Finally, a belligerent who inflicts unlawful damage upon the population and territory of the opposing belligerent could be responsible or liable for such damage, perhaps through indemnification. The imposition of such damage constitutes a violation of international law and such responsibility and indemnity may, as a matter of law, be appropriately enforced and extracted from the offending belligerent.[145] The long-term viability of the United Nation's plan, which assumes continued sanctions against Iraq, has yet to be proven, though expectations presently remain high, given the new and emerging configuration of international political relationships.

[145] 1949 Geneva Convention, *supra* note 129; Protocol I, *supra* note 67, art. 51, *reprinted in* 16 I.L.M. at 1413; 1 OFFICIAL RECORDS DIPLOMATIC CONFERENCE, *supra* note 85, at 149. Any country guilty of "grave breaches" is liable for compensation, nd the individual is responsible for acts committed by persons in its armed forces. *Id.*

CLIENT IDENTITY: IS IT PROTECTED INFORMATION UNDER THE ATTORNEY-CLIENT PRIVILEGE?

FRANCISCO ED. LIM*

INTRODUCTION

The attorney-client privilege prohibits a lawyer from disclosing, without the consent of his client, information learned in confidence from the latter.[1] The "privilege is so ingrained in our law, that for centuries it has been steadily upheld."[2]

The nature and extent of this privilege has, to some extent, been examined by our courts of law.[3] There are, however, other issues that remain unanswered in this jurisdiction. One unsettled question is whether or not the identity of a client can qualify as confidential information under the attorney-client privilege.

This paper will discuss the issue. To put the question in its proper perspective, this paper shall discuss the history of, and policy behind, the attorney-client privilege; thereafter, it will analyze the various cases that have examined the question.

* LL.B. 1980, Ateneo de Manila University; LL.M. 1986, University of Pennsylvania; Editor-in-Chief, ATENEO LAW JOURNAL 1979-1980. The author is a member of the law faculty of the Ateneo de Manila University. He has submitted this paper in fulfillment of the requirements of the Justice Jose C. Colayco Professorial Chair in Remedial Law of which he is an awardee. The author wishes to thank his law firm, the Angara Abello Concepcion Regala & Cruz Law Offices (ACCRA), for giving him the time to write this paper. He also wishes to thank his former student and now an associate in ACCRA, Atty. Gilberto D. Gallos, for his assistance.

[1] Section 24(b), Rule 130, Revised Rules of Court.

[2] *People v. Warden of County Jail*, 270 N.Y.S. 362, 367 (1934).

[3] For example, communication made by a client to his attorney for the express purpose of being communicated to a third person is not covered by the privilege [*Uy Chico v. Union Life Assurance Society*, 29 Phil. 163 (1915)]. Equally settled is the question that the privilege may be waived. [e.g., *Jones v. Harding*, 9 Phil. 279 (1907); *Orient Insurance Co. v. Revilla & Teal Motor Co.*, 54 Phil. 919 (1930); *Barton v. Leyte Asphalt & Mineral Oil Co.*, 46 Phil. 938 (1924)].

I. THE ATTORNEY CLIENT PRIVILEGE: ITS HISTORY, POLICY AND GENERAL PRINCIPLES

A. History

The history of the attorney-client privilege goes back to the reign of Queen Elizabeth I in the early 1600s. At that time, the reason underlying the privilege was a consideration for the oath and honor of the attorney, and not so much the apprehensions of the client. It was viewed that the first duty of the attorney was to keep the secrets of his client. Under the original theory, the privilege did not exempt the client himself. It could be waived by the attorney only, since only his honor was involved. This doctrine was repudiated in the last quarter of the 1700s, and gave way to the theory that emphasized the importance of freeing the client from any apprehension in consulting his legal adviser. The new theory "looked to the necessity of providing subjectively for the client's freedom of apprehension in consulting his legal adviser and proposed to assure this by removing the risk of disclosure by the attorney even at the hands of the law."[4] Under the new theory, the privilege belongs to the client; consequently, the attorney could not waive it; only the client could do so. Not only were the lawyer's lips sealed, but the client himself could not be compelled to disclose the confidence. Originally, the privilege was limited to communications received in connection with a litigation and for the purpose of the litigation only. Gradually, the privilege was extended to all communications made by a client in confidence to the attorney, whether they related to any suit then pending or contemplated or to any other matters proper for professional advice. The seal of secrecy was placed not alone on communications made by the client, but on the advice given by the attorney.[5]

In the United States, the privilege is rooted in common law and exists independently of, but in many states is declared by, statute.[6] The doctrine is subject to statutory regulation and limitation, but except as so modified, the statutes are merely declaratory of the common law rule.[7]

[4] WIGMORE ON EVIDENCE, § 2290.

[5] *Bacon v. Frisbie*, 80 N.Y. 394, 36 Am. Rep. 627; *Root v. Wright*, 84 N.Y. 72, 38 Am. Rep. 495.

[6] 81 Am. Jur. 2d, § 208-209, at 209-210.

[7] 97 CJS § 276, 783.

In the Philippines, the attorney-client privilege traces its origin from Section 383[8] of Act No. 190, more popularly known as the Code of Civil Procedure, enacted by the Philippine Commission on 7 August 1901. The rule was carried in Section 26(e), Rule 123 of the old Rules of Court and subsequently in Section 21(b), Rule 130 of the 1964 Rules of Court. The 1964 version was amended when the rules on evidence were revised in 1988.[9] As presently worded, the attorney-client privilege is contained in Rule 130, paragraph 24(b), which reads:

> Sec. 24. Disqualification by reason of privileged communication. - The following persons cannot testify as to matters learned in confidence in the following cases:
>
> xxx
>
> (b) *An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon* in the course of, or with a view to, professional employment; nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of the client and his employer, concerning any fact the knowledge of which has been acquired in such capacity; (emphasis supplied)
>
> xxx

In this jurisdiction, the attorney-client privilege is further implemented by the following statutory provisions:

1) Rule 138, Revised Rules of Court

> Sec. 20. It is the duty of an attorney:
>
> xxx
>
> (e) *To maintain inviolate the confidence, and at every peril to himself, to pre-*

[8] Sec. 383. Incompetency of Witnesses. The following persons cannot be witnesses:
xxx
4. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given thereon in the course of professional employment; nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of client and his employer, concerning any fact, the knowledge of which has been acquired in such capacity.

[9] The amendment consisted in adding the phrase "or with a view to" between the phrases "in the course of" and "professional employment", thereby clarifying that the existence of attorney-client relationship is not an essential requisite for the attorney-client privilege to apply.

serve the secrets of his client, and to accept no compensation in connection with his client's business except from him or with his knowledge and approval." (emphasis supplied).

2) Code of Professional Responsibility

Rule 21.01 - A lawyer shall not reveal the confidence or secrets of his client except:

a) When authorized by the client after acquainting him of the consequences of the disclosure;

b) When required by law;

c) When necessary to collect his fees or to defend himself, his employees or associates or by judicial action.

Rule 21.03 - A lawyer shall not, without the written consent of his client, give information from his files to an outside agency seeking such information for auditing, statistical, bookkeeping, accounting, data processing, or any similar purpose.

3) Revised Penal Code

Art. 209. *Betrayal of trust by an attorney or solicitor* - Revelation of secrets. — In addition to the proper administrative action, the penalty of prison correctional in its minimum period, or a fine ranging from 200 to 1,000 pesos, or both, *shall be imposed upon any attorney-at-law or solicitor (procurator judicial) who, by any malicious breach of professional duty or inexcusable negligence or ignorance, shall prejudice his client or reveal any of the secrets of the latter learned by him in his professional capacity* (emphasis supplied).

B. Policy

As explained above, the original policy reason for the attorney-client privilege was the attorney's oath and honor.[10] But "[t]he judicial search for truth could not endure to be obstructed by a voluntary pledge of secrecy ...".[11] The modern theory behind the privilege is that the client must be free to discuss whatever his wishes with his lawyer, and the latter

[10] *People v. Warden of County Jail*, 270 NYS 362, 363 (1934).

[11] WIGMORE ON EVIDENCE, § 2290.

must be equally free to obtain information beyond that volunteered by his client.[12] Wigmore summarizes the policy as follows: "In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; and hence the law must prohibit such disclosure except on the client's consent."[13] As succinctly stated in *United States vs. Jones*,[14] the attorney client privilege "is a creature of public policy calculated to encourage people to seek legal advice on the basis of frank, useful communications." Unless the client is assured that the lawyer cannot be compelled to reveal what is told him, he will suppress what he thinks to be unfavorable facts. The advice given will then be probably wrong, misleading, or inaccurate and the trial will be full of surprises.[15]

The rule is also founded on public policy, *i.e.*, that people should be encouraged to approach lawyers for their legal problems, and not take the law into their own hands.[16] Furthermore, the privilege has both a legal and an ethical basis. The ethical obligation not to disclose is a broader one. Thus, the prohibition against disclosure of confidential information is designed to preserve the confidential and trust relation which lie at the bottom of, and affords the security in the relation of attorney and client.[17]

C. General Principles

In the Philippines, the following are the requisites to entitle a party to claim the attorney-client privilege: (a) there must be communication by the client to the attorney; (b) such communication has been made in the course of, or with a view to, professional employment;[18] and (c) the communication must have been made confidentially.[19]

[12] PIRSIG, MAYNARD AND KIRWIN, CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 319 (1976).

[13] WIGMORE ON EVIDENCE § 2291.

[14] 517 F.2d 666 (5th Cir. 1975).

[15] AGPALO, LEGAL ETHICS 204-205 (1989); PINEDA, LEGAL JUDICIAL ETHICS 251 (1994).

[16] MARTIN, LEGAL AND JUDICIAL ETHICS 135 1988.

[17] AGPALO, *supra* note 15 at 205.

[18] 7 FRANCISCO, THE REVISED RULES OF COURT IN THE PHILIPPINES 1973.

[19] MARTIN, *supra* note 16 at 136; Pineda, *supra* note 15 at 249-250: *Uy Chico vs. Union Life Assurance Society*, 29 Phil. 163 (1915).

The privilege applies to verbal or written communications by the client to the attorney, as well as to information communicated by any other means. However, the privilege ordinarily does not cover the mere fact of execution, delivery, existence, or custody of documents.[20]

There are cases when a lawyer is not bound by the rule, for example: (a) when authorized by the client after acquainting him of the consequences of the disclosure; (b) when required by law; and (c) when necessary to collect his fees or to defend himself, his employees or associates or by judicial action.[21] Furthermore, professional communications are not privileged when such communications are made for an unlawful purpose or are not within the scope of lawful employment.[22]

II. The Privileged Character of Client Identity: The General Rule and Exceptions

A. As a General Rule, the Identity of a Client is Not Privileged Information.

The general rule is that the identity of a client is not privileged. The rule is predicated on the principle that, since non-disclosure of a client's identity is in contravention of the general rules of law and to the widely-held view that the fullest disclosure of facts will be to the best interest of truth and justice, it should be strictly construed and not extended beyond the policy upon which it is based.

For example, in *People vs. Warden of County Jail*,[23] the identity of the client was held not to be privileged on public policy considerations. The Court held that the identity of the client "should not be veiled in mystery" and that "[d]isclosure should be made if we are to maintain confidence in the bar and in the administration of justice."[24] In this case, Vogelstein, a lawyer, appeared as counsel for fifteen defendants charged with illegal gambling. Twelve defendants pleaded guilty and were fined; the cases of the other three remained pending. On information that there was a systematic, organized movement to violate the law, the grand jury of the

[20] MARTIN, *supra* note 16 at 136.

[21] Code of Professional Responsibility, Rule 21.01; Rules of Court, Rule 130, Section 24(b).

[22] BATACAN, LEGAL AND JUDICIAL ETHICS 68-69 (1978).

[23] 270 NYS 362, 150 Misc 714 (1934), affd 242 App Div 611, 271 NYS 1059.

[24] *Id.* at 371.

County of New York commenced an inquiry on the matter. Eleven of the fifteen defendants for whom Vogelstein previously appeared came before the grand jury, voluntarily waived the attorney-client privilege, and testified that they did not retain Vogelstein in the criminal proceedings which had been instituted against them; that they did not know him and did not pay him for his services.

Vogelstein was called before the grand jury, and asked to reveal the name and address of the man who employed him to appear for the defendants. He declined on the ground that the identity of his client was privileged communication, which he could not disclose in the absence of the client's waiver. In overruling this contention, the Court observed that, if the rule were so, "attorneys might conceal a multitude of information under the claim of the privilege, without having to show that the alleged client ever, in fact, existed."[25]

The *Vogelstein* case adopts, as its philosophical foundation, the proposition that "the privilege and duty of being silent do not arise until the fact (of engagement) is ascertained."[26] "`The client does not consult the solicitor with a view to obtaining his professional advice as to whether he shall be his solicitor or not.'"[27] Simply put, the attorney-client privilege does not arise until there is a client. The Court held that "[t]he name or identity of the client was not the confidence which the privilege was designed to protect; the statements of the client for the purpose of seeking advice from his counsel were the disclosures which were to be kept secret."[28] Thus:

> The attorney-client privilege is not one which is guaranteed by the Constitution. It is a statutory provision which embodies in substance the common law rule. It is subject to the will and control of the legislature. The same body which controls the privilege may regulate it, may modify it, if indeed it may not abolish it altogether.
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> xxx
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> A review of the decisions clearly indicates that it was not the purpose of the privilege to shield guilt. Its primary object was to secure the orderly administration of justice by insuring frank revelation by the client to the

[25] *Id.*

[26] *Id.* at 367.

[27] *Id., citing Bursill v. Tanner*, L.R. 16 Q.B.D. 1, 4.

[28] *Id.*

attorney without fear of a closed disclosure; in other words, to promote freedom of consultation. To be sure, the exercise of the privilege may at times result in concealing the truth and in allowing the guilty to escape. That is an evil, however, which is considered to be outweighed by the benefit which results to the administration of justice generally.

> *There is nothing in the books to show that the privilege was to extend to the fact of the retention of counsel. No point is made that the employment of counsel should be shrouded with secrecy. The retention of counsel was to call the privilege into operation. The privilege itself was to extend only to communications between a client and an attorney who had been retained. The name or identity of the client was not the confidence which the privilege was designed to protect; the statements of the client for the purpose of seeking advice from his counsel were the disclosures which were to be kept secret. x x x The mere fact of the engagement of counsel is out of the rule because the privilege and duty of being silent do not arise until the fact is ascertained. x x x* (emphasis supplied).

The same approach was adopted in *Behrens vs. Hironimus*,[29] where the U.S. Court of Appeals for the Fourth Circuit held that since the attorney-client privilege "presupposes the relationship of attorney and client, it does not attach to the creation of that relationship."[30] In this case, a certain Theresa Behrens filed suit for *habeas corpus* against Helen Hironimus, Warden of the Federal Reformatory for Women, Alderson, West Virginia, to obtain release from custody. After trial, the District Court came to the conclusion that Behrens failed to prove that she was denied any of her federal constitutional rights, and she was remanded to the custody of Hironimus. Behrens appealed. Among the points of error she raised was the admission of the testimony of Mrs. Merill, which was limited to the fact that she was consulted by Behrens and given her advice on certain subject matter. Ruling on the issue of whether the identity of the client was privileged information, the Court held:

> The existence of the relation of attorney and client is not a privileged communication. *The privilege pertains to the subject matter, and not to the fact of the employment, and since it presupposes the relationship of attorney and client, it does not attach to the creation of that relationship.* So, ordinarily, the identity of the attorney's client, or the name of the real party in interest, and the terms of employment will not be considered privileged matter. xxx (emphasis supplied)

[29] 170 F.2d 627 (4th Cir. 1948).

[30] *Id.* at 628.

In United States vs. Lee,[31] a U.S. Court of Appeals, in ruling that "a counsel may not ... leave [his] client mysterious, unknown, and undefined," reasoned out that "[t]he court has the right to know that the client whose secret is treasured is actual flesh and blood."[32] In this case, Louis Lee was charged with larceny before the Circuit Court for the Eastern District of New York. He entered a plea of not guilty and was admitted to bail. On the date of the trial, neither the defendant nor his counsel, Mr. Nev appeared. It appeared that the defendant had fled from justice. The US attorney investigated by means of a grand jury the disappearance, and proceeded upon the theory that it was effected with the aid of others. In aid of this investigation, Mr. Nev was subpoenaed, and it was revealed that he was not retained by Lee himself, but by a third person. Mr. Nev declined to disclose the name of the person who retained him to defend Lee, on the ground that such information was privileged communication.

The Court of Appeals held the identity of the client is not protected by the attorney-client privilege, reasoning out that:

> It is an attorney's right to guard the secrets of his client, where such secrets do not involve an actual or intended breach of the law on the part of the client, and hence complicity by the attorney therein, and the court should support him in such duty. x x x It should be observed that the basis of the protection afforded to the communication of clients to attorneys is found in the law, and not in some convention or agreements made between the attorney and the client pursuant to which the communication is made. Attorneys and clients cannot broaden the scope of this privilege, although they may narrow it, even to the point of waiving it altogether, and therefore it is unimportant that the unknown client exacted from the attorney a promise that he would keep secret whatever communications should be made. x x x But it is thought that a *counsel may not state that he gained the information called for from a client, and then leave that client mysterious, unknown, and undefined. The court has the right to know that the client whose secret is treasured is actual flesh and blood, and demand his identification, for the purpose, at least, of testing the statement which has been made by the attorney who places before him the shield of this privilege. The declination of the answer because a man imparted the desired information who stood in the relation of a client justifies the testing of questions relating to the client's actual identity and existence.*

[31] 107 F 702 (CC NY 1901).

[32] *Id.* at 704.

The case of *In re: Grand Jury Appearance of Alvin S. Michaelson, Esquire*[33] invoked the inherent power of the courts to regulate the bar as a policy reason for ruling that the identity of the client is not privileged. The Court of Appeals for the Ninth Circuit stated that the "court retains the right to satisfy itself that no conflict exists and that the attorney is fulfilling his duty of loyalty to his client."[34] In this case, a lawyer, Alvin S. Michaelson, was adjudged in civil contempt and ordered confined by the United States District Court for the District of Nevada, for disobeying a court order requiring him to answer grand jury questions concerning his fee arrangements with his client. The questions which Michaelson refused to answer were the following:

1. Did anyone refer Miss Sibson to you?
2. Did you discuss a fee arrangement with Miss Sibson?
3. Did any other individual besides Miss Sibson ever discuss with you a fee arrangement for your representation of Miss Sibson?
4. What is your fee arrangement with Miss Sibson?
5. How much money have you received from Miss Sibson?
6. Have you received any money from any other person besides Miss Sibson to represent Miss Sibson?
7. Have you received any funds from Miss Sibson?
8. Have you made arrangements with Miss Sibson to pay your expenses?
9. Have you made an arrangement with any other person besides Miss Sibson for the payment of your expenses to represent her?

Among the grounds cited by Michaelson for his refusal to answer was the attorney-client privilege.

[33] 511 F.2d 882 (9th Cir. 1975), cert. denied 95 S. Ct. 1979 (1975).

[34] *Id.* at 889.

In holding that the name of the client was not protected information, the Court of Appeals stated that "[w]hen an attorney is paid by someone other than his client to represent that client, there is a real and present danger that the attorney may in actuality be representing not the interests of his client, but those of his compensator. Not only does the client have the right to know who is paying his attorney, but the court retains the right to satisfy itself that no conflict exists and that the attorney is fulfilling his duty of loyalty to his client."[35] Thus:

> There are strong policy reasons why the existence of an attorney client relationship, including the fee arrangement, should not be privileged absent incriminating circumstances such as outlined above. *The courts have the inherent power to regulate the bar. The courts have the right to inquire into fee arrangements both to protect the client from excessive fees and to assist an attorney in the collection of his fee, but more importantly, the court may inquire into fee arrangements to protect against suspected conflicts of interest. When an attorney is paid by someone other than his client to represent that client, there is a real and present danger that the attorney may in actuality be representing not the interests of his client, but those of his compensator.* Not only does the client have the right to know who is paying his attorney, but the court retains the right to satisfy itself that no conflict exists and that the attorney is fulfilling his duty of loyalty to his client.[36]

The right of the opposing party to know with whom he is contending is another policy reason why client identity is, generally, not privileged. Thus, in *United States v. Threlkeld*,[37] an attorney who prepared an estate return was held properly compelled to state with whom he had contracted for his services, the court basing its holding on the assertion that a party is entitled to know the identity of his adversary. Citing Wigmore,[38] the District Court stated that "[a]n adversary is entitled to know the identity of the client."[39] "[I]t is necessary to have this information," said the Court, "to determine whether a communication claimed to be privileged is actually privileged, *e.g.*, it must be known whether it was communicated by the client and whether it was communicated within the scope of the attorney's employment."[40]

[35] *Id.*

[36] *Id.* at 888-889.

[37] 241 F. Supp. 324 (1965, DC Tenn).

[38] 8 WIGMORE § 2313.

[39] 241 F. Supp. at 326.

[40] *Id., citing* 8 WIGMORE § 2292.

B. The Exceptions

While client identity is generally not within the attorney-client privilege, there are situations where disclosure of a client's name will betray the nature and purpose of the privilege and, for that reason, has been held to be privileged information protected from disclosure.

1. WHERE THE CIRCUMSTANCES ARE SUCH THAT THE NAME OF THE CLIENT IS MATERIAL ONLY FOR THE PURPOSE OF SHOWING HIS ACKNOWLEDGMENT OF GUILT OF THE VERY OFFENSES FOR WHICH THE LAWYER WAS EMPLOYED, HIS IDENTITY IS PROTECTED INFORMATION UNDER THE ATTORNEY-CLIENT PRIVILEGE.

Where the disclosure of a client's identity would expose the client to criminal liability, his lawyer cannot be compelled, without the client's consent, to reveal said identity. In *Ex Parte Enzor,*[41] for example, the undisclosed client, an election official, told his attorney in confidence that a third party had offered to bribe him to violate election laws, or that he had accepted a bribe to such an end, and requested the attorney's legal opinion as to what he should do under the circumstances. The attorney testified that she had advised the client to count the ballots correctly, but that she could not recall whether the client had merely been offered or had, in fact, accepted the bribe prior to consultation. The attorney refused to reveal to the grand jury the name of her client on the ground of attorney-client privilege. The lawyer was ordered jailed for contempt. Reversing the judgment, the court, while acknowledging the client identity is generally not privileged, observed that if the client had accepted the bribe he would have violated the law, in which case his identity, by way of exception to the general rule, would be a privileged communication.

To the same effect is *Ex Parte McDonough,*[42] where the petitioner (McDonough) was retained by Wooley and Gorman to represent them as their lawyer in connection with all investigations that were being made as to their participation in alleged election frauds committed in Alameda County during the general primary election of 25 August 1914. Subsequently, Higgins, Gale, and Wiles were indicted by the grand jury for participation in the said crimes. McDonough appeared as lawyer for Higgins, Gale and Wiles, and deposited $10,000 cash bail for the release of Higgins. The grand jury of Alameda County summoned McDonough as a witness, but he refused to answer the following questions:

(1) Who employed you to represent Higgins, *et al.*?

(2) Did Wooley or Gorman employ you to represent Higgins, *et al.*?

(3) Did Wooley or Gorman furnish the $10,000 which you deposited as bail for Higgins?

(4) Who furnished the $10,000 deposited as bail for Higgins?

The questions were aimed to obtain evidence against Wooley and Gorman, by which they could be implicated as principals in the commission of the crimes for which Higgins, *et al.* had been indicted. McDonough was adjudged in contempt of court and ordered confined in prison until he answered the questions. The Supreme Court of California, in ordering the discharge from custody of McDonough, declared that the name of the client would be considered privileged where the circumstances are such that the client's name is material only to prove his acknowledgment of guilt for the very offenses for which the attorney was employed.

Similarly, in *U.S. vs. Hodge and Zweig,*[43] the issue was whether or not the information demanded by an Internal Revenue (IRS) subpoena was protected by, among others, the attorney-client privilege. In 1971, a federal grand jury in Nevada began an inquiry into an alleged conspiracy to import drugs by a group called the "Sandino Gang". Hodge and Zweig, partners in law practice, represented several witnesses and suspects called before the grand jury, including Joe Sandino. The investigation led to several convictions. In November 1973, in connection with a tax investigation, Special Agent Christopher of the IRS issued summons to Hodge and Zweig, directing them to produce business records and information pertaining to, among others, (1) payment received from Sandino on behalf of any other person, and (2) payments received from any other person on behalf of Sandino. The lawyers refused to comply. In March 1974, Sandino and some of his associates were charged with conspiracy to import mari-

[41] 270 Ala 254, 117 So2d 361 (1960).

[42] 170 Cal. 230, 149 P. 566 (1915).

[43] 548 F2d 1347 (9th Cir. 1977).

juana. The Government alleged that as part of the conspiracy, the conspirators had agreed to provide bail and legal services for participants apprehended by the authorities. In August of 1974, the district court ordered the summons enforced. Hodge and Zweig appealed, alleging that the summons was issued solely to gather information in aid of the criminal prosecution and that the requested information is protected by the attorney-client privilege. The Court of Appeals held that client identity is privileged where a strong probability exists that disclosure thereof would implicate the client in the very criminal activity for which he sought legal advice.

Parenthetically, the Court stated that the attorney-client privilege does not apply when legal representation was secured in furtherance of criminal or fraudulent acts. The crime/fraud exception applies even when the attorney is unaware that his advice is sought in furtherance of such improper purpose. The court then ordered Hodge and Zweig to disclose the information requested in the IRS summons, upon a *prima facie* finding that the payments to them during the years 1970, 1971 and 1972, by and on behalf of Sandino were made pursuant the conspiratorial agreement and thus in furtherance of a drug conspiracy.

2. WHEN SO MUCH HAS BEEN REVEALED CONCERNING THE LEGAL SERVICES RENDERED THAT THE DISCLOSURE OF THE CLIENT'S IDENTITY EXPOSES HIM TO POSSIBLE INVESTIGATION AND SANCTION BY GOVERNMENT AGENCIES, THE IDENTITY OF THE CLIENT IS PRIVILEGED.

The privileged character of a client's identity is not limited to cases where disclosure would expose the client to criminal prosecution. It extends to cases where such disclosure may expose the client to possible investigation and sanction by government agencies. In *Baird vs. Koerner*,[44] for example, Baird, a lawyer, was consulted by the accountants and the lawyer of certain undisclosed taxpayers regarding the defenses and steps to be taken to place the undisclosed taxpayers in the most favorable position in case criminal charges were brought against them by the Internal Revenue Service. It appeared that the taxpayers' returns were incorrect and the taxes understated. No investigation was then being made by the government of the taxpayers. Subsequently, the lawyer of the taxpayers delivered to Baird the sum of $12,706.85, which had been previously determined to be the amount of the tax due, and another sum as his fee for the consultation and advice given. Baird transmitted a cashier's check for $12,706.85 to the District Director of Internal Revenue of Baltimore, Maryland, with a letter explaining the sum and its payment, but without naming the taxpayers. Koerner, as special agent of the Internal Revenue Service, summoned Baird to identify the attorneys, accountants, and taxpayers for whom the check was given. Baird declined to name the taxpayers on the ground that he did not know their names, and declined to name the attorney and accountants on the ground that they were privileged communication. Koerner filed a petition for the enforcement of the Internal Revenue Service summons. At the hearing, Baird again refused to identify his employer, and was found guilty of civil contempt. The Court of Appeals for the Ninth Circuit held that, an attorney could not be compelled to state the names of clients who employed him to voluntarily mail sums of money to the government in payment of undermined income taxes, unsued on, and with no government audit or investigation into that client's income tax liability pending. A taxpayer-client's name is privileged when so much has been revealed concerning the legal services rendered that the disclosure of the client's identity exposes him to possible investigation and sanction by government agencies. In clear and unequivocal terms, the Court held:

> ... In the instant case, *a disclosure of the persons employing the attorney-appellant would disclose the persons paying the tax; the fact of payment indicates clearly what is here specifically admitted, that an additional tax was payable and that unknown clients owed it.* But as yet the clients are unnamed. Suppose those unknown clients had related certain facts to their attorney, and asked that attorney for an opinion as to whether the clients, as taxpayers, owed the government additional taxes. Could the attorney be required to state the information given him in confidence by the clients, and the attorney's advice in response thereto? Or could the government require any tax attorney to reveal the name of those clients who had consulted the attorney with respect to possible taxes payable, so that the government could institute investigations of all such taxpayers?
>
> We think the answer is 'no' to both such questions. If it were not, the government could obtain by indirection, through demand for identity of a taxpayer, the information it seeks simply because a certain amount has been paid in as a tax in accordance with a tax law that permits such an anonymous payment. This would disclose the 'ultimate motive of litigation' as Wigmore says the privilege should protect. (emphasis supplied)[45]

[44] 279 F.2d 623 (9th Cir.1960).

[45] *Id.* at 630.

3. WHERE THE DISCLOSURE OF THE CLIENT'S IDENTITY WOULD EXPOSE THE CLIENT TO CIVIL LIABILITY, HIS IDENTITY IS PRIVILEGED.

Case law also holds that a client's identity is privileged where its disclosure would establish a civil claim against the client. A case in point is *In re Shawmut Mining Company,*[46] where the Shawmut Mining Company ("Shawmut") entered into a contract with Reilly and Company ("Reilly"), who was operating the "Brock mines", for the entire output of said mines. The term of the contract was from 22 September 1899 to 1 April 1903. However, Reilly ceased to deliver coal on 1 October 1902, claiming that the Brock mines had been sold. Shawmut filed an action against Reilly, the lawyer Miller, Cartwright, and the alleged buyer of the mines -- Fisk. He alleged that the sale of the mines by Reilly was colorable and fraudulent and for the purpose of defeating enforcement of the contract; and that Fisk was a mere "straw man" in the transaction, representing other parties who actually furnished the money and took the property. With the purpose of determining the real buyers, Miller was summoned as a witness and asked to disclose the names of the persons whom he represented in the Brock mines. Miller declined to answer on the ground that the same was confidential communication. The Court held that the name of the client will be considered a privileged matter when a party, for the purpose of establishing his claims in a litigation which is hostile to the client, desires to establish that certain persons were interested in a certain transaction so that they may be made liable or parties, and in the hope of establishing this liability, seek to make the attorney testify that represented them in that transaction. Thus:

> Under all of the circumstances of this case we think that the witness is correct in his contention that he should not be compelled to answer such question and disclose the information sought thereby. Resolved into its constituent parts, the question would compel the witness to state that certain persons retained him as attorney, and that, desiring to become interested in the purchase or sale of said mines, they communicated to him that fact, and directed and employed him to carry out and accomplish their purpose. It seems to us clear that such testimony given by him would involve the disclosure of confidential communications made by clients with reference to their purposes and plans, and in the fulfillment and prosecution of which he was employed and retained as an attorney, and that such disclosures would come within the prohibition of the statute as interpreted by the courts.

[46] 87 NYS 1059 (1904).

> xxx For the purpose of establishing its claims in a litigation which is hostile both to the witness and his clients it is desirous of establishing that certain persons were interested in a certain transaction so that they may be made liable as parties in respect thereto, and in the hope of establishing this liability it seeks to make the witness testify that he did represent them in respect to that transaction. *Plaintiff wishes to prove simply the fact that they were connected with the purchase or sale of these mines. That is one of the issues which is in litigation. If they can compel the witness to state, as directed by the order appealed from, that he represented certain persons in the purchase or sale of these mines, they have made progress in establishing by such evidence their version of the litigation. As already suggested, such testimony by the witness would compel him to disclose not only that he was attorney for certain people, but that, as the result of communications made to him in the course of such employment as such attorney, he knew that they were interested in certain transactions. We feel sure that under such conditions no case has ever yet gone to the length of compelling an attorney, at the instance of a hostile litigant, to disclose not only his retainer, but the nature of the transactions to which it related, when such information could be made the basis of a suit against his client.* Upon the other hand, we believe that a refusal to compel such disclosures is sustained by the principles laid down in *Carnes v. Platt,* 36 N.Y. Super. Ct. 361, 362, affirmed 59 N.Y. 405; *Williams v. Fitch,* 18 N.Y. 546, 551; *Chirac v. Reinecker,* 11 Wheat. 280, 6 L.Ed. 474.[47]

The doctrine laid down by the *Shawmut* case was reiterated in *Neugass v. Terminal Cab Corporation.*[48] In that case, Miriam Neugass was injured when the cab she was riding in, owned by the Terminal Cab Corporation, collided with another cab. She filed an action against Terminal Cab Corporation and the owner of the second cab under the fictitious designation of "John Doe". She sought an order for the examination of the lawyer of the Terminal Cab Corporation. The order included the requirement that the lawyer reveal the name and address of the owner of the second cab. It appeared, however, that the lawyer was engaged by an insurance company to defend suits against its policyholders, one of whom was the owner of the second cab; and that prior to the time that the present action was brought to his attention, a policyholder other than the Terminal Cab Corporation came to him and reported that he was involved in an accident. The lawyer found out later that he was the owner of the second cab. He claimed that the information was privileged. Neugass asserted that the disclosure was not made to the attorney by his client, but to him as an

[47] *Id.* at 1063.

[48] 249 N.Y.S. 631 (1931).

employee of the insurance company. The Supreme Court of New York held that such information was made to the lawyer in his professional capacity. The Court upheld the refusal of the lawyer to identify his client, holding at, that:

> In the case of *Matter of Shawmut Mining Co.*, 94 App. Div. 156, 162, 87 N.Y.S. 1050, 1063, the attorney was asked to disclose on examination whether he represented certain persons in a certain transaction. This was for the purpose of disclosing that these persons as interested parties were connected with the purchase of certain property involved in the action. The court said: 'If it can compel the witness to state, as directed by the order appealed from, that he represented certain persons in the purchase or sale of these mines, it has made progress in establishing by such evidence their version of the litigation. As already suggested, such testimony by the witness would compel him to disclose not only that he was attorney for certain people, but that, as the result of communications made to him in the course of such employment as such attorney, he knew that they were interested in certain transactions. We feel sure that under such conditions no case has ever yet gone to the length of compelling an attorney, at the instance of a hostile litigant, to disclose not only his retainer, but the nature of the transactions to which it related, when such information could be made the basis of a suit against his client. Upon the other hand, we believe that a refusal to compel such disclosures is sustained by the principles laid down in *Carnes v. Platt*, 36 N.Y. 546; *Chirac v. Reinicher*, 11 Wheat. 280, 6 L. E. Ed. 474.
>
> "It appears to me that the name and address of the owner of the second cab came to the attorney in this case as a confidential communication. His client is not seeking to use the courts, and his address cannot be disclosed on that theory, nor is the present action pending against him as service of the summons on him has not been effected. The objections on which the court reserved decision are sustained.[49]

Note, however, that the Court stated that the theory for the proposition cited by the plaintiff that an attorney who has appeared for a party in an action may be compelled to disclose the address of his client where it is necessary to the administration of justice, is that the client will not be permitted to use the machinery of the law for his benefit without disclosing his identity and address. However, the court pointed out that such cases are distinguishable from the present case because here, the party is not seeking to use the courts, but someone is seeking to bring an action against him.

[49] *Id.*, at 634.

4. WHEN SO MUCH OF THE ACTUAL COMMUNICATION HAS ALREADY BEEN DISCLOSED (NOT NECESSARILY BY THE LAWYER) THAT IDENTIFICATION OF THE CLIENT AMOUNTS TO DISCLOSURE OF CONFIDENTIAL COMMUNICATION, THE IDENTITY OF THE CLIENT IS PROTECTED FROM DISCLOSURE UNDER THE ATTORNEY-CLIENT PRIVILEGE.

Another exception culled out by the courts is that, when so much of the communication has already been disclosed (not necessarily by the lawyer) that identification of the client amounts to, or would lead to, the disclosure of confidential information, then the identity of the client is privileged information. Thus, as early as 1826, the United States Supreme Court, in *Chirac vs. Reinicker*,[50] disallowed the revelation of client identity if in the context of the revelation, other privileged information will thereby be revealed as well. In that case, the following question, was propounded to the attorneys who served as Reinicker's counsel in another lawsuit between the same parties:

> Were you retained, at any time, as attorney or counselor, to conduct the ejectment suit abovementioned, on the part of the defendant, for the benefit of the said George Reinicker, as landlord of those premises?[51]

The attorneys objected to the question on the ground of the attorney-client privilege. The trial court sustained the attorneys' objections. The U.S. Supreme Court sustained the trial court, holding, that:

> [The question] ... asks, not only whether the witnesses were employed, but whether they were employed by Reinicker to conduct the ejectment for him, as landlord of the premises. We are all of the opinion that the question, in this form, does involve a disclosure of confidential communications. It seeks a disclosure of the title and claim set up by Reinicker to his counsel, for the purpose of conducting the defense of the suit. It cannot be pretended that counsel could be asked what were the communications made by Reinicker as to the nature, extent or grounds of his title; and yet, in effect, the question, in the form in which it is put, necessarily involves such a disclosure.[52]

[50] 11 Wheaton 280, 6 L.Ed. 474.

[51] 11 Wheaton 291, 6 L.Ed. 477.

[52] 11 Wheaton 295, 6 L.Ed. 477-478.

Similarly, in *In re Grand Jury Proceedings*,[53] the federal grand jury for the Southern District of Texas was investigating possible narcotics and income tax violations by certain individuals. Several lawyers were served with subpoena, commanding each to appear, testify and bring records relating to specific named clients who had either recently been convicted or then under arrest for marijuana-related offenses. The lawyers refused to answer the following questions:

(1) Did any third party make arrangements for the attorney to represent the named defendant?

(2) If bond was posted for the named defendant, who furnished the bond money to the attorney-witness for deposit with the United States Magistrate?

(3) If attorneys' fees had been paid, who paid the attorney's fees for the named defendant? And, if attorney's fees had not been paid, who promised to pay the balance of the moneys owned to the attorney-witness for the named defendant?

The lawyers claimed the attorney-client privilege. The Court of Appeals, Fifth Circuit, upheld the privilege, saying that the privilege may be recognized when so much of the actual communication has already been disclosed (not necessarily by the lawyer) that identification of the client amounts to disclosure of confidential communication. The names of the clients would be useful to the government only for one purpose. Disclosure of the names would be directly relevant to corroborating or supplementing already existing incriminating information about certain persons suspected of income tax offenses, regardless of their complicity in marijuana traffic. Aside from the fact that the revelation of the clients' identities could lead to their indictment, the Court ruled that the income tax aspects of the government's inquiry showed an independent motive why the unidentified clients could be expected to seek legal advice and anticipate that their names could be kept confidential. The attorney-client privilege protects the motive itself from compelled disclosure, and the exception to the general rule protects the client's identities when such protection is necessary to preserve the privileged motive.

[53] 517 F.2d 666 (5th Cir. 1975).

Another case that illustrates this exception is *NLRB vs. Harvey*,[54] where the National Labor Relations Board investigated charges that the American Furniture Company (the "Company") placed E.O. Shrader, a union representative, under surveillance by private detectives during an organizing campaign. The company discharged two employees after Shrader visited their homes. The head of the detective agency, upon being summoned by the Board, revealed that his agency had been employed by Harvey. Harvey was subpoenaed, and testified before the Board that at the request of a client he employed the agency to conduct the surveillance. He declined to name his client on the ground of the attorney-client privilege. The United States Court of Appeals held that an exception to the general rule that the identity of the client is not privileged communication is when so much of the communication has already been disclosed that identification of the client amounts to a disclosure of confidential communication. Circumstances might exist where a lawyer finds it necessary to employ a detective to enable the lawyer to furnish adequate legal services to his client, and in such a situation, the client's communications, including those relating to the hiring of a detective, would be privileged because legal services would be indistinguishable from nonlegal.[55]

To the same effect is the ruling in *In Re Kaplan*[56] where an attorney was confidentially retained by the client to pass certain information to a public investigating body. The lawyer disclosed the information but refused to identify his client on the ground of attorney-client privilege. The Court, while acknowledging the general rule that a client's name is not protected by the attorney-client privilege, held that the case was within the exception. Usually, observed the court, 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. In the instant case, however, said the court, the client's communication had already been divulged to the authorities and it was the client's

[54] 349 F.2d 900 (4th Cir. 1965).

[55] In this case, the Court noted that not all communications to a lawyer are privileged, and that the privileged is allowed only with respect to the client's communications made primarily for the purpose of securing: (1) an opinion of law, (2) legal services, or (3) assistance in some legal proceeding. It remanded the case to the District Judge for the purpose of determining whether Harvey was retained by his client to render a legal opinion, perform a legal services, or afford representation in legal proceedings, and whether as an incident to this employment he hired the detective. If Harvey was retained for any of the purpose enumerated, the privilege should be recognized. Otherwise, the privilege does not exist and Harvey must disclose the names of his client.

[56] 8 NY2d 214, 203 NYS2d 836,168 NE2d 660 (1960).

name that deserved and needed protection for fear of reprisals. The court concluded that since the client's communication to his attorney was made in the aid of public purpose to expose wrongdoing and not to conceal wrongdoing, the seal of secrecy should cover the client's name, so long as his information was made available to the public authorities.

CONCLUSION

The general rule is that the identity of the client is not privileged communication. The most common premises upon which this rule is based are the following:

(1) Since the privilege presupposes the attorney-client relationship, it does not attach to its creation;

(2) When the undisclosed client is a party to the action, the opposing party has the right to know with whom he is contending or who the real party in interest is;

(3) The court has the right to know that the client is actual flesh and blood, otherwise, lawyers might conceal information under the claim of the privilege without establishing the existence of the client; and

(4) The privilege pertains to the subject matter, and not to the fact of employment as attorney.

American jurisprudence has developed exceptions to this general rule, some of which are broadly stated as follows:

(1) When the circumstances of the case are such that the name of the client is material only for the purpose of showing his acknowledgment of guilt of the very offenses for which the lawyer was employed;

(2) When so much has been revealed concerning the legal services rendered that the disclosure of the client's identity exposes him to possible investigation and sanction by government agencies;

(3) When the disclosure of the client's identity exposes him to civil liability; and

(4) When so much of the actual communication has already been disclosed (not necessarily by the lawyer) that identification of the client amounts to disclosure of confidential communication.

In determining whether or not a case falls within the exceptions, there are no fixed or rigid rules. Each case must be judged according to its own circumstances. Always, however, two contending fundamental principles must be balanced: first is the objective of the law to ascertain the truth, and second, the policy behind the attorney-client privilege, *i.e.*, to secure the right of every person to freely and fully confer and confide with his lawyer in order that the former may have adequate advice and proper defense. In either case, it is the function of a court to mediate between these two competing social policies assigning, as far as possible, the proper value to each.