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Deterring the Formation of the Attorney-Client Relationship: Disclosure of Client Identity, Payment of Fees, and Communications by Fiduciaries

DANIEL J. CAPRA*

In recent months, state and federal courts have, consistent with well-established but little-investigated principles, limited the scope of the attorney-client privilege.¹ On the federal level, the Tax Reform Act of 1984 requires people to report the receipt of cash payments in excess of \$10,000.² The Internal Revenue Service has promulgated a Form 8300 for this purpose and is attempting by way of summonses to compel attorneys who submit I.R.S. 8300 Forms to disclose the names of clients who have paid their fees in cash amounts over \$10,000.³ An IRS commissioner has stated that the government intends to use the 8300 report as "another weapon in fighting the war on drugs and in combatting organized crime across the board."⁴ In contrast, the President of the American Bar Association has called the serving of I.R.S. summonses "an unmitigated attack on the sanctity enjoyed by all citi-

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1. Under federal practice, the state law of privilege applies where state law provides the rule of decision. FED. R. EVID. 501. Where federal law supplies the rule of decision, the attorney-client privilege is determined by the federal common law, as it develops in the light of reason and experience. Thus, the attorney-client privilege is not codified under federal law. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (summarizing federal case law on the privilege). Generally speaking, however, the federal courts have adopted the famous Wigmore definition of the attorney-client privilege: the privilege applies to a statement by the client to an attorney or his agents, where the client is seeking legal advice, and the communication is intended to be confidential. See, e.g., *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1036 (2d Cir. 1984) (implicitly adopting language of the Wigmore test); See generally, Capra, *The Federal Law of Privileges*, 16 LITIGATION 32 (1989) (for a discussion of common law privileges).

In New York, the attorney-client privilege is codified by CPLR 4503, which protects a "confidential communication made between the attorney or his employee and the client in the course of professional employment." N.Y. CIV. PRAC. L. & R. 4503 (McKinney Supp. 1990). CPLR 4503 has been interpreted as a codification of the Wigmore test. See J. WEINSTEIN, H. KORN & A. MILLER, *NEW YORK CIVIL PRACTICE* 45-92.1 (1989) (citing to 8 J. WIGMORE, *EVIDENCE* §§ 2290-2393 (McNaughton rev. ed. 1961)).

2. 26 U.S.C. § 6050I (1988).

3. Under 26 U.S.C. § 6050I, the I.R.S. drafted regulations which require all persons "engaged in a trade and business," including attorneys, to report cash received in excess of \$10,000 on a Form 8300. In addition to the name of the payer, the regulations also require disclosure of the payer's address, date of birth, social security number, and business, profession or occupation.

4. Fricker, *U.S. Targets Lawyers*, A.B.A. J., May 1990, at 18-19 (quoting I.R.S. Commissioner Fred T. Goldberg, Jr.).

zens to seek legal assistance in confidence.”⁵ Attorneys have in the past filled out the 8300 Forms, but have left blank the name of the client, on the ground that supplying the name would disclose information which could be adverse to the client, to wit: that the client thought he had a legal problem, sought legal advice for it, and paid in cash. Currently, the I.R.S. is proceeding with a number of Form 8300 test cases, in which I.R.S. summonses have been served for the missing information.⁶ One such case, *United States v. Fischetti*,⁷ resulted in a victory for the I.R.S. in the Southern District of New York. The I.R.S. took the position that the name of the client is not protected by the attorney-client privilege, and therefore that the I.R.S. has an absolute right to the information.⁸

In an unpublished ruling, Judge Broderick of the Southern District of New York held that two New York criminal defense firms were required to supply the names of clients on the Form 8300s filed with the I.R.S.⁹ Judge Broderick stayed enforcement of the summonses pending appeal, and suggested that the law firms and the I.R.S. work together to develop guidelines for client disclosure. The Judge stated that there might be “special circumstances” in

5. *IRS Serves Summonses on Attorneys for Client Transaction Information*, 46 CRIM. L. RPTR. (BNA) 1503-04 (Mar. 14, 1990) (quoting American Bar Association President L. Stanley Chauvin).

6. See N.Y.L.J., Mar. 8, 1990, at 1, col. 2:

The Internal Revenue Service, hoping to expose major drug figures, has served summonses on criminal defense attorneys around the country, demanding the names of clients who paid cash for fees exceeding \$10,000. . . . One attorney served said an IRS agent told him 900 attorneys were to receive summonses. Neal Sonnett of Miami, president of the National Association of Criminal Defense Lawyers, predicted “hundreds of attorneys will go to jail” rather than comply.

See generally Kenderline, *The Internal Revenue Service Summons to Produce Documents: Powers, Procedures, and Taxpayer Defenses*, 64 MINN. L. REV. 73 (1979) (treating extensively the power of the I.R.S. to compel production of documentary evidence by summons).

7. No. M-18-304 (S.D.N.Y. Mar. 13, 1990).

8. Federal courts have held that they have the authority to impose reasonable conditions on enforcement of an I.R.S. summons, if unlimited enforcement would be unfair or tantamount to abuse of process. See, e.g., *United States v. Rockwell Int'l*, 897 F.2d 1255, 1261 (3rd Cir. 1990) (citing cases upholding the authority to enforce). But see *United States v. Barrett*, 837 F.2d 1341 (5th Cir. 1988), cert. denied, 109 S. Ct. 3264 (1989) (court has no power to impose conditional enforcement of I.R.S. summonses). In *United States v. Zolin*, 109 S. Ct. 2619 (1989), an equally divided Supreme Court upheld a Ninth Circuit ruling that I.R.S. summonses could be enforced conditionally to protect against abuse of the judicial process. Under the court's ruling, however, even if information sought by the I.R.S. is not privileged, a court can impose limitations on disclosure, such as refusing a blanket enforcement of summons on all defense attorneys.

In addition, 26 U.S.C. § 7602(c) authorizes the quashing of an I.R.S. summons if the I.R.S. has referred the matter under investigation to the Justice Department for criminal prosecution. But the statute bars the use of the summons procedure only after the decision to prosecute or convene a grand jury has been made. 26 U.S.C. § 7602(c)(2)(i) (1988). Thus, a proper purpose for an I.R.S. summons is to determine whether a person should be recommended to the Justice Department for prosecution.

9. Fricker, *supra* note 4 at 18.

other cases when the privilege would apply, but did not specify what those special circumstances might be.¹⁰

On the state level, the New York Court of Appeals recently held in *Hoopes v. Carota* that: 1) the attorney-client privilege does not generally protect information concerning the attorney-client relationship itself, such as fee payments and the fact of consultation; and 2) beneficiaries should have some right of access to confidential communications between their fiduciary and an attorney.¹¹

The rulings in these cases are not unprecedented. It has been often held that the attorney-client privilege does not apply to the incidents of representation such as the name of the client, the fact of consultation, or the fee payment. It is also well-accepted that a fiduciary cannot generally shield his or her communications with an attorney from those whom the fiduciary ostensibly represents. Yet these cases are examples of the courts' failure to recognize the importance of the attorney-client relationship and the attorney's duty of zealous representation. If the attorney is forced to give information detrimental to the client's interest, the attorney-client relationship will only suffer. In the long run, there will be a detrimental chilling effect on the attorney, especially the criminal defense attorney who is put in the untenable position of having to face disqualification for giving evidence against the client. Indeed, the chilling effect will run even to the formation of the attorney-client relationship: what client will seek advice if the very seeking of that advice can be used against him? What fiduciary will seek advice if the fiduciary's communications can be disclosed to a possible adversary?

It is one thing if the client is using the attorney to further a plan of crime and fraud. Such a relationship should be deterred, whether or not the attorney is aware of the client's motivations. But it is another thing if a client is seeking legal advice for permissible purposes, which nonetheless could result in adverse consequences if disclosed. In such circumstances, disclosure deters the formation of the attorney-client relationship, imposes an ethical dilemma on attorneys who may be forced to give adverse information against the client, and skews the adversary system through *ad hoc* disqualification. These costs far outweigh whatever gains that disclosure of client information brings to the search for truth.

This article describes ethical issues governing the attorney-client relationship other than the privilege in order to highlight the nature of the relationship. It then analyses how that relationship is being undermined by focussing on the current state of the law of the attorney-client privilege as it

10. Brodsky, *An Attorney's Obligation to Identify Clients Who Pay Cash Fees*, N.Y.L.J., May 29, 1990, at 1, col. 3. Thus, the judge refused to grant the government's request for a sweeping order which would have precluded refusals to comply in future cases by other attorneys.

11. 74 N.Y.2d 716, 543 N.E.2d 73, 544 N.Y.S.2d 808 (1989).

relates to disclosure of clients' names and consultations by fiduciaries. It will discuss the ethical problems created by required disclosure, and will advocate a uniform approach to protect this information unless it is being used to further a crime or fraud.

I. ETHICAL CONSIDERATIONS BEYOND THE PRIVILEGE

Even if the privilege is inapplicable, there may still be some limited protection for attorneys subject to demands for client information. The privilege is only one aspect of the trust and confidence that is necessary for an effective attorney-client relationship. The attorney's ethical obligation to protect against disclosure of adverse client information extends beyond the evidentiary privilege.¹² This obligation is based on the proposition that the trust and confidence which is the foundation of the attorney-client relationship do not rest solely on the privilege, but also on the expectation that the attorney has a duty of loyalty and will represent the client's interests in every appropriate way. It is hardly conducive to trust and confidence if the attorney is forced to give damaging information about his client to the government.¹³ Moreover, forcing the attorney to become a witness against the client may require the attorney to disqualify himself, with an obvious deleterious effect on the attorney-client relationship.¹⁴ Finally, a prosecutor's subpoena of defense counsel can have a significant chilling effect on the lawyer and on the defense bar as a whole. In one study, 14% of the members of the National

12. See N.Y. CODE OF PROFESSIONAL RESPONSIBILITY, DR 4-101(A) (an attorney must keep client "secrets," defined as "information gained in the professional relationship which the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client."). Thus, the term "secret" includes much information which is not protected by the evidentiary attorney-client privilege. See also *Proposed Amendments to the Lawyer's Code of Professional Responsibility*, 42 THE RECORD OF THE A. OF THE B. OF THE CITY OF NEW YORK 323, 329 (1987) (disagreeing with State Bar Committee's proposal to excuse duty to report lawyer misconduct where disclosure would reveal client "secrets"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1983) (prohibiting an attorney from revealing any information relating to representation of a client, whether or not such information is privileged).

13. See A.B.A. COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, REPORT TO THE HOUSE OF DELEGATES 7 (February, 1990) ("There could be few things more destructive of [the expectation of trust and confidence] than the spectacle of [the client's] own attorney forced by their adversary to supply information detrimental to their interest."). See also *In re Grand Jury Investigation* (Sturgis), 412 F. Supp. 943, 946 (E.D. Pa. 1976) ("The very presence of the attorney in the grand jury room . . . can raise doubts in the client's mind as to his lawyer's unfettered devotion to the client's interests and thus impair or at least impinge upon the attorney-client relationship.").

14. See N.Y. CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-102(B) (If lawyer must testify adversely to his client, the lawyer and his firm must withdraw from acting as an advocate before the tribunal); MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 3.7(a) (Rules provision corresponding to DR 5-102(B)). See also *In re Grand Jury Investigation* (Sturgis), 412 F. Supp. at 945-46 ("The practice permits the government by unilateral action to create the possibility of a conflict of interest between the attorney and client, which may lead to a suspect's being denied his choice of counsel by disqualification.").

Association of Criminal Defense Lawyers responding said that they would no longer take a major criminal case due to their fear of receiving a subpoena for client information and having to face such a serious ethical dilemma.¹⁵

For all these reasons beyond those based in the evidentiary privilege, a few courts have imposed limitations on the issuance of subpoenas upon attorneys for client information; even if the information is not privileged, these courts are cognizant of the damaging effect such subpoenas may have upon the attorney-client relationship.¹⁶ Also, the Attorney Subpoena Guidelines of the Department of Justice permit a subpoena to an attorney for client information to be issued only if the information is not accessible from other sources, and the need for the evidence outweighs the potential harm to the attorney-client relationship.¹⁷ A problem with the Guidelines, however, is that they are not enforceable by a court if they are violated.¹⁸

In New York, the Appellate Divisions have recently rejected a proposal from the State Bar House of Delegates which would have amended the *New York Code of Professional Responsibility* to address the problem of subpoenaing attorneys for client information. The proposed amendment would have required a prosecutor to obtain a court order upon a showing of substantial need before demanding information from a defense attorney.¹⁹ A similar provision has recently been passed by the A.B.A. House of Delegates, adding a new paragraph (f) to Rule 3.8 of the A.B.A.'s *Model Rules of Professional Conduct*. The new paragraph forbids the subpoena of a lawyer for client information unless the information sought is essential to the successful com-

15. See Genego, *Reports from the Field: Prosecutorial Practices Compromising Effective Criminal Defense*, CHAMPION, May, 1986, at 7-18. See also *In re Grand Jury Matters*, 593 F. Supp. 103, 107 (D.N.H. 1984), *aff'd sub nom.* United States v. Hodes, 751 F.2d 13 (1st Cir. 1985) ("Also to be considered is the ever increasing specter of malpractice suits, the possible vindictiveness of prosecution counsel towards a successful, recalcitrant, obnoxious or obfuscating adversary, the jeopardizing of the attorney-client relationship, real or imaginary, the reluctance of capable attorneys to continue or to consider a full or partial career in the practice of criminal law and the further depletion in the paucity of capable trial lawyers because of a concatenation of events leading to abuse of process.").

16. See, e.g., *In re Stewart*, 156 A.D.2d 294, 548 N.Y.S.2d 679 (1st Dep't 1989) (enforcement of subpoenas for fee information should be stayed until attorneys' representation of clients in current matter is terminated; even though information is not privileged, a stay is necessary to limit "chilling effect" on attorney-client relationship). But see *In re Grand Jury Subpoena* (Slotnick), 781 F.2d 238, 243-44 (2d Cir. 1985), *cert. denied sub nom.* Roe v. United States, 475 U.S. 1108 (1986) (court order upon showing of substantial need is not required before serving subpoena on attorney for fee-related information; attorney is entitled to no special treatment).

17. See UNITED STATES DEPARTMENT OF JUSTICE MANUAL, § 9-2.161 (prohibiting subpoenaing of jurors).

18. *In re Klein*, 776 F.2d 628, 635 (7th Cir. 1985). See also *In re Grand Jury Subpoenas*, 906 F.2d 1485, 1496 (10th Cir. 1990) (violation of Department of Justice Guidelines creates no cause of action and does not affect the validity of a subpoena: "They may enable the Department to control those in the field, but once an agent of the Department acts, the legal status of that act depends on other rules of law.").

19. See Proposed DR 7-103(C), N.Y. STATE B. ASS'N, DRAFT OF THE LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY (Oct. 5, 1987).

pletion of an ongoing investigation, and there is no alternative source for the information. The A.B.A. provision further requires the prosecutor to obtain judicial approval of a subpoena after an opportunity for an adversary hearing.²⁰

The provision proposed by the New York State Bar and adopted by the A.B.A. is undoubtedly controversial in light of the position of the federal circuit courts in cases such as *In re Grand Jury Subpoena Served upon John Doe*.²¹ In *Doe*, the Second Circuit specifically rejected the proposition that judicial approval and a showing of special need was required before a defense attorney could be subpoenaed for fee-related information. However, *Doe* does not at all preclude the imposition of discipline for failing to seek such judicial approval.

The courts which have considered the propriety of subpoenaing defense attorneys have generally done so in the context of a Sixth Amendment challenge: the client argues that the possible disqualification of counsel under the attorney-witness rule deprives the client of the Sixth Amendment right to counsel of choice. In *Doe*, the Second Circuit held that neither the Sixth Amendment nor the attorney-client privilege were violated when the defense attorney was subpoenaed to give fee-related information before the grand jury. The court in *Doe* reasoned that the client's Sixth Amendment right to counsel was not implicated by a grand jury subpoena since that right does not attach until the defendant has been indicted.²² This has been a virtually unanimous opinion in the federal circuit courts.²³

Even after an indictment, a subpoena of a defense attorney may be upheld as a constitutional matter, despite the fact that it may result in disqualification of counsel. This is because the right to chosen counsel is qualified by legitimate state interests; and one such interest is that of investigating and

20. 58 U.S.L.W. 2476 (Feb. 20, 1990). Massachusetts, New Hampshire, Tennessee, and Virginia have already adopted ethical prohibitions similar to that found in new Model Rule 3.8 (f). See, e.g., MASS. SUP. JUD. CT. R. 3:08 PF 15 (requiring judicial approval before issuing subpoena for client information). Similar rules are being considered by the District of Columbia, Pennsylvania and Rhode Island. Illinois and New York have rejected the imposition of any ethical limitation upon a prosecutor seeking client information from a defense attorney. See A.B.A. COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, REPORT TO THE HOUSE OF DELEGATES (Feb. 1990) for the text of new Model Rule 3.8 (f) and a discussion of state activity on this matter.

21. 781 F.2d 238 (2d Cir.) (en banc), cert. denied sub nom. *Roe v. United States*, 475 U.S. 1108 (1986).

22. 781 F.2d at 244. See also *In re Grand Jury Proceedings*, (Rabin), 896 F.2d at 1277 (Sixth Amendment controversy not ripe before indictment); *United States v. Sims*, 845 F.2d 1564, 1569 (11th Cir.) (Sixth Amendment does not require the government to make a preliminary showing of relevance and need before a lawyer can be compelled to appear before a grand jury), cert. denied, 488 U.S. 957 (1988); *In re Grand Jury Subpoenas*, 906 F.2d 1485, 1493 (10th Cir. 1990) ("We agree with these circuits that no sixth amendment rights attach prior to indictment or after all appeals have been exhausted.").

23. See 906 F.2d at 1493.

prosecuting crime or fraud.²⁴ While the client's right to *some* counsel is absolute, the absolute right to counsel is not implicated when a particular attorney is disqualified, since the client still has the right to retain a different counsel.²⁵ Thus, the only practical limitation imposed by the Sixth Amendment is that the government cannot subpoena a defense attorney post-indictment, if the only purpose of the subpoena is to cause a disqualification or to harass and intimidate defense counsel.²⁶ Ordinarily the government can come up with a plausible explanation for the issuance of a subpoena, even post-indictment.²⁷

Neither *Doe* nor any other case has held or could hold that a subpoena served upon a defense attorney presents no threat to the attorney-client relationship. The fact that a subpoena upon a defense attorney is not prohibited by the Constitution or by an evidentiary rule does not necessarily mean it is ethical or good social policy. Of course, defense counsel does not violate his

24. See *Doe*, 781 F.2d at 251 ("courts have the power and duty to disqualify counsel where the public interest in maintaining the integrity of the judicial system outweighs the accused's constitutional right"); *United States v. Perry*, 857 F.2d 1346, 1350 (9th Cir. 1988) (no Sixth Amendment violation where probative value of evidence outweighs the defendant's interest in retaining chosen counsel); *In re Grand Jury Subpoenas*, 906 F.2d at 4193-94 ("The risk of disqualification should remain for determination at an *in limine* hearing by the trial judge who must weigh the probative value of the information the government seeks against the loss of counsel of the accused's choice.") (quoting *Doe*, 781 F.2d at 250). See also *United States v. Monsanto*, 109 S. Ct. 2657, 2666 (1989) (right to chosen counsel is qualified by legitimate interests of the criminal justice system).

25. See *Wheat v. United States*, 486 U.S. 153, 159 (1988) (Sixth Amendment not violated where chosen counsel is disqualified due to conflict of interest: "The Sixth Amendment right to choose one's counsel is circumscribed in several important respects."). See generally *Green, Through a Glass Darkly: How the Court Sees Motions to Disqualify Criminal Defense Lawyers*, 89 COLUM. L. REV. 1201 (1989) (criticizing the analysis and result in *Wheat* and suggesting that ethical standards do not require disqualification where a client is to be cross-examined in the trial of another client).

26. See, e.g., *In re Grand Jury Matters*, 751 F.2d 13 (1st Cir. 1984) (subpoena quashed where it was issued right before trial in circumstances arguably for purposes of intimidating defense attorneys and interrupting their preparation for trial).

27. A prosecutor may not use the grand jury's subpoena power to gather evidence solely for use in the trial of a pending indictment. See 8 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 6.04[5]. However, a prosecutor serving a subpoena post-indictment will obviously articulate a legitimate purpose—such as to investigate the client or the attorney on a further charge. Courts understandably hesitate to assume that a prosecutor's sole or principal purpose in issuing a subpoena is to gather evidence for a pending trial. See *Beverly v. United States*, 468 F.2d 732, 743 (5th Cir. 1972) (subpoena of previously indicted witnesses proper where purpose is to identify co-conspirators). In the absence of clear evidence to the contrary, the courts presume that a prosecutor has acted properly in issuing a subpoena. *In re Antitrust Grand Jury Investigation*, 714 F.2d 347, 350 (4th Cir. 1983) ("Once it is shown that a subpoena might aid the grand jury in its investigation, it is generally recognized that the subpoena should issue even though there is also the possibility that the prosecutor will use it for some purpose other than obtaining evidence for the grand jury."). See also *In re Grand Jury Proceedings (Rabin)*, 896 F.2d at 1279 (no abuse of grand jury process where clients of subpoenaed attorneys had not previously been indicted for tax evasion, and where prosecutor alleged that the primary purpose of the subpoena was to gather information relevant to grand jury's investigation of tax evasion; while information was relevant to pending indictments, it was also relevant to grand jury's ongoing investigation, and improper purpose could not be presumed).

or her duty of confidentiality by complying with a court order.²⁸ But the propriety of a prosecutorial demand for the information is still open to question. The constitutional analysis of *Doe* and like cases does not preclude the adoption of a disciplinary rule such as already exists in Massachusetts, which requires prosecutors to seek judicial approval before they subpoena defense attorneys.²⁹

The court in *Doe* did state that the grand jury would be stopped "dead in its tracks" by a limit upon the prosecutor's power to subpoena defense attorneys. But such a fear is overstated and unwarranted; any concern about grand jury efficiency is clearly outweighed by the threat posed to the defense attorney and the client by unrestrained use of the prosecutor's subpoena power.³⁰

It has been contended that the Supremacy Clause would bar the application to federal prosecutors of a rule such as proposed by the New York State Bar. This argument was made in *United States v. Klubock*, but was rejected on the ground that the Massachusetts rule had been incorporated as a local rule of the federal district court.³¹ If that were not the case, the Supremacy Clause issue would have been determinative in *Klubock*. But the existence of a Supremacy Clause issue is hardly a reason for rejecting state-imposed ethical limitations on intrusions into the attorney-client relationship. For one thing, the Supremacy Clause argument is obviously not applicable to state prosecutors. For another, adoption of a state-imposed ethical rule would almost inevitably lead to its inclusion in the Rules of the District Courts as well.³² And finally, it is not self-evident that the Supremacy Clause would bar the application of state-imposed ethical limitations to federal prosecutors at any rate.³³ It is well established that the regulation of the legal profession is a proper exercise of state power, and that power includes the

28. See *In re Grand Jury Subpoenas*, 906 F.2d at 1498 (Oklahoma Rule of Professional Conduct 1.6 not violated by compliance with court order).

29. See *United States v. Klubock*, 832 F.2d 664, 667 (1st Cir. 1987) (disciplinary rule limiting subpoenas on attorneys, incorporated as local rule of court, upheld as a proper exercise of rulemaking authority of federal court). See also Sheridan, *Grand Jury Subpoenas to Criminal Defense Attorneys: Massachusetts Restrains the Federal Prosecutor Through an 'Ethical' Rule*, 2 GEO. J. LEGAL ETHICS 485, 490-91 (1988) (balancing the right to counsel with society's interest in effective justice).

30. See 832 F.2d at 671 (concerns over prosecutorial abuse of subpoena power are not unwarranted) (Breyer, J., dissenting).

31. 832 F.2d at 667.

32. For instance, the Court Rules of the Northern, Eastern and Southern Districts of New York incorporate by reference all provisions of the *New York Code of Professional Responsibility*, and the Rules of the Western District require familiarity with the *Code*, and impose sanctions parallel to those imposed under State Bar rules. See, e.g., FED. LOCAL CT. R. (S.D., E.D.N.Y.) RULE 4(F) (incorporating provisions of *N.Y. Code of Professional Responsibility*).

33. See *United States v. Klubock*, 639 F. Supp. at 122. (Disciplinary Rule identical to State Bar proposal is not in conflict with any federal law, and is not inconsistent with any dominant federal interest).

authority to regulate the conduct of federal prosecutors insofar as it is not inconsistent with federal law.³⁴

II. TWO CATEGORIES OF INFORMATION: SUBSTANCE AND "INCIDENTS"

The decision in *Hoopes v. Carota* is exemplary of most courts' positions on disclosure of the incidents of representation and communications by fiduciaries. In *Hoopes*, plaintiffs were beneficiaries of a trust which held stock in a corporation that their family had founded. They brought an action against the Chief Executive Officer of the corporation, who was also a member of its board of directors and a trustee of the trust to which plaintiffs were beneficiaries. The action was brought to remove defendant as a trustee, on the ground that defendant had engaged in self-dealing and other misconduct, both as a trustee and in his corporate capacity. The alleged misconduct included promulgation of salary increases and long-term employment contracts, and rejection of merger possibilities which were favorable to shareholders and not to management.

During deposition, plaintiffs asked defendant whether he had consulted attorneys as to any proposed sale, merger, or acquisition of the corporation; if so, what advice was given; and whether he consulted the attorney in an individual or a fiduciary capacity. Plaintiffs also asked defendant to disclose any legal opinions he sought and received as a fiduciary, on any trust or corporate matters. Finally, plaintiff asked for information about arrangements for paying defendant's legal fees in the instant action. To all these questions, defendant claimed the attorney-client privilege. The Appellate Division, Third Department, held that the privilege did not apply to any of the information requested,³⁵ and the Court of Appeals affirmed that ruling in a memorandum opinion.

The information requested in *Hoopes* can be usefully divided into two categories, and was so divided by the Third Department and the Court of Appeals. First, the plaintiff wanted to know about the "incidents" of the attorney-client relationship itself: was an attorney consulted? If so, in what capacity (individual or fiduciary)? And how would the fees be paid—from personal or corporate funds? The defendant in *Fischetti* was also asked to provide the same type of information. There, the I.R.S. summons to compel disclosure of the client's identity dealt with the "incidents" of the attorney-client relationship.

Second, plaintiffs in *Hoopes* wanted to know about the substance of the legal advice and communications that defendant received concerning the op-

34. See *United States v. Kepros*, 759 F.2d 961, 968 n.5 (1st Cir.) (applicable state rules of discipline govern prosecutorial misconduct in federal courts), *cert. denied*, 474 U.S. 901 (1985).

35. *Hoopes v. Carota*, 142 A.D.2d 906, 531 N.Y.S.2d 407 408(1989).

eration of the trust and the corporation. Different legal analysis applies to these two categories of information; but a proper view of the privilege protects both categories of information for similar reasons.

INCIDENTS OF THE ATTORNEY-CLIENT RELATIONSHIP

The general rule in both the federal and state courts is that the incidents of the attorney-client relationship are not covered by the privilege.³⁶ The privilege protects only confidential communications made for the purpose of obtaining legal advice. The incidents of the relationship—whether an attorney was consulted, the name of the client, and the fee arrangement—are not protected since they are not confidential communications. This proposition stems from the widespread view that the attorney-client privilege is concerned solely with assuring that the attorney is an effective adviser and advocate.³⁷

The attorney's effectiveness is dependent on a free flow of information between attorney and client.³⁸ This free flow could not occur if the client felt inhibited from telling the attorney the truth. One of the leading exponents of this "communication rationale" of the privilege is Judge Winter, author of the oft-cited opinion of *United States v. Shargel*:

Absent the privilege . . . [l]awyers would routinely have to choose between forgoing information indispensable to the provision of informed and competent legal representation or hearing the information and exposing the client to risk of subsequent disclosure to the adversary.³⁹

Under the communication rationale, the incidents of an attorney-client relationship such as fact of representation, name of client, and fee arrangement will almost never be privileged, since such information does not have an impact on the attorney's effectiveness. It is only after an attorney-client relationship has been formed that there can be concern about whether an attorney will be an effective advocate. Information such as identity of the client and the fact and extent of representation is generally incidental and

36. *Hoopes v. Carota*, 74 N.Y.2d at 717, 543 N.E.2d at 74, 544 N.Y.S.2d at 409. See generally Saltzburg, *Communications Falling within the Attorney-Client Privilege*, 66 IOWA L. REV. 811 (1981) (discussing the scope of the attorney-client privilege).

37. See generally *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1451, 1515-24 (1985) [hereinafter *Privileged Communications*] (discussing the "effective advocate concern" and the "incrimination concern" as two opposing rationales for the attorney-client privilege).

38. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) ("The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.").

39. *In re Shargel*, 742 F.2d 61, 63 (2d Cir. 1984); see also 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶503(02) (1982) (the theory of the privilege is that encouraging clients to make the fullest disclosure to their attorneys enables attorneys to act more effectively).

preparatory to the formation and maintenance of the relationship, and has nothing to do with the free flow of information once that relationship has been established. It is collateral to and preliminary to the confidential communications themselves.⁴⁰

Put another way, the focus of the privilege in most courts is on the information the client will offer if he or she knows the communications will be confidential. Communications respecting the formation and extent of the attorney-client relationship do not meet this standard. As Judge Winter stated in *Shargel*:

Absent special circumstances, disclosure of the identity of the client and fee information stand on a footing different from communications intended by the client to explain a problem to a lawyer in order to obtain legal advice. . . . A general rule requiring disclosure of the fact of consultation does not place attorneys in the professional dilemma of cautioning against disclosure and rendering perhaps ill-informed advice or learning all the details and perhaps increasing the perils to the client of disclosure.⁴¹

A small minority of courts take a different view of the privilege. This view emphasizes the client's need to seek legal representation to determine the legality of a proposed or past course of conduct. Without the privilege, the client faces a Hobson's choice: either go without legal services and be inadequately informed, or confer with an attorney and run the risk of incrimination through the attorney's disclosure.⁴² Instead of emphasizing the attorney's role, this "incrimination rationale" focuses on encouraging the client to seek representation. Courts following the incrimination rationale will invoke the privilege when without it the risk of incrimination will deter the client from seeking an attorney.⁴³ These courts recognize that the client's fear of incrimination often preempts the lawyer's need to be an effective advocate; that is, if fearful clients never consult attorneys in the first place, the effectiveness of attorneys' representation never becomes an issue.

40. See *In re Grand Jury Subpoenas* (Hirsch), 803 F.2d 493, 496 (9th Cir. 1986) ("The fact of representation and the associated fee arrangement are preliminary, by their own nature, establishing only the existence of the relation between client and counsel, and therefore, normally do not involve the disclosure of any communication arising from that relation after it was created.").

41. 742 F.2d at 63. See also *Tornay v. United States*, 840 F.2d 1424, 1426 (9th Cir. 1988) (fee information not privileged since it is not a communication necessary to further legal advice); *In re Grand Jury Proceedings*, 791 F.2d 663, 665 (8th Cir. 1986) (adopting the communication rationale—client identity not privileged); *United States v. Ricks*, 776 F.2d 455, 465 (4th Cir. 1985) (following the communication rationale—fee information not privileged).

42. See generally Kaplow & Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 567 (1989) (examining the effects of legal advice on client behavior).

43. See *In re Grand Jury Proceedings* (Pavlick), 663 F.2d 1057, 1060 (5th Cir. 1981) (identity of client privileged where it is incriminating, since the privilege exists to encourage people to seek legal advice freely), *rev'd* 680 F.2d 1026 (5th Cir. 1982) (en banc).

Courts such as that in *Shargel* do recognize that the communication rationale means that "the lack of a privilege against disclosure of the fact of an attorney-client relationship may discourage some people from seeking legal advice at all."⁴⁴ Yet this is not a valid reason to apply a privilege under the predominant view.⁴⁵

III. EXCEPTIONS UNDER THE INCRIMINATION AND COMMUNICATION RATIONALES

Under either view of the privilege, it is the rare case in which the fact of representation, identity of the client, or fees paid will be privileged. Under the communication rationale, such facts are hardly ever confidential communications which further the effectiveness of the attorney. Under the incrimination rationale, such information is ordinarily not incriminating or damaging, at least not at the time of consultation.

However, the exceptions to the rule of nonprivilege are much broader under the incrimination rationale than under the communication rationale. Under the incrimination rationale, the facts concerning the attorney-client relationship will be privileged if disclosure of such information will implicate the client in the very matter for which he sought legal advice.⁴⁶ If this is so, there is a fair presumption that the client would be deterred from seeking such advice if his name would be disclosed thereby. For example, in the classic case where the attorney sends a check to the I.R.S. in payment of back taxes on behalf of an unidentified client, the legal advice exception would apply to shield the identity of the client, the payment of the fee, and

44. 742 F.2d at 63.

45. The incrimination rationale has been explicitly rejected by most courts, including the Ninth Circuit, which had been its major proponent. *See, e.g., Tornay v. United States*, 840 F.2d at 1429. *See also In re Grand Jury Proceedings*, 791 F.2d at 665 ("Nonprivileged information is not suddenly transformed into confidential communications, however, whenever it becomes relevant to a criminal investigation or prosecution of a client.").

46. *See United States v. Hodge & Zweig*, 548 F.2d 1347, 1353 (9th Cir. 1977) (such information is privileged where disclosure "would implicate that client in the very criminal activity for which legal advice was sought."). The "legal advice" exception has been disapproved in the Circuit which promulgated it. The Ninth Circuit has rejected the incrimination rationale in favor of the communication rationale. *See Tornay v. United States*, 840 F.2d at 1428 (information concerning the incidents of an attorney-client relationship is privileged only when it would reveal information that is "tantamount to a confidential professional communication."). *See also In re Grand Jury Subpoenas (Hirsch)*, 803 F.2d at 496-97 ("Appellees argue that this case falls within an exception to the general rule that the privilege does not apply, because disclosure of the fee-payer's identity would implicate him in the very criminal activity for which legal advice was sought . . . However, the relevant inquiry is not whether disclosure of the fee-payer's identity would be incriminating . . . but rather whether the requested information represents a confidential professional communication.").

Nonetheless, the "legal advice" exception of *Hodge & Zweig* has been followed by one other circuit. *See, e.g., In re Grand Jury Investigation (Durant)*, 723 F.2d 447, 451 (6th Cir. 1983) (citing *Hodge & Zweig* for the "legal advice" exception).

the fact of representation.⁴⁷ Under the incrimination rationale, if the incidents of the attorney-client relationship are disclosed in this situation, the client may never come to the lawyer in the first place.⁴⁸

Another example is where the government has traced a series of stolen checks to a bank account maintained under a fictitious name. Out of that bank account, a check has been drawn to an attorney in payment for legal services. The government demands that the attorney disclose the name of the client who paid him. If the client retained the attorney to represent him in the matter of stolen checks, then the legal advice exception would apply and the identity of the client and the fact of representation would be privileged. In contrast, if the client sought the attorney's advice on any other matter (e.g., a personal injury action or the drafting of a will) then the legal advice exception would not apply, since disclosure as to one matter would not have deterred the client from seeking legal advice on an unrelated matter.⁴⁹

A few cases have applied a so-called "last link" exception, prohibiting disclosure of the client's identity or fee arrangement if such information would provide the last incriminating link in the chain of a criminal prosecution.⁵⁰ The "last link" exception has been properly criticized and rejected by most federal courts, on two grounds: 1) it has nothing to do with protection of privileged communications, since it would logically protect against disclosure of any last link of incriminating information, whether or not it was a communication;⁵¹ and 2) the exception is illogical in that it depends on the temporal

47. *Baird v. Koerner*, 279 F.2d 623, 635 (9th Cir. 1960).

48. Of course, application of the privilege in this example assumes that the attorney was retained to give legal advice. If the attorney was retained solely as a conduit to send a check to the I.R.S., the privilege would not apply in any event. See *In re Feldberg*, 862 F.2d 622, 627 (7th Cir. 1988) (privilege does not apply to communications made to attorney if he was employed solely to turn over files to the government, since attorney would not be giving legal advice, but rather would be acting as a file clerk). See also Capra, *Attorney-Client Privilege (Part I)*, N.Y.L.J., Aug. 11, 1989, at 7, col. 3 (discussing *In re Feldberg*).

49. *In re Grand Jury Investigation (Durant)*, 723 F.2d at 454 (legal advice exception not applicable where attorney fails to establish that disclosure of client's identity would implicate client in matter for which legal advice was sought).

50. See *United States v. Innella*, 821 F.2d 1566, 1567 (11th Cir. 1987) (per curiam) ("last link" exception applies only to client's identity and fees, and not to other incriminating information that forms the last link in a chain of evidence); *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d at 1027 (articulating the "last link" exception).

51. See *In re Grand Jury Investigation (Durant)*, 723 F.2d at 453-54 (specifically rejecting the "last link" exception in favor of the "legal advice" exception); *In re Grand Jury Subpoenas*, 906 F.2d 1485, 1489-90 (10th Cir. 1990) ("the exception is simply not grounded upon the preservation of confidential communications and hence not justifiable to support the attorney-client privilege. Although the last link exception may promote concepts of fundamental fairness against self-incrimination, these concepts are not proper considerations to invoke the attorney-client privilege. Rather, the focus of the inquiry is whether disclosure of the identity would adversely implicate the confidentiality of communications.").

sequence of events—thus it does not protect against disclosure of the “penultimate link” which may be every bit as damaging to the client as the “last link.”⁵²

Recently, both the Fifth and Eleventh Circuits have recharacterized the last link doctrine so that it is coextensive with the communication rationale of the privilege. Under this recharacterization, the “last link” doctrine is not concerned with whether the client’s identity would constitute an incriminating last link, but with whether disclosure of the client’s identity would reveal her incriminating motive for seeking legal representation. Under this view, the client’s identity is protected only when it would reveal another privileged communication. This is simply a restatement of the communication rationale of the privilege.⁵³

Under the incrimination rationale it is possible that the information concerning the incidents of the relationship would be protected in the fact situations of *Hoopes* and *Fischetti*. In *Hoopes*, the information sought concerned legal consultation on the very trust and corporate matters at issue; therefore, the incrimination view of the privilege would probably shield disclosure.

With an I.R.S. summons, the attorney would have to show that the client consultation dealt with a matter that the government could be investigating by way of the I.R.S. summons, and not some unrelated criminal or civil matter. If such a showing could be made, then the client’s identity would be privileged.

Of course, the I.R.S. could argue that its summons concerning Form 8300 information is not drafted to investigate any discrete matter on which a client would already be consulting counsel. Rather, it is really a dragnet procedure used to determine who should be subject to investigation for tax evasion, money-laundering and drug activity. The legal advice exception seems ill-suited to a case where the government has not even begun to investigate a crime, since consultation could be incriminating. But the government could

52. See *Privileged Communications*, *supra* note 37, at 1523 (criticizing “last link” exception as temporally based). *But see In re Grand Jury Subpoena* (DeGuerin), 724 F. Supp. 458, 464 (S.D. Tex. 1989) (relying on “last link” exception to quash subpoenas seeking fee information, even though such information under the facts is clearly not the last link in a chain of criminal prosecution).

53. See *In re Grand Jury Subpoena* (De Guerin), 1990 U.S. App. Lexis 16613 (5th Cir. 1990) (“last link” doctrine is reconcilable with “the now-settled principle that the attorney-client privilege shields the identity of a client or fee information only where revelation of such information would disclose other privileged communications.”); *In re Grand Jury Proceedings* (Rabin), 896 F.2d 1267, 1271 (11th Cir. 1990), *rehearing en banc granted* 896 F.2d 1283.

The Eleventh Circuit will rehear *Rabin* en banc to determine whether the “last link” exception, even as recharacterized, should ever be applied to fee arrangements when the client pays the attorney in cash. 904 F.2d at 1498. The concurring judge in *Rabin* argued that the last link doctrine was superfluous in light of the crime-fraud exception, which in his view would always apply when the client paid an attorney’s fee with large amounts of cash. 896 F.2d at 1281 (Tjoflat, C.J., concurring).

end up using the information to incriminate on a matter different from that for which advice was sought. For example, the client seeks legal counsel because he may be involved in a murder, and pays a cash retainer of \$20,000. If the client knows that his identity would be disclosed, he may not seek legal counsel. Yet, in this example, the legal advice exception would not protect the client if the I.R.S. sought and used the information for evidence of money-laundering or tax evasion.

The possibility of incrimination through consultation (and client reluctance to consult in the absence of privilege) can exist whether or not the government has focused on a particular crime at the time the client sees an attorney, or chooses to investigate a different crime thereafter. Thus, the legal advice exception is too narrow to cover all situations in which the privilege is implicated under the incrimination rationale. A more appropriate exception would be to say the incidents of the representation are privileged whenever a client would reasonably think that consulting an attorney could be damaging evidence as to *any* crime, charge, or matter. Under this view, the privilege would apply to consultation concerning one matter even if the adversary sought the information as relevant to another matter.

The exception to the rule of no privilege is much narrower under the predominant communication rationale. The communication rationale is not concerned with whether the client will seek legal advice in the first place, but rather with the free-flowing nature of the communications once such advice is sought. Under this view, the incidents of an attorney-client relationship are not privileged, even though damaging or incriminating, unless in the context of the case such information in fact reveals a privileged communication.⁵⁴

An example of the limited nature of this exception occurs in *In re Shargel*.⁵⁵ There, the government subpoenaed a noted criminal defense attorney to produce records of money or property transferred to him by certain individuals suspected of or indicted for violations of RICO. The government sought the information as evidence of unexplained wealth, tax law violations, and payment of legal fees by co-conspirators.⁵⁶ The defense attorney argued

54. See, e.g., *In re Witnesses Before the Special March*, 1980 Grand Jury, 729 F.2d 489, 494-95 (7th Cir. 1984) ("The fact that the information is incriminating may provide all parties with their motives to seek its disclosure or protection; however, the application of the privilege turns not upon incrimination *per se* but upon whether disclosure would in effect reveal information which has been confidentially communicated.").

55. 742 F.2d 61 (2d Cir. 1984).

56. It should be noted that even if the incidents of the relationship could be privileged, the privilege would not apply if the fees were paid in furtherance of the crime or fraud (such as money-laundering), or if the person who paid the fees was not seeking legal advice for himself. E.g., *Priest v. Hennessy*, 51 N.Y.2d 62, 69-70, 409 N.E.2d 983, 987, 431 N.Y.S.2d 511, 515 (1980) (benefactor who pays attorney fees for another client is not thereby seeking legal advice for himself). See

that the fact of consultation was privileged, because it would indicate that the clients were involved in criminal activity. The attorney further argued that an incriminating inference of conspiratorial activity would be drawn from the fact that each client consulted him shortly after the events underlying the RICO indictment.

The Second Circuit in *Shargel* admitted that if the privilege were not applied to the incidents of representation, which implicated the client in the very matter for which legal advice was sought, then clients may not seek such legal advice in the first place.⁵⁷ However, this consideration is not relevant under the communication rationale of the privilege. This view of the privilege is concerned with the attorney giving well-informed advice, and not about his inability to give any advice at all when he is not consulted in the first place.⁵⁸ The only question is whether disclosure of such information, in the context of the case, is tantamount to a disclosure of a privileged communication.⁵⁹

The *Shargel* court rejected the proposition that merely consulting an attorney, even a noted criminal defense attorney, was tantamount to a confidential communication. According to the court, no legitimate inference could be derived from the fact of consultation, or the payment of a fee, or the disclosure of the client's identity.⁶⁰ Even though the consultations occurred shortly after the events underlying the RICO proceeding, the court con-

generally E. EPSTEIN & M. MARTIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 13-23 (2d ed. 1989) (discussing the communication element of the privilege).

57. 742 F.2d at 63 ("To be sure, the fact of consultation and the payment of a fee may be preconditions to seeking legal advice, and we would be less than candid not to concede that the lack of a privilege against disclosure of the fact of an attorney-client relationship may discourage some persons from seeking legal advice at all.")

58. *Id.* ("Nevertheless, a general rule requiring disclosure of the fact of consultation does not place attorneys in the professional dilemma of cautioning against disclosure and rendering perhaps ill-informed advice or learning all the details and perhaps increasing the perils to the client of disclosure.")

59. *In re Grand Jury Subpoenas* (Hirsch), 803 F.2d at 496-97 ("the relevant inquiry is not whether disclosure of the fee-payer's identity would be incriminating . . . but rather, whether the requested information represents a confidential professional communication.")

60. The Seventh Circuit reached a result apparently contrary to *Shargel* in *In re Grand Jury Proceeding* (Cherney), 898 F.2d 565 (7th Cir. 1990). The *Cherney* court, applying the communication rationale, held that where disclosure of the client's identity would reveal the client's motive for seeking representation, the identity is shielded by the privilege. The court reasoned that a client's motive for seeking legal advice is itself a confidential communication. *Id.* at 568. That proposition is subject to serious dispute, since the motive itself (independent of any specific communications concerning the motive for seeking advice) is not a communication at all, and hence would not be protected under the traditional Wigmorean view of the privilege, any more than the payment of a fee is protected, apart from confidential communications concerning the fee. But if the Seventh Circuit is right in its assertion that the bare motive for seeking legal advice is itself a confidential communication, then the Second Circuit is apparently wrong in *Shargel*, since the fact of consultation at a suspicious time shows the motive of the client in seeking legal advice, which would be protected even under the limited communication rationale.

tended that no connection with that proceeding could be inferred from the fact of consultation alone.⁶¹

Even presuming that no incriminating inference can be derived from the fact of consultation, which is questionable at best, it is unclear why the court in *Shargel* was concerned with whether the consultation could connect the client with the RICO proceeding. Under the communication rationale, whether an incriminating inference can be drawn from the fact of consultation is irrelevant. The only question is whether the name of the client would link that client to a confidential communication.⁶²

Under the facts of *Shargel*, no link to a confidential communication could occur, since disclosure of the name of the client would not disclose any of the privileged communications made during the consultation; it may be relevant to the client's incriminatory motive for seeking legal advice, but it does not result in a disclosure of any specific communication about the client's motive or anything else.⁶³ Thus, the court in *Shargel* espoused the communication rationale, but did not apply it correctly to the facts of the case. The court was right for the wrong reasons.

The court in *Shargel* also held that the privilege does not protect the identity of a "benefactor" who pays the legal fees of another. Certainly this is information from which an incriminating inference can be derived, and the services of an attorney may not be sought if disclosure is mandated. The court stated, however, that,

An attorney's ability to give informed legal advice is not impaired by a rule allowing disclosure of such payments. . . . Whatever legal result might flow from application of the incrimination rationale, the view of the privilege we adopt thus denies protection to evidence indicating payment of one per-

61. This holding in *Shargel* is inconsistent with a previous case in the Second Circuit, *United States v. LaFroschia*, 485 F.2d 457 (2d Cir. 1973). In *LaFroschia*, a defendant had been found with the name and address of an attorney in his wallet when he was arrested. The government brought this out at trial as evidence of consciousness of guilt. The court held that the evidence could be properly admitted as meeting the low standard of relevance: it tended to show that the defendant was anticipating that he would need an attorney, and that tended to show a consciousness of guilt. *Id.* at 459. What was held to create an incriminating inference in *LaFroschia* was held to create no inference in *Shargel*.

62. See *supra* notes 38-40 and accompanying text.

63. Cf. *In re Grand Jury Proceeding (Cherney)*, 898 F.2d at 568 (applying the communication rationale, the court held that where disclosure of the client's identity would reveal the client's motive for seeking representation, identity is shielded by the privilege; the court reasoned that a client's motive for seeking legal advice is itself a confidential communication, even apart from any specific communications concerning the motive). Most courts have held that the motive for seeking legal advice (as opposed to actual communications concerning the motive) is not a communication protected by the privilege. See, e.g., *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 467 (2d Cir. 1989) (fact that attorney was consulted with respect to treatment of employee is not privileged: "Though the statements made to the attorney for the purpose of seeking legal advice and the advice given by the attorney are normally protected by the privilege, the fact and date of the consultation would not be privileged.").

son's legal fees by another.⁶⁴

Under the communication rationale, when would the privilege apply to such preliminary information as fact of consultation, identity of client, and payment of fees? The court in *Shargel* gave as an example a group consultation. According to the court, an inference of confidential communications indicating concerted activity of several clients might be drawn if they all saw the attorney at the same time.

Yet it is unclear why a group consultation would create an inference of confidential communications whereas (as the court held in *Shargel*) a series of individual consultations around the same suspicious time would not. If the distinction is that the inference from a group consultation is stronger than an inference from a series of individual consultations, that sounds like a reference to the incrimination rationale—one situation is more incriminating than the other. The court in *Shargel* thus does not clearly delineate the exception to the general rule. The unpersuasive delineation of the exception indicates that the Second Circuit will be loathe to find that the exception ever exists. But it also indicates that the rule itself is not based on sound reasoning or persuasive application.

A better example of the exception to the rule of no privilege under the communication rationale is the Third Circuit case of *United States v. Liebman*.⁶⁵ A group of attorneys gave tax advice concerning the purchase of shares in a limited partnership. The attorneys charged a client for services only after they arranged the sale of such shares to the client. The I.R.S. challenged the attorneys' advice to their clients that the attorneys' fees were deductible as a legal expense. The I.R.S. contended that the attorneys were acting as brokers, whose fees are not deductible. The I.R.S. moved to discover the identity of the clients.

The court held that the identity of the clients was privileged under the communication rationale.⁶⁶ The substance of the communication from the attorney to the client was already known—the attorneys had told the clients

64. 742 F.2d at 64-65. See also *United States v. Ricks*, 776 F.2d 455, 465-66 (4th Cir. 1985) cert. denied sub nom. *King v. United States* 480 U.S. 1009 (1986) (rejecting the legal advice exception, and holding that fees paid by benefactors are not privileged); *In re Grand Jury Subpoenas* (Hirsch), 803 F.2d at 497 (fee arrangements and payments by benefactors are not privileged, since these matters go only to the forming of an attorney-client relationship, and not to communications that occur after the relationship arises; exception to the general rule exists not because such information would be incriminating, but because disclosure would convey the substance of a confidential communication); *United National Records, Inc. v. MCA, Inc.*, 106 F.R.D. 39, 40 (N.D. Ill. 1985) (the privilege does not protect the relationship as a whole, only confidential communications necessary to aid the attorney in giving effective representation; thus, the opponent can demand information about whether an attorney was consulted, and about the duration and nature of legal services rendered).

65. 742 F.2d 807 (3d Cir. 1984).

66. *Id.* at 810.

that their services were tax deductible, and the clients had presumably acted on that advice and deducted the fees. The disclosure of the clients' identity would thus be tantamount to disclosure of a privileged communication, since it would itself connect the clients with the communication. As far as the clients were concerned, the previous disclosure was meaningless so long as they were unidentified, since it was not connected to them. However, if the clients' identities were disclosed, then the previous disclosure would be very meaningful; it would be at that point that the previous disclosure becomes a disclosure of confidential communications as to the particular clients. Thus, the disclosure of identity was in context tantamount to the disclosure of privileged information.⁶⁷ If the previous communication had not already been disclosed, then the clients' identity would not have been privileged, since there would then be no connection with or disclosure of a privileged communication. Thus, the *Liebman* exception is limited to those unique situations where the adversary knows the communication but not the communicator. The far more prevalent situation where identity is undisclosed is that the adversary knows neither the communication nor the communicator.

Under a proper application of the communication rationale, the I.R.S. summons in *Fischetti* clearly does not seek privileged information, since the client's identity is only an incident of the relationship. The fact that disclosure may tend to incriminate the client as having sought advice from a noted criminal defense firm, or as having paid a large sum of money in cash, may be relevant under the incrimination rationale, but is not relevant under the predominant view. Nor has there been a prior disclosure of a privileged communication which could be connected with the client if his identity is disclosed. The government knows neither the communicator nor any communication.⁶⁸ Even under the faulty application of the communication rationale in *Shargel*, the client's identity is subject to disclosure, since no legitimate inference can be derived from the fact of consultation or the payment of a fee.⁶⁹

The state courts have also been reluctant to protect the incidents of the attorney-client relationship. A leading case applying an exception to the gen-

67. See also *Dole v. Milonas*, 889 F.2d 885, 889 (9th Cir. 1989) (name of client is not privileged "unless disclosure of the client's identity would be tantamount to a disclosure of a confidential communication.").

68. In his oral ruling in *Fischetti*, Judge Broderick relied on *Liebman* in finding that disclosure of a client's identity on a Form 8300 did not disclose the essence of another confidential communication. See Brodsky, *supra* note 10, at 4, col. 4.

69. It should be noted, however, that even under the communication rationale, the terms of a fee agreement may be privileged because it may reveal confidential communications. See *In re Grand Jury Witnesses*, 695 F.2d 359, 362 (9th Cir. 1982) (remanding to district court to determine whether fee contract contained confidential communications). See also *In re Witnesses Before the Special March, 1980 Grand Jury*, 729 F.2d 489, 495 (remanding to district court for determination of whether privilege applied to certain information in billing sheets).

eral rule that such matters are not privileged, is the New York Court of Appeals decision in *Matter of Kaplan*.⁷⁰ There, a client gave the lawyer information which the lawyer turned over to the New York City Commissioner of Investigation. The information concerned bribery of city officials, which the Commissioner was investigating. The client was not involved in the bribery, but witnessed certain conditions which created an inference that certain city officials had been paid off. It was established that the client came to the attorney in secret, for fear of reprisals. The Commissioner of Investigation sought to compel the attorney to disclose the client's name.

The court in *Kaplan* held that the name of the client was privileged, as an exception to the general rule. The court stated:

Usually, it is not the client's name but the client's communication to his lawyer which is held to be sacred, and so, ordinarily, there is no need to conceal the name to preserve the confidence. But here the client's communication had already been divulged to the Commissioner and it was the client's name that deserved and needed protection.⁷¹

Kaplan is thus a straightforward application of the communication rationale, much like *Liebman*. The substance of the privileged communication was already known; disclosure of the client's name would connect him to that communication; therefore disclosure of the name was tantamount to disclosure of a privileged communication by this particular client.⁷² Of course, the broader incrimination rationale would also protect the client's name in the *Kaplan* situation: if the name could not be kept secret, the client may not have gone to the attorney in the first place.

In another leading case, *Priest v. Hennessy*,⁷³ attorneys refused to tell the grand jury the identity of parties who paid fees to the attorneys for representing clients charged with prostitution. The attorneys claimed that the fee arrangements were shielded due to the privilege surrounding the relationship

70. 8 N.Y.2d 214, 168 N.E.2d 660, 203 N.Y.S.2d 836 (1960).

71. 8 N.Y.2d at 218, 168 N.E.2d at 661, 203 N.Y.S.2d at 839. *Kaplan* is referred to in *Saltzburg*, *supra* note 36, at 821.

72. In *In re Jacqueline F.*, 47 N.Y.2d 215, 391 N.E.2d 967, 417 N.Y.S.2d 884 (1979), the Court of Appeals seemed to expand the *Kaplan* exception by stating that the incidents of an attorney-client relationship—in this case the address of a client—would be protected from disclosure unless the client would anticipate that disclosure would have to occur in the ordinary course of litigation. *Id.* at 220-21, 391 N.E.2d at 970-71, 417 N.Y.S.2d at 887-88. Under this rationale, the client's name and all other preliminary factors would be protected in non-litigation situations, which is a view considerably broader than that taken by most federal courts, and which is broader than the language and rationale of *Kaplan*. Ultimately, however, the court held that even if the address were privileged, the privilege would not apply where the client was hiding behind the privilege in order to frustrate an outstanding order of a court. Thus, *Jacqueline F.* does not in the final analysis expand protection of the incidents of an attorney-client relationship. See generally E. FISCH, FISCH ON NEW YORK EVIDENCE, § 521 (2d ed. 1977 and Supp. 1988) (discussing privilege as it applies to name and address of client).

73. 51 N.Y.2d 62, 409 N.E.2d 983, 431 N.Y.S.2d 511 (1980).

between the attorneys and the women they represented; and further that the information was protected due to the independent attorney-client relationship that the attorneys had with the alleged "benefactors." The New York Court of Appeals rejected both claims, stating: "A communication concerning the fee to be paid has no direct relevance to the legal advice to be given. It is a collateral matter which, unlike communications which relate to the subject matter of the attorney's professional employment, is not privileged."⁷⁴ According to the court, the rule does not change where the benefactor is a client who is paying for the legal fees of another. Since the privilege does not protect the payment of one's own fees, it obviously does not protect the payment of the fees of another client.⁷⁵

Like *Kaplan*, *Hennessy* is a straightforward application of the communication rationale. The payment of a fee is a preliminary matter. It does not have an impact on the role of the attorney as an effective advocate, since that role begins only after the relationship has been formed. While the threat of disclosure may deter the client from seeking legal advice in the first place, this factor is irrelevant to the communication rationale.

Under the broader incrimination rationale, however, the result in *Hennessy* would be different. Assuming that the benefactor was seeking legal advice, (as opposed to merely obtaining the attorney's services for another) disclosure of the fee arrangement would be prohibited since it would implicate the client in the very matter for which legal advice was sought.⁷⁶

Applying the communication rationale to the information sought in *Hoopes v. Carota*, the New York Court of Appeals correctly held that the information concerning the fact of representation and the nature of the fee arrangement was not privileged. For all that was shown, such information was preparatory to the attorney-client relationship, and did not impact on the effectiveness of the attorney once the relationship had been established. There was no indication that disclosure of this preliminary information would connect the client with previously disclosed confidential information, as in *Kaplan*. The party invoking the privilege has the burden of establishing that it applies.⁷⁷ The defendant in *Hoopes* made no showing that disclosing

74. 51 N.Y.2d at 69, 409 N.E.2d at 986-87, 431 N.Y.S.2d at 515.

75. Moreover, the payment of the fee of another is not a communication seeking legal advice for the client. *Id.* at 69-70, 409 N.E.2d at 987, 431 N.Y.S.2d at 515.

76. See *United States v. Hodge & Zweig*, 548 F.2d at 1353 (under the incrimination rationale, the privilege applies to the payment of fees by a benefactor since disclosure would implicate him in the very matter for which legal advice was sought; however, information was not protected since government established *prima facie* case that fees were paid to further crime or fraud); *United States v. Lawson*, 600 F.2d 215 (9th Cir. 1979) (applying the incrimination rationale, the court held that the identity of a client who had arranged to pay the legal fees for two conspirators was protected by the privilege). The Ninth Circuit no longer follows the incrimination rationale, and has limited *Hodge & Zweig* and *Lawson* to their facts. See *Tornay v. United States*, 840 F.2d at 1428.

77. *Priest v. Hennessy*, 51 N.Y.2d at 69, 409 N.E.2d at 986, 431 N.Y.S.2d at 514.

the information would connect him with a previously disclosed confidential communication. The courts are willing to accept the consequence that the client may not seek out representation in the first place if there is no privilege for the incidents of the attorney-client relationship.

When a party invokes the privilege with respect to the incidents of the attorney-client relationship, the true concern of the courts is that such a party may be trying to shield corrupt and fraudulent activity. The presumed scenario is that the client wants to keep himself or his fees secret because he is consulting the attorney for aid in perpetrating a crime or fraud. Otherwise, why be secretive about who you are or how you pay your attorney? As one commentator stated: "One who reviews the cases in this area will be struck with the prevailing flavor of chicanery and sharp practice pervading most of the attempts to suppress the proof of professional employment."⁷⁸ As the basis for its opinion denying the privilege in *Shargel*, the Second Circuit stated:

It seems evident to us that a broad privilege against the disclosure of the identity of clients and of fee information might easily become an immunity for corrupt and criminal acts. . . . Such a shield would create unnecessary but considerable temptations to use lawyers as conduits of information or of commodities necessary to criminal schemes or as launderers of money.⁷⁹

IV. THE CRIME/FRAUD EXCEPTION

A broad rule denying the privilege to incidents of the relationship is, however, unnecessary to regulate the problem of crime or fraud. Any concern that a client may seek to shield his identity or payment of fees for nefarious purposes is already addressed under the fact-specific crime/fraud exception to the privilege.⁸⁰ Why is it necessary to address the same problem through a broad rule that the privilege can never apply, and thereby risk deterring honest clients from seeking counsel?

If the true concern is about crime and fraud, it is more reasonable, and less costly to the attorney-client relationship, to regulate improper activity on a case by case basis where evidence of crime or fraud is actually found.⁸¹ A case by case approach is preferable to a categorical denial of protection to all events surrounding the formation of the attorney-client relationship. Otherwise, there is a considerable risk of deterring honest parties from seeking representation in the first place. It is not *always* true that a client who wants

78. MCCORMICK ON EVIDENCE § 90 at 216-17 (3d ed. 1984).

79. *In re Shargel*, 742 F.2d at 64 (citing MCCORMICK ON EVIDENCE § 90 (2d ed. 1972)).

80. See *In re Grand Jury Subpoena Duces Tecum*, 798 F.2d 32, 34 (2d Cir. 1986) (exception to privilege exists where party demanding information can make a *prima facie* case that communications to attorney were made in furtherance of a crime or fraud).

81. See *supra* note 56 and accompanying text.

to remain anonymous is consulting an attorney for improper purposes. A client may well have legitimate reasons for not wanting it known that he is consulting a lawyer. For example, a battered spouse may with good reason seek counsel secretly; so may a couple wanting to provide for an illegitimate child.⁸² The same is true with fee payments. A client who pays for an attorney's services in cash is not always using such a payment to further a crime or fraud.⁸³

It may be argued that it is difficult for the party seeking the information to prove that the client consulted the attorney to further a crime or fraud, and that therefore a broad rule denying the privilege to incidents of the attorney-client relationship is necessary. This difficulty is overstated, however. In *United States v. Zolin*,⁸⁴ the Supreme Court recently held that under the crime/fraud exception, the trial court could consider the challenged statements themselves, *in camera*, to determine whether a crime or fraud was afoot.⁸⁵ The Court specifically stated that consideration of the statements themselves was necessary, since otherwise a crime or fraud *would* be too difficult to prove.⁸⁶ Moreover, the party seeking the information need only es-

82. See Seidelson, *The Attorney-Client Privilege and Client's Constitutional Rights*, 6 HOFSTRA L. REV. 693, 709-10 (1978) (discussing reasons why honest clients would not want it known that they were consulting an attorney).

83. *But see In re Grand Jury Proceedings (Rabin)*, 896 F.2d at 1283 (Tjoflat, C.J., concurring) ("Simply by paying for services in cash, the defendants concealed relevant evidence, and such a method of conducting a business transaction, standing alone, furthered the alleged misconduct. In this case, therefore, the crime/fraud exception should apply to the communicative act of paying fees.").

84. 108 S. Ct. 2619 (1989).

85. The Court in *Zolin* stated that a trial court could in its discretion conduct an *in camera* review to determine whether there is a *prima facie* case of crime or fraud, so long as there is a showing of "a factual basis adequate to support a good faith belief by a reasonable person." 109 S. Ct. at 2631 (quoting *Caldwell v. District Court*, 644 P.2d 26, 33 (Colo. 1982)). The Court specifically rejected the extreme propositions that an *in camera* review was either absolutely prohibited or absolutely mandated in every case. See 109 S. Ct. at 2627, 2629.

The *in camera* procedure is sometimes attacked as a denial of due process due to its *ex parte* nature. The Court in *Zolin* noted that there is "reason to be concerned about the possible due process implications of routine use of *in camera* proceedings." 108 S. Ct. at 2630. However, due process challenges to *in camera* proceedings are ordinarily rejected due to the legitimate interests of the government in maintaining the secrecy of grand jury materials, informant's identities, and the like. See, e.g., *In re Grand Jury Subpoena*, 884 F.2d 124, 126 (4th Cir. 1989) (*in camera* proceeding appropriate to protect the government's interests in secrecy). *But see In re Taylor*, 567 F.2d 1183, 1187-89 (2d Cir. 1977) (*in camera* proceeding violates due process where government's interest in secrecy was minimal because the government intended to disclose the same materials to the client during questioning before the grand jury). See also *In re John Doe Corp.*, 675 F.2d 482, 490-91 (2d Cir. 1982) (limiting *Taylor* to situations where government intends to disclose materials and thus has no secrecy interest in materials submitted for *in camera* review).

86. 'No matter how light the burden of proof which confronts the party claiming the exception, there are many blatant abuses of privilege which cannot be substantiated by extrinsic evidence. This is particularly true . . . of . . . situations in which an alleged illegal proposal is made in the context of a relationship which has an apparent legitimate end.' . . . *A per*

establish a *prima facie* case on crime or fraud to pierce the privilege.⁸⁷

Given the crime/fraud exception, the adoption of a rule that the incidents of representation are generally privileged would not be as costly as the courts assume.⁸⁸ In fact, the current general rule that such information is not privileged is unnecessary, overbroad, and imposes an unreasonable impediment to the citizen's access to legal advice and to justice. The limited cost of proving crime or fraud on the facts is outweighed by the benefit that clients will not

se rule that the communications in question may never be considered creates, we feel, too great an impediment to the proper functioning of the adversary process.

Zolin, 108 S. Ct. at 2629 (quoting Note, *The Future Crime or Tort Exception to Communications Privileges*, 77 Harv. L. Rev. 730, 737 (1964)). Significantly, the Ninth Circuit in *Zolin*, on remand from the Supreme Court, found a *prima facie* case of fraud to exist when it was allowed to consider the allegedly privileged statements themselves. It had not found a *prima facie* case when it had considered only evidence independent from the statements. See *United States v. Zolin*, 905 F.2d 1344 (9th Cir. 1990).

87. *Clark v. United States*, 289 U.S. 1, 14 (1933) (finding that a juror may be required to reveal role in deliberations upon a *prima facie* showing of jury misconduct); *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985) ("A *prima facie* violation is shown if it is established that the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme . . . The government satisfies its burden of proof if it offers evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud."); *In re Antitrust Grand Jury*, 805 F.2d 155, 166 (6th Cir. 1986) (rejecting directed verdict standard as too stringent for establishing *prima facie* case); *In re Feldberg*, 862 F.2d 622, 625-26 (7th Cir. 1988) (discussing conflict in circuits concerning appropriate definition of *prima facie* standard); *In re Grand Jury Investigation*, 842 F.2d 1223 (11th Cir. 1987) (good faith statement by prosecutor sufficient to establish *prima facie* case; opposition to grand jury subpoenas should not result in mini-trials).

These ambiguities notwithstanding, it is clear that the *prima facie* standard is not an exacting one, especially since the statements sought to be shielded can be considered by the court to determine whether they were made with intent to further a crime or fraud. In *Zolin*, the Court noted that there was "some confusion" in the lower courts concerning the application of the *prima facie* standard to the crime-fraud exception. 109 S. Ct. at 2626 n.7. The *Zolin* Court found it unnecessary to decide the specific quantum of proof required to establish a *prima facie* case of crime or fraud, or whether the proponent of the privilege should be allowed an opportunity to rebut a *prima facie* showing. *Id.* at 2631.

88. Much of the argument by those who would limit the privilege is based on the assumption that the privilege imposes a cost of denying access to reliable and probative information. See generally 8 J. WIGMORE, EVIDENCE § 2291 (McNaughton rev. ed. 1961) (discussing policy underlying the privilege). In fact, it is questionable whether the privilege obstructs the truth-finding process at all. The rationale of the privilege is that without it, a client would not be truthful to his attorney. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (privilege exists to encourage the communication of relevant and truthful information to the attorney). The argument that the privilege obstructs the truth-finding process is based on the premise that the client would have made a truthful statement to the attorney anyway (and that such a statement could be admitted if not for the privilege). Yet this is the premise that is explicitly rejected in adopting the privilege. If not for the privilege there would have been no truthful communication made in the first place. As one commentator has stated, "[u]pholding an attorney-client privilege claim signifies only that what is created through the privilege can be protected by it. . . . No tribunal is denied any evidence that it definitely would have been able to obtain simply because the privilege is recognized." Saltzburg, *Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: Garner Revisited*, 12 HOFSTRA L. REV. 817, 823 (1984).

be deterred from seeking legal advice through a broad denial of the privilege.⁸⁹

To the extent that the broad rule denying the privilege is designed to obtain information other than that indicating crime or fraud, it is submitted that the benefits of obtaining that information are outweighed by the cost imposed on society when citizens are deterred from seeking legal advice.⁹⁰ The benefits of obtaining information other than that pertinent to crime or fraud are speculative at best. Without the privilege, there may not be any information to be obtained in the first place, since the client will be deterred from seeking legal advice due to threat of disclosure. It can hardly be said that the privilege is costly where it protects only such information as is created in reliance upon the privilege.⁹¹

The broad rule denying protection to the incidents of the attorney-client relationship is inconsistent with the finely tuned balance of interests that is found in the application of the crime-fraud exception. Under that exception, the courts are careful to preserve the privilege when the client is seeking advice concerning the legality of a prospective course of conduct. Where the boundaries between legality and illegality are unclear, it is particularly necessary for a layman to be able to seek legal advice, safe in the knowledge that he will not be incriminated thereby; it is important that he obtain proper advice so that he can conform his conduct to legal requirements.⁹²

The crime-fraud exception is carefully applied to cover only those situations where the client has sought the attorney in furtherance of a clearly illegal or fraudulent act; it does not seek to prevent a person from obtaining representation to determine whether a prospective course of conduct is lawful.⁹³ Thus the courts are committed under the crime-fraud exception to

89. Indeed, one jurist has stated that the crime/fraud exception is exceptionally easy to prove, if not automatically shown, when the client pays for the attorney's services in large cash amounts. *In re Grand Jury Proceedings (Rabin)*, 896 F.2d at 1281 (Tjoflat, C.J., concurring).

90. Seidelson, *supra* note 84, at 712 (1978) (arguing that "imposing possible jeopardy on the client who may be innocent . . . as the price to be paid for retaining counsel" is a "greater evil" than excluding probative evidence of client consultation).

91. Saltzburg, *supra* note 90, at 823. (Attorney-client privilege "reaches communications that are presumed to have been made precisely because the privilege exists. No tribunal is denied any evidence that it definitely would have been able to obtain because the privilege is recognized. It is not accurate, therefore, to say that the privilege operates in derogation of the search for truth.").

92. *See, e.g., E. EPSTEIN & M. MARTIN, supra* note 58, at 89 ("Society . . . has an interest in protecting the confidences of a client who seeks advice about contemplated acts so that he can conform his conduct to the requirements of the law; one could argue that the case for the privilege is at its strongest in this situation.").

93. *See, e.g., United States v. White*, 887 F.2d 267, 272 (D.C. Cir. 1989) (no crime-fraud exception where client consults an attorney in order to determine whether a prospective course of conduct is lawful; it is inappropriate to deny the privilege in a situation where "even its stern critics acknowledge that the justifications for the shield are the strongest—where a client seeks counsel's advice to determine the legality of conduct before the client takes any action.").

carefully delineate between the intent to exploit the privilege and the intent to determine the legality of a course of conduct.⁹⁴ As such, it makes no sense to apply a broad rule denying the privilege to the client's identity and like matters, which rule deters a client from seeking an attorney to do either good or ill.

V. THE EXCEPTION FOR COMMUNICATIONS BY A FIDUCIARY

In *Hoopes*, the plaintiffs demanded more than just the facts surrounding the defendant's attorney-client relationship. They demanded the substance of communications between the defendant and the attorney concerning all matters of trust and corporate business. Plaintiffs admitted that they were demanding confidential communications that were made in the course of seeking legal advice. Thus, the defendant had met his burden of showing that the privilege applied in the first instance. Moreover, plaintiffs did not claim (or did not have sufficient evidence to claim) that the communications were made in furtherance of crime or fraud and thus subject to the crime-fraud exception to the privilege. Rather, plaintiffs argued that since defendant was acting in a fiduciary capacity in seeking the advice of the attorney, the information was not privileged vis-a-vis the beneficiaries. Since he was acting on their behalf, plaintiffs argued that it would be illogical, unreasonable and unfair to shield the communications from the very parties who were supposedly being served by the fiduciary.

The "fiduciary exception" to the privilege that was pressed by plaintiffs in *Hoopes* originated in the famous Fifth Circuit case of *Garner v. Wolfenbarger*.⁹⁵ *Garner* was a derivative action in which the plaintiffs sought access to confidential communications made between management and corporate counsel. In *Garner*, the court found two competing principles at stake when the shareholders in a derivative action seek access to confidential communications from management to corporate attorneys. On the one hand, management does not manage for itself, it manages for the shareholders; thus it seems anomalous to deny the shareholders access to communications presumptively made on their behalf. Because of the fiduciary relationship, the shareholders and management have a common interest; and communications to an attorney are not shielded from one who is a joint client with a common

94. *Id.* (citing Kaplow & Shavell, *supra* note 42 at 597 (to behave desirably, clients must know what sanctions will be imposed before choosing a course of action)); *See also In re Doe*, 551 F.2d 899, 902 (2d Cir. 1977) (privilege should apply where a "client has gone to his attorney in good faith, seeking an opinion as to the legality of certain conduct in an area where legal boundaries may be difficult for the layman to discern.").

95. 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971). The fiduciary exception has come to be known as the *Garner* doctrine. *See Quintel Corp, N.V., v. Citibank, N.A.*, 567 F. Supp. 1357, 1360-61 (S.D.N.Y. 1983) (discussing "the line of cases that has developed from the doctrine enunciated in *Garner*.").

interest.⁹⁶

On the other hand, if shareholders were given an unlimited right of access on a mere showing of commonality of interest, management would be exposed to harassment suits, and an overall deterioration of corporate legal representation might occur.⁹⁷

To balance these competing considerations, the court in *Garner* held that management had no absolute privilege to shield confidential communications from the shareholders. If the shareholders could establish "good cause" for access to the communications, then the privilege would not apply. The court in *Garner* set forth a non-exclusive list of factors which would support a finding of "good cause." The court did not state why the factors listed were relevant to a showing of good cause, or whether some factors should be weighed more heavily than others. Most of the good cause factors are problematic.⁹⁸ The most important of the good cause factors discussed in *Garner* are:

1. *The number of shareholders and the percentage of stock they represent.* After *Garner*, it has been held that derivative plaintiffs who represent single digit percentages of shareholders are not entitled to pierce the privilege.⁹⁹ It is difficult to see why plaintiffs' ownership percentage is relevant, however. If management manages for the shareholders, it manages for all the shareholders, so all should be equally entitled to the privileged communications.¹⁰⁰

2. *Whether the shareholders were in good faith, and the colorability of the*

96. See *Ward v. Succession of Freeman*, 854 F.2d 780, 784 (5th Cir. 1988) (*Garner* doctrine based on mutuality of interest between fiduciary and beneficiaries, parallel to the "common interest" or "joint representation" rule), *cert. denied*, 109 S. Ct. 2064 (1989). See also *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989) (discussing the "common interest" rule). See generally *Capra, The Attorney-Client Privilege in Common Representations: Information-Pooling and Problems of Professional Responsibility*, 1989 TRIAL LAW GUIDE 20 (discussing the "common interest" rule).

97. See *Cohen v. Uniroyal, Inc.*, 80 F.R.D. 480, 483 (E.D.Pa. 1978) ("On the one hand, management is under a legal obligation to serve the best interests of the corporation, and since the corporation is owned by its stockholders, it would seem anomalous to deny stockholders access to information ostensibly gathered for their own ultimate benefit. On the other hand, the complete removal of the attorney-client privilege from the grasp of the corporation client (based on the supposed identity between a corporation and its stockholders) . . . would expose corporations to harassment suits by minority stockholders and a possible deterioration of candid attorney-client communication and effective corporate management."). For a full discussion of the problems raised in *Garner*, see E. EPSTEIN & M. MARTIN, *supra* note 58, at 82-88 (discussing the fiduciary exception in corporate litigation). For an extensive criticism of the *Garner* doctrine, see Saltzburg, *supra* note 90, at 828-47 (1984).

98. See *id.* at 832-34 (demonstrating that the factors listed in *Garner* are of questionable relevance).

99. *E.g.*, *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 31-32 (N.D. Ill. 1980) (plaintiffs representing less than one per cent of shareholders fail under *Garner* test to pierce privilege), *cert. denied*, 459 U.S. 943 (1982).

100. Saltzburg, *supra* note 90, at 832.

shareholders' claim. These factors go more appropriately to the merits of the derivative action than to whether a fiduciary can consult with an attorney secure in the knowledge that his communications will remain private.

3. *The shareholders' need for the information*. Any party who tries to obtain privileged information has need for the information, yet this need is ordinarily held irrelevant.¹⁰¹ The court in *Garner* makes no persuasive case for why the shareholders' need should be treated differently from that of any other litigant.

4. *Whether the actions of the fiduciary were criminal, illegal but not criminal, or of doubtful legality*. These are the concerns of the crime-fraud exception. The court in *Garner* was clearly concerned about crime and fraud, and indeed analogized to the crime-fraud exception in establishing a special exception against fiduciaries.¹⁰² Indeed, uncovering fraud seems to be the major reason behind the *Garner* doctrine.¹⁰³ But the court in *Garner* makes no case for why a separate exception is necessary to cover the very same problem covered by the crime-fraud exception. It appears that *Garner* was creating a hybrid—an exception by which shareholders could pierce the privilege on a lesser showing of crime or fraud than would be required by other litigants.¹⁰⁴ But the court did not give fair consideration to the costs of such a watered-down exception: that without the privilege, a fiduciary who simply wants to determine how to discharge his duties to the beneficiaries will be hesitant to seek counsel, and that the quality of the fiduciary's representation will suffer thereby.

5. *Whether the communications relate to past or prospective activity*. The court in *Garner* did not state which type of statement—one looking forward or one looking backward—would make a stronger showing of good cause. It could be argued that if the communication dealt with past activity, that would lead to good cause since the fiduciary is no longer seeking to represent the beneficiary, but is determining for his own good whether he has acted properly. On the other hand, it could be argued that a communication as to future activity would lead to good cause because of a presumed commonality

101. See *Admiral Insurance Co. v. United States Dist. Ct.*, 881 F.2d 1486, 1495 (9th Cir. 1989) (privilege is not pierced merely because information is unavailable from other sources: "Even assuming that the information plaintiffs need to establish their claims cannot be discovered from any source other than the statement Gardner gave to Admiral's counsel, we decline to establish an unavailability exception to the attorney-client privilege. . . . Such an exception either would destroy the privilege or render it so tenuous and uncertain that it would be 'little better than no privilege at all.'" (quoting *Upjohn v. United States*, 449 U.S. 383, 393 (1981))).

102. See *Garner*, 430 F.2d at 1102-03 (crime-fraud and common interest exceptions are useful analogies for an exception allowing shareholders to pierce the privilege).

103. See *Privileged Communications*, *supra* note 37, at 1528 ("When courts pierce the attorney-client privilege in derivative actions, they are responding to legitimate pressure to exempt from protection those communications that are intended to further future or ongoing fraud.").

104. Saltzburg, *supra* note 90, at 833.

of interests as to future activity, and because of the concern over future crime or fraud. The *Garner* court merely lists this factor without giving any guidance as to how it should be weighed.¹⁰⁵ Further, the privilege itself protects communications as to both past and future activity so long as no crime or fraud is afoot. No reason is given in *Garner* for why such a distinction is relevant in shareholder suits but not in all other suits.¹⁰⁶

6. *Whether the advice concerns the instant litigation.* Listing this as a good cause factor is ominous. If the fiduciary sought counsel to defend himself in an anticipated litigation with the beneficiary, communications made at that point should be wholly outside the *Garner* doctrine. The fiduciary's communications to an attorney in preparation of litigation are clearly not made for the benefit of the beneficiary. There is no commonality of interest that is at the heart of *Garner*. Indeed, there is an adversity of interests. Accordingly, courts after *Garner* have not pierced the privilege when the fiduciary communicates to the attorney in order to defend himself from the instant litigation.¹⁰⁷ While this is a sound result, it does not appear *required* by *Garner*. *Garner* merely considers whether the fiduciary communicated in anticipation of litigation to be one factor among many good cause factors, and does not discuss the weight to which such factor is entitled. It therefore remains open to deny the privilege to statements made by the fiduciary in anticipation of litigation with the beneficiaries.

7. *Whether the shareholders have made a particularized request or appear to be engaged in a fishing expedition.*¹⁰⁸ Yet if the fiduciary communicates to an attorney on behalf of the beneficiaries, it is difficult to see why a beneficiary must make a particularized request. After all, the attorney is representing all beneficiaries, including those on a fishing expedition. Again, the court in *Garner* gives no explanation for why its listed good cause factors are relevant, given the doctrinal underpinnings of the fiduciary exception. The court was clearly concerned with the possibility of harassment of fiduciaries, but

105. In *In re LTV Sec. Litig.*, 89 F.R.D. 595 (N.D. Tex. 1981) the court held that the client's statement about past conduct could not be disclosed under *Garner*, since "[f]orced disclosure of counsel's remedial advice would do great injury to the corporation's interest in self-investigation and preparation for litigation." *Id.* at 608. While this is true, it is equally true that forced disclosure of a statement concerning a future course of conduct would do great injury to the corporation's interest in effectively managing the affairs of the corporation. Thus, *Garner's* distinction between past and future conduct is unpersuasive. There is no meaningful distinction between past and future conduct, either under the *Garner* doctrine or under the privilege in general.

106. Saltzburg, *supra* note 90, at 833.

107. See *Privileged Communications*, *supra* note 37, at 1526 (citing *In re Sec. Litig.* and *Quintel Corp., N.V. v. Citibanc, N.A.*). For similar reasons, the *Garner* doctrine has been held inapplicable to the work-product rule. See *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1239 (5th Cir. 1982) ("The work-product privilege is based on the existence of an adversarial relationship, not the quasi-fiduciary relationship analogized to in *Garner*.").

108. See *Garner*, 430 F.2d at 1104 (distinguishing cases in which plaintiffs are on a fishing expedition from those where plaintiffs have identified the sought-after communication).

the rationale for its decision leaves no principled way to protect against such harassment.

Besides their questionable relevance, a mere glance at the good cause factors indicates that there will be uncertainty of application in many cases.¹⁰⁹ In any case, some factors will exist and others will not, and even a court that is committed to applying the factors honestly will be hard-pressed to determine how to weigh the various coalescing factors. For example, what should the court do if the shareholders have minimal holdings, but they have made a colorable case and have established necessity? And what if the communications deal with a past course of conduct, though they were not made in anticipation of litigation? Do some factors cross each other out? Are they weighed equally? More troubling, the good cause factors are such that it will be impossible to predict at the time of communication whether the privilege will apply.¹¹⁰ For instance, the fiduciary will never know in advance whether the beneficiaries represent a large holding, or have a likelihood of success or a strong need for the information. Yet for the privilege to be valuable, it must be relatively certain of application, and a client must be able to rely upon it with some degree of predictability. Otherwise clients and attorneys will never be able to communicate with the assurance that the communications will remain private, and the quality of representation will suffer. As the Supreme Court has stated, a privilege of uncertain application is tantamount to no privilege at all.¹¹¹

Expansion and variations on *Garner* have occurred with respect to the "good cause" requirements. Several courts have dispensed with the good cause requirements entirely, especially in cases where an express trust-beneficiary relationship has been created.¹¹² Other courts retain the good cause requirement, but put the burden of establishing the lack of good cause on the fiduciary; good cause is ordinarily a foregone conclusion in such circumstances, given the vagueness and malleability of the good cause factors.¹¹³

109. See *Shirvani v. Capital Investing Corp.*, 112 F.R.D. 389, 390 (D. Conn. 1986) (the "rather vague" good cause exception "was ill-defined in origin and has been troublesome in application.").

110. See E. EPSTEIN & M. MARTIN, *supra* note 58, at 88 ("The balancing called for by the *Garner* doctrine means that fiduciaries have no certainty that advice they seek regarding the fiduciary relationship will be immune from discovery.").

111. *Upjohn v. United States*, 449 U.S. 383, 393 (1981).

112. See, e.g., *Helt v. Metro. Dist. Comm'n*, 113 F.R.D. 7, 9 (D. Conn. 1986) (privilege does not apply to communications between fiduciary and attorneys about fund held for beneficiaries); *Donovan v. Fitzsimmons*, 90 F.R.D. 583, 587-88 (N.D. Ill. 1981) (*Garner* doctrine does not work to defeat the work-product doctrine).

113. See, e.g., *Valente v. Pepsico*, 68 F.R.D. 361, 369 (D. Del. 1975) (communications by attorney for fiduciary are discoverable). Other courts more naturally impose the burden of showing good cause on the party seeking the information. See, e.g., *In re LTV Sec. Litig.*, 89 F.R.D. 595, 607-08 (N.D. Tex. 1981) (class action plaintiffs unable to show good cause where benefits of protecting privilege are apparent and sought-after communications are available from alternative sources).

Still other courts have found good cause on the minimal showing of likelihood of success and need for the information.¹¹⁴ Again, on these minimal requirements, the finding of good cause is a foregone conclusion. In fact, most of the cases applying *Garner* have found good cause on the facts, which is not surprising given the vagueness of the factors.¹¹⁵

The Fifth Circuit, which begat *Garner*, has muddied the waters of good cause even further, by holding that the good cause factors should be more strictly applied when the unity of interest between fiduciary and beneficiary is not as strong as in *Garner*. The court rejected the more rational approach that *Garner* should not apply at all when the mutuality of interest is weak such as in a tender offer to shareholders, where the corporate interest in conserving assets is adverse to the shareholder interest in maximizing the price. Instead, the court held that *Garner* should apply but that the plaintiff has a heavier burden in such cases of establishing good cause.¹¹⁶ But adding a vague "higher standard" to already vague "good cause" factors renders the privilege all but meaningless: such a privilege obviously cannot be applied with any certainty in advance.¹¹⁷

Contrary to the Fifth Circuit's anomalous "higher standard" approach, a few courts have held that the *Garner* doctrine should not be expanded beyond the peculiar circumstances of a shareholder derivative action; these courts reason that the *Garner* doctrine is spread thin when the action is not brought on behalf of the corporation, but rather on behalf of individual claimants who clearly have interests which are separate from that of the fiduciary. Under the minority view, the mutuality of interest at the heart of *Garner* does not exist outside the derivative suit.¹¹⁸

Most courts, however, have applied the *Garner* doctrine wholeheartedly and have extended it well beyond the derivative action, to any suit in which a fiduciary relationship is shown. For instance, *Garner* has been applied to individual shareholder actions for fraud;¹¹⁹ to actions against majority share-

114. See, e.g., *Quintel Corp., N.V. v. Citibank, N.A.*, 567 F. 1357, 1364 (S.D.N.Y. 1983) (*Garner* requirements met where sought-after communications are important to plaintiff's case and are not readily available from another source).

115. Saltzburg, *supra* note 90, at 844-47 (discussing *Donovan v. Fitzsimmons* and *Quintel Corp., N.V. v. Citibank, N.A.*).

116. See *Ward v. Succession of Freeman*, 854 F.2d at 786 (good cause not met in tender offer situation where plaintiffs owned less than four per cent of corporation's stock, and did not attempt to obtain the information from other sources).

117. See *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) (vagueness of control group test adopted by lower court makes prediction of when privilege applies impossible).

118. See, e.g., *Weil v. Investment/Indicators Research & Management*, 647 F.2d 18, 23 (9th Cir. 1981) (*Garner* doctrine limited to derivative suits).

119. *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1239 n.3 (5th Cir. 1982) (*Garner* factors apply to class action by former shareholders of corporation).

holders owing a fiduciary duty to the minority;¹²⁰ to actions brought by employees for breach of fiduciary duty owed by the trustee of a pension plan under ERISA;¹²¹ to actions brought against a bank acting pursuant to a power of attorney in a commercial land transaction;¹²² to actions against a union and its officers brought by union members;¹²³ to claims against an unsecured creditors' committee brought by unsecured creditors;¹²⁴ and to actions brought by beneficiaries against an executor of a will.¹²⁵ In these cases, the term "fiduciary" becomes a device for an undifferentiated and unjustified denial of the privilege to those properly seeking legal advice in order to determine how to best fulfil their duties. It is ironic that in order to ostensibly protect beneficiaries, the *Garner* doctrine inhibits the fiduciary from seeking advice as to how best to protect beneficiaries.

Where applicable, the *Garner* doctrine allows the beneficiary access to communications made by the fiduciary in the course of representing the interests of the beneficiary.¹²⁶ But some courts have gone further and held that the *Garner* doctrine applies even to communications made to determine the extent of the obligations owed by the fiduciary to the beneficiary.¹²⁷ Under this broad view, a fiduciary cannot freely seek legal counsel to determine the scope of his fiduciary obligations, a result which surely impairs the fiduciary's effectiveness.¹²⁸ Some consolation can, however, be derived from the fact that if the communications are made to prepare a defense against an action by the beneficiary, the *Garner* doctrine has to date been

120. *In re Transocean Tender Offer Sec. Litig.*, 78 F.R.D. 692, 696-97 (N.D. Ill. 1978) (majority shareholders virtually concede that plaintiffs have established good cause to pierce the privilege).

121. *Washington-Baltimore Newspaper Guild v. Washington Star Co.*, 543 F. Supp. 906, 909-10 (D.D.C. 1982) (employer cannot invoke privilege where sought-after communications came in course of fiduciary relationship).

122. *Quintel Corp.*, 567 F.Supp. 1357, 1363-64 (S.D.N.Y. 1983) (*Garner* doctrine applies to communication occurring during fiduciary relationship, but not to communications occurring before relationship is begun or after it is terminated; *Garner* doctrine applies even to communications made to determine the extent of the obligations owed by the fiduciary to the beneficiary).

123. *Aguinaga v. John Morrell & Co.*, 112 F.R.D. 671, 679-81 (D. Kan. 1986) (privilege does not protect communications between union officials and their attorneys).

124. *In re Baldwin-United Corp.*, 38 B.R. 802, 805 (Bankr. S.D. Ohio 1984) (unsecured creditors' committee has burden of showing good cause for failing to disclose privileged information to its constituent creditors).

125. *Estate of Torian v. Smith*, 263 Ark. 304, 315, 564 S.W.2d 521, 526 (1978) (executor of will cannot assert attorney-client privilege concerning advice given to him by an attorney, since executor acts not for his own sake but in common interest with the beneficiaries).

126. See Note, *The Shareholders' Derivative Exception to the Attorney-Client Privilege*, 48 J. LAW & CONTEMP. PROBS. 199, 215 (1985) (piercing privilege allows shareholders to use confidential legal communications for the benefit of the corporation).

127. See *supra* note 124 and accompanying text.

128. See generally Ward, *The Attorney-Client Privilege: A Litigator's Perspective*, 6 DEL. J. CORP. L. 447 (1981) (discussing effect of *Garner* on corporate communications).

inapplicable.¹²⁹

In *Hoopes*, neither the Third Department nor the Court of Appeals had any problem applying the *Garner* doctrine to the particular fiduciary relationship at issue. As the Third Department stated:

"The salient factor on this issue is that defendant, both in his capacity as a trustee and as a corporate officer and director, was the fiduciary of the plaintiffs. In any of these roles, defendant was not entitled to shield absolutely from his beneficiaries the communications between him and his attorneys regarding pertinent affairs of the trust and of the corporation . . ."¹³⁰

Thus, *Hoopes* is a straightforward application of the mutuality of interest principle that is at the heart of *Garner*.

The more difficult question in *Hoopes* was whether the plaintiffs would be required to establish good cause before they received access to the fiduciary's communications. Both the Third Department and the Court of Appeals noted that there were cases on both sides of this issue, some requiring a showing and some not. Both courts stated that the issue did not have to be decided in *Hoopes*, since the plaintiffs had in any event established good cause.

Hoopes is a classic example of the uselessness of the *Garner* good cause factors. The Third Department had held that good cause had been found because: the beneficiaries had an identity of interest; the plaintiffs "may have been directly affected" by defendant's decisions which were based on his attorneys' advice; the plaintiffs had demonstrated a need for the evidence; the communications related to prospective and not past actions; plaintiffs' claims were colorable; and plaintiffs' request for information was specific.¹³¹ Upon this minimal showing, the Third Department held that the burden was shifted to *defendant* to show that the good cause requirements were not in fact met.¹³² According to the court, defendant could satisfy that burden by, for example, showing that he had consulted the attorney solely in an individual capacity. Presumably the burden could also be satisfied by attacking the plaintiff's minimal showing on factual grounds. Defendant had not met his burden. The Court of Appeals affirmed the Third Department in conclusory fashion by agreeing that good cause was present.

Under the analysis in *Hoopes*, it is unimportant to determine whether the *Garner* good cause factors must be met: they are met in virtually every case. The plaintiffs did little more than establish the colorability of their claim and

129. See *Privileged Communications*, *supra* note 37, at 1526 (citing *In re LTV Sec. Litig.*, 89 F.R.D. 595, 607-08 (N.D. Tex. 1981)).

130. 142 A.D.2d at 909, 531 N.Y.S.2d at 409.

131. *Id.* at 910, 531 N.Y.S.2d at 410.

132. *Id.*

a need for the evidence. Then the burden shifted to the defendant to show lack of good cause. The example given by the court in which that burden would be met—that the defendant could show that he sought advice in a purely individual capacity—is no example at all, since if he did seek advice in an individual capacity, the *Garner* doctrine is by definition inapplicable. There is no issue of good cause in such circumstances. Good cause is only relevant where the fiduciary seeks advice in a fiduciary capacity. It is at that point where the fiduciary needs the protection of the good cause factors, such as they are. It is at that point where the courts in *Hoopes* deprived the fiduciary of meaningful protection, given plaintiff's minimal showing and the shifting of the burden to the defendant.

Hoopes is not a novel decision. It is merely indicative of the consequences of virtual eradication of the privilege in fiduciary situations. The fiduciary has a dilemma: he is subject to high standards of conduct, yet deterred from receiving the guidance of counsel that is so necessary to meet those high standards.

While *Garner* has received an expansive reading in most courts, including the Court of Appeals in *Hoopes*, the *Garner* doctrine is in fact ill-considered and unsupportable.¹³³ It is true that a fiduciary ostensibly acts on behalf of a beneficiary; but that is no reason to destroy the opportunity of a fiduciary to seek legal advice. Yet this is what occurs if the fiduciary cannot approach an attorney safe in the knowledge that what he says will not come back to haunt him. As one noted commentator has stated:

The word 'fiduciary' has no talismanic quality that dictates abdication of the usual approach to attorney-client privilege whenever the word is invoked. Those who have fiduciary responsibility often want legal advice concerning their responsibilities. They should have the same opportunity to consult with counsel and to speak freely and without fear of making admissions as any other clients.¹³⁴

The fact that fiduciaries have special duties of care is more and not less reason to give them the opportunity to consult freely with counsel concerning the performance of their duties. As a result of *Garner*, the fiduciary's representation of the beneficiary may suffer in the long run, since the fiduciary may find it preferable to go without legal advice.¹³⁵

133. See O'Neal & Thompson, *Vulnerability of Professional-Client Privilege in Shareholder Litigation*, 31 BUS. LAW. 1775, 1782 (1976) (discussing difficulty in weighing *Garner* factors when they do not all tip in the same direction).

134. Saltzburg, *supra* note 90, at 846.

135. See Shirvani v. Capital Investing Corp., 112 F.R.D. 389, 391 (D. Conn. 1986) ("Indeed, a curtailment or confusion of traditional privilege concepts eventually may not lead to more endpoint disclosure at all, but result instead in less open and candid attorney-client communication in the first place.").

It is no answer to say that the fiduciary is sufficiently protected by the *Garner* good cause factors. There is no way for a fiduciary to predict at the time of consulting an attorney whether such factors will apply. As discussed above, the fiduciary could not know at the time of consultation whether the beneficiary can establish sufficient need or a colorable claim, or the percentage of ownership that the future plaintiffs will have. Moreover, even if the good cause factors could be predicted in advance, the courts have either ignored them entirely or applied them without significant scrutiny.

Of course, the need for access by the beneficiaries is not to be lightly disregarded if the fiduciary is abusing his position. But the costly *Garner* doctrine is overbroad in accomodating this need: if the fiduciary is consulting the attorney to further a plan of crime or fraud, the communications will not be privileged at any rate due to the crime-fraud exception.¹³⁶ As one court has stated:

Without sacrificing important public interests in maintaining open communication between lawyer and client generally, shareholders do possess adequate disclosure rights under long-established limits to the attorney-client privilege in cases of demonstrable wrongdoing—i.e. the privilege exception recognized when there are “communications in furtherance of contemplated or ongoing criminal or fraudulent conduct.”¹³⁷

The courts applying *Garner* admirably seek to regulate the fiduciary's attempts to use an attorney for nefarious purposes.¹³⁸ Yet these courts inexplicably fail to use the very test which was specifically designed to prevent the use of the privilege where crime or fraud is afoot.¹³⁹ Instead, they use an overbroad exception to the privilege which may well apply even where the fiduciary is properly seeking legal advice. As discussed above, the crime-fraud exception is a well-balanced, case by case approach which prevents clients from consulting with attorneys for improper purposes and yet allows those with good intentions to unhesitatingly seek legal advice. And if the client has crossed the crime-fraud line, it is not difficult to establish a *prima facie* case of wrongdoing, since the trial court is allowed to consider the chal-

136. See, e.g., *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985) (communications made in furtherance of obstruction of justice are subject to disclosure under the crime-fraud exception to the attorney-client privilege).

137. *Shirvani v. Capital Investing Corp.*, 112 F.R.D. at 391 (quoting *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1038 (2d Cir. 1984)).

138. See *Privileged Communications*, *supra* note 37, at 1528 (“When courts pierce the attorney-client privilege in derivative actions, they are responding to legitimate pressure to exempt from protection those communications that are intended to further future or ongoing fraud.”).

139. Indeed, a compelling case has been made that the crime-fraud exception was applicable to the communications at issue in *Garner* itself, thus rendering the court's analysis completely unnecessary. See Saltzburg, *supra* note 90, at 841-42 (asserting that the facts of *Garner* fell within the crime-fraud exception to the privilege).

lenged statements themselves on this issue.¹⁴⁰

In those cases where the beneficiary is unable to pierce the privilege through the crime-fraud exception, the cost to the beneficiaries imposed by the privilege is clearly outweighed by the benefits derived from allowing the fiduciary to seek counsel to determine a presumptively legal course of activity. This is especially so since the "cost" to the beneficiaries is as illusory as the cost of the privilege itself—if there is no privilege, then the fiduciary's communications would probably not have been made in the first place.¹⁴¹

Even if it can be argued that the privilege imposes a cost, and that the beneficiary who cannot show crime or fraud nonetheless has some legitimate interest in pursuing his case, rejection of the *Garner* doctrine would not impose undue hardship on beneficiaries seeking to prove a case against a fiduciary. Even in these cases, the *Garner* exception is not crucial for beneficiaries, especially considering its cost. For one, the privilege attaches to communications only, and not to underlying facts.¹⁴² Thus, the fiduciary can be asked what he did, but not what he said to his attorney.¹⁴³ Nor does the privilege protect pre-existing documents that the fiduciary turned over to the attorney.¹⁴⁴ Also, a statement to the lawyer is not privileged if the fiduciary is seeking business and not legal advice.¹⁴⁵ This is especially likely to occur in the corporate context.¹⁴⁶ Further, in the corporate context, the privilege is

140. See *supra* notes 87-89 and accompanying text.

141. See *supra* note 93 and accompanying text.

142. See C. WOLFRAM, *MODERN LEGAL ETHICS* § 6.3.5 at 257 (1986) (discussing content of client communicative acts). See also *In re Grand Jury Proceedings (Rabin)*, 896 F.2d at 1270 ("[C]ourts have distinguished between underlying facts—facts existing independently of any communication between the attorney and the client—and communications about those facts, extending the privilege to the latter but not to the former.").

143. See *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981) (broad view of privilege does not impose undue costs, since underlying facts can still be obtained); *Stanwick v. A.R.A. Services, Inc.*, 124 A.D.2d 1041, 1041-42, 508 N.Y.S.2d 755, 756 (4th Dep't 1986) (privilege extends to communications and not to facts; subject matter of meeting is not privileged).

144. See, e.g., *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 825 F.2d 676, 679-680 (2d Cir. 1987) (documents which are not privileged in the hands of the client do not become privileged merely because they are turned over to the attorney).

145. *United States v. Int'l Business Machines, Inc.*, 66 F.R.D. 206, 212-213 (S.D.N.Y. 1974) (test is whether the element of legal advice predominates; even legal advice may not be privileged if it is only incidental to business advice). See generally E. EPSTEIN & M. MARTIN, *supra* note 58, at 36-40 (discussing the legal and non-legal aspects of attorneys' actions).

146. See, e.g., *S.E.C. v. Gulf & Western Indus., Inc.* 518 F. Supp. 675, 683 (D.D.C. 1981) (communications to corporate attorney were not privileged where he received information not as general counsel but as a member of the Pensions Fund's investment committee: "Because of Dolkart's many roles . . . it cannot be assumed that all of his discussion with corporate officials involved legal advice."); *In re Feldberg*, 582 F.2d 622, 626 (7th Cir. 1988) ("A business that gets marketing advice from a lawyer does not acquire a privilege in the bargain; so too a business that obtains the services of a records custodian from a member of the bar."); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 515 (D. Conn. 1986) ("Legal departments are not citadels in which public, business or technical information may be placed to defeat discovery and thereby insure confidentiality").

held by the corporation, not by the corporate official.¹⁴⁷ If the official is suspected of wrongdoing, the corporation may waive the privilege, and the official may be disqualified from participating in the waiver decision.¹⁴⁸ Finally, if the fiduciary relies upon an "advice of counsel" defense, as will often be the case, the privilege is deemed waived.¹⁴⁹

VI. CONCLUSION

Given the minimal costs imposed on the beneficiary in any case, it is clear that the *Garner* doctrine is overkill: the argument for a special rule providing undifferentiated protection to beneficiaries is especially weak given the various modes of access that are well-established for all litigants. Application of the crime-fraud exception results in a far better balance of competing interests than does a blunderbuss application of the *Garner* doctrine.

The *Garner* doctrine is similar in intent to the rule holding that the incidents of the attorney-client relationship are not privileged. Both rules are concerned that the attorney-client relationship is being exploited for purposes of wrongdoing. Yet both rules go beyond the traditional method used to penetrate such wrongdoing: the crime-fraud exception. Both rules eschew a well-established case by case approach and opt instead for an overbroad and costly principle which deters an honest client from seeking legal counsel. By establishing an all but categorical exception to the privilege, the *Garner* doctrine, like the rule holding the relationship itself unprivileged, certainly deters fraud; but it also deters legitimate communications from ever occurring.¹⁵⁰

Federal and state courts generally deny a privilege to the incidents of the attorney-client relationship and to the substance of the communications between a fiduciary and an attorney. In both situations, the courts are concerned with exploitation of the attorney-client relationship for nefarious purposes. Yet in both situations, the courts have gone too far. Given the crime-fraud exception, it makes no sense to establish categorical rules abolishing the privilege for fear of fraud; this is especially so when the conse-

147. See *In re Beville, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 124 (3rd Cir. 1986) ("Any privilege that exists as to a corporate officer's role and functions within a corporation belongs to the corporation, not the officer. . . . A corporate official thus may not prevent a corporation from waiving its privilege arising from discussions with corporate counsel about corporate matters.") (citing *In re Grand Jury Subpoenas Duces Tecum*, 391 F. Supp. at 1034).

148. See Kirby, *New Life for the Corporate Attorney-Client Privilege in Shareholder Litigation*, 69 A.B.A. J. 174 (1983) (discussing perceived trend toward stronger and more predictable corporate privilege).

149. See, e.g., *Hollins v. Powell*, 773 F.2d 191, 196 (8th Cir. 1985) (defense of relying on attorney's advice in pursuing challenged course of conduct results in waiver of privilege).

150. See *Privileged Communications*, *supra* note 37, at 1515-24 (advocating rejection of both the *Garner* doctrine and the rule holding that the incidents of the attorney-client relationship are unprivileged, in favor of a case by case application of the crime-fraud exception).

quence of denial is to deter the person from seeking legal advice in the first place.