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CRIMINAL PROCEDURE

COMMENTARY

THE RELUCTANT WITNESS FOR THE PROSECUTION: GRAND JURY SUBPOENAS TO DEFENSE COUNSEL

*Stacy Caplow**

INTRODUCTION

When Gerald L. Shargel, an active New York City criminal defense attorney,¹ appealed the denial of a motion to quash a subpoena duces tecum² issued to him by a grand jury sitting in the Southern District of New York, he provided the United States Court of Appeals for the Second Circuit with an opportunity to address any one of several evidentiary, procedural or policy issues raised by the increasingly common practice of grand juries issuing subpoenas to attorneys. The Second Circuit's decision in *In re Grand Jury Subpoena Duces Tecum (Shargel)*³ reaffirmed the long-standing view⁴ that, absent special circumstances, the attorney-client privilege does not extend to client identity and fee arrangements. The opinion, however, failed to

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¹ Parenthetically, Mr. Shargel was the subject of another unusual court ruling in connection with this same prosecution when, on May 1, 1985, he was disqualified by the trial court from representing his client because his long-time representation of many of the individual defendants might tend to prove the existence of a continuing criminal enterprise. Also, since he inevitably would be testifying at the trial, the court held that the public interest in Mr. Shargel's testimony overrides the defendant's right to be represented by his choice of counsel. *United States v. Castellano*, 610 F. Supp. 1359 (S.D.N.Y. 1985).

² 742 F.2d 61 (2d Cir. 1984).

³ *Id.*

⁴ See, e.g., *Colton v. United States*, 306 F.2d 633, 636-38 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963); *United States v. Pape*, 144 F.2d 778, 782-83 (2d Cir.), cert. denied, 323 U.S. 752 (1944).

comment on the need for procedures or guidelines that would impose some judicial restraints on the use by prosecutors of subpoenas calling for lawyers to testify at grand jury proceedings investigating their clients. The opinion also failed to adequately discuss the effects such subpoenas have on the attorney-client relationship, and did not raise any general sixth amendment concerns.⁵

The impact of the *Shargel* decision has been eclipsed by subsequent developments. New legislation⁶ and attention-grabbing reports about criminal defense attorneys⁷ have propelled the issue of serving subpoenas on attorneys from the obscurity of a relatively minor evidentiary concern to the limelight of constitutional inquiry.⁸ Thus, *Shargel* was actually the precursor of more portentous issues.

The limitations of the *Shargel* decision can be attributed to

⁵ U.S. CONST. amend. VI provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." As early as *Powell v. Alabama*, 287 U.S. 45 (1932), this right was interpreted as affording effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *McMann v. Richardson*, 397 U.S. 759 (1970).

⁶ I.R.C. § 6050I (West Supp. 1985) now requires reporting of all cash receipts in excess of \$10,000 which, as the law is drafted, includes attorney's fees. The Comprehensive Forfeiture Act of 1984, 18 U.S.C. §§ 1963(a)-(m) (West Supp. 1985), permits the government to seek the forfeiture of proceeds of racketeering, including attorney's fees. These newly enacted laws are understood to provide prosecutors with the ability to invade the attorney-client relationship. See Morvillo, *Freezing and Squeezing the Lawyers*, N.Y.L.J., Apr. 2, 1985, at 1, col. 1; Robinson, *Targeting Lawyers*, Nat'l L.J., Jan. 21, 1985, at 1, col. 2.

One reported decision, *United States v. Rogers*, 602 F. Supp. 1332 (D. Colo. 1985), addressing the effect of the new forfeiture provisions on the right to counsel, held that the Act was not intended to include an attorney's bona fide fee. The court excluded attorney's fees from forfeiture on the basis of the defendant's sixth amendment claim that forfeiture denied him counsel of his choice. *Id.* at 1348. In *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1985), the district court viewed the problem not as choice of counsel but as a denial of the right to counsel.

⁷ PRESIDENT'S COMMISSION ON ORGANIZED CRIME, MATERIALS ON ETHICAL ISSUES FOR LAWYERS INVOLVED WITH ORGANIZED CRIME CASES (1984). See Taylor, *Work of Lawyers for 'Mob' Studied*, N.Y. Times, Mar. 12, 1985, at A24, col. 3; Taylor, *Criminal Lawyers and Lawyers Who Turn Criminal*, N.Y. Times, Mar. 19, 1985, at A17, col. 1; *Lawyers Called Organized Crime 'Life Support'*, N.Y.L.J., Mar. 11, 1985, at 1, col. 2.

⁸ In recent months, committees of prominent bar associations, including the Grand Jury Committee of the American Bar Association Section on Criminal Justice, have been investigating the increased use of subpoenas issued to lawyers concerning information obtained during the course of representation. See Public Hearings on Subpoenas to Lawyers: The Effect on the Attorney-Client Relationship and on the Adversarial Process, Association of the Bar of the City of New York on March 20 and 21, 1985 [hereinafter cited as Hearings].

the narrowly drawn issue before the court. Basically, the Second Circuit had only one question to consider: whether the information sought by the grand jury subpoena was protected by the attorney-client privilege. This Commentary will suggest that by confining the objection to the subpoena to this ground, the Second Circuit in *Shargel* ignored key constitutional and policy implications which, in the months following the court's decision, have surfaced as matters of increasing significance in federal criminal practice.⁹ In fact, *Shargel* may have actually triggered these larger inquiries. Prosecutors, interpreting the holding of *Shargel* as generally excluding fee information from the attorney-client privilege,¹⁰ may have read the decision as an indication of decreased judicial sensitivity to the privilege, and therefore as a license to subpoena lawyers.

Developments are proceeding so rapidly that only eight months after the *Shargel* decision, the Second Circuit, over a vehement dissent,¹¹ held that in certain circumstances some judicial oversight is necessary in order to balance the grand jury's need to subpoena lawyers to obtain certain information against the resultant interference with the attorney-client relationship.¹² A few months later, when again confronted by a challenge to a similar subpoena for production of documents relating to an at-

⁹ No systematic record keeping of grand jury subpoenas issued to lawyers seems to have been undertaken to date by any group or agency. Therefore, any conclusions about the nature and frequency of such subpoenas are based on reported decisions only and on a general impression in the legal community that resort to grand jury subpoenas issued to lawyers is on the rise. Hearings, *supra* note 8.

Although they are not the exclusive tool of federal prosecutions, state prosecutors rarely issue subpoenas to lawyers. This is probably due to the comparatively rare use of investigative grand juries in the state system. A few reported state court decisions discuss subpoenas issued to lawyers. *Priest v. Hennessey*, 51 N.Y.2d 62, 409 N.E.2d 933, 431 N.Y.S.2d 511 (1980); *In re Kaplan* (Blumenfeld), 8 N.Y.2d 214, 168 N.E.2d 660, 203 N.Y.S.2d 836 (1960). See also *In re Grand Jury Subpoena Duces Tecum*, 171 N.J. Super. 475, 410 A.2d 63 (1979); *Losavio v. District Court*, 188 Colo. 127, 533 P.2d 32 (1975).

¹⁰ See, e.g., Government's Memorandum of Law in Opposition to the Motion of Robert M. Simels to Quash the Grand Jury Subpoena Duces Tecum dated January 2, 1985 at 19, *In re Grand Jury Subpoena Duces Tecum* Dated January 2, 1985 (Simels), 605 F. Supp. 839 (S.D.N.Y.), *rev'd*, 767 F.2d 26 (2d Cir. 1985) ("In the *Shargel* case . . . decided August 13, 1984, and thus more than a month before Mr. Simels undertook the representation in this case, the Court of Appeals placed the community, particularly the defense bar, on notice that fee information was not sacrosanct.").

¹¹ *In re Grand Jury Subpoena Served upon Doe*, 759 F.2d 968, 977 (2d Cir. 1985) (Timbers, J., dissenting).

¹² *Id.* at 975.

torney-client fee arrangement, the Second Circuit reversed the district court's decision denying a motion to quash.¹³ A unanimous court found that the subpoena served on an attorney representing a previously indicted defendant must be quashed as an abuse of grand jury process.¹⁴

This Commentary will review briefly the status of the attorney-client privilege in relation to grand jury subpoenas to lawyers, using *Shargel* as a case study. The Commentary will then identify some of the emerging legal arguments going beyond privilege analysis. Finally, it will examine some models available to regulate this increasingly prevalent practice that one group of defense attorneys¹⁵ has called "a nationwide pattern of prosecutorial abuse."¹⁶ In brief, the Commentary's limited ambition is to survey this rapidly evolving topic, leaving to courts and prosecutors the job of attempting to recommend specific proposals to address the complex issues involved.¹⁷

I. THE ATTORNEY-CLIENT PRIVILEGE: THE CONFUSION OVER STANDARDS

Although service of a grand jury subpoena¹⁸ on a lawyer is

¹³ *Simels*, 767 F.2d at 30.

¹⁴ *Id.*

¹⁵ The National Association of Criminal Defense Attorneys [NACDL] has been particularly active in filing amicus curiae briefs in support of subpoenaed lawyers, and has done so in *In re Grand Jury Matters*, 751 F.2d 13 (1st Cir. 1984); *United States v. Dyer*, 722 F.2d 174 (5th Cir. 1983); *In re Osterhoudt*, 722 F.2d 591 (9th Cir. 1983); *In re Grand Jury Witness (Salas)*, 695 F.2d 359 (9th Cir. 1982). As would be expected, other bar groups have filed amicus briefs as well. *In re Grand Jury Proceedings (Jones)*, 517 F.2d 666 (5th Cir. 1975) (Association of Trial Lawyers of America and Texas Criminal Defense Lawyers Association); *United States v. Hodge and Zweig*, 548 F.2d 1347 (9th Cir. 1977) (California Attorneys for Criminal Justice and American Civil Liberties Union); *In re Grand Jury Matters*, 751 F.2d 13 (1st Cir. 1984) (New Hampshire Bar Association, New Hampshire Civil Liberties Union, Civil Liberties Union of Massachusetts, and Massachusetts Association of Criminal Defense Lawyers).

¹⁶ *In re Grand Jury Witness (Salas)*, 695 F.2d at 363; *In re Osterhoudt*, 722 F.2d at 594.

¹⁷ The United States Attorney for the Southern District of New York recently promulgated guidelines for the issuance of subpoenas, 37 CRIM. L. REP. (BNA) 2100 (May 1, 1985), see note 147 and accompanying text *infra*. Similar views of the United States Attorney for the Eastern District of New York were expressed by Chief Assistant United States Attorney Ronald DePetrìs in a letter dated September 26, 1984 to William J. Landers, Special Counsel to the Assistant Attorney General, Criminal Division, Department of Justice. See note 135 *infra*. See notes 135-45 and accompanying text *infra* for discussion of prosecutorial guidelines.

¹⁸ This Commentary will concentrate on grand jury subpoenas, rather than trial

not a daily occurrence, *Shargel* provides a typical instance in which such subpoenas are issued. During a grand jury investigation of ongoing criminal activities, an attorney who represents or counsels a client is subpoenaed by a grand jury to provide information about the client's identity, attorney fee arrangements, or other conditions of employment. The attorney in this position who wishes to avoid an appearance before the grand jury must move to quash the subpoena.¹⁹ The usual ground for such motions to quash is that the matter sought is protected from disclosure by the attorney-client privilege.

Ordinarily, to assure frank and open exchange of information, the confidential communications of a client are protected from outside scrutiny by the attorney-client privilege.²⁰ Absent special circumstances, however, client identity and fee information are not generally considered privileged.²¹ Such information

subpoenas to attorneys, the latter being a comparatively rare procedure, see *Hearings*, *supra* note 8, at 276-81 (Statement of Rudolph Giuliani, United States Attorney for the Southern District of New York). The infrequency of issuing a trial subpoena to a lawyer representing a defendant is attributable both to the more obvious interference with the attorney-client relationship after a charge has been filed that causes delays in case preparation and, when a lawyer's testimony is required, almost certain disqualification of counsel. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 (Proposed Final Draft 1981). It is also much easier to maintain a claim that such subpoenas are a pretext for discovery about the pending case, and as such constitute an abuse of the grand jury process. In contrast, the grand jury subpoena issued to an attorney at a pre-indictment investigatory phase is issued at a time when the defendant does not even have a right to counsel. *Kirby v. Illinois*, 406 U.S. 682 (1972) (right to counsel attaches only at or after adversary judicial proceedings have been initiated against defendant). This distinction, however, may not take into account the complexities of typical federal prosecutions where multiple, sequential, or superseding accusatory instruments are often filed against the same defendant.

¹⁹ FED. R. CRIM. P. 17(c) empowers the court to quash or modify a subpoena if "compliance would be unreasonable or oppressive."

²⁰ *Upjohn Co. v. United States*, 449 U.S. 383 (1981). The Court noted that: [The privilege's] purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client.

Id. at 389; see also *Fisher v. United States*, 425 U.S. 391, 403 (1976).

²¹ J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 503(a)(4)[02] (1980); *In re Witnesses before the Special March 1980 Grand Jury*, 729 F.2d 489 (7th Cir. 1984); *In re Grand Jury Investigation No. 83-2-35 (Durant)*, 723 F.2d 447 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 3524 (1984); *United States v. Davis*, 636 F.2d 1028 (5th Cir.), *cert. denied*, 454 U.S. 862 (1981); *In re Walsh*, 623 F.2d 489 (7th Cir.), *cert. denied*, 449 U.S. 994 (1980); *In re Grand Jury Investigation (Tinari)*, 631 F.2d 17 (3d Cir. 1980); *In re Michaelson*, 511 F.2d 882 (9th Cir.), *cert. denied*, 421 U.S. 978 (1975); *In re Grand Jury*

is independent of, incidental to, and usually precedes, the divulgence of confidential information which the privilege is designed to encourage, such as the motive for seeking legal advice. The privilege, therefore, rarely can be invoked successfully to challenge subpoenas such as the one addressed to Mr. Shargel.

A. *The Shargel Case*

On March 5, 1984, a federal grand jury sitting in the Southern District of New York and investigating alleged RICO²² violations ordered Mr. Shargel to produce certain records revealing his fee arrangements and property transactions with ten named individuals.²³ At the time the subpoena was issued, the grand jury had returned an indictment charging two of these individuals with interstate transportation of stolen property.²⁴ Eight of the ten individuals were among the twenty-one defendants charged several weeks later in a fifty-one count indictment that included a host of federal crimes such as racketeering, extortion, loan sharking, narcotics trafficking and interstate transportation of stolen property.²⁵

Mr. Shargel's motion to quash the subpoena in the United States District Court for the Southern District of New York was denied by Judge Morris E. Lasker. One of Mr. Shargel's clients intervened,²⁶ and was permitted to appeal on an expedited

Proceedings (Jones), 517 F.2d 666 (5th Cir. 1975); *United States v. Pape*, 144 F.2d 788 (2d Cir. 1944).

²² 18 U.S.C. §§ 1961-68 (1982) (Racketeer Influenced And Corrupt Organizations Act).

²³ The subpoena to Mr. Shargel ordered him to produce [r]ecords of any money, property or thing of value received, accepted, transferred, held or acted upon by you or any of your employees or associates from, on account of, on behalf of or to any of the following: Roy DeMeo, Anthony Frank Gaggi, Frederick DiNome, Joseph Carmine Testa, Jr., Anthony Senter, Sol Hellman, Paul Castellano, Paul Dordal, Henry Borelli, Richard Mas-trangelo. You are to include the date of the transaction, the type of property, monies, etc. and its value, and the basis or reason for the transaction.

Memorandum of Law in Support of Motion to Quash Subpoena Duces Tecum, March 22, 1984, Exhibit A, *Shargel*, 742 F.2d 61 (2d Cir. 1984).

²⁴ Brief for Government at 2, *Shargel*, 742 F.2d 61 (2d Cir. 1984).

²⁵ *Id.*

²⁶ Generally, the recipient of a subpoena cannot appeal the denial of a motion to quash without refusing to comply and being held in contempt. *Cobbledick v. United States*, 309 U.S. 323 (1940). When a subpoena is directed to a third party, such as an attorney, the movant who claims that the production of the subpoenaed documents would violate his or her fifth amendment right against self-incrimination is permitted to

schedule after a stay was granted.²⁷

In his motion to quash the subpoena, Mr. Shargel asserted that he had represented eight of the ten men named in the subpoena in the past.²⁸ He stated that he had consulted with six of these eight men individually in connection with the charges that later formed the basis of the RICO indictment.²⁹ Mr. Shargel conceded that his representation of the remaining two of the eight men concerned matters already charged publicly and that therefore the attorney-client privilege did not protect identity and fee information as to those two clients.³⁰

Since his legal advice in connection with the subsequent charges was sought before the indictment was returned, Mr. Shargel contended that the communications were privileged. He argued that whenever a client has not been publicly charged, the fact of consultation is tantamount to disclosure of a confidential communication and is therefore privileged. He identified two public facts — his expertise in criminal law and the multi-defendant indictment of several of his clients — that would tend to reveal each individual's motive in seeking his legal advice.³¹ Mr. Shargel argued that revealing fee arrangements, an acknowledgment of the fact of legal consultation, would inform the grand jury that his clients were associated in joint criminal activity with each other. Disclosure of their individual relationships with the same lawyer after the alleged criminal conduct but before indictment would, when connected to the facts already known, lead inevitably to the confidential communication itself, namely that the clients were seeking legal counsel because they were guilty of concerted criminal conduct. Accordingly, Mr.

take an immediate appeal, since the attorney cannot be expected to risk a contempt citation so that the feared harm might occur without any way to remedy it. *Perlman v. United States*, 247 U.S. 7 (1918). The *Perlman* rule is followed in a majority of circuits. See, e.g., *In re Grand Jury Proceedings — Gordon, Witness*, 722 F.2d 303 (6th Cir. 1983), cert. denied, 104 S. Ct. 3524 (1984); *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005, vacated and withdrawn after target indicted and became fugitive, 697 F.2d 112 (4th Cir. 1982); *In re Grand Jury Proceedings (Fine)*, 641 F.2d 199 (5th Cir. 1981); *In re Katz*, 623 F.2d 122 (2d Cir. 1980). But see *In re Oberkoetter*, 612 F.2d 15 (1st Cir. 1980).

²⁷ "John Doe's" motion to intervene was granted and his notice of appeal was filed on May 2, 1984. Brief for Appellant at 2, *Shargel*, 742 F.2d 61 (2d Cir. 1984).

²⁸ 742 F.2d at 62.

²⁹ *Id.*

³⁰ *Id.* at n.1.

³¹ *Id.* at 62.

Shargel asserted that the fee information sought by the government was privileged because it was part of an otherwise protected communication.³²

The government contended that the attorney-client privilege did not extend to the matters subpoenaed, claiming that the information requested fell within the settled rule that client identity, fee arrangements and circumstances of retention are not privileged communications. The prosecution sought the subpoenaed matter for two acknowledged reasons: to further its investigation into possible tax violations, and as evidence of unexplained wealth earned from the clients' criminal activities.³³ The prosecution thus created a situation in which the attorney, by supplying information to be used to prove elements of the crimes charged or of additional charges, became in effect a witness against the client.³⁴

The Second Circuit affirmed the denial of the motion to quash, defining the attorney-client privilege as "encompass[ing] only those confidential communications necessary to obtain informed legal advice."³⁵ The court followed the well established rule that, absent special circumstances, client identity and fee information are unprivileged.³⁶ In so doing, it rejected a limited exception that was established in 1960 by the Ninth Circuit in *Baird v. Koerner*³⁷ and followed by other circuits.

B. *The Baird Doctrine*

Baird v. Koerner is the progenitor of an exception to the general rule that facts of client identity and retention are unprivileged. In *Baird*, an attorney, acting on behalf of several de-

³² *Id.*

³³ *Id.*

³⁴ In addition to the reasons advanced in *Shargel*, a prosecutor might want information about client identity and fees to prove elements of other crimes being investigated, to identify accomplices or co-conspirators, to locate assets for forfeiture, or to uncover evidence of related but uncharged criminal activities. Other less legitimate motives might include: an attempt to secure independent evidence to subvert a prior grant of immunity to a witness; retaliation against the lawyer for not cooperating with the prosecutor in earlier, less intrusive attempts to secure evidence; or vindictiveness in response to zealous representation.

³⁵ 742 F.2d at 62.

³⁶ See note 4 and accompanying text *supra*.

³⁷ 279 F.2d 623 (9th Cir. 1960). *Baird* was based on California state common law. *Id.* at 632.

linquent taxpayers, anonymously paid taxes owed to the government. At the time of the payments, no Internal Revenue Service (IRS) investigation was in progress, but the motive of these taxpayers undoubtedly was to avoid or mitigate the possibility of prosecution. After the taxes had been paid, the IRS issued a summons to the lawyer ordering him to reveal the names of his clients, even though the very acts of repayment were tantamount to an admission that proper payment of taxes had been unlawfully evaded.

Baird established that, in determining whether the attorney-client privilege applies, the pivotal inquiry is whether the information would implicate the client in the very matters for which legal advice was sought.³⁸ In other words, if naming the clients served to convey ordinarily privileged communications, then the privilege should be extended to cover a fact that is normally unprotected, such as the client's identity in *Baird*. *Baird* assumes that even these normally unprivileged matters could reveal the essence of the confidential communication, namely that the clients believed they were guilty of wrongfully withholding their taxes. Since the government knew that certain taxpayers effectively admitted their wrongdoing, client identity would be a probative link in a chain leading toward conviction.³⁹

Although *Baird* itself did not address fees and other circumstances of retention, the general *Baird* rule has been applied or at least considered applicable to this information as well.⁴⁰

³⁸ *Id.* at 633. The court noted:

'We cannot escape the conclusion that . . . to require the petitioner [attorney] to answer any of the questions as to the name of the client who employed him . . . would be to require him to divulge a confidential communication made to him by a client in the course of his employment — a communication tending to show, and, under the circumstances of this case, material only for the purpose of showing, an acknowledgment of guilt on the part of such client of the very offenses on account of which the attorney had been employed to defend him.'

Id. at 634 n.18 (quoting *Ex parte McDonough*, 170 Cal. 230, 236-37, 149 P. 566, 568 (1915)).

³⁹ The court stated:

The names of the clients are useful to the government for but one purpose — to ascertain which taxpayers think they were delinquent, so that it may check the records for that one year or several years. [The voluntary nature of the payment] may well be the link that could form the chain of testimony necessary to convict an individual of a federal crime.

Baird, 279 F.2d at 633.

⁴⁰ In many cases, subpoenaed attorneys have not read *Baird* as being limited to identity, but also have raised the *Baird* exception to challenge subpoenas seeking fee

Many circuits, including the Second Circuit, acknowledge that "special circumstances" might warrant extension of the privilege to the normally unprivileged matters of client identity and fee arrangements. They usually cite *Baird v. Koerner* for this proposition.⁴¹ Some confusion, however, stems from the ways in which courts have interpreted *Baird*. The Second Circuit apparently sees *Baird* as the source of the idea that any communication incriminating the client is privileged. This so-called "incrimination rationale" has been expressed by other courts in two alternative, yet obviously interrelated, propositions. First, facts of client identity and fee arrangements should be privileged if their disclosure incriminates the clients in the very matters for which legal advice was sought.⁴² Second, these matters should be privileged if they provide an evidentiary link facilitating prosecution or conviction.⁴³ Both concepts, however, focus on the content and incriminatory consequences of the communication rather than on the nature of the confidential relationship.

information and other circumstance of retention. See, e.g., *In re* Witnesses before Special March 1980 Grand Jury, 729 F.2d 489 (7th Cir. 1984) (all records relating to money received from or on behalf of client); *In re* Osterhoudt, 722 F.2d 591 (9th Cir. 1983) (amount, form and date of payment of legal fees sought); *In re* Grand Jury Witness (Salas), 695 F.2d 359 (9th Cir. 1982) (accounts receivable, time records, bills, receipts and payments sought); *In re* Slaughter, 694 F.2d 1258 (11th Cir. 1982) (fee information sought); *In re* Grand Jury Investigation (Tinari), 631 F.2d 17 (3d Cir. 1980) (financial records of fees paid sought), *cert. denied*, 449 U.S. 1083 (1981); *In re* Grand Jury Proceedings (Lawson), 600 F.2d 215 (9th Cir. 1979) (financial records and correspondence sought); *United States v. Hodge and Zweig*, 548 F.2d 1347 (9th Cir. 1977) (business records of payments by clients sought); *In re* Grand Jury Proceedings (Jones), 517 F.2d 666 (5th Cir. 1975) (information concerning surety on bail bond and payor of fees sought); *In re* Michaelson, 511 F.2d 882 (9th Cir.) (facts of fee arrangements sought), *cert. denied*, 421 U.S. 978 (1975).

⁴¹ *In re* Grand Jury Empanelled February 14, 1978 (Markowitz), 603 F.2d 469, 473 n.4 (3d Cir. 1979); *NLRB v. Harvey*, 349 F.2d 900, 905 (4th Cir. 1965); *Colton v. United States*, 306 F.2d 633, 637 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963).

⁴² The legal advice interpretation of the incrimination rationale appears in: *In re* Grand Jury Proceedings (Freeman), 708 F.2d 1571, 1573-74 (11th Cir. 1983); *In re* Grand Jury Investigation No. 83-2-35 (Durant), 723 F.2d 447, 453 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 3524 (1984); *In re* Grand Jury Witness (Salas), 695 F.2d 359, 362 (9th Cir. 1982); *In re* Grand Jury Investigation (Tinari), 631 F.2d 17, 19 (3d Cir. 1980), *cert. denied*, 449 U.S. 1083 (1981); *United States v. Hodge and Zweig*, 548 F.2d 1347, 1353 (9th Cir. 1977).

⁴³ *In re* Grand Jury Subpoenas (Marger/Merenbach), 695 F.2d 363 (9th Cir. 1982); *In re* Grand Jury Proceedings (Pavlick), 680 F.2d 1026 (5th Cir. 1982); *In re* Grand Jury Proceedings (Twist), 689 F.2d 1351 (11th Cir. 1982); *In re* Grand Jury Proceedings (Jones), 517 F.2d 666 (5th Cir. 1975).

While the principle of *Baird v. Koerner* has been discussed by many courts in cases where grand juries have subpoenaed lawyers, it has also been subject to criticism.⁴⁴ The analytical confusion spawned by *Baird* over the standard by which the privilege should extend to otherwise unprivileged matters is reflected in the difficulties courts have encountered when applying its principle to particular cases.

Some courts have simply tinkered with the incrimination rationale in an attempt to explain their application of the privilege. For example, in *In re Grand Jury Proceedings (Jones)*,⁴⁵ the government sought to compel attorneys to name certain unidentified individual clients who had paid the legal fees and arranged the bonds of other known defendants.⁴⁶ The government clearly intended to use these disclosures to further its own narcotics and tax evasion investigations of the "benefactor" clients. The Fifth Circuit reasoned that in this case the information requested by the government would be used only for one purpose, namely to supply the identities of other clients of the attorney who were suspected of income tax violations.⁴⁷ Requesting information about fees was simply another means of ascertaining the identities of the subpoenaed lawyer's other clients. Characterizing such disclosures under these circumstances as "substantially probative links in an existing chain of inculpatory events or transactions,"⁴⁸ the court adopted the view that even client identity and fee arrangements may be confidential communications when they are inextricably bound up with the reason for seeking legal advice.⁴⁹ The court therefore held that the govern-

⁴⁴ See E. CLEARY, MCCORMICK ON EVIDENCE ¶ 90, at 216 (3d ed. 1984):

It is arguable that the decisions following *Baird*, though introducing a wholesome flexibility into the general rule, have nevertheless blazed a false trail in making the exceptions to the rule turn largely upon the severity of potential harm to the client rather than upon the question whether the protection afforded works in aid of a legitimate function of the attorney in his professional role. Thus it has been suggested that the agencies performed by attorneys in some of the cases presenting the issue were neither part of the attorney's unique role nor appropriate for immunization from public disclosure and scrutiny.

Id.

⁴⁵ 517 F.2d 666 (5th Cir. 1975).

⁴⁶ *Id.* at 668.

⁴⁷ *Id.* at 674.

⁴⁸ *Id.*

⁴⁹ *Id.*

ment could not use its subpoena power to obtain information about identities and fee information from lawyers if the real motive behind the subpoena is to corroborate or strengthen incriminating evidence already known to the grand jury.⁵⁰

Decisions subsequent to *Jones* have not clearly articulated the meaning of the incrimination rationale. Does incrimination mean that any information damaging to the client is automatically protected? How extensive does the damage have to be in order to successfully invoke the incrimination rationale? For example, the Ninth Circuit, in *United States v. Hodge and Zweig*,⁵¹ circumscribed the *Baird* standard slightly to include only instances in which there is a strong probability that information would incriminate the client in the matter for which legal advice was sought.⁵² More recently, the Ninth Circuit seems to have abandoned altogether the view that *Baird* is based on an incrimination rationale in favor of the traditional view that client and fee information are privileged when their disclosure conveys a privileged communication.⁵³ The Fifth Circuit, in *In re Grand Jury Proceedings (Pavlick)*,⁵⁴ rearticulated⁵⁵ the test it formulated in *Jones* from "substantially probative" to a "last link" in the evidentiary chain leading to the client's indictment,⁵⁶ so that an attorney's testimony about client identity and fee information would be protected only if this evidence is the indispensable element for indictment.

⁵⁰ *Id.*

⁵¹ 548 F.2d 1347 (9th Cir. 1977).

⁵² *Id.* at 1353.

⁵³ *In re Osterhoudt*, 722 F.2d 591, 594 (9th Cir. 1983).

⁵⁴ 680 F.2d 1026 (5th Cir. 1982) (en banc).

⁵⁵ *Id.* at 1032-33 (Politz, J., dissenting).

⁵⁶ *Id.* at 1027. See also *In re Grand Jury Proceedings (Twist)*, 689 F.2d 1351 (11th Cir. 1982). *Pavlick* was concerned with the identity of the so-called benefactor of the client who had furnished money for bonds and attorney's fees. Where such payments are made in furtherance of a conspiracy and as a fringe benefit to participation in a criminal enterprise, the identity of the payor will not be protected by the privilege, even if *Baird* applies, because of the crime or fraud exception. The crime or fraud exception permits an attorney to disclose the confidences of a client that reveal an intention to commit a crime and the information necessary to prevent its commission. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(c)(3) (1980). MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1983) authorizes disclosure of confidential information to prevent the commission of a crime or fraudulent act which could result in death or substantial bodily injury. See also *United States v. Dyer*, 722 F.2d 174 (5th Cir. 1983); *In re Grand Jury Proceedings (Fine)*, 641 F.2d 199 (5th Cir. 1981); *United States v. Hodge and Zweig*, 548 F.2d 1347 (9th Cir. 1977).

C. *The Second Circuit's Standard*

In *Shargel*, the Second Circuit expressly repudiated the incrimination rationale and, by inference, the "incrimination" interpretation of *Baird* and its progeny, for two reasons. First, based on the historical differences between the attorney-client privilege and the privilege against self-incrimination, an attorney's honorable and natural reluctance to incriminate his client does not necessitate application of the privilege.⁵⁷ Second, the court emphasized that the performance of the lawyer as "professional advisor and advocate"⁵⁸ requires that the party asserting the privilege demonstrate that disclosure of client identity or fees would also reveal a communication, made in the confidence of the attorney-client relationship, that is necessary to enable the lawyer to carry out this role.⁵⁹ The court was reverting to, or at least reaffirming, the traditional view that the attorney-client privilege exists to foster the free flow of information and advice rather than to protect the client from all potentially damaging consequences. However, the court made no effort to delineate the rather amorphous standard it set forth.

The Second Circuit found that Mr. Shargel's factual assertions fell short of establishing a protected confidential communication. The court disposed of his arguments summarily, relegating almost entirely to footnotes the factual issues he raised. The court found that an inference of an admission of past criminal conduct cannot be drawn from the fact of consultation with a criminal law specialist.⁶⁰ The court added that such consultations, in any event, are as consistent with innocence as they are

⁵⁷ 742 F.2d at 63.

⁵⁸ *Id.* at 62.

⁵⁹ Examples of such confidential communications that might be exposed by disclosing client identity and fee arrangements might include the motive for consultation, *In re Grand Jury Witnesses before Special March 1980 Grand Jury*, 729 F.2d 489 (7th Cir. 1984); *In re Grand Jury Witness (Salas)*, 695 F.2d 359 (9th Cir. 1982); *In re Grand Jury Proceedings (Jones)*, 517 F.2d 666 (5th Cir. 1975); *NLRB v. Harvey*, 349 F.2d 900 (4th Cir. 1965); *Tillotson v. Boughner*, 350 F.2d 663 (7th Cir. 1965), a fear for personal safety, *In re Kaplan (Blumenfeld)*, 8 N.Y.2d 214, 168 N.E.2d 660, 203 N.Y.S.2d 836 (1960) (disclosure of identity of client not required when client, having anonymously provided information about crimes to investigators, feared for personal safety), litigation strategy, *Salas*, 695 F.2d at 362, or the nature of the billable services which in turn, reveal the substance of issues researched or matters discussed with the attorney, *id.*

⁶⁰ *Shargel*, 742 F.2d at 64 n.4.

with guilt,⁶¹ and that no inference of concerted criminal activity can be drawn from the fact that a lawyer has several clients within a particular time period who subsequently are jointly charged with criminal activities.⁶²

It is difficult to predict from the limited language of the court which special circumstances would compel the application of the privilege to client identity and retention matters. By implication, the holding disapproves of the extremely rare instances in which such special circumstances were found to exist based upon the incrimination rationale.⁶³ In any event, the obscure standard adopted in *Shargel* leaves lawyers in the dark about what, if any, assertions of privilege survive its holding. What is clear from *Shargel* is that the mere fact that disclosure of fee information and client identity by an attorney may hurt the client will not shield the attorney from a grand jury subpoena. The court did not address the possibility that fear of disclosure of these matters will lead to less candid communication between attorney and client. The court's standard would require an analysis of the information subpoenaed and its relationship to the particular case. However, the court made no effort to refute the conclusion that this very process, usually involving motions to quash, contempt citations, hearings, *in camera* inspection of documents and appeals, may well have the same undesirable chilling effect on the free flow of confidential information and advice that the privilege itself seeks to avoid.⁶⁴

⁶¹ *Id.* at 63 n.3.

⁶² *Id.* The court noted, however, that it was possible to draw an inference of concerted criminal activity from joint consultations. *Id.* at 64.

⁶³ See, e.g., *In re Grand Jury Proceedings* (Lawson), 600 F.2d 215 (9th Cir. 1979); *In re Grand Jury Proceedings* (Jones), 517 F.2d 666 (5th Cir. 1975). Accord *United States v. Liebman*, 742 F.2d 807 (3d Cir. 1984) (finding that special circumstances based on confidentiality of communication were sufficient to quash IRS summons to law firm that sought names of all clients who paid legal fees in connection with acquisition of tax shelter because IRS investigation centered on deductibility of said fees).

⁶⁴ The court recognized that:

Absent the privilege, an attorney could not even appraise the risk to the client of such a communication until it occurs. The attorney must thus decide early in the course of consultation whether to warn the client against communications which, however necessary to the rendering of competent legal advice, might be disclosed to an adversary in litigation. Lawyers 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 an adversary. Inadequate legal counsel would fall upon the innocent as well as upon the guilty and would

If anything, *Shargel* highlights the inherent restrictions in relying solely on privilege analysis in these cases. Lawyers seeking to quash subpoenas as well as courts desiring to provide clearer, more comprehensible, criteria and procedures to supervise this case-by-case review, must broaden the scope of the issues they address to include previously ignored or undeveloped arguments.⁶⁵ The next section of this Commentary will examine some of these arguments and will discuss some models for regulating the use of subpoenas to lawyers.

II. SAFEGUARDING THE ATTORNEY-CLIENT RELATIONSHIP: LOOKING BEYOND THE PRIVILEGE

A. *Balancing the Public Interest Against the Private Relationship*

As the foregoing section reveals, the attorney-client privilege rarely protects against disclosure of client identity and fee arrangements. Certainly, in the Second Circuit after *Shargel*, the mere assertion that disclosure of information about identity and fees would be harmful to a client's interests will not justify a claim of privilege. Courts intervene only in the most extraordinary circumstances, when fees or identity are integral to otherwise privileged communications such as the client's motive for seeking legal advice. Regardless of whether the claim of privilege ultimately fails or succeeds, damage to the attorney-client relationship is inevitable in other fundamental ways.

By emphasizing the privilege as the main ground for nondisclosure, subpoenaed lawyers or their client-intervenors have ig-

in the long run impair the ability of courts to administer justice fairly.

Shargel, 742 F.2d at 63; see also *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981), where the Court noted that

if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

Id.

⁶⁵ In the aftermath of *Shargel*, the privilege issue appears to have receded to the point that it was not even raised in the more recent attorney subpoena cases such as *In re Grand Jury Subpoena Served Upon Doe*, 759 F.2d 968 (2d Cir. 1985); *In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985* (Simels), 605 F. Supp. 839 (S.D.N.Y.), *rev'd*, 767 F.2d 26 (2d Cir. 1985) or *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1985).

nored other arguments that focus on the attorney-client relationship more directly. However, in cases where constitutional claims have been raised in addition to privilege, courts traditionally have relegated these arguments to cursory, dismissive dictum.⁶⁶

A subpoena to an attorney whose client is the actual or potential target of a grand jury investigation can compromise an existing attorney-client relationship at any stage of the proceedings, regardless of whether the grand jury is investigating totally new charges, considering whether to supercede a previously filed indictment, or gathering evidence against someone already charged on unrelated matters. Even an eventually successful motion to quash will entail extensive tangential litigation, during which the attorney or client-intervenor bears the burden of proving that the motion should be granted.⁶⁷ Even if this collateral proceeding is limited to a determination of the narrowest of issues, such as the privilege, the document-by-document review that is often required to render a decision can be very expensive. The cost is not only the monetary one involved in hiring independent counsel to represent the attorney's interest; more importantly, the process itself impairs the very values served by the Constitution, the attorney-client privilege, and the canons of ethics⁶⁸ in encouraging clients to make full disclosure to attorneys so that they can be represented effectively and zealously.

1. Sixth Amendment Claims

The subpoena issued to a lawyer, a "demand that is trouble-

⁶⁶ See, e.g., *In re Osterhoudt*, 722 F.2d 591, 594 (9th Cir. 1983); *In re Grand Jury Proceedings* (Lawson), 600 F.2d 215, 217-18 (9th Cir. 1979); *United States v. Wolfson*, 558 F.2d 59, 65 (2d Cir. 1977); *In re Michaelson*, 511 F.2d 882, 892 (9th Cir.), cert. denied, 421 U.S. 978 (1975).

⁶⁷ *United States v. DeMauro*, 581 F.2d 50, 55 (2d Cir. 1978); *United States v. Stern*, 511 F.2d 1364, 1367 (2d Cir.), cert. denied, 423 U.S. 829 (1975); *In re Bonanno*, 344 F.2d 830, 833 (2d Cir. 1965).

⁶⁸ Ethical Consideration 4-1 of the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) outlines the importance of the preservation of confidences and secrets between the lawyer and his client and suggests that it is a fundamental value for the proper functioning of the legal system. Rule 1.6(a) of the MODEL RULES OF PROFESSIONAL CONDUCT (1983) suggests: "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . ." The notes after the rule also suggest that the rule is of fundamental importance, as it facilitates full development of the facts necessary to effectuate proper representation and encourages people to seek legal assistance early.

some on its face,"⁶⁹ can infringe the defendant's right to counsel in many serious ways. The practice permits the government to unilaterally interfere with or even destroy the relationship between attorney and client. The knowledge that the government might subpoena an attorney to ascertain details about identity and fees might dissuade the client from seeking advice or might deter him or her from revealing fully the facts necessary to the preparation of an effective defense. In addition, when a subpoena is issued to a lawyer who has represented a client on other matters for a number of years, the client may be forced to end this long-term relationship and hire different counsel.

A subpoenaed lawyer faces the classic dilemma of a direct conflict between the client's interests and his or her own.⁷⁰ An attorney must choose between resisting the subpoena, a tactic usually in the best interests of the client, or complying with it to the possible detriment of the client. Resistance involves litigation and its accompanying expense. It may also cause some public or professional embarrassment to the lawyer if his or her actions are construed, or misconstrued, as an obstruction of the grand jury process or as an admission of the client's criminal involvement.⁷¹ Compliance is not a simple choice either; while it

⁶⁹ *In re Terkletoub*, 256 F. Supp. 683, 685 (S.D.N.Y. 1966) (application to compel testimony of lawyer about conversation with potential witness during course of preparation for trial denied). Other cases that have invoked the work product doctrine to bar a lawyer's testimony have expressed displeasure with the issuance of subpoenas to attorneys. The court in *In re Grand Jury Investigation* (Sturgis), 412 F. Supp. 943 (E.D. Pa. 1976) stated:

[W]e are disturbed by the practice of calling a lawyer before a grand jury which is investigating his client, especially where the government does not have good grounds for belief that the lawyer possesses unprivileged, relevant evidence that cannot be obtained elsewhere The practice permits the government by unilateral action to create the possibility of a conflict of interest between attorney and client, which may lead to the suspect's being denied his choice of counsel by disqualification. The very presence of the attorney in the grand jury room, even if only to assert valid privileges, 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.

Id. at 945-46; see also *In re Rosenbaum*, 401 F. Supp. 807 (S.D.N.Y. 1975).

⁷⁰ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1980) (requiring attorney to exercise his judgment "solely for the benefit of his client and free of compromising influences and loyalties"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1983) (suggesting that "a lawyer shall not represent a client if that representation of that client may be materially limited . . . by the lawyer's own interests . . .").

⁷¹ In its extreme, resistance can lead to the situation faced by Barry P. Wilson, a Boston criminal defense attorney. Wilson, as of October 1, 1985, has spent four months

avoids the personal hazard of a contempt citation, it places the attorney at the risk of being discredited in the eyes of present or potential clients. Compliance means that as the attorney enters the grand jury room, both real and symbolic messages are conveyed to the client that the attorney is helping the prosecution in some way or is placing his or her interests above those of the client. Either alternative may ultimately harm the client, since the motion to quash may itself prolong a defendant's incarceration or anxiety about the pending case, while compliance may provide the government with helpful information. Undoubtedly, the effort required to litigate the subpoena will detract from the preparation of the defense for trial on pending cases. All in all, regardless of the outcome of a motion to quash, the mere issuance of the subpoena causes unavoidable and undeniable disruption to the defense.

If the attorney cannot avoid an appearance before the grand jury, even after extensive litigation, additional conflicts arise which, whether real or hypothetical, undermine the unity of the relationship. Despite assurances to the contrary, a client may well worry that the lawyer's testimony to the grand jury will disclose defense strategy or will help the prosecution to build its case. Witnessing, albeit figuratively, the door to the grand jury room closing behind the lawyer may cause the client to question the attorney's devotion and commitment.

The dangers inherent in this practice were described dramatically in a recent case; lawyers appearing on behalf of defendants in a pending New Hampshire state court criminal case were served with subpoenas, apparently at their doorsteps in the middle of the night, issued by a federal grand jury investigating related criminal activities. The District Court of New Hampshire granted a motion to quash a subpoena for all records concerning legal fees, expenses, and other monies paid to or received by the attorneys on behalf of certain named clients.⁷² The

in a federal prison for refusing to answer questions before a federal grand jury related to a subpoena which sought information about the role of his client in a drug smuggling investigation. Breton, *'Moral' Decision Sends Lawyer Into U.S. Prison*, Nat'l L.J., Sept. 30, 1985, at 6, col. 1; see also *In re Grand Jury Proceedings* (Wilson), 760 F.2d 26 (1st Cir. 1985).

⁷² *In re Grand Jury Matters*, 593 F. Supp. 103 (D.N.H.), *aff'd*, 751 F.2d 13 (1st Cir. 1984).

First Circuit affirmed,⁷³ summarizing the two key ways in which enforcement of a subpoena served on an attorney during the course of representation could hurt the attorney-client relationship. First, a subpoena to an attorney creates a clear conflict of interest. The attorney's goals, avoiding a contempt citation and avoiding personal expenditures to fight the subpoena, might spur him or her to comply with the request. However, compliance may be detrimental to the client, whose main interest is avoiding additional criminal charges. Second, the subpoenaed lawyer may well provide information ultimately harmful to the client, not only driving a wedge between the two, but also requiring the disqualification of the attorney if his or her testimony is needed by the government at a trial.⁷⁴ Thus, the government in certain situations can control the client's ability to select counsel of his or her choice.

Since the First Circuit's holding was limited to reviewing the reasonableness of the district court's exercise of its discretion,⁷⁵ this decision does not create any constitutional precedent or any rule immunizing the attorney from grand jury inquiry. Nonetheless, by balancing the government's need to obtain the information against the lawyer's need to maintain the "special and important relationship"⁷⁶ with clients awaiting a felony trial, the court explored new concepts, including the government's failure to explain why it needed the information at that particular time. This balancing test, unfettered by the confusing privilege analysis, represents a fresh and constructive approach. This approach focuses on the impact of the subpoena on the attorney-client relationship and the goal of effective assistance of counsel, both of which are earmarks of constitutionally-based reasoning.

Similar right to counsel arguments were raised in two cases decided by the Second Circuit in April and June of 1985.⁷⁷ Al-

⁷³ 751 F.2d 13 (1st Cir. 1984).

⁷⁴ *Id.* at 19. In this particular case, the possibility of disqualification was enhanced by the small size of the criminal defense bar in New Hampshire. See Hearings, *supra* note 8, at 251-67 (Statement of Nancy Gertner).

⁷⁵ 751 F.2d at 16, 19.

⁷⁶ *Id.* at 19.

⁷⁷ *In re Grand Jury Subpoena Served Upon Doe*, 759 F.2d 968 (2d Cir. 1985); *In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985* (Simels), 767 F.2d 26 (2d Cir. 1985).

though neither decision adopted a constitutional test, each limited the virtually absolute license of government to issue grand jury subpoenas to attorneys.

In re Grand Jury Subpoena Served Upon Doe,⁷⁸ decided less than eight months after *Shargel*, provides further evidence that the restrictive privilege issue, dominating not only *Shargel* but the majority of cases around the country, has been overshadowed by broader arguments spurred by concerns about the attorney-client relationship and the attendant constitutional implications. *Doe* and *Shargel* seem barely related in spite of their virtually identical facts. In *Doe*, all mention of the attorney-client privilege is relegated to a brief footnote;⁷⁹ the opinion and the emphatic dissent concentrate on the validity of the constitutional claims raised and the procedural rule adopted.

Relying heavily on a Fourth Circuit case,⁸⁰ the *Doe* court held that the government was required to make a preliminary showing of reasonable need in addition to relevance when it subpoenas an attorney whose testimony before a grand jury investigating his or her client would result in the attorney's disqualification.⁸¹ In some instances, the client's sixth amendment rights could outweigh the government's interest in procuring evidence. The Second Circuit went on to find that the district court judge in *Doe* had abused his discretion by failing to conduct an inquiry on *both* need and relevance issues before enforcing the subpoena.⁸²

⁷⁸ 759 F.2d 968 (2d Cir. 1985). The subpoenaed lawyer, like Mr. Shargel, was a New York City criminal defense attorney, and had represented a well-known organized crime figure for almost two decades. The subpoena sought the attorney's appearance and the production of records regarding fees and other financial transactions on behalf of 21 individuals. As in *Shargel*, the government wanted the information to further its RICO investigation.

⁷⁹ *Id.* at 971 n.3.

⁸⁰ *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005 (4th Cir.), *vacated and withdrawn after target indicted and became fugitive*, 697 F.2d 112 (4th Cir. 1982) (en banc). *Harvey* has not been followed by other circuits. See, e.g., *In re Grand Jury Proceedings (Freeman)*, 708 F.2d 1571, 1575 (11th Cir. 1983) (holding *Harvey* has no present vitality); *In re Grand Jury Proceeding*, 721 F.2d 1221, 1222 n.1 (9th Cir. 1983) (*Harvey* factually distinct, and in conflict with Ninth Circuit's narrow construction of the district court's supervisory power over grand juries). Its precedential value in the Fourth Circuit itself is doubtful. *United States v. Morchower*, No. 83-1816, slip op. at 3-6 (4th Cir. Sept. 28, 1983).

⁸¹ 759 F.2d at 975.

⁸² *Id.* at 977.

Acknowledging that the sixth amendment does not apply at the grand jury stage,⁸³ the court concluded that the right of a subsequently indicted defendant to counsel of his or her choice will have been destroyed or impaired by the earlier subpoena. Thus, the court reasoned that the client's inherent sixth amendment right to counsel is affected by the subpoena. The court stated: "If the right is not protected now, once the right does attach it will already have been rendered meaningless."⁸⁴ Since constitutional rights would eventually be at stake, the court's rule requiring a preliminary showing of reasonable need and relevance is a mechanism designed to balance the competing rights involved.

This decision, however, may prove to be ephemeral authority for two reasons. First, the majority decision was authored by a Third Circuit judge sitting by designation.⁸⁵ That circuit pioneered the unusual procedure that all grand jury subpoenas should be screened by the court for their relevance to the pending proceedings.⁸⁶ Since this procedure apparently has not placed unreasonable or unmanageable burdens on the trial courts in the Third Circuit,⁸⁷ it is quite possible that the majority view was influenced by the current Third Circuit practice.

The length and vehemence of the dissent also suggest that the decision will not be the last word from the Second Circuit on this issue. In highly critical language, the dissent denounced the imposition of new requirements on the government in enforcing a grand jury subpoena.⁸⁸ Believing that no constitutional or statutory rights were at stake, the dissent described the holding as "incompatible with long settled law."⁸⁹ The dissent, despite its view of the majority's analysis as speculative and conjectural,

⁸³ *Id.* at 972 (citing *Brewer v. Williams*, 430 U.S. 387 (1977); *Kirby v. Illinois*, 406 U.S. 682 (1972)).

⁸⁴ *Id.* at 972-73.

⁸⁵ The decision was authored by the Honorable Max Rosenn, Senior United States Circuit Judge for the Third Circuit.

⁸⁶ See *In re Grand Jury Proceedings* (Schofield I), 486 F.2d 85 (3d Cir. 1973); notes 117-19 and accompanying text *infra*.

⁸⁷ See *Doe*, 759 F.2d at 976 n.10 ("Actual experience suggests that requiring a preliminary showing will not impede the grand jury process.") (citing *Hearings on H.R. 94 Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 1589 (1977)).

⁸⁸ 759 F.2d at 977 (Timbers, J., dissenting).

⁸⁹ *Id.* at 981.

failed to answer the basic, troubling issue: the increased potential for the government to control unilaterally the defendant's choice of counsel.⁹⁰ Whether the defendant has a right to choose counsel is at the core of the dispute.⁹¹

The other case decided by the Second Circuit after *Doe, In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985 (Simels)*,⁹² involved an attorney representing a defendant in a pending narcotics case. In *Simels*, defense counsel first received a trial subpoena a week after his client was indicted. The government, apparently responding to opposition and criticism from the defense bar, then issued a grand jury subpoena seeking the identical materials described in the original trial subpoena, which it subsequently withdrew.

The district court concluded that the rationale of the sixth amendment claim raised by defendant was substantially similar to the rationale of the attorney-client privilege as developed in *Shargel*.⁹³ The court held that the scope of protection for the information sought was identical under both constitutional and evidentiary standards.⁹⁴ Despite its eventual rejection of the sixth amendment argument that the client would be denied effective assistance of counsel, the court nevertheless viewed its central task as one of balancing the defendant's constitutional claims against the government's interest in investigating criminal activities.⁹⁵ This approach represents a significant contrast to the limited analysis that would ordinarily be necessitated by a privilege claim.

⁹⁰ In fact, all of the preconditions the dissent identifies as indicia of the remoteness of the harm envisioned by the majority are prosecutorial decisions. "The right [to retain counsel of his choice] is held to be 'implicated' since the target's attorney will be disqualified as trial counsel if the client is indicted, if the government decides to prosecute, and if the attorney is called as a witness against his client at trial." *Id.* at 988 (emphasis in original).

⁹¹ *United States v. Ostrer*, 597 F.2d 337, 341 (2d Cir. 1979) (right to counsel of choice not absolute, but must give way when required by fair and proper administration of justice). Cf. *United States v. Rogers*, 602 F. Supp. 1332 (D. Colo. 1985) (constitutional rights implicated when defendant's choice of counsel controlled by government's attempt to seek forfeiture of attorney's fees).

⁹² 767 F.2d 26 (2d Cir. 1985).

⁹³ *Simels*, 605 F. Supp. at 846; see also *United States v. Melvin*, 650 F.2d 641 (5th Cir. 1981) (sixth amendment violation occurs only when there is an intrusion into a confidential attorney-client relationship).

⁹⁴ *Simels*, 605 F. Supp. at 847.

⁹⁵ *Id.* at 843.

The Second Circuit, in reversing the district court's decision,⁹⁶ considerably revived the spirits of those advocating the sixth amendment claims. Conceding at the outset of its opinion the importance of the sixth amendment claims implicated by post-indictment subpoenas issued to defense counsel,⁹⁷ the court chose to resolve the case on the narrower ground of grand jury abuse of process for which a strong factual basis existed. This aspect of the holding will be discussed more fully in the next section, but it is noteworthy that the court reserved the resolution of the broad constitutional issues "for another day."⁹⁸

At the heart of the constitutional and policy arguments advanced by the defense bar is the claim that issuing subpoenas to lawyers would enable the government to control who represents the defendant by forcing an attorney's disqualification. This is particularly important since the incidence of subpoenas issued to lawyers seems to have increased significantly since the *Shargel* decision. This drastic consequence, at first glance, may seem somewhat remote in the case of a subpoena issued to a lawyer because, as in *Simels*, the government might be willing to accept a stipulation about the information sought rather than requiring the attorney's live testimony at trial.⁹⁹ This would avoid mandatory disqualification of the attorney. Whether a stipulation in lieu of live testimony can cure a sixth amendment violation and avoid disqualification is an open question.¹⁰⁰ On the surface, a stipulation may be preferable to live testimony. It cannot, however, guarantee that the client's inevitable loss of trust in the attorney's dedication and commitment resulting from the appearance of cooperation with the government will not continue to erode the relationship.

2. Abuse of Process Claims

Although grand juries traditionally have almost limitless

⁹⁶ *Simels*, 767 F.2d at 30.

⁹⁷ *Id.* at 29.

⁹⁸ *Id.*

⁹⁹ *Simels*, 605 F. Supp. at 850.

¹⁰⁰ In *Virgin Islands v. Zepp*, 748 F.2d 125 (3d Cir. 1984), a stipulation by defense counsel concerning subpoenaed information still necessitated disqualification of counsel, since the admission of the stipulated evidence at a trial at which the same attorney continued to represent the client violated the defendant's fifth and sixth amendment rights.

power to call witnesses to testify,¹⁰¹ an argument in support of a motion to quash a subpoena can be framed as a claim of abuse of grand jury process. For example, at the heart of a recent First Circuit decision¹⁰² was a determination by the district court that the tactics of the government not only harassed the attorneys but also fundamentally harmed the legal community. Referring to the trauma and emotional upset arising from the events surrounding the subpoena, the district court postulated that this subpoena "would have an arctic effect with the non-salutary purpose of freezing criminal defense attorneys into inanimate ice floes, bereft of the succor of constitutional safeguards."¹⁰³ Arguments of harassment, vindictiveness or overreaching may become more commonplace if the practice of issuing subpoenas continues and increases, especially in the absence of uniform standards or internal supervision of prosecutors.

A different abuse of process claim can be raised when the subpoenas issued after a grand jury indictment has been filed. After indictment, the government cannot use the grand jury as a discovery tool for the sole or dominant purpose of amassing additional evidence against the defendant on the pending charges.¹⁰⁴ Although the government will generally be able to defeat this claim by demonstrating a need for the information in order to add charges or defendants in a superseding indictment, courts may be willing to probe more deeply into the government's motives in cases where charges have been previously filed in light of the increasing frequency with which lawyers are subpoenaed.

¹⁰¹ See *Branzburg v. Hayes*, 408 U.S. 665 (1972), in which the Court stated: The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it. To this end it must call witnesses, in the matter best suited to perform its task A grand jury investigation "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed."

Id. at 701 (citations omitted).

¹⁰² *In re Grand Jury Matters*, 751 F.2d 13 (1st Cir. 1984). See notes 72-76 and accompanying text *supra*.

¹⁰³ 593 F. Supp. at 107. But see *In re Grand Jury Proceedings (Wilson)*, 760 F.2d 26 (1st Cir. 1985) (upholding lower court's denial of motion to quash where attorney was not defense counsel for defendant but merely served in landlord-tenant matter).

¹⁰⁴ See 8 J. MOORE, *MOORE'S FEDERAL PRACTICE* ¶ 6.04[5] (2d ed. 1985) (the "rule, however, is difficult if not impossible, to enforce").

The *Simels* case illustrates the Second Circuit's increasing willingness to exercise its supervisory powers and give closer scrutiny to subpoenas issued to lawyers. Although it recognized the traditional reluctance of courts to enforce the accepted principle that grand juries cannot be used to gather evidence on a pending indictment, the Second Circuit in *Simels* nevertheless found nothing in the government's argument to refute the defendant's claim that the sole and dominant purpose of the subpoena was pretrial preparation.¹⁰⁵

The facts of *Simels* seem particularly egregious at first but actually they are fairly typical.¹⁰⁶ In *Simels*, Donald Payden and a co-defendant were originally indicted for two narcotics related charges: conspiracy to distribute heroin¹⁰⁷ and distribution and possession with intent to distribute heroin.¹⁰⁸ After Payden's original attorney withdrew due to a conflict of interest, Mr. Simels undertook to represent Payden. Afterwards, a superseding indictment was filed. This indictment added another defendant and a third count, charging Payden with organizing a continuing criminal enterprise, in violation of a statute which authorizes the government to seek forfeiture of the proceeds of Payden's criminal activities.¹⁰⁹ A week after the superseding indictment was filed, the government subpoenaed Mr. Simels to testify at trial and requested evidence relating to his fee arrangements with the defendant. The government ultimately withdrew this subpoena, but only after it had served Mr. Simels with a grand jury subpoena requesting identical information.

Even though it had filed two indictments without the testimony of either Simels or of Payden's previous lawyer, the government claimed a continuing need for the attorney's information in order to identify additional potential co-conspirators or to locate additional assets for forfeiture to be included in another superseding indictment.¹¹⁰ The district court found that while the government seemed to have sought the information initially for use at trial rather than for the grand jury, an investi-

¹⁰⁵ *Simels*, 767 F.2d at 30.

¹⁰⁶ *Id.* at 27-28.

¹⁰⁷ A violation of 21 U.S.C. § 846 (1982).

¹⁰⁸ A violation of 21 U.S.C. § 841 (1982).

¹⁰⁹ 21 U.S.C. § 848 (1982).

¹¹⁰ Government's Memorandum of Law in Opposition to Motion to Quash Subpoena at 8-10, *Simels*, 767 F.2d 26 (2d Cir. 1985).

gation was still in progress,¹¹¹ and it therefore denied the motion to quash.

The Second Circuit, disturbed by the timing of the subpoena and the inactivity of the grand jury between the date of the last indictment and the issuance of the grand jury subpoena, quashed the subpoena entirely, finding less severe remedies inadequate.¹¹²

The *Simels* decision is significant not only because its choice of remedy unequivocally repudiates the prosecutorial tactics employed, but also because it represents a development in the nature of the court's response to subpoenas issued to lawyers. In less than a year, the Second Circuit has broken free from the restrictiveness of examining only the attorney-client privilege claims to engage in a multi-faceted approach — considering, if not actually resolving, constitutional claims and exercising its supervisory power over such subpoenas essentially for the first time. In *Doe*, the court required a showing of relevance and stressed the need to protect sixth amendment rights. In *Simels*, it required the finding of an abuse of process in the pretext subpoena after applying a more stringent supervisory standard than the “clearly erroneous” test employed by the district court.¹¹³

B. *Procedural Safeguards Against Abuse*

The harm to the attorney-client relationship that results when a lawyer is subpoenaed to testify even about matters as supposedly non-confidential as client identity and fees presents a substantial independent argument for curbing the issuance of such subpoenas, particularly when the information requested may be obtained by other means. Even if the major aim of the attorney-client privilege is limited to the narrow goal of encouraging a frank exchange of information and legal advice rather than the broader goal of the protection of the client from the disclosure of all arguably incriminating information, effective conflict-free assistance of counsel as contemplated by the sixth amendment would be advanced by greater judicial intervention and by voluntary prosecutor self-regulation. The next section of this Commentary will explore some of the steps already taken by

¹¹¹ *Simels*, 605 F. Supp. at 853-54.

¹¹² *Simels*, 767 F.2d at 30.

¹¹³ *Id.* at 29.

other circuits to control subpoenas issued to lawyers. It will also look at approaches adopted in analogous areas.

Judicial screening of grand jury subpoenas issued to witnesses is clearly not required by the Constitution,¹¹⁴ and federal courts generally have not relied on their supervisory powers to regulate the use of such subpoenas.¹¹⁵ Acknowledging that grand jury subpoenas can and do raise troubling legal and policy issues, the Third Circuit pioneered a screening approach that, while admittedly ignored or expressly rejected by the majority of other circuits,¹¹⁶ provides an example of the willingness of one court to impose its authority over the grand jury. On two occasions, first in *In re Grand Jury Proceedings (Schofield I)*,¹¹⁷ then in *In re Grand Jury Proceedings (Schofield II)*,¹¹⁸ the court developed, and subsequently applied, a standard that the government must satisfy *before* a grand jury subpoena is issued to any witness. Relying exclusively on its supervisory authority over the grand juries in the circuit, the court created a standard that would require the government to make a preliminary showing by affidavit in every case that each item sought by the subpoena: (1) is relevant to an investigation being conducted by the grand jury; (2) is properly within the grand jury's jurisdiction; and (3) is not sought for another purpose.¹¹⁹ The *Schofield I* standard, therefore, is intended mainly to protect against abuse rather than to predetermine through an extensive preliminary review the possible legal objections to the subpoena, such as the

¹¹⁴ *United States v. Dionisio*, 410 U.S. 1, 15-18 (1972) (fourth amendment does not require showing of reasonableness or probable cause prior to issuance of grand jury subpoena); see also *United States v. Doe*, 457 F.2d 895, 900 (2d Cir. 1972), *cert. denied*, 410 U.S. 941 (1973).

¹¹⁵ *In re Liberatore*, 574 F.2d 78, 83 (2d Cir. 1978).

¹¹⁶ See *In re Grand Jury Investigation*, 565 F.2d 318, 320-21 (5th Cir. 1977) ("In the absence of a witness asserting harassment or prosecutorial misuse of the system, we will not impose . . . any preliminary requirements or procedures which would impede the grand jury's investigative powers."); see also *In re Grand Jury Proceedings (Doe)*, 754 F.2d 154 (6th Cir. 1985); *In re Osterhoudt*, 722 F.2d 591 (9th Cir. 1983); *In re Grand Jury Proceedings (Freeman)*, 708 F.2d 1571 (11th Cir. 1983); *In re Grand Jury Proceeding*, 721 F.2d 1221 (9th Cir. 1983); *In re Grand Jury Proceedings (Bowe)*, 694 F.2d 1256 (11th Cir. 1982); *In re Pantojas*, 628 F.2d 701 (1st Cir. 1980); *In re Grand Jury Proceedings (Guerrero)*, 567 F.2d 281 (5th Cir. 1978); *In re Grand Jury (Hergenroeder)*, 555 F.2d 686 (9th Cir. 1977).

¹¹⁷ 486 F.2d 85 (3d Cir. 1973).

¹¹⁸ 507 F.2d 963 (3d Cir.), *cert. denied*, 421 U.S. 1015 (1975).

¹¹⁹ *Schofield I*, 486 F.2d at 93.

attorney-client privilege.

Ironically, the Third Circuit in *Schofield II* illustrated the limitations of its own precedent when applying this standard to a particular subpoena several years later.¹²⁰ The court was satisfied by the government's showing that the grand jury in the district was investigating possible federal crimes (perjury and giving false declarations) and that the evidence sought (handwriting exemplars) was needed as a standard for comparison.¹²¹ Characterizing the government's arguments as "scant" and "slender,"¹²² the Third Circuit nevertheless found that the district court did not abuse its discretion in holding the subpoenaed witness in contempt for refusing to comply. Despite the fairly minimal showing of necessity sustained in *Schofield II*, the *Schofield* cases are distinctive because of their requirement that all subpoenas issued to attorneys be screened by the court. If judicial screening were required for subpoenas issued to attorneys, the court, at the very least, would have a mechanism for keeping track of the big picture: the frequency of the practice, the possible harassment of particular attorneys, the timing of the subpoena with respect to other pending cases, and any other pattern of abuse that might emerge. Even if most individual subpoenas pass muster as a result of the low threshold of the standard, the government's awareness that the request will be reviewed in advance might produce effective voluntary self-restraint on the prosecution's use of its subpoena power.

Presented with a subpoena issued to an attorney, the Fourth Circuit, in *In re Special Grand Jury No. 81-1 (Harvey)*,¹²³ expressly shared the Third Circuit's concerns about grand jury abuse. The Fourth Circuit chose, however, to resolve these concerns in a different way and considered the special attorney-client confidential relationship in reaching its decision. In *Harvey*, the government subpoenaed a law partnership's records of fees and payments related to its representation of a target in a grand jury investigation. At the hearing on the motion to quash, the government made a "sketchy" representation that it

¹²⁰ *Schofield II*, 507 F.2d at 966.

¹²¹ *Id.* at 967.

¹²² *Id.*

¹²³ 676 F.2d 1005 (4th Cir.), vacated and withdrawn after target indicted and became fugitive, 697 F.2d 112 (4th Cir. 1982) (en banc).

needed these records in connection with possible tax fraud and narcotics prosecutions.¹²⁴ Mindful of the particular dilemma posed to a lawyer in choosing whether to risk contempt or to appear before a closed grand jury, the court attempted to strike a balance between the public interest in the investigation of crime and the private interests bound up in the attorney-client relationship. The court viewed the issuance of any subpoena to a lawyer as "automatically" raising both privilege and constitutional questions.¹²⁵ To effectuate the balancing test, the court, relying on its supervisory power over federal grand jury proceedings, required the government to make a preliminary showing, by affidavit, indicating that there is a compelling need for the information and that the subpoena is being used for a proper purpose, such as an investigation of new charges as opposed to post-indictment discovery.¹²⁶

In *Harvey*, in contrast to *Schofield I*, the court did not adopt a sweeping rule requiring a preliminary showing for all subpoenas. Instead, it explicitly limited the application of its rule requiring a showing of important need to those cases involving subpoenas served on attorneys who represent the target of a grand jury investigation when, and because, constitutional and privilege issues are implicated. While the court failed to make any practical suggestions about the implementation of its rule, it predicted that the rule would enhance efficient court administration since judicial screening would initiate a prompt review and disposition of the attorney-client privilege issues.¹²⁷ *Harvey*, like *Schofield I*, had not been well received by any other circuits¹²⁸ including the Second until the *Doe* decision.

As discussed above, the majority in *Doe* embraced *Harvey* enthusiastically under circumstances in which issuing a sub-

¹²⁴ 676 F.2d at 1009.

¹²⁵ *Id.* at 1010.

¹²⁶ *Id.* at 1011. Although the court did not define what would constitute a sufficient showing of an important need, it identified two inquiries the prosecution must address: whether the information is necessary to the investigation, and whether the subpoenaed attorney is the best source of the information. *Id.* at 1011 n.6. "A showing that the information cannot be obtained from another source would, of course, be important to, but not necessarily conclusive for, the second inquiry." *Id.*

¹²⁷ *Id.* at 1012.

¹²⁸ *In re Osterhoudt*, 722 F.2d 591, 594 n.1 (9th Cir. 1983) ("*Harvey* rested entirely upon *Schofield I*). We disapproved of *Schofield* in *In re Grand Jury (Hergenroeder)*."; see also *In re Grand Jury Proceedings (Freeman)*, 708 F.2d 1571 (11th Cir. 1983).

poena would cause an attorney's disqualification. *Doe* required a demonstration of need, relevance, and presumably a showing of lack of other sources for the information sought. Unfortunately, *Doe* failed to provide much guidance about how to apply its test, particularly since the court, conceding that the government had already shown the relevance of its request, remanded the case to the district court for a determination of need.¹²⁹

The limited judicial screening approach suggested by *Harvey* and *Doe* seems initially to be an appealing way to control the virtually unlimited subpoena power of the grand jury. By requiring a preliminary review of the subpoena, the court can, at the outset, weigh the delicate balance between the private value of the attorney-client relationship and the grand jury's need for the material sought. If constitutional and policy issues are paramount, judicial screening should eliminate a later motion to quash. For example, since no claim that the attorney-client privilege extends to fee arrangements stands much chance of success after *Shargel*, a motion to quash on this basis alone will ordinarily be fruitless. If constitutional and policy claims can be resolved in advance at a contested preliminary proceeding, the controversy, for all practical purposes, would be over.¹³⁰

Judicial screening would certainly help to deter systemic abuse by prosecutors, particularly when the burden of meeting the standard is on the government. Additionally, early judicial intervention would avoid the time-consuming and distracting incidental litigation that accompanies a motion to quash. Screening would probably also discourage the issuance of subpoenas to lawyers as a first rather than a last resort. The onus of the screening process might further inspire the prosecutor to voluntarily limit or circumscribe the items subpoenaed to those demonstrably relevant or necessary, thus avoiding contempt proceedings. Finally, if judicial screening were administered centrally, the court could keep track of the frequency and the contents of subpoenas issued to lawyers.

On the other hand, given that *Harvey* and *Doe* focus pri-

¹²⁹ *Doe*, 759 F.2d at 976-77. The prosecution had explained to the district court that fee information was sought to determine the existence of an enterprise within the meaning of RICO by proving that legal representation had been prearranged by the client. *Id.* at 970.

¹³⁰ The only issue presumably preserved for appeal, then, would be whether the district court abused its discretion in enforcing the subpoena.

marily on relevance and need, it is almost unimaginable that the government would fail to formulate some minimal argument justifying the issued subpoena. For example, just as the government in *Schofield II* satisfied its burden by merely describing the information sought as relevant to an ongoing criminal investigation, the prosecution in *Shargel* undoubtedly would have been able to meet either the *Schofield I* 'minimum relevance' or the *Harvey* 'important need' criteria with its claim that the information was necessary to its ongoing tax evasion investigation and as a means of proving unexplained wealth as circumstantial evidence of the criminal activities under scrutiny.¹³¹ Thus, while judicial screening as framed by *Harvey* and *Doe* appears to be an attractive means to control issuing subpoenas to lawyers at first glance, the ease with which prosecutors can meet its requirements undercuts its theoretical advantages.

Close scrutiny of the practical application of the screening process also reveals that some unanticipated problems may have been created by the process. For example, if judicial screening contemplates only a unilateral *ex parte* review of the intended subpoena by submission of an affidavit from the prosecutor, it would enable the prosecutor to specify the basis for the needed material in the light best designed to obtain it without any challenge from defense counsel. The likelihood of a truly meaningful screening is reduced substantially, since the first time the attorney for the subpoenaed witness would be aware of the issuance of a judicially approved subpoena would be upon its receipt. Without an opportunity for counsel to be heard, the reviewing court would have before it only those facts concerning relevance that are immediately apparent on or can be inferred from the face of the subpoena as drafted by the prosecutor.

Neither *Schofield*, *Harvey*, nor *Doe* addressed how much weight the approval of the issuing court would be given by another court subsequently considering either the constitutional (right to counsel), supervisory (abuse of process) or evidentiary (privilege) issues on a motion to quash. This initial finding of relevance, analogous to screening by a magistrate before the issuance of a search warrant, may be afforded a great deal of deference by a reviewing court.¹³² On the other hand, if the screen-

¹³¹ *Shargel*, 742 F.2d at 63.

¹³² See *Illinois v. Gates*, 462 U.S. 213 (1983).

ing has no effect on later proceedings, it is nothing more than a redundant and mechanistic process.

Finally, although judicial screening focuses attention on the sensitive area of the issuance of subpoenas to lawyers, it is incapable of adjudicating the privilege or addressing the effect of the subpoena on the attorney-client relationship due to its limitations as a unilateral proceeding. At best, judicial screening will succeed only if district court judges recognize that the virtually unlimited subpoena power the grand jury possesses requires a more stringent level of review when confidential relationships are involved. Otherwise, nothing meaningful is accomplished and all of the difficult questions of interference with the attorney-client relationship and the privilege would still require resolution in a subsequent adversarial proceeding.

Judicial screening cannot effectively curb excessive or abusive issuing of subpoenas to lawyers without defining clearer and more rigorous standards than the present showing of either minimal relevance and/or important need. Also, the supervisory courts must establish definite procedures, particularly since *Schofield I* and *Harvey* have been so disfavored by other circuits. An example of such standards can be found in the analogous area of the issuance of subpoenas to reporters, where public awareness of freedom of the press is much greater than that of the right to counsel. The Second Circuit requires, in both civil and criminal cases, a clear and specific showing that the information sought by a subpoena issued to the news media is highly material and relevant, is necessary or critical to maintain the claim, and is unobtainable from any other source.¹³³ These criteria, mandating a substantial showing of relevancy as well as exhaustion of all other available sources, provide an example that could be adopted by circuit courts in the exercise of their supervisory power over the grand jury. They may also enable courts to balance more effectively the public and private interests involved when subpoenas are issued to lawyers.

¹³³ *United States v. Burke*, 700 F.2d 70, 76 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983).

C. *Other Means of Regulation*

1. By Courts

Ordinarily, the burden of proving the applicability of the attorney-client privilege is borne by the individual asserting it.¹³⁴ One aspect of the judicial screening approach that is preferable to the motion to quash is that a burden of production is placed on the government. Even without prior screening, a court could require the government, during the motion to quash (when the privilege ordinarily is raised), to go forward with a preliminary showing of specific need and relevance as well as unavailability of other sources of the information before the privilege issue ripens and the burden of proof shifts to the defense. Thus, the intent of *Schofield I*, *Harvey*, and *Doe* that the prosecution make a preliminary showing could be retained; if this burden is met, better defined standards could be applied to a fully litigated adversarial motion without procedural ambiguities. In the exercise of their supervisory power, some courts might add other criteria such as materiality or exhaustion of other available means of obtaining the evidence. Absent a showing of need and relevance made in open court in the presence of and subject to challenges by the defense, however, the subpoenaed attorney should not have to litigate the privilege question.

Another small step that courts could take would be to establish a rule requiring that a personal appearance by counsel before the grand jury could only be ordered after the government has demonstrated that other less intrusive attempts to obtain the information have failed. Less intrusive procedures, such as informal discovery efforts and compliance with the subpoena by an affidavit, might facilitate cooperation with the government's investigation in some cases while reducing or eliminating the conflict of forcing counsel to choose between testifying at a proceeding where his client is a target or risking contempt to avoid an appearance. The client also would be in the position of knowing the precise amount of information that would satisfy the government's request. Also, if the evidence provided by counsel is not needed at trial, the problem of disqualification of an attorney-witness would be avoided since written stipulation might substitute for live testimony.

¹³⁴ See text accompanying note 67 *supra*.

2. By Prosecutors

Self-regulation by individual federal prosecutors' offices¹³⁵ or preferably by the Department of Justice would also establish standards for nationwide control of the issuance of subpoenas to attorneys. Such self-regulation could be undertaken voluntarily or in response to legislative mandate. Recent examples of both types of self-regulation in related areas provide a model for this approach. After the Supreme Court acknowledged the powers of police and prosecutors to obtain evidence from members of the news media¹³⁶ or from disinterested third parties¹³⁷ by such means as searches pursuant to a warrant, Congress responded by enacting the Privacy Protection Act of 1980,¹³⁸ which limits the scope of such searches. The stringent criteria restricting news media searches are strengthened by the remedy of a damage suit against the United States upon a violation of the statute.¹³⁹

The statute further mandates that the Attorney General publish guidelines for federal officers to follow in searches of disinterested non-suspects generally, which also address the particular privacy interests inherent in certain confidential relationships, such as that of lawyer and client.¹⁴⁰ The Attorney General, in response to the legislative directive, promulgated a set of guidelines and procedures to protect against overly intrusive searches.¹⁴¹

These guidelines, basically tracking the Privacy Act, require that the least intrusive means of obtaining the information be

¹³⁵ In the office of the United States Attorney for the Eastern District of New York, for example, approval of the Chief of the Criminal Division is required before a grand jury subpoena will be issued to an attorney. Approval will be given only when "1) The testimony sought from the attorney is not privileged; 2) there is a clear need for the attorney's testimony; and 3) that need is sufficient to justify any possible intrusion into the attorney-client relationship." Letter from Ronald E. DePetris, Chief Assistant United States Attorney to William J. Landers, Dep't of Justice (Sept. 26, 1984).

¹³⁶ *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

¹³⁷ *Andresen v. Maryland*, 427 U.S. 463 (1976).

¹³⁸ Pub. L. No. 96-440, 94 Stat. 1879 (codified at 42 U.S.C. §§ 2000aa-2000m-11 (1982)).

¹³⁹ *Id.* § 2000aa-6 (authorizing actual damages, a minimum of \$1,000 liquidated damages, and reasonable attorney's fees and costs if improper search of media conducted).

¹⁴⁰ *Id.* § 2000aa-11. Even guidelines do not guarantee proper conduct by the government. See *Klitzman v. Krut*, 744 F.2d 955 (3d Cir. 1984) (search of law office pursuant to warrant overbroad; seized materials ordered returned to law firm).

¹⁴¹ 28 C.F.R. §§ 59.1-59.6 (1984).

used and that, absent an emergency, prior approval of a government attorney be sought. They further acknowledge the even greater level of intrusion resulting from a search warrant invading the privacy of confidential professional relationships such as the attorney-client relationship. In that case, the warrant will only issue upon a showing that less intrusive alternative means would impede the investigation, that the information sought is of substantial importance to the investigation, and that the approval of a Deputy Assistant Attorney General has been given in the ordinary case.¹⁴²

This example of legislative and rule making responses to a judicially sanctioned activity jeopardizing privacy rights is a valuable model for the development of similar protections in the area of issuing subpoenas to lawyers. Yet even without legislative impetus, prosecutors can promulgate policies to protect the competing interests endemic to such evidence gathering. An example of such a set of regulations is the policy covering issuing subpoenas to members of the news media.¹⁴³ Although a subpoena is admittedly a less intrusive means for obtaining material than a search warrant, the guidelines promulgated by the Attorney General in recognition of the problems that even a subpoena to the news media can raise demonstrate that prosecutors can and do set effective standards in this area.

These guidelines set forth certain standards and procedures which are transferable to the parallel situation of a subpoena issued to a lawyer. The introductory policy statement expressly acknowledges the competing interests of access to the news on the one hand and effective law enforcement and the administration of justice on the other.¹⁴⁴ The policy statement establishes principles governing the request for authorization and specifically requires in criminal cases that there be reasonable grounds to believe that a crime has occurred and that the information be essential to a central aspect of the investigation.¹⁴⁵ The policy statement also requires that the express authorization of the Attorney General be obtained, that the subpoena be used only after all other sources have been exhausted and finally, that before

¹⁴² *Id.* § 59.3(b)(2).

¹⁴³ 28 C.F.R. § 50.10 (1984).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* § 50.10(f)(1).

the subpoena is issued, negotiations take place between the prosecutor and the media in an attempt to resolve the matter less formally.

These guidelines recognize that the freedom of reporters to investigate and report the news needs some protection from compulsory process. By analogy, the goal of effective conflict-free assistance of counsel would be served by similar regulations. Drawing from these examples, regulations requiring a comparable demonstration of relevance, need and the absence of alternative means could be drafted by the Department of Justice. Such guidelines would avoid abuse and establish uniform published standards for voluntary prosecutorial self-regulation, particularly if their spirit were to contain an instruction that the prosecutor balance the value of the attorney-client relationship and traditional sixth amendment concerns against a demonstrable need for the information.

The United States Attorney in the Southern District of New York, the venue of many of the key attorney-subpoena cases, publicly supported the concept of guidelines, and has made a substantial beginning in this area by promulgating a policy for that office modeled after guidelines for issuing subpoenas to reporters.¹⁴⁶ After initially voicing respect for the attorney-client relationship, the guidelines require that prosecutors first attempt to obtain the evidence sought from sources other than the attorney and, failing that, they must negotiate with the attorney to accommodate the competing interests at stake.¹⁴⁷

¹⁴⁶ 37 CRIM. L. REP. (BNA) 2100 (May 1, 1985).

¹⁴⁷ The text of the Guidelines states:

Because the attorney-client relationship is an important public interest, the prosecutorial power of the government should not be used in such a way that it unnecessarily impairs that relationship. In balancing the concern that the United States Attorney's Office for the Southern District of New York has for the integrity of the attorney-client relationship and the office's obligation to the fair administration of justice, the following guidelines shall be adhered to by the United States Attorney's Office for the Southern District of New York.

(a) In determining whether to request issuance of a subpoena to an attorney, the approach in every case must be to strike the proper balance between the public's interest in the attorney-client relationship, and the public's interest in effective law enforcement and the fair administration of justice.

(b) All reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the bar.

(c) Negotiations with the attorney shall be pursued in all cases in which a

Internal controls by local United States Attorneys and the Justice Department¹⁴⁸ demonstrate a growing sensitivity of prosecutors to the constitutional, ethical and practical considerations raised by defense attorneys and some courts. While the guidelines certainly do not concede the validity of the constitutional

subpoena to a member of the bar is contemplated. These negotiations should attempt to accommodate the interests of the trial or grand jury with the interests of the attorney and client. Where the nature of the investigation permits, the government should make clear what its needs are in a particular case as well as its willingness to respond to particular problems of the subpoenaed party.

(d) No subpoena may be issued to a member of the bar without the approval of the United States Attorney for the Southern District of New York.

(e) In requesting the United States Attorney's authorization for a subpoena to a member of the bar, the following principles will apply:

(1) In criminal cases, there should be reasonable grounds to believe that a crime has occurred or is about to occur, and that the information sought is necessary to a successful investigation or prosecution. The subpoena should not be used to obtain peripheral, nonessential, or speculative information.

(2) In civil cases there should be reasonable grounds, to believe that the information sought is necessary to the successful completion of the litigation. The subpoena should not be used to obtain peripheral, nonessential, or speculative information.

(3) Unless it would compromise the investigation, the government should have unsuccessfully attempted to obtain the information from alternative sources.

(4) Even subpoena authorization requests for publicly disclosed information should be treated with care to avoid claims of harassment.

(5) Subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonable limited period of time, and should avoid requiring production of a large volume of material. They should give reasonable and timely notice of the demand for documents.

(f) Failure to obtain the prior approval of the United States Attorney may constitute grounds for an administrative reprimand or other appropriate disciplinary action. The principles set forth in this section are not intended to create or recognize any legally enforceable right in any person.

37 CRIM. L. REP. (BNA) 2100 (May 1, 1985).

¹⁴⁸ Not long after the United States Attorney for the Southern District of New York promulgated guidelines, the Department of Justice published its own standards to be included in the *U.S. Attorney's Manual*, 37 Cr. L. 2479 (September 25, 1985). Substantially similar to the Southern District guidelines, the nationwide standards forbid the issuance of a subpoena to a lawyer relating to representation of the client without authorization of the Assistant Attorney General of the Criminal Division. They differ from the Southern District version by permitting the prosecutor to bypass the negotiation stage if such "efforts would compromise a criminal investigation or prosecution or would impair the ability to obtain such information from an attorney if such attempts prove unsuccessful." *Id.* § C.

arguments and are perhaps not as restrictive as the defense bar would prefer, they do attempt to strike a balance between the interests of the government and those of defendants.

CONCLUSION

The privilege argument raised in the *Shargel* case itself did not provide a very good vehicle for the Second Circuit to consider many of the various percolating constitutional, procedural, and policy issues arising out of the issuance of grand jury subpoenas to lawyers. The court, however, could have been less reticent and constrained by the facts of the case and could have taken a more critical perspective on this increasingly prevalent practice.¹⁴⁹ Rather than confining its analysis to the narrowest possible question, namely, whether the privilege applied, the court should have at least commented on the need for regulation and the intrusion into the attorney-client relationship. In retrospect, however, the finality of *Shargel's* pronouncement about the inapplicability of the privilege seems to have provided new directions for argument and new impetus for the Second Circuit itself to rethink the sensitive issues at stake.

In quite the opposite tone, the *Shargel* opinion itself not only repeated McCormick's well-known pessimistic pronouncement that the motives of the subpoenaed defense counsel who objects to disclosure are characterized by "chicanery and sharp practice,"¹⁵⁰ but it also presaged the emerging view that a lawyer who invokes the privilege is, at best, being used by, and is, at worst criminally involved with, the client. The court expressed its fear that

a broad privilege against the disclosure of the identity of clients and of fee information might easily become an immunity for corrupt or 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

¹⁴⁹ For example, the Second Circuit has been highly critical, admittedly to no avail, of the policy of the Office of The United States Attorney for the Southern District of New York of interviewing suspects prior to arraignment. The court has gone so far as to find a violation of a defendant's sixth amendment rights. *See, e.g., United States v. Perez*, 733 F.2d 1026, 1036 (2d Cir. 1984); *United States v. Mohabir*, 624 F.2d 1140, 1150 (2d Cir. 1980).

¹⁵⁰ *Shargel*, 742 F.2d at 64 (quoting E. CLEARY, MCCORMICK ON EVIDENCE ¶ 90, at 216 (3d ed. 1984)).

money.¹⁵¹

Since *Shargel* was decided in August of 1984, the question of issuing subpoenas to lawyers and the participation of lawyers in criminal activities have received nationwide attention.¹⁵² Most prominently, the President's Commission on Organized Crime issued a report calling a small group of lawyers a "critical element in the life support system of organized crime."¹⁵³ Among the Commission's recommendations was that the Justice Department investigate lawyers by means of electronic surveillance and undercover operations. Inquiry about attorney's fees before the grand jury presumably will also enable prosecutors to trace laundered money, locate assets for forfeiture, and identify other accomplices who may have been fee-paying benefactors.¹⁵⁴ Perhaps the Second Circuit would have opened up its discussion of the broader issues if Mr. Shargel had raised them or if their public significance had been perceived at the time.

In most cases, information about client identity and fees is sought by the government in order to facilitate its prosecution of the client or other suspects and not in order to prosecute the attorney. As reasons for requiring this information increase due to new legislation,¹⁵⁵ courts and prosecutors should be equally concerned with fashioning workable, fair standards and procedures to ensure that lawyers do not routinely become the government's star witnesses and that valued rights are not trampled in the rush to obtain evidence in complex criminal investigations.

Editor's Note

On January 9, 1986, the Second Circuit, in an en banc rehearing, vacated its prior judgment in *In re Grand Jury Subpoena Served Upon Doe*,¹⁵⁶ and affirmed the district court's order.¹⁵⁷ The court found no constitutional basis for imposing

¹⁵¹ *Shargel*, 742 F.2d at 64.

¹⁵² PRESIDENT'S COMMISSION ON ORGANIZED CRIME, MATERIALS ON ETHICAL ISSUES FOR LAWYERS INVOLVED WITH ORGANIZED CRIME CASES (1984).

¹⁵³ *Id.* at 3.

¹⁵⁴ *Id.* at 34-36.

¹⁵⁵ See note 6 *supra*.

¹⁵⁶ 759 F.2d 968 (2d Cir. 1985). See notes 77-91 and accompanying text *supra*.

¹⁵⁷ *In re Grand Jury Subpoena Served Upon Doe* (Slotnick), No. 84-6319 (2d Cir.

upon the government the additional requirement of need before a grand jury subpoena can be enforced against the attorney of an unindicted client.¹⁵⁸ The court rejected appellant's sixth amendment argument, stating that sixth amendment rights do not attach at the pre-indictment stage. The Second Circuit also found no merit in appellant's argument that the subpoena implicated his fifth amendment due process rights.¹⁵⁹

The Second Circuit's reversal is not surprising, however, as few circuits were inclined to follow the *Doe* decision.¹⁶⁰

Jan. 9, 1986).

¹⁵⁸ *Id.* at 6982.

¹⁵⁹ *Id.* at 6987.

¹⁶⁰ See *In re Klein*, 776 F.2d 628 (7th Cir. 1985) (rejecting need requirement before calling attorney to testify before grand jury); *In re Grand Jury Proceedings (Weiner)*, 754 F.2d 154 (6th Cir. 1985) (*Doe* requirement of need in order to direct a subpoena to an attorney not supported by precedent).