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TAX LITIGATION ISSUES

Application of the Attorney-Client Privilege to Client Identities

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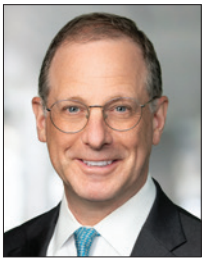

It is a well-known maxim that the attorney-client privilege "extends only to *communications* and not to facts." *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981). It is similarly well established that while the identity of a client typically is not protected from disclosure, the privilege can be invoked to bar revealing a client's identity when doing so will necessarily disclose the substance of a privileged communication. See *United States v. Liebman*, 742 F.2d 807, 809 (3d Cir. 1984). These principles frame the conundrum presented when the Government seeks to compel lawyers to disclose their clients' identities.

Earlier this Term, the Supreme Court declined to review a decision by the U.S. Court of Appeals for the Fifth Circuit upholding a John Doe summons requiring a law firm to disclose the identities of clients to the IRS. *Taylor Lohmeyer Law Firm v. United States*, 957 F.3d 505 (5th Cir. 2020), cert. denied, 142 S. Ct. 87 (2021). This article addresses the Fifth Circuit's opinion, including the key features of three analogous cases the court analyzed in finding that the summons at issue did not breach the privilege. By declining to take up the issue, the Supreme Court has, for the moment, left it to the lower courts to establish the appropriate limits of John Doe summonses in this context, and *Taylor Lohmeyer* provides instructive guideposts to practitioners litigating application of the privilege to such circumstances.

The John Doe Summons Procedure

A John Doe summons permits the IRS to compel the production of information relating to unidentified taxpayers upon making an ex parte showing that (1) "the summons relates to the investigation of a particular person or ascertainable group or class of persons"; (2) "there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law"; and (3) "the information sought … is not readily available from other sources." 26 U.S.C. §7609(f), (h)(2). This column previously addressed the IRS's expanded use of John Doe summonses in recent years, and the limited opportunities for affected taxpayers to object to the production of the requested materials. See, e.g., Jeremy H. Temkin, *John Doe Summonses: Procedural Hurdles With Limited Review*, N.Y.L.J. (Nov. 14, 2019); *Tax Enforcement, John Doe Summonses and Digital Currency*, N.Y.L.J. (Jan. 19, 2017).

In *Taylor Lohmeyer*, the IRS sought and obtained a John Doe summons compelling a law firm to disclose the identity of any client who used its services over a 23-year period "to acquire, establish, maintain, operate, or control (1) any foreign financial account or other asset; (2) any foreign corporation, company,

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trust, foundation or other legal entity; or (3) any foreign or domestic financial account or other asset in the name of such foreign entity." *Taylor Lohmeyer*, 957 F.3d at 507. In the district court, the firm attacked the ex parte process through which the IRS obtained the summons and asserted the attorney-client privilege with respect to the information sought. See *Taylor Lohmeyer Law Firm v. United States*, 385 F. Supp. 3d 548 (W.D. Tex. 2019). Though it dismissed the law firm's petition to quash the summons, the district court stayed enforcement of the summons pending appeal, finding that "the applicability of the attorney-client privilege to a John Doe summons that seeks a broad range of documentation … is a serious legal question." *Taylor Lohmeyer Law Firm v. United States*, No. 18-CV-1161 (XR), 2019 WL 5694116, at *2 (W.D. Tex. Oct. 3, 2019).

Taylor Lohmeyer's Appeal

On appeal, the law firm eschewed its procedural challenges. Instead, it argued that the summons called for information falling within the "narrow exception" to the general rule that client identities are not privileged and that, under the circumstances presented, "revealing the identity of the client … would itself reveal a confidential communication." *Taylor Lohmeyer*, 957 F.3d at 510 (quoting *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 926 F.2d 1423, 1431 (5th Cir. 1991) (*Reyes-Requena II*)). Specifically, the law firm argued that the IRS agent's affidavits supporting issuance of the summons demonstrated that "the Government already knows the content of the legal advice the Firm provided" to the unidentified clients, and thus revealing the names of the clients "would provide all there is to know about a confidential communication between the taxpayer-client and the attorney." *Taylor Lohmeyer*, 957 F.3d at 511 (quoting *Liebman*, 742 F.2d at 810). In upholding the summons, the Fifth Circuit narrowly construed the firm's privilege claim in light of "the 'congressional policy choice *in favor of disclosure* of all information relevant to a legitimate IRS inquiry.'" *Taylor Lohmeyer*, 957 F.3d at 510 (quoting *United States v. Arthur Young & Co.*, 465 U.S. 805, 816-17 (1984)).

The court first evaluated the law firm's claim that the Government already knew the legal advice it had provided to the clients, concluding that while the supporting affidavits revealed specific legal advice provided to one client about how to conceal that client's beneficial ownership of offshore assets, the affidavits did not reveal the IRS's knowledge of advice provided to *other* firm clients whose identities were sought by the summons. Instead, the affidavits merely provided the required "reasonable basis" for the issuance of a summons intended "to develop information about other unknown clients of [the Firm] *who may have* failed to comply with the internal revenue laws by availing themselves of similar services to those that" Taylor Lohmeyer provided to the client already known to the agent. *Taylor Lohmeyer*, 957 F.3d at 512.

The court distinguished situations where the IRS obtained a John Doe summons knowing that some of the firm's unidentified clients "engaged in allegedly fraudulent conduct, or … specific legal advice the Firm gave [them], and then requesting their identities." Id. Rather, the summons at issue before the Fifth Circuit broadly sought the identities and related documents for "*any* U.S. clients at whose request or on whose behalf [the Firm] ha[s] acquired or formed *any* foreign entity, opened or maintained *any* foreign financial account, or assisted in the conduct of *any* foreign financial transaction," regardless of any particular advice provided in connection with these arrangements. Id.

Other Appellate Authority

In *Taylor Lohmeyer*, the Fifth Circuit analyzed several circuit cases addressing circumstances under which a client's identity may be privileged. In *Reyes-Requena II*, the Government issued a grand jury subpoena to defense counsel requiring disclosure of the identity of an anonymous third-party benefactor who funded a defendant's attorney fees. The Fifth Circuit refused to enforce the subpoena, finding that (1) the third party had retained counsel for a confidential joint representation, which included the defendant, and (2) the third party's identity would necessarily expose the "confidential motive for [the] retention of [defense counsel]." 926 F.2d at 1432. Thus, the court

concluded that the third party's identity and "confidential motive" for seeking counsel were inextricably intertwined and therefore protected by the privilege. Id. at 1431. By contrast, the *Taylor Lohmeyer* court found no such inextricable and revealing link between the identities of the law firm's clients and their motives for retaining the firm.

The court next discussed the Third Circuit's decision in *United States v. Liebman*, which addressed a John Doe summons issued to a law firm predicated on an affidavit that identified specific advice the law firm gave to its clients and asserted that the advice had been given to all clients who comprised the John Doe class. 742 F.2d at 809. In other words, disclosing the identifying information sought by the John Doe summons in *Liebman* would have been tantamount to disclosing the substance of the specific legal advice given to the clients, which was a bridge too far for the Third Circuit.

Unlike in *Liebman*, however, the affidavit in *Taylor Lohmeyer* "did *not* state the Government *knows* the substance of the legal advice the Firm provided the [unknown firm clients]." *Taylor Lohmeyer*, 957 F.3d at 512. Indeed, the court pointed to Taylor Lohmeyer's submission to underscore the absence of a link between the advice given to the one client described in the supporting affidavits and the unknown clients subject to the summons, noting that the firm represented it did not give such advice to any other clients. Id.

Finally, the *Taylor Lohmeyer* court reviewed *United States v. BDO Seidman*, 337 F.3d 802 (7th Cir. 2003), in which the Seventh Circuit rejected a challenge to a John Doe summons predicated on the statutory privilege protecting confidential communications between a taxpayer and tax professional. See 26 U.S.C. §7525. In *BDO Seidman*, the summons requested the identities of taxpayers who "participated in one of [] 20 types of tax shelters," but the Seventh Circuit found that the privilege did not apply since the identifying information did not necessarily reveal the motive for such shelters, "or other confidential communication of tax advice" involving the taxpayers. *BDO Seidman*, 337 F.3d at 812. Similarly, the Fifth Circuit found that revealing the client identities called for by the summons issued to Taylor Lohmeyer would only "inform the IRS that the [clients] participated in at least one of the numerous transactions described in the John Doe summons," but would not reveal particular advice protected by the attorney-client privilege. *Taylor Lohmeyer*, 957 F.2d at 513.

Conclusion

Under *Taylor Lohmeyer*, a John Doe summons seeking the identities of law firm clients engaging in broad categories of transactions will withstand challenge so long as no confidential client motivation or specific advice is revealed or otherwise known to the IRS. Nevertheless, in dissenting from the denial of rehearing en banc, six judges noted that John Doe summonses are "traditionally served…on financial institutions and commercial couriers[,] [n]ot lawyers," and cautioned that the opinion should not be read to impose any new requirements for the attorney-client privilege to protect client identity. *Taylor Lohmeyer Law Firm v. United States*, 982 F.3d 409, 410 (5th Cir. 2020) (Elrod, J., dissenting). In particular, the dissent emphasized that "[w]henever disclosing a client's identity would reveal the confidential purpose for which the client consulted the attorney, [the] attorney-client privilege applies," and "[t]his protection may obtain *even if the government does not know the specific, substantive legal advice that was provided to the client,*" suggesting a concern that the opinion might (wrongly) be construed to require only this latter element. Id. at 411-12 (emphasis added).

In 2019, Congress amended 26 U.S.C. §7609(f) to impose a requirement that John Doe summonses must be "narrowly tailored." This provision will give law firms an additional basis to challenge future John Doe summonses requiring disclosure of their clients' identities, ensuring that the lower courts' balancing of the IRS's enforcement prerogatives against protected client confidences is likely to remain an evolving issue.