor and, in the process, necessarily inculpate client. If, instead, counsel asserts his client's rights, including the fifth amendment right against self-incrimination, the sixth amendment right to counsel, and the attorney-client privilege, the court, concerned primarily with the immediate issue of whether to suspend counsel from practice, may very well insist on complete candor from counsel in any event as the most appropriate evidence on which to determine the propriety of counsel's conduct. These considerations suggest either of two alternatives: (1) evidence tending to inculpate client which is adduced in a proceeding concerned with suspension of counsel should be inadmissible against client, or (2) no proceeding concerned with suspension of counsel should be initiated in any case in which counsel's conduct and client's rights are inextricably related unless and until the asserted rights of client are resolved against client in a proceeding in which client's rights are primarily and directly before the court.

There are a couple of shortcomings which may attach to the first alternative. One very apparent problem is that which arises in connection with grants of immunity. If and when inculpating evidence is subsequently offered against client, either before a grand jury or at trial, a court will be confronted with the task of determining whether that evidence had been secured wholly independently of the evidence adduced at the suspension proceeding or whether the existence, location, or significance of the evidence had been suggested by the suspension proceeding evidence. Such determinations are necessarily difficult and therefore vulnerable to possibly incorrect conclusions. Even putting aside the difficulty of such decisions, the alternative has an inherent weakness. Whether or not counsel's revelations concerning client are received or even offered in evidence in any subsequent criminal proceeding involving client, they will have been heard by those attending and read by those legitimately interested in the suspension proceeding.

62. E.g., Ryder was reported in Federal Supplement and Federal Reporter. Id. In addition, it has been set forth in substantial part in D. LOUISELL, J. KAPLAN, & J. WALTZ, CASES AND MATERIALS ON EVIDENCE 594 (3d ed. 1976); J. MAGUIRE, J. WEINSTEIN, J. CHADBORN, & J. MANSFIELD, CASES AND MATERIALS ON EVIDENCE 1284 (6th ed. 1973). It has been cited to and discussed in any number of works on professional responsibility. See, e.g., M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 6 (1975); T. MORGAN & R. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 208, 216 (1976) (containing excerpts from district court opinion).
That breach of confidentiality alone may frustrate the reasonable expectations of client at the time he retained counsel. Therefore, the first alternative is not particularly appealing either in terms of the difficult judicial determinations it would generate or in terms of protecting client's confidences.

How about the second alternative? If no suspension proceeding against counsel could be initiated until the asserted rights of client had been resolved adversely to client in a judicial proceeding focused primarily on those rights, counsel would be spared the awesome task of weighing client's rights against counsel's continued practice and, consequently, the possibility that the former might fall victim to the latter would be eliminated. Moreover, in such circumstances, the determination of client's rights would be the primary and immediate issue before the court; therefore, the possibility that those rights might be jeopardized by a judicial desire to know precisely what counsel did (inherent in a suspension proceeding) would be eliminated.

What adverse consequences would this second alternative generate? We have already noted that if client is in fact guilty of the offense under investigation, judicial indulgence in the presumption of innocence (for purposes of ruling on client's right against self-incrimination, attorney-client privilege, and right to counsel) could result in counsel's becoming "the privileged repository of the fruits of a violent crime." If we assume that client's asserted rights are accepted by a court required to rule directly on those rights, and that, because of client's factual guilt, counsel did become "the privileged repository," would counsel then be immune from a subsequent suspension proceeding? I think the answer is, not necessarily but probably he should be. One could assert that, once the criminal prosecution involving client is terminated, a suspension proceeding against counsel, even one producing predictable revelations about the conduct of client and counsel, would no longer confront client with legal jeopardy, and therefore, should be permitted. But there are problems with this assertion. First, complete candor from counsel in the suspension proceeding could very well inculpate client with regard to a criminal investigation or prosecution wholly unrelated to the criminal proceeding already terminated. Second, even assuming a relatively limited audience for the suspension proceeding, the revelations in that proceeding concerning client could result in the "social convic-

63. See text accompanying notes 44 & 45 supra.
tion” of client among the members of that audience. And, finally, whether or not such a social conviction occurs in the minds of those in that audience, all within that audience would become privy to the confidences earlier given by client to counsel. It seems to me that all of these consequences are inimical to an appropriate attorney-client relationship. Consequently, assuming that client’s rights are accepted judicially, I believe that counsel should be immune from any subsequent suspension proceeding in which those rights and counsel’s conduct are related. I believe that affording counsel that immunity from professional sanction (including suspension from practice) even in those cases in which counsel in fact assumes the role of “privileged repository of the fruits of a violent crime” is a necessary and appropriate price to pay for the preservation of basic rights of clients. And that limited immunity is all that I suggest. If counsel did in fact serve as the “repository of the fruits of a violent crime,” he would remain vulnerable to possible criminal prosecution.64

To those understandably concerned that affording counsel even such a limited immunity might encourage lawyers to assume the role of “repository,” I would offer these countervailing considerations. I believe that under existing law the overwhelming majority of lawyers would refuse to assume such a role because of their personal and professional morality and, given the suggested change, I believe these same lawyers would continue to refuse such a role for precisely the same reason. And for those relatively few lawyers willing to assume such a role under existing law or enticed to do so by the suggested change, the specter of possible criminal prosecution would remain. But the basic rationale for the limited immunity suggested remains the preservation of clients’ rights; the significance of those rights is the basic justification for the suggested change which would afford counsel immunity from disciplinary proceedings in which counsel’s conduct and client’s

64. Depending on the knowledge and intent of counsel, he might be vulnerable to prosecution for receiving stolen property or obstructing justice. Moreover, conviction on such a charge or on any felony charge might, in and of itself, constitute a basis for disciplinary proceedings and even disbarment. See ABA Code of Professional Responsibility DR 1-102(A)(3) (1976) (footnote omitted); “A lawyer shall not: Engage in illegal conduct involving moral turpitude.”; 43 Cornell L.Q. 489, 490 (1958) (footnotes omitted);

The most obvious non-professional ground for disbarment is conviction for a felony. Most states make conviction for a felony grounds for automatic disbarment. Some of these states, including New York, make disbarment mandatory upon conviction for any felony, while others require disbarment only for those felonies which involve moral turpitude.
rights are inextricably related and where client's asserted rights have not been rejected in a proceeding focused primarily upon those rights.

Now back to *Genson* and a retrospective examination of that decision and my reactions to it in light of a subsequent Supreme Court opinion. When *Genson* was decided by the Seventh Circuit, *Fisher v. United States* and *United States v. Kasmir* were pending before the Supreme Court. Each of these cases involved the question of whether an accountant's work papers, transferred to taxpayer and by him to counsel, were vulnerable to an IRS summons served on counsel. In connection with the fifth amendment right against self-incrimination asserted in *Genson*, Judge Pell found that case "distinguishable on its facts" from *Fisher* and *Kasmir* so that "there would appear to be no reason to anticipate that the Supreme Court resolution of the standing issue in the tax context" would be controlling in *Genson*: "Adoption of a rule of no attorney standing in tax fraud or tax investigation cases might provide persuasive authority for a conclusion of no standing in this case, but adoption of the contrary rule of standing in tax cases would not be directly applicable." Just how did the Supreme Court resolve "the standing issue" in *Fisher*? Well, I'm not sure that it did. Mr. Justice White, writing for the Court, noted that "[t]he parties disagree on the question whether an attorney may claim the Fifth Amendment privilege of his client. We need not resolve this question." At the same time, the Court did conclude that the taxpayers' fifth amendment right against self-incrimination would not be violated by an order to produce directed to their counsel, since the compulsion would be directed toward counsel and not toward clients, and "[t]his is true whether or not the [fifth amendment] would have barred a subpoena directing the taxpayer to produce the documents while they were in his hands." Does that mean that client's retention of counsel and his transfer of documents to counsel automatically makes those documents vulnerable to compelled production even though, while in the hands of client, they would have been immune? Not at all. According to *Fisher*, if the docu-

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65. Both cases were decided under the designation of *Fisher v. United States*, 425 U.S. 391 (1976).
67. *Id.*
68. *Id.*
70. *Id.* at 397.
ments, while in the possession of client, would have been immune from compelled production because of the fifth amendment, they may retain that immunity even after transfer to counsel by reason of the attorney-client privilege:

Our . . . holding is that compelled production of documents from an attorney does not implicate whatever Fifth Amendment privilege the taxpayer might have enjoyed from being compelled to produce them himself. The taxpayers in these cases, however, have from the outset consistently urged that they should not be forced to expose otherwise protected documents to summons simply because they have sought legal advice and turned the papers over to their attorneys. The Government appears to agree unqualifiedly. The difficulty is that the taxpayers have erroneously relied on the Fifth Amendment without urging the attorney-client privilege in so many words. They have nevertheless invoked the relevant body of law and policies that govern the attorney-client privilege. In this posture of the case, we feel obliged to inquire whether the attorney-client privilege applies to documents in the hands of an attorney which would have been privileged in the hands of the client by reason of the Fifth Amendment.71

The Court then concluded that, “[s]ince each taxpayer transferred possession of the documents in question from himself to his attorney, in order to obtain legal assistance in the tax investigations in question, the papers, if unobtainable by summons from the client, are unobtainable by summons directed to the attorney by reason of the attorney-client privilege.”72 However, the accountants’ work papers sought by the summons were not, even while in the temporary possession of taxpayers, immune from compelled production because such production would have been nontestimonial; therefore, the attorney-client privilege does not bar production by counsel. “[W]e are quite unprepared to hold that either the fact of existence of the papers or of their possession by the taxpayer poses any realistic threat of incrimination to the taxpayer.”73

How do the Supreme Court’s conclusions apply to Genson? Well, if I am correct in the premise that a subpoena duces tecum served on either suspect in that case directing production of money acquired at or after the time of the robbery could have been avoided by assertion of client’s fifth amendment right, client’s sub-

71. Id. at 402 (footnote omitted).
72. Id. at 405.
73. Id. at 412.
sequent transfer of money to retained counsel would not terminate that immunity from production; rather, the preexisting fifth amendment right would be preserved through acceptance of the attorney-client privilege so that “clients will not be discouraged from disclosing [or transferring] the documents [or the money] to the attorney, and their ability to obtain informed legal advice will remain unfettered.” 74 Moreover, Fisher tends to corroborate that the suspects in Genson would have had a fifth amendment right to avoid compliance with a subpoena directing production of money acquired at or after the time of the robbery. In negating an analogous right on the facts presented in Fisher, the Court emphasized that taxpayers’ production of the work papers would have been neither communicative nor incriminating since the papers had been prepared by their accountants, and taxpayers’ production of them “adds little or nothing to the sum total of the Government’s information by conceding that [they] in fact [have] the papers. Under these circumstances by enforcement of the summons ‘no constitutional rights are touched. The question is not of testimony but of surrender.’” 75 In Genson, on the other hand, suspects’ compliance with a production order may have demonstrated that they had acquired possession of money stolen from the savings and loan association at or after the time of that robbery; such a demonstration would have been both communicative and incriminating. Consequently, contrary to the prediction of Judge Pell, it would appear that the Court’s opinion in Fisher suggests that the attorney-client privilege asserted in Genson should have been sustained.

There is at least one aspect of Fisher which I find perplexing and a little bit troubling. I don’t fully understand why the Court concluded that client’s fifth amendment right could not be asserted to avoid production by counsel but that, assuming the existence of that right while the documents were in the possession of client, the attorney-client privilege could be asserted to prevent production by counsel. I think I understand the purely mechanical explanation: Compulsion directed toward counsel does not require client “to do anything—and certainly would not compel him to be a ‘witness’ against himself.” 76 However, if client’s fifth amendment right is not to be vitiated simply because he retains counsel and transfers possession of the documents to counsel (and I think that concept is accepted by Fisher), it would seem that the attorney-client priv-

74. Id. at 404.
75. Id. at 411 (quoting In re Harris, 221 U.S. 274, 279 (1911)).
76. Id. at 397.
ilege is simply the verbalization utilized by the Court to preserve client's preexisting fifth amendment right. It would have been reassuring to have the Court make such an explicit statement in *Fisher*. Its absence creates the possibility that client's fifth amendment right may be subverted to a nonconstitutional privilege in future cases in which client retains counsel and effects a transfer to counsel. That, I think, would be unfortunate. It would have been preferable, I believe, to have stated expressly that the attorney-client privilege considered in *Fisher* was constitutionally mandated to assure that client's fifth amendment right would not be jeopardized by his retention of counsel. Even absent such explicit language, *Fisher* can (and, I believe, should) be read in this manner. If that is done, and if the suggestions made earlier in this article with regard to the appropriate assumptions which should be made by a court confronted with the assertion of an attorney-client privilege are employed, that privilege will indeed preserve the basic rights of clients which, it seems to me, are intended to be protected by the privilege. The very nature of the attorney-client privilege infuses it with the basic and constitutional rights of clients. *Genson* provides a dramatic example of the necessary and intimate relationships which exist between the attorney-client privilege and client's fifth amendment right against self-incrimination and the sixth amendment right to counsel; *Fisher* implies a recognition of and sensitivity to those relationships by the Supreme Court.

I do not for a moment delude myself with the notion that any of the suggestions set forth in this article represents the *terminus ad quem* of the developing and very difficult and delicately balanced problems inherent in the attorney-client privilege. Immutable laws remain in the exclusive province of the sciences; they have no place in the law. The most I can hope for is that some of the suggestions may be considered as possible, and conceivably effective, alternatives to or rationales for some of the judicial conclusions already achieved. The suggestions seem to me to be consistent with and supportive of the basic rights of clients who retain counsel; perhaps that is the most compelling assertion I can make on their behalf.

77. The intimacy of the relationship among the fifth amendment right against self-incrimination, the attorney-client privilege, and the sixth amendment right to counsel is substantiated by the Court's opinion in *Fisher*. Although not confronted with a right to counsel assertion, in discussing the right against self-incrimination and the attorney-client privilege, the Court found it appropriate, and probably even necessary, to fashion a rule which would assure that clients' "ability to obtain informed legal advice will remain unfettered." *Id.* at 404.