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Spring 1990

## The Adversarial System at Risk

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### Recommended Citation

Bennett L. Gershman, *The Adversarial System at Risk*, *Crim. Just.*, Spring 1990, at 22, <http://digitalcommons.pace.edu/lawfaculty/413/>.

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# LEGAL ETHICS

By Bennett L. Gershman

## The Adversarial System at Risk

The 1980s witnessed a significant alteration in the balance of power between the prosecutor and defense counsel. The balance now tilts strongly toward the prosecutor. The prosecutor's ability to obtain evidence through police searches, seizures, undercover operations, and interrogations was broadened (*United States v Leon*, 468 US 897 (1984); *New York v Quarles*, 467 US 649 (1984); *United States v Kelly*, 707 F2d 1460 (DC Cir 1983)), and the defendant's ability to obtain potentially exculpatory evidence was limited (*Arizona v Youngblood*, 109 S Ct 333 (1988); *United States v Valenzuela-Bernal*, 458 US 858 (1982)), making it easier for the prosecution to obtain convictions. Broader application of appellate doctrines such as harmless error (*Rose v Clark*, 478 US 570 (1986); *Delaware v Van Arsdall*, 475 US 673 (1986)) and restrictions on post-conviction remedies such as habeas corpus (*Murray v Carrier*, 477 US 478 (1986); *Engle v Isaac*, 456 US 107 (1982)) made it easier to preserve those convictions. The balance was further skewed by the continued erosion of due process constraints on prosecutorial excesses in areas such as grand jury practice (*Bank of Nova Scotia v United States*, 108 S Ct 2369 (1988)), charging decisions (*Wayte v United States*, 470 US 598 (1985)), plea bargaining (*Mabry v Johnson*, 467 US 504 (1984)), disclosure of evidence (*Pennsylvania v Ritchie*, 480 US 39 (1987)), and trial conduct (*Darden v Wainwright*, 477 US 168 (1986)).

However, the most ominous recent development affecting the balance of forces in the adversary system is the unprecedented attack by prosecutors on criminal defense lawyers themselves. Grand jury subpoenas to attorneys, law office searches, disqualification motions, fee forfeiture proceedings, and, most recently, IRS attempts to enforce currency-reporting regulations do not seem to be isolated occurrences or mere happenstance. Rather, perhaps inspired by Shakespeare's injunction in *Henry VI* to "kill all the lawyers," some prosecutors appear to have concluded that the most effective way to prevail in the battle against crime is to cripple the defense lawyers, particularly those who represent defendants in areas such as enterprise drug crimes, currency violations, and RICO offenses.

The increasing use of this heavy prosecutorial firepower against criminal defense attorneys poses a serious threat to the adversarial system. Defense attorneys themselves will be placed on the defensive, thereby giving prosecutors considerable leverage over the attorney-client relationship. Many of the most talented and aggressive defense attorneys will be driven out of defense work, unwilling to deal with the pressures, harassment, and potential loss of income from these prosecutorial tactics. Finally, prosecutors will be empowered to re-fashion and to some extent even control the course of private criminal defense representation. Although it is hazardous to predict the outcome, these developments may actually foreshadow the demise of

the system of private criminal defense work. (*United States v Monsanto*, 109 S Ct 2657, 2675 (1989) (dissenting opinion).)

## IRS Form 8300

Attorney subpoena litigation continues to be a bitter source of controversy, with attorneys risking jail rather than revealing information that is detrimental to their clients. (Julie DelCour, *Attorneys Jailed for Keeping Silent*, Nat'l L J, Dec 18, 1989, p. 3.) As of this writing, however, an even more controversial investigative weapon against attorneys is being tested. This is the attempt by the IRS, pursuant to 26 U.S.C. § 6050I, Form 8300, to force criminal defense attorneys to disclose the identities of clients or third parties who pay cash fees in excess of \$10,000. (*United States v Fischetti, Pomerantz, and Russo et al.*, No M-18-304 (S D NY, Nov 16, 1989) (Order to Show Cause).) As with fee forfeitures and attorney subpoenas, the issue raises complex legal and ethical questions relating to the attorney-client privilege, the confidentiality privilege, the Sixth Amendment right to counsel, and due process.

Recently, the IRS mailed to several prominent criminal defense attorneys a request in the form of a "check sheet" for information from those attorneys who, in filing Form 8300 ("Report of Cash Payments Over \$10,000 Received in a Trade or Business"), withheld information concerning either the identity of the individual from whom the cash was received, the individual or

organization for whom the transaction was conducted, or a description of the transaction or the method of payment. The IRS letter concluded: "Failing to voluntarily submit the requested information could result in summons enforcement action being initiated." Assuming, *arguendo*, that the attorney received cash payments from a client who does not consent to have his or her identity revealed, what are the attorney's legal and ethical options and obligations in the event that enforcement action is initiated?

26 U.S.C. § 6050I provides:

- (a) Cash receipts of more than \$10,000.—Any person—
- (1) who is engaged in a trade or business, and
  - (2) who, in the course of such trade or business, receives more than \$10,000 in cash in 1 transaction (or 2 or more related transactions), shall make a return described in subsection (b) with respect to such transaction (or related transactions) at such time as the Secretary may by regulation prescribe.
- (b) Form and manner of returns.—A return is described in this subsection if such return —
- (1) is in such form that the Secretary may prescribe,
  - (2) contains—
    - (A) the name, address, and TIN of the person from whom the cash was received;
    - (B) the amount of cash received;
    - (C) the date and nature of the transaction; and
    - (D) such other information as the Secretary may prescribe.

The regulations implementing § 6050I require that reports be filed within 15 days of the completion of the transaction or series of transactions involving cash payments in the same case. (26 CFR § 1.6050I-1.) These reports, designated *Form 8300* by the IRS, are to be mailed to a central location where the in-

formation is entered into a computer.

Since November 1988, willful failure to file a Form 8300 is a felony punishable by imprisonment for up to five years and a fine of up to \$25,000 (\$100,000 in the case of a corporation). (26 USC § 7203.) There is also a civil penalty for intentional failure to file: ten percent of the amount which should have been reported, or ten percent of the taxable income derived from the transaction. (26 USC § 6721(b).)

### Ethical rules of confidentiality

However, the requirement that an attorney disclose a client's identity may clash with rules of professional conduct that broadly prohibit disclosure of information acquired by the attorney during the professional relationship. Clearly, responsible attorneys do not wish to violate either the federal currency-reporting regulations or the professional disciplinary rules that protect client confidences and secrets. Those ethical rules are embodied in Rule 1.6 of the ABA Model Rules of Professional Conduct and DR 4-101 of the ABA Model Code of Professional Responsibility.

Rule 1.6 of the ABA Model Rules provides:

- (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as authorized in paragraph (b).
- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
- (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a crimi-

nal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

The so-called confidentiality privilege includes but is broader than the attorney-client privilege. The Comment to Rule 1.6 observes that "the confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."

DR 4-101 of the ABA Model Code of Professional Responsibility provides:

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

- (1) Reveal a confidence or secret of his client.
- (2) Use a confidence or secret of his client to the disadvantage of the client.
- (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

- (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
- (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
- (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
- (4) Confidences or secrets necessary to establish or col-

lect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

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### **Attorney-client privilege narrowly construed**

No court has yet decided whether the duty to protect client confidences extends to the reporting requirements of 26 U.S.C. § 6050I. Several state and local ethics committees (e.g., Florida, Georgia, and Chicago) have concluded that the duty does extend to such reports. Other ethics committees have issued advisory opinions discussing the attorney's duty (e.g., New Mex-

ico, Kentucky, Connecticut, Philadelphia, and the District of Columbia). However, the ethical standards' confidentiality requirements are broader than the confidentiality requirements of evidentiary privileges. The attorney-client privilege—an evidentiary privilege—has not fared well in the federal courts as a basis for refusing to reveal a client's identity. This is so with respect to both grand jury subpoena enforcement and IRS summons enforcement.

Because it is an impingement on the search for truth, the attorney-client privilege is narrowly construed. The privilege exists to protect confidential communications between a lawyer and his or her

client that relate to the *legal* interests of the client and society. (J. Wigmore, 8 *Evidence* § 2291 (McNaughton Rev Ed 1961).) The policy behind the privilege is to promote freedom of consultation of legal advisors by clients. In order to dispel the fear of compelled disclosures, the law prohibits disclosures of such confidential communications except with the client's consent. (*Upjohn Co. v United States*, 449 US 383 (1981).) However, the attorney-client privilege is limited to communications that are necessary to obtain informed legal advice. As a general rule, therefore, neither the identity of a client nor the fee arrangement comes within the scope of the privilege, since

neither matter is considered confidential or a communication for the purpose of obtaining legal advice. (*In re Grand Jury Proceedings (Jones)*, 517 F2d 666 (5th Cir 1975).)

To be sure, some clients might feel inhibited about retaining a lawyer, or might be less candid in their disclosures, if they anticipated that their attorney might be compelled to reveal their identities or the fee arrangements. This concern, however, seems unavailing. As one court recently observed:

Some prospective clients, arguably, may decide not to retain counsel for legal services if they could be implicated by expenditures for those services. This is

not, however, a sufficient justification to invoke the privilege. The privilege is not to immunize a client from liability stemming from expenditures for legal services. Its purpose is only to encourage persons who choose to be represented by counsel, despite the consequences of that choice, to confer candidly and openly with their attorney. (*Tornay v United States*, 840 F2d 1424, 1429 (9th Cir 1988).)

The courts, however, have established three narrow exceptions to the general rule that client identity and fee arrangements are not covered by the attorney-client privilege. The first exception lies when the disclosure of identity or

fee arrangements would supply the "last link" in an existing chain of incriminating evidence likely to lead to the client's indictment (*In re Grand Jury Proceedings (Pavlick)*, 680 F2d 1026 (5th Cir 1982) (*en banc*)); the second, when disclosure would implicate the client in the very matter for which legal advice was sought in the first place (*United States v Hodge and Zweig*, 548 F2d 1347 (9th Cir 1977)); and the third, when disclosure would be tantamount to disclosing an otherwise protected confidential communication (*NLRB v Harvey*, 349 F2d 900 (4th Cir 1965)). The burden of establishing the existence of a privilege rests with the party asserting the privilege. Thus, it would

be appropriate for the attorney to request an in camera *ex parte* hearing to support his or her claim. (*United States v Zolin*, 109 S Ct 2619 (1989).)

### Court enforcement of IRS efforts

Given the broad investigative powers of both the grand jury and the IRS (see *United States v Arthur Young & Co.*, 465 US 805 (1984)) and the public outcry against drug trafficking, racketeering, and money laundering, it is not surprising that the courts have been reluctant to sustain claims of privilege—or, for that matter, broader constitutional claims of right to counsel or due process. Indeed, IRS efforts pursuant to 26 U.S.C. § 7602 (the general summons enforcement section of the Internal Revenue Code) to force attorneys to reveal information regarding fees paid by clients have invariably been enforced by the courts, so long as the government has established the threshold requirements that: 1) the investigation is being conducted for a legitimate purpose; 2) the information is relevant to the investigation; 3) the information is not already in the IRS's possession; and 4) administrative steps required by the IRS code have been followed. (*United States v Powell*, 379 US 48, 57-58 (1964).) Nor have the courts required the IRS to establish guidelines for the issuance of summonses to attorneys or to show that it followed Justice Department guidelines (U.S. Attorney Manual § 9-2.161) already established for issuing grand jury subpoenas to attorneys. (*Hollified v United States*, 689 F Supp 865 (ED Wis 1988).)

The Justice Department's Subpoena Guidelines—not followed by the IRS—provide that a subpoena to an attorney for client information may not be issued unless the prosecutor can demonstrate that: (1) there are reasonable grounds to believe that a crime has been or is being committed and that the information sought is reasonably needed for the successful completion of the investigation; (2) the

subpoena will not be used to obtain peripheral or speculative information; (3) all reasonable attempts to obtain the information from alternative sources proved to be unsuccessful; and (4) the reasonable need for the information outweighs the potential adverse effects upon the attorney-client relationship.

### What to advise your client

What are the lawyer's obligations when advising a client who wishes to pay a cash fee in excess of \$10,000? Clearly, the lawyer must advise the client that the lawyer may have a duty to file a Form 8300 disclosing the client's identity, the amount of cash received, and the date and nature of the transaction. The lawyer should also inform the client of the risks of investigation and prosecution flowing from disclosure of the client's identity and fee information. The client should make the decision, after full consultation, about whether his or her identity should be disclosed. If the client decides that his or her identity should not be disclosed, the lawyer may ethically decline the representation or, if a relationship already exists, may withdraw in view of the apparent conflict and threat of prosecution for both attorney and client. On the other hand, the attorney may ethically

choose to continue to represent the client and to refuse to disclose the client's identity, although the lawyer is statutorily obligated to file Form 8300. (See Georgia Advisory Opinion No 41; Hall, *Professional Responsibility of the Criminal Lawyer* § 11.7.)

If the IRS threatens enforcement, the attorney may continue to assert confidentiality until a judicial enforcement order requiring disclosure is obtained. Under DR 4-101(C)(2) of the Model Code, a lawyer "may reveal . . . confidences or secrets . . . required by law or court order." The client should be advised that he or she may seek to retain separate counsel to intervene and challenge the IRS enforcement action. (FRCP 24(a)(2).) If faced with a court order to comply, the lawyer will have to decide whether to risk contempt in order to appeal the order. (*Cobble-dick v United States*, 309 US 323 (1940).)

As noted above, an IRS enforcement "test case" against a New York law firm and two of its attorneys is currently being litigated. A decision by the district court is expected shortly.

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## LIVINGSTON HALL JUVENILE JUSTICE AWARD NOMINATIONS SOUGHT

The ABA Criminal Justice Section is seeking nominations for the 1990 Livingston Hall Award. The ABA's annual Livingston Hall Juvenile Justice Award is bestowed upon a juvenile justice practitioner for his or her contributions, with the highest degree of professionalism, to the juvenile justice system.

Contact the ABA Criminal Justice Section at 202/331-2260 for information on selection criteria and nominating procedures.

The deadline for nominations is May 1, 1990.