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Part III: Student Comment: The Attorney-Client Privilege

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nition of the privacy approach to governmental compulsion will have little effect on future interpretation of the privilege against compulsory self-incrimination.

PART III: STUDENT COMMENT: THE ATTORNEY-CLIENT PRIVILEGE

The idea that an attorney should not be compelled to disclose confidential communications made to him by a client has its origins in ancient Roman law. Although the effect of Roman tradition on English common law is difficult to determine, England by the eighteenth century was in search of a rationale for the privilege, founded on the principle of justice and truth rather than on Roman law's antiquated notion of chivalry's code of honor. This newer justification for the privilege of barristers to keep confidential their clients' words and deeds rested on the theory that claims and disputes leading to litigation can most justly and expeditiously be handled where clients have fully disclosed to their lawyers all details of their cases. If clients are to feel free to make such disclosures, they must have assurance that their attorneys cannot be forced to divulge confidential communications.

Common law courts of sixteenth century England provided some measure of protection to a defendant (especially in a criminal action) when incriminating evidence was used against him. In particular, an attorney could not be compelled to testify against his client. Both compulsory testimony and the attorney-client privilege are deeply rooted in American jurisprudence. The Code of Professional Responsibility of the American Bar Association, The Uniform Rules of Evidence, and The Federal Rules of Evidence all recognize the attorney-client privilege as an integral part of our judicial structure. The continuing importance of the attorney-client privilege is well stated by Simon Rifkind, a former federal judge now in private practice:

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249. C. McCormick, EVIDENCE §87 (2d Ed. 1972); Radin, The Principles of Confidential Communication Between Lawyer and Client, 16 CALIF. L. REV. 487 (1928).
252. ABA CODE OF PROFESSIONAL RESPONSIBILITY CANON 4.
253. Rule 26 UNIFORM RULES OF EVIDENCE.
254. §503 FEDERAL RULES OF EVIDENCE.
If the Government looks over the lawyer's shoulder as he writes to his client, or if the Government eavesdrops as the client talks to his lawyer then the assistance of counsel is warped, it is not effective. That is why the great masters of the law have treated the attorney-client privilege with such great respect.

On my personal totem pole, this privilege stands higher than the privilege against self-incrimination. The latter privilege, as we all know, has been treated as the very symbol of a civilized society. But I can visualize a free society, even a truly great society, which does not enjoy this special immunity. I cannot, however, visualize, I cannot conceptualize a free society in which clients and attorneys cannot speak and write to each other in confidence and in privacy. Indeed, that society is not free in which its citizens do not, with accustomed confidence, have recourse to their lawyers without doubt or trepidation.

I have said all this not to engage in vain rhetoric but to have your Honor vividly appreciate that we are treading on sacred soil, that every footprint is important and that what is done in this area of the attorney-client privilege deserves the most meticulous and delicate concern of this court.

II. THE PRIVILEGE, THE TAXPAYER AND THE INTERNAL REVENUE SERVICE

A. The Nature of the Privilege

The classic definition of the attorney-client privilege as stated by Dean Wigmore, provides:

Where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his insistence permanently protected from disclosure by himself or by the legal advisor, except [to the extent] the protection be waived. [footnotes omitted]

Generally, privileged communications between an attorney and client include any communication by the client to his attorney, or by the attorney to his client, in the course of a professional employment relationship. The communication must relate to the subject matter about which the attorney has been retained to advise the client and which it is assumed has been elicited as a

256. 8 J. WIGMORE, EVIDENCE §2292 (J. McNaughton rev. ed. 1961).
consequence of the relationship between the parties.\textsuperscript{258} The privilege, however, does not necessarily extend to all things about which the attorney gains knowledge while acting as counsel.\textsuperscript{259} For information to be considered privileged, the attorney must have acquired knowledge of the information by virtue of his relationship as an attorney or in anticipation of such employment.\textsuperscript{260}

The attorney-client privilege assumes that communication between the client and his attorney is intended to be confidential.\textsuperscript{261} The client need not expressly require secrecy from his attorney.\textsuperscript{262} It is noteworthy that the attorney-client relationship, without more, does not raise a presumption of confidentiality. The circumstances must raise the inference that the particular communication was the sort intended to be confidential.\textsuperscript{263} The raising of such an inference is often negated where a third party not an agent of the attorney is present.\textsuperscript{264}

\textbf{B. The Outer Limit in Tax Investigations}

The attorney-client privilege is generally limited in use and scope. With regard to federal income tax investigations, the key to the privilege is the phrase “confidential communication.” And, it is at this juncture that the classic definition and the statutory mandate of the Code collide. For it is without reference to or recognition of the privilege that section 7602 of the Internal Revenue Code of 1954 broadly authorizes the use of an administrative summons for the production of individuals and documents for examination.\textsuperscript{265}

\begin{footnotes}
\footnote{258}{See Hyde Construction Co. v. Koehring Co., 455 F.2d 337 (5th Cir. 1972); Grauer v. Schenley Products Co., 26 F. Supp. 768 (S.D.N.Y. 1938).}
\footnote{261}{8 J. WIGMORE, EVIDENCE §2311 (J. McNaughton rev. ed. 1961).}
\footnote{262}{Id.}
\footnote{263}{Id.; see generally notes 372-86 \textit{infra} and accompanying text.}
\footnote{264}{Id.; see text accompanying notes 457-64 \textit{infra} dealing with the accountant employed by the attorney.}
\footnote{265}{§7602 provides in part:
For the purpose of ascertaining the correctness of any return . . . determining the liability of any person for any internal revenue tax . . . or collecting any such liability, the Secretary or his delegate is authorized—
\begin{enumerate}
\item To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
\item To summon the person liable for tax . . . or any person
\end{enumerate}}
\end{footnotes}
Only once has the Service sought a direct holding that the attorney-client privilege is inapplicable to 7602 proceedings. In United States v. Summe, the Service sought an order compelling an attorney to respond to questions concerning the returns of two of his clients. The government countered the claim of privilege by asserting that the "privilege has no application to an examination under section 7602." In a somewhat confusing opinion, the court appeared to hold that since the privilege is derived from common law and since there is little authority holding that the privilege does not apply to federal investigative proceedings, "it is therefore necessary that the court proceed on the premise that the attorney-client privilege must be recognized at this investigation."

Conspicuously absent from the opinion is any attempt to interpret the language of the statute. It can hardly be disputed that Congress has the power to bar testimonial privileges in agency proceedings. Therefore, it is somewhat surprising that the court should ignore the government's suggestion that the statute itself preclude the privilege.

The Civil Aeronautics Board has consistently contended that the attorney-client privilege is unavailable in proceedings before it. The Board reasons that it is simply actualizing a congressional mandate for "untrammeled powers of visitation" and therefore doctrines of privilege must yield to the concept of the

having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax . . . or any other person the Secretary or his delegate may deem proper, to appear . . . and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry . . . .

The subpoena or summons is enforced by the government by filing an action in the federal district court requesting compliance. See Internal Revenue Code of 1954, §§7402 (b), 7604 (a). If the subpoenaed party has refused to comply because of a claimed attorney-client privilege, he must base his defense in the district court enforcement proceeding on the privilege.

267. Id. at 926.
268. Id. at 927.

270. See Federal Aviation Act, 49 U.S.C. §§1377 (e):
The Board shall at all times have access to . . . all accounts, records and memoranda, including all documents, papers and correspondence, nor or hereafter existing, and kept or required to be kept by air carriers . . . .

agencies' need to know. This argument was squarely before the court in Civil Aeronautics Board v. Air Transport Association of America and was disposed of summarily:

The attorney-client privilege is deeply embedded and is part of the warp and woof of the common law. In order to abrogate it in whole or in part as to any proceeding whatsoever, affirmative legislative action would be required that is free from ambiguity. The very existence of the right of counsel necessitates the attorney-client privilege in order that a client and his attorney may communicate between themselves freely and confidentially.

At least until other cases are decided and digested, the attorney-client privilege will remain available in agency investigations, except where there is specific legislation to the contrary.

III. THE SCOPE OF THE PRIVILEGE

The word privilege itself connotes a somewhat bridled extravagance which might not be available but for some overriding social, political or legal policy. Indeed, the attorney-client privilege can be distinguished from the exclusionary rules of evidence because only the latter are designed to make adversary litigation more efficient as factfinding tribunals. Furthermore, the exclusionary rules of evidence may only be invoked by the person having an interest in the outcome of the litigation. Privileges, by contrast, attach to the person vested with an interest or relationship fostered by the privilege, even though not a party to the litigation. Therefore, a client should have standing to intervene, claiming the attorney-client privilege in an enforcement proceed-

273. Id. at 318.
276. Id.
The exclusionary rules of evidence, which attach more frequently to constitutionally guaranteed rights and privileges, are nevertheless intended to preserve common law rights which have not been abrogated by statute. Bouschor v. United States\textsuperscript{278} held, \textit{inter alia}, that an attorney could not assert fourth and fifth amendment protections on behalf of a client who was not a party to the proceedings. In that case, the taxpayer's attorney, who had done no prior tax work for the client, was retained after the Intelligence Division had begun a federal income tax fraud investigation. Bouschor, the attorney, requested the taxpayer's accountants to deliver the taxpayer's papers to him and they promptly complied. The special agent investigating the taxpayer issued a section 7602 summons to Bouschor for the production of the taxpayer's papers. Bouschour refused production. The court, following \textit{Brady v. United States},\textsuperscript{279} held that "an attorney may assert a constitutional privilege on behalf of his client . . . when the client is a party."

The results of \textit{Bouschor}, when considered in conjunction with a recent Supreme Court case, may be to deny the taxpayer the opportunity to argue that his constitutional rights foreclose discovery of documents pursuant to a 7602 summons. The Supreme Court in \textit{Donaldson v. United States}\textsuperscript{281} has held that the taxpayer is not entitled to intervene as a matter of right in summary proceedings brought to enforce an Internal Revenue summons directed to a third party for the production of records simply because it is the taxpayer's liability which is the object of the investigation.

In \textit{Donaldson}, Mr. Justice Blackmun, in analyzing the applicable statutes, rules of procedure and cases wrote:

\begin{quote}
But this [statutory] language . . . is permissive only and is not mandatory. The language recognizes that the District Court . . . may allow the taxpayer to intervene. . . . But the [Supreme] Court did not . . . pronounce, even when con-
\end{quote}

\textsuperscript{278} 316 F.2d 451 (8th Cir. 1963). \textit{See generally} text accompanying notes 158-65 supra.
\textsuperscript{279} 243 F.2d 378 (1st Cir.), \textit{cert. denied}, 354 U.S. 923 (1957).
\textsuperscript{280} 316 F.2d 451, 458 (8th Cir. 1963).
\textsuperscript{281} 400 U.S. 517, 542 (1971). \textit{See generally} text accompanying notes 95-116 \textit{supra} for an expanded discussion of intervention.
fronted with a situation concerning an attorney's work product, that the taxpayer possesses an absolute right to intervene in any internal revenue summons proceedings. The usual process of balancing opposing equities is called for. [W]e, thus, are not in agreement with the holdings or implications . . . to the effect that . . . a taxpayer may intervene as of right simply because it is his tax liability that is the subject of the summons. Instead, we agree with the opposing conclusion. . . .

This conclusion appears to contradict directly the language of Mr. Justice Clark in Reisman v. Caplan. In that case, the attorneys for a taxpayer requested declaratory and injunctive relief from a section 7602 summons issued to the taxpayer's accounting firm. The Court held, inter alia:

[T]hat in any of these procedures before either the district judge or the United States commissioner, the witness may challenge the summons on any appropriate ground. This would include . . . the defenses that . . . it is protected by the attorney-client privilege. In addition, third parties might intervene to protect their interests, or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, may intervene.

282. Id. at 541-2. §7604 (a), entitled Enforcement of Summons, states in part: If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court . . . shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

Rule 81 (a) (3) of the Federal Rules of Civil Procedure states in part: These rules apply to proceeding to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceeding. [Emphasis added]

Rule 24 (a) (2) of the Federal Rules of Civil Procedure states in part that an applicant may intervene:

. . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

It is extremely difficult to reconcile the above quoted statute and rules with Justice Blackmun's statement quoted in the text. See note 281 supra. It is also interesting to note that Justice Blackmun is the author of Bouschor v. United States, 316 F.2d 451 (8th Cir. 1963) which held that an attorney could not assert fourth and fifth amendment protection on behalf of a client who is not a party to the proceedings.

284. Id. at 449.
The Donaldson court distinguished Reisman by concluding that the statutory language was permissive only and not mandatory. Therefore, intervention should be denied when the circumstances are not proper.285

What are proper circumstances for taxpayer intervention? The Federal Rules of Civil Procedure permit intervention by right "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest . . . ."286

The Donaldson court disposed of this rule by asserting that the taxpayer's interest in quashing a summons issued to a third party for the taxpayer's personal records is "nothing more than a desire to counter and overcome [the summoned party's] willingness, under summons to comply and produce records."287 This, the Court concluded, is neither a "proprietary, nor a significantly protectable interest" and, therefore, is properly raised at trial, presumably by attempting to invoke the exclusionary rules of evidence.288 Note, however, that the exclusionary rules of evidence would not deny admission of the taxpayer's records where they were properly summoned pursuant to a 7602 summons.289

An example of such a result occurred in United States v. Hickok.290 During the course of a criminal income tax fraud trial, the defendant-taxpayer attempted to invoke the exclusionary rule for evidence obtained by a section 7602 summons issued by a special agent in a joint civil and criminal income tax investigation. The taxpayer alleged that the materials were obtained by improper use of the administrative summons, solely to build a criminal fraud case, and that this was a violation of the taxpayer's fourth amendment right to privacy and his fifth amendment privilege against compulsory self-incrimination.291

288. Id. See also Schwimmer v. United States, 232 F.2d 855, 860 (8th Cir.), cert. denied, 352 U.S. 833 (1956).
289. See United States v. Hickok, 481 F.2d 377 (9th Cir. 1973).
290. 481 F.2d 377 (9th Cir. 1973).
291. It is interesting to note that the Hickok court gave no consideration to the search and seizure cases when discussing self-incrimination and privacy. See Vonder Ahe v. Howland, 31 APTR 2d 73-1075, 73-1079 (9th Cir. 1973), where the court stated: [T]he suggestion that the presence of a search warrant, in and of itself removes
The court, following *Couch v. United States*, found that the summons was directed at the accountant for the production of corporate records, and the taxpayer knew that information from both his "personal and corporate" records would be disclosed in the appropriate tax returns, therefore, the court concluded that evidence could not be suppressed:

[N]o Fourth or Fifth amendment claim can prevail where, as in this case, there exists no legitimate expectation of privacy and no semblance of governmental compulsion against the person of the accused.

A recent case dealing with the right of intervention is *United States v. Kessler*. In that case, Kessler, the secretary of a corporation, was summoned to produce corporate records in his possession which might bear upon the tax liabilities of certain shareholders of the corporation. Kessler argued, *inter alia*, that the issuance of the section 7602 summons was a sham and a subterfuge, designed to obtain Kessler’s personal records, and, under the facts of the case, the summons was issued for an improper purpose and in bad faith.

Kessler, in his effort to intervene in the district court enforcement proceeding, attempted to rely on *Donaldson* for the proposition that a section 7602 summons issued in bad faith will not be enforced. The court found, as did the Court in *Donaldson*, that Kessler had neither a proprietary nor a significantly protectable interest and that the special agent had not made a recommendation for criminal prosecution. Likewise, it was the court’s opinion that Kessler did not sufficiently demonstrate the government’s “bad faith” in obtaining the records:

The IRS has a right and a duty under the law to conduct investigations when it suspects that violations of the tax laws have occurred. Such investigations are in part, by their very

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293. Id. at 336.
295. Id. at 424.
296. Id. at 425.
297. Id. at 427.

See also Hill v. Philpott, 345 F.2d 144 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) cited in Vonder Ahe with approval at 73-1079. See generally text accompanying notes 215-227 supra.
nature, inquiries into the unknown. Under such circumstances there will be frequent forays into areas that may ultimately prove unproductive. Such efforts, however, do not constitute bad faith.

Bad faith, in the Court's opinion, must include at the very least evidence that the investigation of the [shareholders] is a sham and fabrication; that the inquiry into the records of [the corporation] has no relevance to such investigation; and that this entire operation is a cover for what is really an unjustified and vexing investigation of Barry L. Kessler. [emphasis added]

In neither Reisman, Donaldson, nor Kessler was the taxpayer the owner of the documents involved nor was such an allegation made. The Supreme Court in Couch v. United States298 distinguished Donaldson under circumstances where the taxpayer has a proprietary interest in the records:

The [Donaldson] Court quite properly concluded that, under these facts, no absolute right to intervene existed. [400 U.S.] at 530-531. The instant case, however, presents a different question. Here petitioner does own the business records which the Government seeks to review and the courts below did permit her to intervene. The essential inquiry is whether her proprietary interest further enables her to assert successfully a privilege against compulsory self-incrimination to bar enforcement of the summons and production of the records, despite the fact that the records no longer remained in her possession.299

Where the attorney-client privilege is properly raised by the attorney in a district court enforcement proceeding, it is unnecessary for the client to intervene in order to assert such a privilege because the attorney is a proper party to invoke it.300 Intervention, however, apparently is necessary in order for the taxpayer to invoke constitutional guarantees, even when his attorney is in the

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299. Id. at 327.
possession of potentially incriminating documents in which the taxpayer has a proprietary interest.\textsuperscript{301}

The attorney-client privilege in tax investigations is extended only to "communications or conversations between the attorney and his client and not to activities engaged in by the attorney on behalf of his client."\textsuperscript{302} A number of court decisions in peripheral areas touching upon the client's identity, the employment arrangement and the attorney's care of his client's records, have substantially limited the scope of the privilege. The discussion of these various limitations on the attorney-client privilege assumes, \textit{ipso facto}, that federal common law regarding the attorney-client privilege governs and is determinative of its scope.\textsuperscript{303}

\textbf{A. Protection of the Client's Identity}

Generally, the identity of the client is excepted from the attorney-client privilege.\textsuperscript{304} The rationale for this principle is derived from the belief that, in an adversary proceeding, the opposing litigant is entitled to know the identity of the person instigating the litigation, and that it would be extraordinary, indeed, for a client to communicate his identity to his attorney in confidence.\textsuperscript{305}

There have been rather unusual situations where the identity of the client has been protected. An early case permitting an attorney to conceal his client's identity is \textit{Ex parte McDonough}.\textsuperscript{306} In \textit{McDonough}, an attorney was retained to represent certain persons during an investigation of election fraud and to defend three previously indicted individuals. The court held that a grand jury could not compel the attorney to disclose the identity of his clients on the ground of attorney-client privilege. The criteria

\textsuperscript{301} See Donaldson v. United States, 400 U.S. 534, 542-43 (1971). But cf. United States v. Judson, 322 F.2d 460 (9th Cir. 1963) and cases following.


\textsuperscript{304} S.J. Wigmore, \textit{EVIDENCE} \textit{§2313} (J. McNaughton rev. ed. 1961); United States v. Ponder, 475 F.2d 37 (5th Cir. 1973).


\textsuperscript{306} 170 Cal. 230, 149 P. 566 (1915).
used to evaluate the communication were that the communication of the client’s identity did not involve the furtherance of a criminal act, that the identity was clearly intended to be confidential, and that the clients were not parties to litigation.\textsuperscript{307}

The leading case on the identity issue with respect to Internal Revenue Service investigations is \textit{Baird v. Koerner}.\textsuperscript{308} This case involved a payment to the Service of back taxes by an attorney who had been hired by the client’s attorney.\textsuperscript{309} In striking a balance between the common law attorney-client privilege and the policy of full disclosure in tax investigations, the court noted that there was no current investigation, that there probably would be none, and that no litigation existed. Furthermore, the court found factually that the client intended his identity to be confidential. Thus, the court held:\textsuperscript{310}

\begin{quote}
[A]n attorney cannot be compelled to state the names of clients who employed him to voluntarily mail sums of money to the government in payment of undetermined income taxes, unsued on, and with no government audit or investigation into that client’s income tax pending.
\end{quote}

This conclusion appears entirely correct on the facts.\textsuperscript{311} In the course of an investigation, the identity of the subject of the investigation is known, and the investigator seeks incriminating evidence to convict him. The attorney-client privilege encourages free communication between the attorney and his client without fear that the attorney will be compelled to disclose incriminating evidence. In \textit{Baird}, the government was aware of illegal activity but ignorant of who perpetrated the activity. In such a situation, the client’s identity must be preserved so that he will be willing to seek effective legal counsel.\textsuperscript{312}

\section*{B. Protection of the Employment Arrangement}

During the course of income tax investigations, certain facts concerning the client’s professional relationship with his attorney

\begin{flushleft}
\textsuperscript{307} \textit{Id.} at 236-37, 149 P. at 568.
\textsuperscript{308} 279 F.2d 623 (9th Cir. 1960).
\textsuperscript{309} \textit{Id.} at 627. It is noteworthy that the court relied upon state law in finding that the client’s identity was a privileged communication.
\textsuperscript{310} \textit{Id.} at 635.
\textsuperscript{312} \textit{See} Tillotson v. Boughner, 350 F.2d 663 (7th Cir. 1965); Schulze v. Rayunc, 350 F.2d 666 (7th Cir. 1965).
\end{flushleft}
may become a point of controversy. On occasion, the Service has sought to compel testimony of these facts from the taxpayer's attorney.

A case dealing directly with the parameters of the attorney-client privilege in a tax investigation, Colton v. United States,\footnote{313. 306 F.2d 633 (2nd Cir. 1962).} held: "[I]t was proper to require counsel to answer questions concerning the years during which they performed legal services and the general nature of the services [performed]."\footnote{314. Id. at 634.}

In Colton, an attorney was required to answer questions about the general nature of legal services rendered to the taxpayer as well as the amounts and dates of fees paid by the client.\footnote{315. See also United States v. Threlkeld, 241 F. Supp. 324 (W.D. Tenn. 1965); In re Wasserman, 198 F. Supp. 564 (D.D.C. 1961).} The court recognized that while the giving of tax advice and preparation of tax returns are well within the parameters of legal services, the attorney-client privilege is limited to matters of substance communicated to the attorney in professional confidence.\footnote{316. 306 F.2d 633, 637 (2nd Cir. 1962).} Furthermore, the court acknowledged that there may be circumstances where matters not normally protected by the attorney-client relationship would constitute prejudicial disclosure and be protected as such.\footnote{317. Id.} The court, however, did not make clear what those circumstances would be.\footnote{318. The court referred to Biard v. Koerner, 279 F.2d 623 (9th Cir. 1960) and In re Kaplan, 8 N.Y.2d 214, 168 N.E.2d 660, 203 N.Y.S.2d 836 (1960) which are both void of criteria.} The court did, however, stop short of requiring disclosure of confidential papers "specifically prepared by the client for the purpose of consultation with his attorney . . . and . . . any of the forms, memoranda and work-sheets 'to the extent of any unpublished expression made by an attorney therein of confidences which had passed between him and his clients.'"\footnote{319. 306 F.2d 633, 639 (2nd Cir. 1962) (citing the judge below). See text accompanying notes 340-71 infra relating to the pre-existing documents rule.}

The Service's attempt to obtain answers to such questions is indicative of the circumstances which have resulted in a partial vacatur of the attorney-client privilege. With respect to the question of when the attorney's services had been rendered, the Service alleged and the Colton court found that this was a proper question although it might aid the Service in obtaining further
unprivileged information from the attorney. Similarly, the issue of what services were performed bore on the question of legal as opposed to non-legal services, the former being privileged and the latter not. Furthermore, the nature of the papers held by the attorney is helpful information for the Service to determine which documents, if any, might aid in the investigation.\textsuperscript{320}

Recently, however, a small incursion has been made into the heretofore sacrosanct \textit{Colton} line of cases, which, as previously indicated, has diminished the applicability of the attorney-client privilege in income tax fraud cases. In \textit{United States v. Hodgson},\textsuperscript{321} a special agent issued an administrative summons to the taxpayer's attorney requiring the production of the attorney's records of fees paid by or for the taxpayer. The court, after finding that the sole purpose of the investigation was to obtain evidence for possible criminal prosecution, held that the information sought was protected by the attorney-client privilege:\textsuperscript{322}

The Court finds that the records sought by the summons, and the information contained therein, are protected by the attorney-client privilege. The assertion of privilege in the instant litigation is proper in view of the fact that the charges for legal fees were made as communications and the work product of the attorney and explain the specific and general nature of the services performed. Disclosure of the requested records could expose the general nature of the legal services rendered by the Respondent to [the taxpayer].

It can probably be argued that the use of the \textit{Donaldson} "criminal prosecution" test is inappropriate for determining whether or not documents are protected by the attorney-client privilege. Nevertheless, the \textit{Hodgson} court's reasoning concerning the importance of the preservation of the attorney-client privilege is worth noting, primarily because of the apparent general failure of most courts to appreciate the attorney-client privilege's fundamental rationale which District Judge Barrow so eloquently recites:\textsuperscript{323}

The legal profession is a noble one. This Court is aware that holding inviolate the confidences and secrets communicated by

\textsuperscript{320} 306 F.2d 633, 638. See text accompanying notes 402-27 infra regarding custodial care of documents.
\textsuperscript{321} 73-1 USTC ¶9419, 81001 (M.D. Okla. 1973).
\textsuperscript{322} \textit{Id}.
\textsuperscript{323} \textit{Id}.
a client to an attorney not only facilitates the full development of facts essential to proper representation of the client, but also encourages laymen to seek early legal representation. Consequently, the attorney-client privilege should be safeguarded. If this privilege is not protected, where shall one go for advice?

It is difficult to argue that disclosures such as a client's identity, the nature of the work performed and the time of performance are privileged absent special circumstances. This is especially true in light of the wide approval of Judge Wyzinski's formulation in *United States v. United Shoe Machinery Corp.* It is certainly logical that the relationship must be established prior to a claim of attorney-client privilege. The facts elicited by the Service in *Colton* certainly aid in proving the attorney-client relationship as well as proving the confidentiality of the communication.

However, there are certainly circumstances, such as those in *Hodgson*, where the admission of certain facts to prove the attorney-client relationship or the confidentiality of the communication or type of service performed could be elements of proof of a crime. For example, where a taxpayer is being investigated for income tax fraud because he is believed to have significantly understated his income, the date of his initial consultation with an attorney might give rise to an inference that there had been advice that the taxpayer had not properly reported his income and, thus, that date should be privileged.

Perhaps a good rule to govern special circumstances would be one that gave the taxpayer and his attorney a presumption that the attorney-client privilege is applicable, thereby placing the burden of proof on the party alleging the nonexistence of the privilege. Certainly, once the attorney-client relationship is established, the question of what is privileged communication.

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324. 89 F. Supp. 357, 358-59 (D. Mass. 1950): (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.


should bear a close relationship to the purpose for which the communication was made and the potential damage the information could impart if disclosed. Even if the communication were made pursuant to an ancillary or peripheral matter, it should be barred from disclosure, absent conscious waiver, on the ground that the prejudicial damage of the communication outweighs the reason for its initial disclosure. It is clear that during the course of an attorney’s inquiry into his client’s financial affairs pursuant to income tax return preparation or income tax fraud investigation many peripheral or ancillary issues are explored. Protection of these matters is crucial to a client’s production of information to his attorney as well as the attorney’s ability to correctly advise his client. For the courts to deny the attorney-client privilege to matters which might be prejudicial to a client’s cause is to erode significantly the foundation of the attorney-client privilege.

C. The Taxpayer’s Records in the Hands of his Attorney

There is little doubt that a taxpayer’s personal records in his own hands fall within the fifth amendment privilege against self-incrimination. The Couch case dealt with a taxpayer who had surrendered possession of her personal records to an accountant. The Court held that there is no compulsory self-incrimination where “there exists no legitimate expectation of privacy and so [no] semblance of governmental compulsion against the person of the accused”. The rationale for this decision was that “where personal rights interfere with the interests of society in the enforcement of laws, and collection of revenues”, personal liberty must give way to superior interests. It is with the heavy impact of the Couch decision on the issue of what is “personal compulsion” in income tax fraud investigations that the exploration of the taxpayer’s records in the hands of an attorney must begin.

1. Privileged Records

In the hands of the taxpayer all personal records, including but not limited to account books, bank statements, checks and receipts, are protected by the privilege against compulsory self-
incrimination in a criminal tax fraud investigation. The courts have consistently held this fifth amendment privilege to be personal in nature and, therefore, generally it must be raised by the party claiming the interest. A "legally protectable" interest is a prerequisite to raising the constitutional claim.

The major issue, remaining after Couch, with respect to an attorney’s possession of a taxpayer’s personal records or workpapers is whether or not the taxpayer will be considered to be in constructive possession of the documents where the attorney has been given the documents as an aid in giving legal advice to the client, whether for preparation of the taxpayer’s income tax return or for defending him in an income tax fraud investigation.

Prior to Couch, the Ninth Circuit in United States v. Judson held that an attorney retained by a taxpayer under investigation by the Internal Revenue Service had standing to assert the taxpayer’s privilege against compulsory self-incrimination where the taxpayer had given possession of certain potentially incriminating documents to the attorney at the attorney’s request. The rationale for this determination was that the personal privilege should be respected where the client himself could have raised it.

In Couch, the taxpayer attempted to rely on Boyd v. United States for the proposition that “any forcible and compulsory extortion of a man’s own testimony or of his private papers to be used as evidence to convict him of a crime” violates the fourth and fifth amendments. The Couch Court distinguished Boyd and Judson because they involved “instances where possession and ownership conjoined”. Apparently, the Supreme Court, by citing Judson as a case where possession and ownership are conjoined, has, by inference, accepted the proposition that an attor-


333. 409 U.S. 322, 333-34 (1973); But cf. Hill v. Philpott, 445 F.2d 144 (7th Cir. 1971); United States v. Cohen, 388 F.2d 464 (9th Cir. 1967); United States v. Judson, 322 F.2d 460 (9th Cir. 1963).

334. 322 F.2d 460 (9th Cir. 1963). See also notes 228-48 supra.

335. Id. at 467. See 8 WIGMORE, EVIDENCE §2307 (J. McNaughton rev. ed. 1961).


338. Id. See United States v. Judson, 322 F.2d 460 (9th Cir. 1963) for a case where if ownership and possession are considered conjoined, it could only be through the concept of constructive possession.
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ne as the taxpayer's representative may not be forced to produce his client's documents because the client will at least be considered to be in constructive possession.\(^3\)

2. Previously Prepared Documents

The pre-existing documents rule has been litigated often. Under this doctrine, the courts have held that the attorney-client privilege may not be asserted to protect documents in the hands of an attorney where the documents were created prior to the attorney-client relationship.\(^3\) The rationale for such a decision rests on the fear that if documents can be withheld, as can oral communication,\(^3\) a client could impede discovery of his own documents and records by the simple transfer of the documents to his attorney.

If, as Couch indicates, an attorney in possession of his client's documents and records can assert his client's fifth amendment privilege or the client himself can intervene and assert his own privilege against compulsory self-incrimination on the theory of constructive possession, the exception to the attorney-client privilege for pre-existing documents would appear meaningless. The cases, however, offer no clear answer.\(^3\)

An early case accepting the proposition that an attorney can assert his client's fifth amendment protection against disclosure of documents is Application of House.\(^3\) In that case, the taxpayers instructed their accountant to turn over his previously prepared work papers partly to their attorney and partly to them-

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\(^3\)9. The court by making the exception for attorneys and not accountants ignores reality but not the constitution. The sixth amendment guarantees right to counsel.


\(^3\)3. 144 F. Supp. 95 (N.D. Cal. 1956).
selves. While the court found the taxpayers' allegation of the attorney-client privilege "so clearly unfounded that it is astonishing," it held, in denying enforcement of the summons, that an attorney can invoke his client's fifth amendment privilege:

The government apparently seeks to establish a novel rule that unless the client himself participates in hearings...held before the agent of the Internal Revenue Bureau, he waives his Constitutional rights. The government could thus put any taxpayer to the choice of attending hearings or investigations...or waiving his privilege against self-incrimination. Such a rule would accomplish nothing except to impose a heavy penalty...on those taxpayers who chose to assert their right against self-incrimination...The effective exercise of Constitutional rights should not be abridged by any such technical and onerous requirements as that.

The Ninth Circuit in the case of United States v. Judson, after declining to quash a section 7602 summons on the basis of attorney-client privilege, held that an attorney in possession of his client's pre-existing records could raise the client's fifth amendment privilege if the client in possession of the documents could raise the same privilege:

An attorney is his client's advocate. His function is to raise all the just and meritorious defenses his client has. No other "third party", nor "agent", nor "representative" stands in such a unique relationship between the accused and the judicial process as does his attorney. He is the only person besides the client himself who is permitted to prepare and conduct the defense of the matter under investigation. The attorney and his client are so identical with respect to the function of the evidence and to the proceedings which call for its production that any distinction is mere sophistry.

Cases expressing views contrary to those stated in Application of House and Judson rely on the rationale that there can be no constitutional privilege for incriminating documents concerning a taxpayer when the documents are in the possession of another person. Those cases generally cite Hale v. Henkel.

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344. Id. at 97.
345. Id. at 100.
346. 322 F.2d 460 (9th Cir. 1963).
347. Id. at 467.
348. Id. at 466. For various analyses of similar propositions, see generally, United States v. Hickok, 481 F.2d 377 (9th Cir. 1973); United States v. Weingarden, 473 F.2d 454.
McAlister v. Henkel, 350 United States v. White, 351 Wilson v. United States, 352 Boyd v. United States 353 and In re Fahey 354 for the proposition that the fifth amendment privilege is personal and therefore can only be raised by the party seeking its protection. These cases, with the exception of In re Fahey, can be distinguished on the ground that they dealt with the difference between natural persons and entities. It is clear that the former have a fifth amendment privilege where the latter do not. 355 This is true even where the corporate records in question are in the hands of an individual whom they incriminate. 356 In none of the entity cases is there a clear holding that an attorney cannot raise a natural person’s constitutional privilege. To the contrary, the Supreme Court in Grant v. United States 357 apparently intimated that an attorney could refuse to produce his client’s personal records if the client had a constitutional right to do so: 358

The inquiry thus remains whether in these circumstances Grant [the attorney] could refuse their production if they would tend to incriminate his principals. . . .

They remained subject to inspection and examination when


349. 201 U.S. 43 (1905).
350. 201 U.S. 90 (1905).
351. 322 U.S. 694 (1944).
352. 221 U.S. 361 (1911).
353. 116 U.S. 616 (1885).
354. 300 F.2d 383 (6th Cir. 1962).
355. It is clear that corporations have no fifth amendment privilege. Wilson v. United States, 221 U.S. 361 (1911). This doctrine has been extended to trustees in bankruptcy, Grant v. United States, 227 U.S. 74 (1913) and to papers of an unincorporated labor union, United States v. White, 322 U.S. 694 (1944). The White decision indicated that the privilege against self-incrimination does not apply to papers belonging to a group. Since the privilege is personal, it applies only to natural persons. Accord, United States v. Egenberg, 443 F.2d 512 (3rd Cir. 1971).
357. 227 U.S. 74 (1912).
358. Id. at 79-80. See also, United States v. Judson, 322 F.2d 460, 464 (9th Cir. 1963).
required by competent authority, and they could not have been withheld by Burlingame himself upon the ground that they would tend to incriminate him. [Emphasis added]

In re Fahey and cases following it generally dealt with records owned by a third party (usually an accountant) and in the hands of the taxpayer or his attorney. A pre-Couch district court decision, United States v. Fisher, discussed in depth the difference between ownership and possession of previously prepared documents in the hands of a taxpayer’s attorney. In Fisher, the taxpayer’s accountant gave the taxpayer all of the records in the accountant’s possession. The taxpayer promptly turned the documents over to his attorney. The special agent assigned to the case served Mr. Fisher, the taxpayer’s attorney, with a section 7602 summons for the documents. In the district court enforcement proceeding, Fisher attempted to assert the taxpayer’s fifth amendment privilege against self-incrimination on the theory that rightful and indefinite possession of the papers was a proper test for the determination of the taxpayer’s fifth amendment claim. The court, relying on a Third Circuit decision, United States v. Egenberg, held that where a third party has a superior right to possession of the papers, a witness cannot withhold them.

A post-Couch Fifth Circuit case, United States v. White, again dealt with the problem raised where the work papers of a

359. 300 F.2d 383 (6th Cir. 1961). See also United States v. White, 477 F.2d 757, rehearing denied, 75-2 USTC ¶9802 (6th Cir. 1973); United States v. Brown, 349 F. Supp. 420 (N.D. Ill. 1972), affd, 478 F.2d 1039 (7th Cir. 1973); Remmer v. United States, 250 F.2d 277 (9th Cir. 1953).
362. 443 F.2d 512 (3rd Cir. 1971).
363. 477 F.2d 757 (5th Cir. 1973). In discussing the Donaldson proper-purpose test Judge Ainsworth, in dissent stated:

There is strong reason to believe that the government was not acting in good faith when it served the instant summons. The case had initially been investigated for some time by an Internal Revenue agent and the Special Agent of the Intelligence Division was called in later. Even though a recommendation for prosecution had not been made at the time the summons issued, the Service had sufficient information available upon which to base a recommendation. The recommendation should not have been delayed to take advantage of a civil summons. I doubt, therefore, that the requisites of Donaldson v. United States, 400 U.S. 517, 536 (1971), have been complied with since the evidence points most strongly to an absence of good faith on the part of the Government . . . .

Id. at 765.

See also Judge Ainsworth’s dissent to the en banc denial of rehearing at 73-2 USTC ¶9802.
client’s accountant are in the hands of the client’s attorney. The
attorney in White had been summoned to produce the documents
pursuant to a section 7602 summons, and he refused. One of the
grounds he asserted was the attorney-client privilege, which was
summarily denied. Another was his client’s fifth amendment
privilege. In ordering enforcement of the summons, the court
stated:364

The lesson to be learned from Couch, then is that unless the
taxpayer is actually in possession of documents sought by the
government or clearly in constructive possession he will be un-
able to seek the shelter of the Fifth Amendment because he will
not be the object of any impermissible governmental compul-
sion. [emphasis added]

The White court relied on the rule that an attorney cannot
raise his client’s fifth amendment privilege unless the client has
one which he could have raised himself. This rule was applied on
the theory that the taxpayer had no fifth amendment privilege
because he had never owned or possessed the documents prior to
their coming into the attorney’s hands.365 Citing Couch for the
proposition that constructive possession might be sufficient
grounds for an attorney to invoke his client’s constitutional guar-
antees, the court asserted the requirement that the taxpayer him-
self must place the papers in the hands of another person, thereby
retaining the right to immediate possession without having actual
possession. This prerequisite was found lacking in White.366

[T]his conception of constructive possession cannot be ex-
tended to fit the situation in which White’s clients find them-
selves. For it is undisputed that they have never for an instant
been in possession of the papers sought by the government . . . . [T]he necessary ingredient of personal compulsion
against White’s clients is totally lacking, and in its absence the
fifth amendment does not prohibit the government from obtain-

364. 477 F.2d 757, 763 (5th Cir. 1973).
365. After Couch, this result leads to the ridiculous conclusion that when an accoun-
tant transfers workpapers or the taxpayer’s records directly to the taxpayer’s attorney, the
attorney could not raise the taxpayer’s fifth amendment privilege against compulsory self-
incrimination because the taxpayer did not own or possess the documents prior to their
coming into the attorney’s hands. If however, the accountant first transfers the papers to
the taxpayer who subsequently turns them over to the attorney, the attorney could then
raise the taxpayer’s privilege against compulsory self-incrimination. It is indeed tenuous
to permit a constitutionally guaranteed privilege to be balanced on such a precarious
pinnacle.
366. 477 F.2d 757, 763 (5th Cir. 1973).
ing information vital to the enforcement of its laws and the collection of its revenues.

It appears obvious that where an attorney is in possession of documents incriminating his client which were not prepared in furtherance of the attorney-client relationship but rather are foreign to that relationship, there can be no attorney-client privilege with respect to those documents without a fundamental change in the doctrine.\textsuperscript{367} It is, however, equally obvious that an attorney who is aiding a client being investigated for criminal tax fraud has a right, if not an inherent obligation, to employ every legal method available to protect his client's guaranteed rights. To deny the attorney the right to assert the fifth amendment privilege on behalf of his client is to deny in part the client's right to adequate representation guaranteed by the sixth amendment.\textsuperscript{368}

When documents would be protected by the privilege against compulsory self-incrimination in the hands of a taxpayer, it is unjust for the taxpayer to lose that protection simply because the documents are transferred into the hands of the client's attorney. A legal distinction based upon ownership and possession of documents seems unfounded. The constitutional privilege against self-incrimination ought to run from the taxpayer to his property irrespective of who might have temporary possession. This is especially true when the documents are in the possession of an attorney retained primarily to safeguard his client's rights in a federal income tax investigation. Regarding the incriminating effect, it makes no difference whether the documents are in the hands of the taxpayer or in the hands of his attorney.

\textsuperscript{367} See generally the discussion on pre-existing documents in the text accompanying note 340 supra. Note also that records prepared by an attorney while acting as a business advisor or in a "non-legal" capacity are not privileged. See also text accompanying notes 482-508 infra. The sixth amendment guarantees the accused in a criminal prosecution the right to counsel for his defense. The Supreme Court in recent years has extended constitutional guarantees to a person being investigated. See Mapp v. Ohio, 367 U.S. 643 (1961) protecting the right to privacy by invoking the exclusionary rule where illegal searches and seizures produced incriminating evidence. In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court required that a prospective defendant be advised of his constitutional rights prior to being questioned. If an attorney is denied the right to assert his client's fifth amendment privileges because the attorney is in possession of potentially incriminating evidence, then the attorney may be neutralized in his effort to protect his client. This idea of opening the attorney's files to the government to aid them in procuring evidence of criminal activity is then an invasion of the right to counsel.

\textsuperscript{368} 322 F.2d 460 (9th Cir. 1963). See also the dissent in United States v. White, 477 F.2d 757, 767 (6th Cir. 1973); see especially Judge Ainsworth's dissent to the \textit{en banc} denial of rehearing at 73-2 USTC \#9802.
Similarly, if the court in Judson is correct, constitutional guarantees should run to the taxpayer even if the documents are directly procured by the taxpayer's attorney from a third party. The attorney is the legal representative of the taxpayer. His actions on behalf of the taxpayer are, in legal effect, the taxpayer's own actions. The sacrosanct nature of revenue collection notwithstanding, there should be no legal distinction regarding a taxpayer's fifth amendment privilege where documents in his attorney's possession are obtained from the client himself or from a third party.

The attorney-client relationship is a personal one, guaranteed by the sixth amendment right to counsel, by the attorney-client privilege, and by ethical restraints on the attorney. It is obvious that the attorney-client relationship does not turn on whether the attorney or client has possession of potentially incriminating documents. It follows, therefore, as Dean Wigmore has stated:

"[T]hat when the client himself would be privileged from the production of the documents, either as a party at common law or as a third person claiming title or as exempt from self-incrimination, the attorney having possession of the document is not bound to produce."

3. Confidential Information

It will be recalled that information communicated by a client to his attorney must be clothed in "confidentiality" before the communication will be within the ever narrowing parameters of the attorney-client privilege. The key to the confidential nature of communication between the attorney and his client is the client's desire for secrecy.

An issue of growing importance in federal income tax fraud cases is whether information communicated by a client to his attorney for purposes of preparing federal income tax returns is confidential. An early case dealing directly with the issue of

369. Note that attorneys are bound by a strict ethical code that precludes the sharing of information given to the attorney by the client. Accountants have no such restraints. See United States v. Couch, 409 U.S. 322, 335 (1973) and United States v. White, 477 F.2d 757 (5th Cir. 1973).


372. 306 F.2d 633 (2nd Cir. 1962).
whether information communicated to an attorney by his client for purposes of preparing a federal income tax return is confidential is United States v. Colton.\textsuperscript{373} Recall, that Colton dealt with a taxpayer’s attorney who had been summoned to produce “retained copies of income tax returns, workpapers, correspondence files, memoranda and all other data relating to the preparation and the filing of Federal Income Tax Returns” for his client.\textsuperscript{374} With respect to confidentiality, the court stated:\textsuperscript{375}

Not all communications between an attorney and his client are privileged. Particularly in the case of an attorney preparing a tax return . . . a good deal of information transmitted to an attorney by a client is not intended to be confidential, but rather is given for transmittal by the attorney to others- for example, for inclusion in the tax return. Such information is, of course, not privileged.

The Eighth Circuit in United States v. Cote\textsuperscript{376} confronted the problem of whether workpapers prepared by an accountant at the request of the taxpayer’s attorney fell within the confidentiality requirement of the attorney-client privilege. After determining that the attorney-client privilege applied to workpapers prepared by an accountant at the request of the taxpayer’s attorney, the court found that:\textsuperscript{377}

Notwithstanding our recognition that the attorney-client privilege attached to the information contained in the accountant’s workpapers under the circumstances existing here, we find that by filing the amended returns the taxpayers communicated, at least in part, the substance of that information to the government, and they must now disclose the detail underlying the reported data. A client may waive the privilege which protects what he earlier confided to his attorney or his attorney to him.

The notion that the filing of an income tax return eliminates any confidentiality with respect to its underlying information is reinforced in Couch v. United States.\textsuperscript{378} In Couch, a taxpayer attempted to quash a section 7602 summons for her own documents, which were in the possession of her accountant. Mrs.

\textsuperscript{373} Id. at 634.  
\textsuperscript{374} Id. at 638.  
\textsuperscript{375} 456 F.2d 142 (8th Cir. 1972).  
\textsuperscript{376} Id. at 144.  
\textsuperscript{377} 409 U.S. 322 (1973).  
\textsuperscript{378} Id. at 329. See also concurring opinion at 337.
Couch contended that her expectation of privacy protected her from the production of potentially incriminating materials which were her personal property. The majority concluded the contents of her personal records would not be disclosed.  

The criterion for Fifth Amendment immunity remains not the ownership of property but the "physical or moral compulsion exerted." [Citations omitted] We hold today that no Fourth or Fifth Amendment claim can prevail where, as in this case, there exists no legitimate expectation of privacy and no semblance of governmental compulsion against the person of the accused. It is important, in applying constitutional principles, to interpret them in light of the fundamental interests of personal liberty they were meant to serve. Respect for these principles is eroded when they leap their proper bounds to interfere with the legitimate interest of society in enforcement of its laws and collection of the revenues.  

Mr. Justice Douglas, in a brilliant dissent, argued that Mrs. Couch had a constitutionally protected right to expect that the accountant's agency was for a specific purpose—to complete the taxpayer's tax return. It is clear, at least to Mr. Justice Douglas, that the preparation of tax returns by an accountant places fiduciary responsibilities upon the accountant:

One of those responsibilities was not to use the records given him for any purpose other than completing the returns. Under these circumstances, it hardly can be said that by giving the records to the accountant, the petitioner committed them to the public domain.

Thus far, the offspring of Couch have tended to expand the "no-confidentiality rule" which requires production of information underlyng the preparation of a tax return. The recent case of United States v. Schmidt is such an example. There, an accountant retained by the taxpayer's attorney was required to disclose sources of data underlying information appearing in a tax

379. Id. at 336.
380. Id. at 340. §7206 of the INTERNAL REVENUE CODE places preparers in the position of being guilty of income tax evasion when they have knowledge that the records are falsified or in some other way intentionally inaccurate. The preparer is also liable to the taxpayer under common law concepts of fiduciary duty. See also United States v. Wein- garden, 473 F.2d 454 (6th Cir. 1973). But cf. United States v. Schmidt, 360 F. Supp. 339 (M.D. Pa. 1973).
return. Citing *Colton v. United States*\(^{383}\) the court, after finding the attorney-client privilege applicable, held:\(^{384}\)

Each [question] attempts to elicit sources of information underlying data appearing on a tax return. These are not confidential. [Citations omitted] Indeed, it is important that the questions be answered because, to the extent that information used in preparing a return is derived from sources other than the clients or the clients' agents, the substance of it is not privileged.

The "no-confidentiality rule" which holds that a common law or constitutional privilege is, in substance, waived when what would be confidential information is communicated in any form to a public agency has not yet been fully accepted. For instance, it has not been suggested that a taxpayer in possession of his personal records can be compelled to produce those records when they are used in preparing his own income tax return. Such a holding, it would seem, requires acceptance of the notion that a taxpayer waives his constitutional rights against invasion of privacy and compulsory self-incrimination when he files his income tax return. An alternative theory which would mandate production of the taxpayer's documents underlying an income tax return is that such records are not testimonial, and therefore, no constitutional privilege would attach to the documents.\(^{385}\)

Although there is no holding that requires production by a taxpayer of materials used to prepare federal income tax returns in a criminal tax investigation, there are cases relying on two alternative theories of law which, on occasion, have permitted discovery of the personal records of individuals. The two theories are the required records doctrine and the work product doctrine. The former has never directly been invoked in criminal income tax fraud cases, but the latter has been frequently employed by

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the government in joint civil-criminal income tax fraud investigations with some success.386

a. The Required Records Doctrine:

The required records doctrine was initially enunciated in Wilson v. United States:387

[T]he physical custody of incriminating documents does not itself protect the custodian against their compulsory production. The question still remains with respect to the nature of the documents and the capacity in which they are held. It may yet appear that they are of a character which subjects them to the scrutiny demanded and that the custodian has voluntarily assumed a duty which overrides his claim of privilege. . . . The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege which exists as to private papers cannot be maintained.

This doctrine was first applied to corporate cases where no fifth amendment privileges would attach.388 It was later extended to the papers of private individuals in Shapiro v. United States.389

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386. 221 U.S. 361, 380 (1911).
388. 335 U.S. 1 (1948).
389. Id.; But cf. Stuart v. United States, 416 F.2d 459 (9th Cir. 1969) where a footnote quotes the Justice Department brief to the effect that the government has refrained from making the "required records argument in recent years." Id. at 462 n.2. For an excellent analysis of the doctrine, see Lipton, Record Keeping and the Privilege Against Self-Incrimination, 14 N.Y.U. Inst. on Fed. Tax 1331 (1956). The possibility of a resurrection of Shapiro has increased by the recent use of search warrants in tax cases. If the courts should hold that the Constitution precludes the involuntary relinquishing of books and records under a search warrant, the Service could contend that the required records doctrine denies the taxpayer both the attorney-client privilege as well as his constitutional safeguards.

Such a result would require the Supreme Court to hold that a taxpayer's records are not communicative or testimonial. Under a recent decision, the effect of non-testimoniality may have already been achieved, for the court in Couch stated: [b]ut there can be little expectation of privacy where records are handed to an
There, the Supreme Court sanctioned compulsory production of an individual's private records that were required to be kept by regulations promulgated under the Price Control Act. 390

b. The Work Product Doctrine:

The work product doctrine was initially pronounced by the Supreme Court in Hickman v. Taylor. 391 There, the court explored the extent to which a party may inquire into information procured by an adverse party's counsel in the course of preparation for possible civil litigation. After finding the attorney-client privilege inapplicable the court stated: 392

Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may be properly had.

[Emphasis added]

The impact of this decision is to protect from discovery documents prepared by an attorney in anticipation of litigation, absent a showing of necessity. Documents prepared by an attorney in anticipation of civil litigation would otherwise not be protected under the liberal discovery rules in both the federal and state courts. 393 Generally, documents prepared pursuant to a criminal investigation are protected by constitutional limitations. Whether the Hickman rule prevails in joint criminal-civil or even criminal tax investigations remains unclear. 394

An early income tax case dealing with the work product rule is In re Kearney. 395 There, a bank sought denial of enforcement of a section 7602 summons for documents prepared in part by the bank's attorney pursuant to an investigation of another individual. The individual and his corporation had made loans from the bank's predecessor in interest. After finding that the attorney-client privilege was inapplicable, the court directed its attention to the work-product rule. The court held that where the Service accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return. [Emphasis added]. 409 U.S. at 335.

391. Id. at 511.
392. See generally 8 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL, §§2001 to 2300.
393. See United States v. Cromer, 483 F.2d 99 (9th Cir. 1973) and cases cited therein.
395. Id. at 177.
investigates a third party who is not the person summoned, and
the summoned person has documents in his possession that were
prepared by that person's attorney for possible litigation not in-
volving the government investigation, that the documents are not
protected by the work-product doctrine. Sub silentio, the court
apparently held that the exception carved out by the Hickman
rule was applicable where the documents in question were pre-
pared by an attorney for a purpose other than a federal tax inves-
tigation, and that in a federal tax investigation discovery may be
had. The Seventh Circuit in United States v. Brown held that
the work-product doctrine is applicable to an Internal Revenue
criminal investigation, but that the "strong public interest . . .
expressed by Congress in enforcement of the Internal Revenue
Act" may be relevant in demonstrating the degree of necessity to
be shown prior to the enforcement of a summons. In Brown, an
accounting firm was ordered to produce, inter alia, a memoran-
dum of law prepared by the taxpayer's attorney which included
legal judgments made by the attorney. Apparently, in the Sev-
enth Circuit, the degree of necessity required to meet the
Hickman criteria is something less than urgent necessity, and the
probability of criminal conviction is not relevant to determining
the necessity for enforcement.

The confusion surrounding the concept of confidentiality has
become increasingly more complex after Couch and subsequent
cases. Nevertheless, one concept that has been clarified by Couch
and Schmidt is that taxpayers will have increasingly greater diffi-
culty in income tax fraud investigations in attempting to deny

396. Id.
397. 478 F.2d 1038 (7th Cir. 1973).
398. Id. at 1041.
399. Any judicial inroads into the work product doctrine, in criminal tax fraud
investigations, would call for a square holding that the work product of an attorney in
anticipation of Internal Revenue litigation with respect to his client’s criminal tax liability
is either not testimonial in the constitutional sense or that public policy demands produc-
tion. Such a determination would rest upon very tenuous constitutional ground. To sug-
gest that an attorney’s work product in a criminal tax investigation is not testimonial is
equivalent to demanding production of an attorney’s notes of his client’s confession in a
murder case on the ground that the notes are not testimonial or that the government could
not otherwise obtain discovery. Likewise, what greater public policy prevails in criminal
tax fraud cases than in murder cases which would permit discovery of testimonial docu-
ments in the former case and not in the latter. Clearly, there is none.
400. See United States v. Brown, 478 F.2d 1038 (7th Cir. 1973); United States v.
White, 477 F.2d 767, rehearing denied, 73-2 USTC ¶9892 (5th Cir. 1973); United States
v. Ponder, 476 F.2d 37 (5th Cir. 1973).
government discovery of their personal records held by third parties.\footnote{Falsone v. United States, 205 F.2d 734, 739 (5th Cir. 1953). Note, although no attorney-client privilege is available, the attorney may be able to raise his client's fifth amendment claim. See notes 229-48 supra. See generally, 8 J. Wimore, Evidence §§2290-2329 (J. McNaughton rev. ed. 1961).}

It has always been clear that the government can inspect any of the taxpayer's personal records in a pure civil investigation where there is little possibility of criminal prosecution, whatever the situs and whoever has possession of the documents. Now, a taxpayer has no expectation of confidentiality where his accountant retained by the taxpayer's attorney has in his possession work papers or photocopies of the taxpayer's records used directly in preparing the income tax returns. If \textit{Couch} is correct, and unless the taxpayer is considered to have "constructive possession" of his personal records or accountant's workpapers when they are in the hands of his attorney, the taxpayer may have no expectation of privacy. If, as previously indicated, \textit{Couch} is interpreted as removing all expectation of privacy where personal records are disclosed in any form in a federal tax return, it would be tantamount to a waiver of constitutional as well as common law privileges and the documents would be at the government's disposal. This is particularly true when the documents are in the possession of the taxpayer's attorney. These results are ominous threats to the personal sanctity of privacy guaranteed by the constitution.

4. \textit{Custodial Care of Records}

In view of the discussion thus far, it is not surprising that pre-existing documents received by an attorney, even for purposes of consultation, are not confidential communications and therefore not within the confines of the attorney-client privilege.\footnote{See United States v. White, 477 F.2d 757 (5th Cir. 1973); United States v. Weingarden, 374 F.2d 454 (6th Cir. 1973).} The rationale is that the administration of justice could be easily defeated by transferring from one to the other important papers and thereby prevent a court or administrative agency from compelling the production of documents.\footnote{This is true for the accountant custodian but perhaps not the attorney custodian. See United States v. Couch, 409 U.S. 322 (1973); United States v. Moore, 73-2 USTC 19748 (5th Cir. 1973) and United States v. Schmidt, 360 F. Supp. 339 (M.D. Pa. 1973).}

In addition to this rule, it appears that constitutional privi-
leges may be waived by turning over valuable documents to a third party for custodial care or preparation of returns.\textsuperscript{404}

As might be expected from the previous discussion, the courts have been ingenious in preventing ownership from inhibiting discovery. Recall that in \textit{Couch v. United States}\textsuperscript{402} the Service successfully sought the production of the taxpayer's tax records, which had been held in the hands of her accountant for a number of years. The issue squarely before the Court was whether the taxpayer could invoke her fifth amendment privilege against compulsory self-incrimination to prevent the production of her business records.\textsuperscript{406}

After reciting the importance of preserving the privilege against self-incrimination, the Court stated:\textsuperscript{407}

\begin{quote}
It is important to reiterate that the Fifth Amendment privilege is a \textit{personal} privilege: it adheres basically to the person, not to information which may incriminate him. As Mr. Justice Holmes put it: "A party is privileged from producing the evidence but not from its production." \textit{Johnson v. United States}, 228 U.S. 457, 458 (1913) . . . .

In the case before us the ingredient of personal compulsion against an accused is lacking. The summons and order . . . are directed against the accountant. He, not the taxpayer, is the only one compelled to do anything.
\end{quote}

Mrs. Couch attempted to rely on the line of cases beginning with \textit{Boyd v. United States}\textsuperscript{408} and culminating in \textit{United States v. Judson},\textsuperscript{409} where it was consistently held that any forcible and compulsory extortion of a person's testimony or private papers to be used against him as evidence of a crime violated both the fourth and fifth amendments. The Court distinguished the facts in \textit{Couch} on the basis of the divergence of ownership and possession:\textsuperscript{410}

\begin{quote}
[P]ossession bears the closest relationship to the personal compulsion forbidden by the Fifth Amendment. To tie the privilege against self incrimination to a concept of ownership would be to draw a meaningless line . . . . Such a holding would thus place
\end{quote}

\begin{itemize}
\item \textsuperscript{404} 409 U.S. 322 (1973).
\item \textsuperscript{405} \textit{Id.} at 323.
\item \textsuperscript{406} \textit{Id.} at 328-29.
\item \textsuperscript{407} 116 U.S. 616 (1886).
\item \textsuperscript{408} 322 F.2d 460 (9th Cir. 1963). \textit{See} text accompanying notes 184-190 \textit{supra}.
\item \textsuperscript{409} 409 U.S. at 331.
\item \textsuperscript{410} \textit{Id.} at 337.
\end{itemize}
unnecessary emphasis on the form of communication . . . while diverting the inquiry from the basic purpose of the Fifth Amendment's protections.

Mr. Justice Brennan, in his concurring opinion, takes the view that the privilege against compulsory self-incrimination is available to one who turns over his personal records to a third person for "custodial safekeeping" rather than "disclosure of the information." The majority is not as succinct in their obfuscation of the "bright line rule":

We hold today that no Fourth or Fifth Amendment claim can prevail where, as in this case, there exists no legitimate expectation of privacy and no semblance of governmental compulsion against the person of the accused.

The decision in Couch puts great emphasis on two theories with respect to confidentiality. The first is that the very act of "communicating" documents to a second party, who in turn communicates the same in summary form to a governmental agency, in some way waives the right to privacy where the documents remain in the hands of the second party. The second theory running through Couch is that the very act of surrendering long term possession of documents to another person can destroy the testimonial nature of the documents.

It is somewhat incomprehensible that constitutional rights can be waived by failing to require prompt return of documents after employing an accountant or perhaps an attorney to prepare income tax returns, which, by necessity, require certain documentary information to complete. First, even if the documents in question could prove an understatement of taxes, the documents themselves are not within the sphere of evidence traditionally subject to discovery in a criminal investigation. Evidence such as a note outlining the procedure of the criminal act from one co-conspirator to another has been traditionally considered as an instrumentality of a crime. An argument that business re-

411. Id. at 336 (Mr. Justice Brennan, concurring).
cords of a taxpayer are such instrumentalities of crime is untenable, for such records are not prepared in contemplation of a crime but in contemplation of keeping accurate personal records of various transactions. There may be instances where a double set of books are prepared, one for accuracy and the other for evading taxes. The second set would be an instrumentality of tax evasion and therefore a proper subject for discovery because the very preparation of the second set is for the purpose of carrying out a premeditated criminal act. This is not the case where only one set of books is kept.

Mr. Justice Marshall in his dissent to Couch states:

A transfer to a lawyer is protected, not simply because there is a recognized attorney-client privilege, but also because the ordinary expectation is that the lawyer will not further publicize what he has been given.

There is, however, little doubt that an attorney does not overreach his capabilities when he gives a client tax advice for purposes of preparing the client's income tax return. If the long term possession of a taxpayer's records by an accountant constitutes waiver of the fourth and fifth amendment right of privacy after they have been disclosed in summary fashion by the accountant, then it is difficult to justify the opposite result if an attorney is the discloser of the information. It would be far better to permit a limited accountant-client privilege with respect to income tax matters. The Tax Court Rules of Practice permit accountants to “represent others in the preparation and trial” of civil court cases. Tax accountants are required to have an intimate knowledge of tax law and are professional experts in tax law. Disclosure to a tax accountant, privileged or not, is tantamount to disclosure to an attorney.

417. 409 U.S. at 350.
420. See Perlman v. United States, 247 U.S. 7 (1918) which held the fifth amendment privilege against compulsory self-incrimination unavailable to a party seeking to suppress admission of incriminating documents before a grand jury. See also Burdeau v. McDowell, 256 U.S. 465 (1921) permitting the government to use stolen documents against an accused in a criminal trial.
421. United States v. Judson, 322 F.2d 460 (9th Cir. 1963).
It is unbelievable that disclosure to the attorney should be privileged and identical disclosure to an equally competent accountant not be privileged for there is no logical basis for such a distinction. It has been held that an attorney can raise his client's fifth amendment rights while an accountant cannot. Disclosure to an attorney therefore is not a constitutional waiver of the fifth amendment privilege, but disclosure to an equally competent tax accountant is. Both should be privileged in that disclosure or possession of the taxpayer's records should not interfere with the owner's right to privacy or privilege against compulsory self-incrimination. This is especially true where the purpose of the transfer is considered, for it is inequitable to hold that a taxpayer who wishes to be certain of proper preparation of his returns and therefore seeks professional guidance in some way surrenders his right to privacy and his privilege against compulsory self-incrimination.

It is also difficult to understand a construction of the fourth and fifth amendments which permits a distinction based upon ownership and possession of documents. There is no doubt that the privilege is personal. "Personal" has generally been construed in fifth amendment cases as running to the holder of the privilege. Prior to Couch, the privilege against compulsory self-incrimination has, with a great degree of regularity, run to the owner of the documents. Although a person who has seen another's records can be compelled to testify as to their contents, the holder of the documents is not compelled to produce them in a criminal investigation of which he is the object. There well may be situations where the owner of personal papers may so relinquish possession that it is tantamount to forfeiting ownership, but consulting a tax accountant for the purpose of preparing complicated compulsory tax returns is not such case. The owner

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422. See generally text accompanying notes 457-64 infra on the use of accountant's workpapers in income tax fraud investigation.

423. See Johnson v. United States, 228 U.S. 457 (1913) where the Court held that the books and records of a bankrupt transferred to a trustee in bankruptcy could be used as evidence against the bankrupt in a prosecution for concealing money from the trustee. Both title and possession, however, had been transferred to the trustee in bankruptcy by operation of law. Therefore, there was no personal compulsion as contemplated by the fifth amendment.

424. But see United States v. Cohen, 388 F.2d 464 (9th Cir. 1967).


should at least bear a presumption of constructive possession which the government must overcome. It is even more preferable to deny any disclosure by the professional advisor or preparer because the disclosure in summary form on a tax return in no way discloses the basic transactions included in the summary which are all that the law requires. The taxpayer would rightly expect the professional to keep such transactions secret and confidential. Therefore, the constitutional aberration could be eliminated by affording the accountant an accountant-client privilege and forbidding disclosure based in income tax cases upon the privilege, thus avoiding the constitutional issue.\textsuperscript{427}

5. \textit{Are Tax Records Testimonial?}

What documents can be the subject of compulsory discovery by the government in a criminal income tax fraud investigation has, in light of recent decisions, turned on the fifth amendment right against compulsory self-incrimination.\textsuperscript{428} Based on the rationale underlying the privilege, it is arguable that the privilege ought to protect the taxpayer from any compelled cooperation with the Intelligence Division. Insofar as the privilege against compulsory self-incrimination rests upon peculiarities of the human psyche, it would be consistent to hold that the privilege protects against any invasion of the psyche. The Supreme Court, however, has stated clearly that the scope of the privilege is not synonymous with the complex values it helps protect.\textsuperscript{429} As early as 1910, the Court held that the fifth amendment was not violated when a suspect was compelled to put on a blouse to determine whether it fitted him. \textit{“[T]he prohibition”,} declared the Court, \	extit{“... is a prohibition of the use of physical or moral compulsion to extort communications from him...”}\textsuperscript{430} Even if the delineation of what falls within the privilege against compulsory self-incrimination is based upon communication, the scope of the privilege in income tax fraud investigations is still unclear.

There are three judicially plausible criteria that may be used in determining whether documents fall within the ever tightening circle of constitutional immunity. First, Dean Wigmore suggested

\begin{itemize}
\item \textsuperscript{427} United States v. Judson, 322 F.2d 460 (9th Cir. 1963).
\item \textsuperscript{428} Couch v. United States, 409 U.S. 322 (1973). See text accompanying notes 191-210 supra.
\item \textsuperscript{429} Holt v. United States, 218 U.S. 245, 252-53 (1910).
\item \textsuperscript{430} 8 J. Wigmore, EVIDENCE §2263 (J. McNaughton rev. ed. 1961). See also the plurality opinion in California v. Byers, 402 U.S. 424 (1971), joined in by four justices.
\end{itemize}
that the term "communicative" might be limited to words spoken by the accused. Second, communication can easily include all activities performed for the purpose of communication. Within this test could be included the preparation of books and records for the purpose of "communicating", in summary form, information required on income tax returns as well as the surrender of physical possession to a qualified expert to aid in the preparation of these returns and retention for possible future investigations. Finally, and most desirable, would be a test which would include any written documents, which if used to prove guilt, would require reliance by the government upon the taxpayer's representations. This formulation would of necessity include all of the taxpayer's documentation, oral or otherwise, which the government might use to prove the matters asserted in the documents. This last formulation, conceptually, would also include any documentation prepared by the taxpayer's agent, attorney, or other representative.

The leading case on testimonial communication is Schmerber v. California. After explaining that the fifth amendment "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature," the Court held that blood extracted from a nonconsenting suspect, "although an incriminating product of compulsion, was neither [his] testimony nor evidence relating to some communicative act or writing by [him]. Thus, it was not inadmissible on privilege grounds". Therefore, without precisely defining what constituted evidence of a "testimonial or communicative nature", the Court expressly rejected Wigmore's formulation of the scope of the fifth amendment privilege.

The greatest judicial confusion, however, has come in the area of determining what documents owned by an individual can be compelled by governmental authorities as evidence for use in a criminal prosecution. In Boyd v. United States, the Supreme Court held that compelling the defendant in a forfeiture proceeding to produce invoices for proof of the quantity and value of

434. Id. at 761.
435. Id. at 765.
436. Id. at 763.
glass, allegedly improperly imported, was a violation of the defendant’s fourth and fifth amendment rights. The confusion which surrounds much of the foregoing discussion has arisen out of a later misinterpretation of the Court’s language in that case:  

[A]ny forcible and compulsory extortion of a man’s own testimony or of his private papers to be used as evidence to convict him of a crime... is within the condemnation of [the fifth amendment].

... . . .

[We have been unable to perceive that the seizure of a man’s private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.

At the least, Boyd suggests that a search pursuant to a search warrant for private books and papers of an individual is as equally compulsive as a subpoena of a person’s private papers. This holding appears to be the antithesis of the position taken in Couch and White, which apparently perceived an administrative subpoena of a person’s personal papers as something less than a compulsory extortion of potentially incriminating evidence.

In Gilbert v. California, the Supreme Court held that the taking of handwriting samples is a form of compulsion within the meaning of the fifth amendment, but that “[a] mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside its protection” because it is not the kind of “communication” covered by the privilege. [Emphasis added]

Following the reasoning of the lower courts, one might have expected the Supreme Court in Schmerber to hold that there was no compulsion involved in taking the blood sample. Schmerber

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438. Id. at 630.
439. See Wright, Federal Practice and Procedure: Criminal, §665 n.88 (1969): It is much less clear that such a distinction [between the compulsion procedure by a subpoena and that produced by a search warrant] would be sound or fully consistent with the interests protected by the privilege against self-incrimination. See also, Lipton, Search Warrant in Tax Fraud Investigations, 56 A.B.A.J. 941, 943 (1970): “It is unthinkable that the courts will grant carte blanche for the seizure of documents that could not be reached by administrative or judicial subpoena.” Vonder Ahe v. Howell, 31 AFTR 2d 73-1075 (9th Cir. 1973); Hill v. Philpott, 445 F.2d 144 (7th Cir. 1971), cert. denied, 404 U.S. 991 (1971).
440. 388 U.S. 263 (1967). For a complete discussion of search warrants in federal income tax cases, see notes 205-06, 211, 217 and accompanying text.
441. Id. at 266-67.
was in no way forced to make "assurance, compelled as an incident of the process, that the articles produced [were] the ones demanded." Furthermore, the nature of the blood sample taken was such that "the proof of [its] authenticity, or other circumstances affecting [it], may and must be made by testimony of other persons, without any employment of the accused's oaths or testimonial responsibility". The Schmerber Court, however, as noted above, expressly held that the taking of a blood sample over a suspect's objection was "compulsion" within the meaning of the fifth amendment.

Compulsion alone, however, is not enough to constitute a fifth amendment violation. As noted in Schmerber, "compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture" is not prohibited under the fifth amendment:

The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony', but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it.

In Schmerber, the Court expressly noted that "[c]ompulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers . . ." is within the fifth amendment privilege. One year after the Schmerber decision, in Warden v. Hayden, the Court overruled the much criticized "mere evidence" rule of Gouled v. United States and upheld the admission of certain evidence despite the petitioner's fifth amendment claims. The

442. 8 Wigmore, Evidence §2264 (J. McNaughton rev. ed. 1961).
444. Id. at 761.
445. Id. at 764.
446. Id.
447. Id.
448. 387 U.S. 294 (1967). See also 18 U.S.C. §3103 which states:
A warrant may be issued under this rule to search for and seize any property
(1) Stolen or embezzled in violation of the laws of the United States; or
(2) Designed or intended for use or which is or has been used as the means
of committing a criminal offense; or
(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18 U.S.C. §957.
449. 255 U.S. 298 (1921).
objects seized in *Hayden* were trousers, a jacket and a cap, items previously immune from seizure under *Gouled*. The Court's opinion, however, contained a very significant caveat: 450

The items of clothing...are not 'testimonial' or 'communicative' in nature, and their introduction did not compel respondent to become a witness against himself in violation of the Fifth Amendment. *Schmerber v. State of California*, 384 U.S. 757. This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being object of a reasonable search and seizure.

In contrast, *California v. Byers*, 451 held that it would be an "extravagant" extension of the privilege to apply the fifth amendment to a California statute declaring it illegal for a motorist to fail to stop after an accident and to furnish his name and address. The Court held that the requirement of stopping is no more testimonial than requiring a person to speak or walk and that the disclosure requirement is essentially a neutral, non-testimonial act. 452

Although the Supreme Court has never discussed in a positive fashion what criteria delineate testimonial communication from nontestimonial, it is apparent from a close reading of *Couch* that the personal documents of a taxpayer are testimonial. However, the compulsion necessary to trigger the "private inner sanctum of individual feeling and thought" which the fifth amendment seeks to protect may be lacking where the taxpayer has surrendered possession of the documents or disclosed their contents as required by law. 453 As indicated previously, this result bears little relationship, in the mind of this author, either to the reality of what constitutes compulsory self-incrimination or to what the fifth amendment means. There is little doubt that a taxpayer's personal records are testimonial no matter what criteria are used. There is no legal justification for describing possession as a criteria for determining whether or not the "private inner sanctum of individual feeling and thought" is violated when the personal property of a taxpayer is appropriated against the

452. Id. at 431. See also United States v. Wade, 388 U.S. 218 (1967).
The taxpayer's will to be used against him in "testimonial fashion" in an income tax fraud investigation.

IV. THE TAXPAYER AND HIS ACCOUNTANT

There is no recognized privilege running between an accountant and his client in either common law or federal law when dealing with income tax investigation. In order to protect communications to accountants, the communications must be brought within the scope of other categories of privileges or the courts or Congress will have to provide for an accountant-client privilege. Although the application of these techniques is severely limited, there are situations where documents prepared by an accountant are protected by the attorney-client privilege.

The tests which have been frequently used by the courts to determine the applicability of the attorney-client privilege to the accountant or his workpapers are whether or not an attorney has been retained by the taxpayer prior to the accountant's preparation of the workpapers, and whether it was the attorney or the client who directed their preparation, and what the purpose of the accountant's work was.

A. The Client's Accountant

It seems clear that where the accountant is retained by the client prior to consultation with an attorney, there is no attorney-client privilege with respect to the communications or workpapers of the accountant. This result follows logically since the


457. It is entirely clear from the record . . . that the documents . . . were either disclosed to the accountant . . . or produced by [the accountant], prior to their delivery to counsel. Under such circumstances, it is obvious that no
client's communication was not made to an attorney or to an accountant working under the direction of an attorney, either as the attorney's employee or agent. Furthermore, since the workpapers are subject to discovery in the hands of the accountant, the courts have been unwilling to deny discovery where the documents have been transferred directly to the client's attorney.458

The premier case upholding discovery where the accountant has transferred workpapers to the client's attorney is Bouschor v. United States,459 where workpapers and returns were prepared by an accountant for several years prior to consultation with an attorney. Subsequent to the tax investigation, the attorney instructed the accountant to transfer all workpapers to him. The attorney was then summoned to produce the material he had received. He declined, contending, inter alia, that the papers were privileged communications. The court weighed the prior preparation of the workpapers, the fact that they had already been reviewed by the Service and reasoned that no confidential communication by the client to an attorney existed, and, thus, the privilege was inapplicable. More important, the court found that ownership of the documents and workpapers lay with the accountant and not with the taxpayer, in spite of the rather clear permanent partition of the documents from the accountant.460

The question of the taxpayer's possession, constructive or actual, as previously indicated, weighs heavily on assessing the validity of a fifth amendment self-incrimination claim, which may on occasion be used by the attorney to prevent discovery of documents in his hands.461 Therefore, the Supreme Court in Couch v.

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459. 316 F.2d 451 (8th Cir. 1963).
460. Id. at 456. See text accompanying notes 228-48, 360-71, and 424-27 supra for a discussion of ownership and possession.
United States\textsuperscript{462} may have overruled, sub silentio, Bouschor.

In Couch, the taxpayer’s accountant was in possession of the taxpayer’s records for many years prior to the issuance of the summons. Mrs. Couch contended that ownership rather than possession defined the boundaries of protection afforded by the fifth amendment. The Court found that the taxpayer’s accountant rather than the taxpayer herself was actually in possession of the documents sought by the government. As a result, the taxpayer could not legitimately claim that enforcing the summons would compel her to incriminate herself. The Court concluded that the ingredient of personal compulsion, essential to a claim of privilege, is almost invariably missing unless the papers are actually in the taxpayer’s possession. The following remarks by the majority are particularly revealing:\textsuperscript{463}

We do indeed believe that actual possession of documents bears the most significant relationship to Fifth Amendment protections against governmental compulsions upon the individual accused of crime. Yet situations may well arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact. But this is not the case before us.

One lesson to be drawn from Couch, then, is that unless the taxpayer is actually in possession of documents owned by him or prepared by another—or is clearly in constructive possession—he will be unable to invoke the shelter of the fifth amendment. This doctrine was followed in United States v. White,\textsuperscript{464} where the taxpayer’s attorney had been in possession of documents previously prepared by taxpayer’s accountant.

B. The Attorney’s Accountant

After Couch, it has become settled law that there exists no

\textsuperscript{462} 409 U.S. 322 (1973).
\textsuperscript{463} Id. at 333-34.
\textsuperscript{464} 477 F.2d 757, rehearing denied, 73-2 USTC ¶9802 (5th Cir. 1973). The White court used a test of one instant of possession in the hands of the taxpayer to defeat the claim of constructive possession:

\textquote{This conception of constructive possession cannot be extended to fit the situation in which White’s clients find themselves. For it is undisputed that they have never for an instant been in possession of the papers sought by the government. . . . Although not of controlling importance, there is no evidence in the record that he did so upon their instructions or that they even knew that he had secured them. Id. at 763-64; see also Judge Ainsworth’s dissent at 73-2 USTC ¶9802 at 82,594.}
privilege, constitutional or otherwise, with respect to testimony, workpapers or even the taxpayer's own papers held indefinitely by the taxpayer's accountant. The result is less clear where the accountant is employed directly by the attorney or by the client at the attorney's request. An early case dealing with the question is *Himmelfarb v. United States*,\(^\text{465}\) where the attorney retained an accountant who not only performed various accounting services but was present at meetings between the taxpayer and the attorney. The accountant's testimony was objected to on the ground that the accountant was an agent of the attorney and therefore the communications between the attorney's client and the accountant were privileged.\(^\text{466}\) The Court reasoned differently, however, stating:\(^\text{467}\)

[The accountant's] presence was not indispensable in the sense that the presence of an attorney's secretary may be. It was a convenience which, unfortunately for the accused, served to remove the privileged character of whatever communications were made.

Although this decision was strongly, and rightly, criticized, it was subsequently approved by the Sixth Circuit in *Gariepy v. United States*.\(^\text{468}\)

The Second Circuit, in *United States v. Kovel*,\(^\text{469}\) took a different approach by expanding the scope of the attorney-client privilege to cover agents or employees with more than "menial or ministerial" duties. In *Kovel*, the accountant was a full time employee of a law firm specializing in tax matters. The attorney instructed the client to turn over his records to the accountant along with any necessary explanation of the matters included in the documents. During the course of an investigation the accountant refused to divulge the documents or the contents of his conversations with the client on the ground that the communications were protected by the attorney-client privilege. The court rejected both the government's argument that non-lawyer employees were not covered by the privilege and the accountant's argu-

\(^{465}\) 175 F.2d 924 (9th Cir.), *cert. denied*, 388 U.S. 860 (1949).

\(^{466}\) *Id.* at 938-39.


\(^{468}\) 189 F.2d 459 (6th Cir. 1951).

\(^{469}\) 296 F.2d 918 (2d Cir. 1961).
ment that any communication by a client to any employee of a law firm was privileged. The court viewed as the essential element that "the communication be made in confidence for the purpose of obtaining legal advice from the lawyer". Applying this principle to the facts of the case, the court reasoned:

Accounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases. Hence the presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege. The presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit. By the same token, if the lawyer has directed the client, either in the specific case or generally, to tell his story in the first instance to an accountant engaged by the lawyer, who is then to interpret it so that the lawyer may better give legal advice, communications by the client reasonably related to that purpose ought fall within the privilege; there can be no more virtue in requiring the lawyer to sit by while the client pursues these possibly tedious preliminary conversations with the accountant than in insisting on the lawyer's physical presence while the client dictates a statement to the lawyer's secretary.

The Ninth Circuit followed Kovel in United States v. Judson, overruling, sub silentio, its much criticized earlier decision in Himmelfarb. In Judson, the taxpayer's attorney requested that an accountant be retained by the taxpayer to prepare a net worth statement necessary for the attorney to provide adequate representation for the client during the course of an income tax investigation. The attorney was subpoenaed to produce the accountant's working papers as well as the net worth statement. The court upheld the attorney's claim of privilege, summarily stating:

470. Id. at 920-23. Contra, United States v. McKay, 372 F.2d 174 (5th Cir. 1967)

471. 296 F.2d at 922.

472. Id.


474. 322 F.2d at 462. Note, this language rejects the view that the accountant could not be an "indispensible party to attorney-client communications." Accord, United States v. McKay, 372 F.2d 174 (5th Cir. 1967).
The accountant's role was to facilitate an accurate and complete consultation between the client and the attorney about the former's financial picture. The lower court was correct in determining that these documents constituted confidential communications within the attorney-client privilege.

Many recent decisions incorrectly avoid this result. In United States v. Cote, the taxpayer had employed Cote for several years as an independent contractor to prepare his income tax returns. After an Internal Revenue Service investigation had begun, the taxpayer consulted an attorney who retained the taxpayer's accountant to audit the taxpayer's books and records. Upon completion of the audit, counsel recommended that the taxpayer file an amended return, which was done. A special agent subsequently summoned the accountant to testify and produce all workpapers. The accountant did not comply. The court overturned the holding of the district court and held that the attorney-client privilege attached to the accountant's workpapers but that the privilege had been waived:

[W]e find that by filing the amended returns the taxpayer communicated, at least in part, the substance of that information to the government, and they must now disclose the detail underlying the reported data. A client may waive the privilege which protects what he earlier confided to his attorney. . . .

If this result be correct, any attempt by the taxpayer to cure the "omission" through professional assistance could result in the discovery of nearly certain evidence of criminal culpability, which could be discovered and used by the government in a criminal proceeding. It is doubtful that Congress ever intended that the amended return procedure have such far reaching results.

A recent post-Couch case, United States v. Schmidt, dealt with the scope of the attorney-client privilege where an attorney

\begin{footnotes}
\footnote{475. 456 F.2d 142 (8th Cir. 1972). \textit{See also United States v. Gurtner, 474 F.2d 297 (9th Cir. 1973) and United States v. Schmidt, 360 F. Supp. 339 (E.D. Pa. 1973).}}
\footnote{476. \textit{Id.} at 144-45. Waiver per se is not often an issue in income tax cases involving the attorney-client privilege since the privilege does not attach to information which the taxpayer intends his attorney to report in the contents of a tax return. \textit{See United States v. Merrell, 303 F. Supp. 490 (N.D.N.Y. 1969); United States v. Threlkeld, 241 F. Supp. 324 (W.D. Tenn. 1965); Colton v. United States, 306 F.2d 633 (2nd Cir. 1962).}}
\footnote{478. 360 F. Supp. 339 (M.D. Pa. 1973).}
\end{footnotes}
had retained independent accountants to aid him in the giving of tax and financial advice to a client. The court recognized that the accountant’s work could fall within the attorney-client privilege but so narrowed the protection afforded thereunder that the privilege was effectively neutralized. Using the no-confidentiality concept, the court permitted the government access to the following information: (1) the identities of the persons who aided in the preparation of the taxpayer’s return and the nature of the services provided; (2) the amount of fees paid to the accounting firm; (3) the sources of information used to prepare the returns; (4) the disposition of all books and records and accountant’s workpapers used in the preparation of the returns; (5) a detailed description of all books, records and workpapers used in the preparation of the taxpayer’s return.479

It is evident that much of the information which the court found “not confidential” and not protected by the attorney-client privilege relates to matters which both the taxpayer and his attorney believed to be confidential. This is especially true with regard to the sources and substance of the workpapers prepared by the accountants. The court, in dealing with these matters, stated:480

The workpapers should be protected insofar as they record client’s confidential communications: but much of the information contained in them may have come from unprotected sources, and a blanket claim of testimonial immunity arising from a consultative employment relationship falls short of meeting respondents’ burden to establish that the specific information they desire to withhold is within the scope of the privilege.

Accordingly, Schmidt must disclose the sources of information contained in his workpapers; to the extent they are unprotected, the substance of it must be revealed.

It is apparent from the discussion, and the cases cited above that, under proper circumstances, an accountant’s testimony and workpapers could fall within the scope of the attorney-client priv-

479. The court required the accountants to answer, inter alia, the following questions:
10A. Describe in detail the workpapers, memoranda and notations compiled in preparation of this 1969 return.
B. What disposition was made of those workpapers?
C. Where are the workpapers now?
D. Are they available?
E. For Internal Revenue Service review?
F. If not, why not?
480. Id. at 351.
ilege if proper precautions are taken by counsel. If an accountant is retained by the attorney to provide technical service and advice to aid the attorney in making legal judgments, the communications to the accountant and the accountant’s workpapers will fall within the attorney-client privilege. It would also be difficult for a court to force production of the accountant’s workpapers and the taxpayer’s personal documents if they are in the possession of the taxpayer. Although these technical requirements place an undue burden on the taxpayer, it is unfortunately necessary that they be followed religiously if the government is to be denied access to potential evidence which the taxpayer expects to be confidential.

C. The Attorney Performing Extra-Legal or Non-Legal Services and the Attorney Preparer

As originally indicated, not all communications between an attorney and his client are privileged. The attorney must have been acting in his capacity as a professional legal advisor at the time the disclosures were made.

[At]torneys frequently give to their clients business or other advice which, at least insofar as it can be separated from their essentially professional legal services, gives rise to no privilege whatever.

It seems clear then that where the attorney gives investment advice, handles financial transactions, or acts as a mere

481. The attorney-client privilege would be inapplicable. However, the taxpayer would be correctly asserting a claim of fifth amendment privilege against compulsory self-incrimination. The ownership-possession criteria enabling the taxpayer to assert the fifth amendment are as follows:

2. Ownership or possession may not be enough to invoke the privilege. See United States v. Zakutansky, 401 F.2d 68 (7th Cir. 1968), cert. denied, 393 U.S. 1021 (1969).
4. Possession is probably a prerequisite to the assertion of a valid fifth amendment claim. See, e.g., Couch v. United States, 409 U.S. 322 (1973); United States v. Hickok, 481 F.2d 377 (9th Cir. 1973); United States v. White, 477 F.2d 757 (5th Cir. 1973).
482. See cases cited at note 259 supra.
collection agent or business manager for a client,\textsuperscript{486} communicative information passed from the client to the attorney is not privileged. It is, however, not uncommon to find attorneys and their clients involved in transactions that can be characterized neither as clearly legal nor clearly nonlegal.\textsuperscript{487} In income tax cases, the most sensitive situations arise where an attorney, who also happens to be an accountant, prepares the client's income tax returns.

An early case dealing with an allegation of privileged communication to an attorney-accountant is \textit{In re Fisher}.\textsuperscript{488} Although the attorney-accountant had primarily performed legal services for his client, the transaction in question dealt with the auditing of his client's books and the preparation of the workpapers relating to that audit. The court compelled discovery of the records and workpapers. The test used by the court was that where the services performed by the professional are characteristically rendered by an accountant, the fact that the accountant happens to be an attorney does not change the status of what would otherwise be unprivileged communications.

In \textit{Olender v. United States},\textsuperscript{489} the nature of the services of the attorney-accountant did not facilitate the use of the \textit{Fisher} test. The attorney-accountant had prepared federal tax returns for the client and a net worth statement pursuant to a request by the Internal Revenue Service during the course of the subsequent tax investigation. The court concluded that since the attorney-accountant was retained to prepare income tax returns and financial statements the attorney-client privilege was inapplicable.\textsuperscript{490} The implication that the preparation of income tax returns was not within the province of an attorney's legal services was without prior judicial foundation.\textsuperscript{491} If tax return preparation is beyond the scope of legal services performed by an attorney-accountant,

\begin{thebibliography}{99}
\bibitem{485} Kelly v. Simon, 9 AFTR 2d 888 (S.D. Cal. 1962). \textit{But see In re Schwarz, 56-2 USTC \textsuperscript{10056} (D.D.C. 1956), aff'd on other grounds, sub nom. Commissioner v. Schwarz, 247 F.2d 70 (D.C. Cir. 1957), where it was held that a list of clients provided by a doctor to an attorney for collection was protected by the attorney-client privilege.}
\bibitem{486} Lowy v. Commissioner, 262 F.2d 809 (2nd Cir. 1959); Pollock v. United States, 202 F.2d 281 (5th Cir.), \textit{cert. denied,} 346 U.S. 993 (1953); Tothaker v. Orloff, 4 AFTR 2d 5029 (S.D. Cal. 1959).
\bibitem{487} United States v. Rosenstein, 474 F.2d 705 (2nd Cir. 1973).
\bibitem{488} 51 F.2d 424 (S.D.N.Y. 1931). \textit{See also United States v. Chin Lim Mow, 12 F.R.D. 433 (N.D. Cal. 1952).}
\bibitem{489} 51 F.2d at 425.
\bibitem{490} 210 F.2d 795 (9th Cir. 1954).
\bibitem{491} \textit{Id.} at 806.
\end{thebibliography}
logic commands the conclusion that a non-accountant attorney is not acting in his capacity as a professional legal advisor when he prepares an income tax return. Tax return preparation would be characterized as a non-legal service such as financial consultation or debt collection, and statements made to the attorney could be used as evidence against the client in a subsequent civil or criminal action against the client.\textsuperscript{492}

A far different analysis of the applicability of the attorney-client privilege to the preparation of tax returns was advanced by the Second Circuit in \textit{Colton v. United States}.\textsuperscript{493} The government attempted to compel both testimony and various documents relating to the preparation of the client's federal income tax return. The attorney appeared before the investigator but refused to give either testimony or documents, relying on the attorney-client privilege. The court, assuming that privilege applied, concluded that some matters under investigation were not privileged.\textsuperscript{494} With respect to the workpapers and documents involved, the court affirming the district court, held that:\textsuperscript{495}

\begin{quote}
[The attorney could] withhold any particular confidential papers which were 'specifically prepared by the client for the purpose of consultation with his attorney' and any of the firm's memoranda and worksheets to the extent of any unpublished expression made by an attorney therein of confidences which had passed between him and his clients.
\end{quote}

The court's analysis is simply that any blanket refusal to produce testimony or documents is unjustified. Furthermore, the burden of establishing the confidential nature of the material, in the court's view, is upon the attorney.\textsuperscript{496}

This decision has been criticized, with justification, in that

\textsuperscript{492} See \textit{Lofts, The Attorney-Client Privilege in Federal Tax Investigations}, 19 TAX L. Rev. 405, 454 (1964); \textit{Peterson, Attorney-Client Privilege in Internal Revenue Service Investigations}, 54 Minn. L. Rev. 67, 92 (1969); cf. \textit{Canady v. United States}, 354 F.2d 849 (8th Cir. 1966). In fairness to the Olender court, it should be pointed out that the attorney-accountant was an employee of an accounting firm and not actively engaged in the practice of law. In addition an attorney was consulted as to what information should be used in the net worth statement. These factors tend to put the professional services on the accountant side of the services test and the court's conclusion is probably justified. See 210 F.2d at 806.

\textsuperscript{493} 306 F.2d 633 (2nd Cir. 1962), cert. denied, 371 U.S. 951 (1963).

\textsuperscript{494} Such matters as remuneration received and the nature of the services rendered were held not confidential and thus not protected by the privilege. 306 F.2d 633 at 637-38.

\textsuperscript{495} Id. at 639.

\textsuperscript{496} Id.
it places a "serious and unjustified limitation on the privilege". The government should be denied any inquiry which would lead to disclosure of privileged information or to open additional avenues of proof of the matters protected by the privilege. The issue of what is privileged and what is not in a federal income tax investigation is one of the most difficult and sensitive matters in this area of the law. An in camera inspection by a judge is the only solution if the issue winds up in court. Most of these matters, however, are handled in administrative proceedings where disclosure to the government, even if later excluded in a court proceeding, could be seriously damaging to a taxpayer. The solution on an administrative level, in light of the other sources of information available to the government, should be resolved in favor of the taxpayer.

In Threlkeld v. United States, an attorney-certified public accountant, asserting the attorney-client privilege, refused to testify or to produce documents in connection with an estate tax return he had prepared. Apparently following the rule of Fisher, without citation thereto, the court found that since he only held himself out as an attorney he was entitled to claim the attorney-client privilege to the extent of its applicability to the communications and documents involved. With regard to the problem of what fell within the privilege, the court, relying on Colton, in part held:

Any communication by the client with the understanding that the information would be inserted in the return must be divulged . . . The reason is that, with such an understanding, it could not be intended to be confidential.

500. Id. at 326. The court apparently came to the correct conclusion. The mere fact that a practicing attorney also happens to be a certified public accountant as in Threlkeld should not deprive his client of the privilege any more than the fact that a practicing accountant also happens to be an attorney as in Olender should bestow the protection of the attorney-client privilege upon his client. Cf. LOFTS, How to Handle Tax Audits, Requests for Rulings, Fraud Cases and Other Procedures Before the I.R.S. at 129 (I. Schreiber ed. 1963), and United States v. Higgins, 266 F. Supp. 593 (S.D. W.Va. 1966) where an attorney-accountant practicing as an attorney was denied the use of the attorney-client privilege for documents primarily of an accounting nature.
501. 241 F. Supp. at 326. See text accompanying notes 428-32 and 451 supra for a larger explanation of the role of the return disclosure theory.
Information communicated by the client with the direction that it not be inserted in the return or with the direction that it be, or not be, so inserted in the discretion and judgment of [the attorney] need not be divulged. . . .

Although this decision is more palatable than either Colton or Olender, it fails to restrict governmental discovery of all "essential" matters disclosed by an attorney except where he has been directed not to disclose or has been given discretion in selecting what information should be reported in the return. The difficult question is who decides whether the client did or did not restrict or give carte blanche approval for disclosure or nondisclosure? If the Service is to decide that question on an administrative level, all the difficulties raised by Colton once again overshadow the availability of the attorney-client privilege. 502

A blatantly superficial analysis and commensurately superfluous result can be found in Canady v. United States, 503 where an attorney practicing as such prepared income tax returns for a client under investigation by the Internal Revenue Service. The taxpayer sought the protection of the attorney-client privilege to prevent the attorney from disclosing information or documents in his possession. The Court of Appeals for the Eighth Circuit, affirming the holding of the district court, held that the privilege was inapplicable since the attorney "had acted not as a lawyer, but merely as a scrivener for defendant." 504 It is difficult to believe that a person would retain counsel merely to copy numbers from one paper to another. Certainly, the expectation of a taxpayer in hiring an attorney to prepare his return is that the attorney will use his skill and legal judgment to minimize taxes and to prepare an accurate return. 505 In addition to suffering from weakness of logic, the two cases cited by the court in support of its decision are either in direct contradiction or inapposite. Falsone v. United States 506 involved not an attorney, but an accountant who unsuccessfully attempted to gain recognition of an accountant-client privilege. Colton v. United States 507 it will be remembered, in-

502. See text accompanying notes 372-86 infra.
503. 354 F.2d 849 (8th Cir. 1966).
504. Id. at 857.
506. 205 F.2d 734 (6th Cir.) cert. denied, 346 U.S. 964 (1953).
volved the successful claim of the attorney-client privilege where the court specifically recognized that tax return preparation was "sufficiently within the professional competence of an attorney to make [it] prima facie subject to the attorney-client privilege." Thus, framed in both logic and precedent, the decision in Canady proclaiming income tax preparation as the work of a "scrivener" is impossible to support.

CONCLUSION

The confusion which exists in this area is the direct result of a tripartite theory of law which expects: accountant-preparers to be knowledgeable in tax matters and yet to be accessible to the government prodding into their clients' affairs; attorney-accountant preparers to be knowledgeable in tax matters and semi-accessible to government investigations into their clients' affairs; and attorneys to be knowledgeable in tax matters and willing to allow the government to decide whether the government should prod into their clients' affairs. An analysis of what should be privileged for all professional preparers should include a limited privilege to refuse disclosure on all matters or materials brought to their attention by the client in aid of the preparation of income tax returns. The privilege should also extend to any materials prepared by the professional return preparer bearing any relationship to their clients' income tax returns. This result should be compelled because the government has broad discovery techniques available without its being necessary to invade a relationship that carries with it an expectation of privacy in matters generally too complex for the unsophisticated average citizen. It is likely that the absence of professional guidance in the preparation of returns would result in greater tax fraud than now exists merely because of the complexity of the law and the inability of most non-professionals to interpret correctly the statutes and regulations.

508. 306 F.2d 637.