USING THE ATTORNEY-CLIENT PRIVILEGE AS A GUIDE FOR INTERPRETING I.R.C. § 7525

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I. INTRODUCTION

The IRS Restructuring and Reform Act of 1998 created a privilege, of sorts, for communications between taxpayers and their tax advisers.[1] Subsequently, if applicable, § 7525 would

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1. IRS Restructuring and Reform Act of 1998 § 3411, I.R.C. § 7525 (West Supp. 2005). The statute reads as follows:

Confidentiality privileges relating to taxpayer communications

(a) Uniform application to taxpayer communications with federally authorized practitioners.—

(1) General Rule.—With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.

(2) Limitations.—Paragraph (1) may only be asserted in—

(A) any noncriminal tax matter before the Internal Revenue Service; and

(B) any noncriminal tax proceeding in Federal court brought by or against the United States.

(3) Definitions.—For purposes of this subsection—

(A) Federally authorized tax practitioner.—The term "federally authorized tax

keep those communications from being used as evidence against the taxpayer. Taxpayers would, thus, have an added incentive for confiding in their advisers. And, with better information, the advisers could more ably provide accurate tax advice.[2]

In order for such policy goals to be realized, application of § 7525 must be predictable. When meeting with an adviser, it is essential that taxpayers be able to determine whether their communications will remain confidential. Otherwise, nothing would be gained through the medium of § 7525. The taxpayers would have no greater incentive to communicate than if the statute did not exist. After all, if § 7525 is to encourage communication, it cannot do so unless the taxpayer is assured of its applicability. Uncertainty in its application means that one must otherwise assume that everything disclosed may later be revealed.

Unfortunately, clarity and predictability are not hallmarks of the terms of § 7525. For example, no language handles such basic questions as: what qualifies as tax advice; or, is a taxpayer's identity a part of the protected communications; or, must a taxpayer intend that the communications be confidential?

Such questions, if left unanswered, will inevitably compromise predictability. However, § 7525 does provide a frame of reference, a model to which it may be compared: the attorney-client privilege. The statute states that a taxpayer's communications with a tax adviser are protected from disclosure to the extent the communication would be privileged if it were

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practitioner" means any individual who is authorized under Federal law to practice before the Internal Revenue Service if such practice is subject to Federal regulation under section 330 of title 31, United States Code.

(B) Tax advice.—The term "tax advice" means advice given by an individual with respect to a matter which is within the scope of the individual's authority to practice described in subparagraph (A).

(b) Section not to apply to communications regarding tax shelters.—The privilege under subsection (a) shall not apply to any written communication which is—

(1) between a federally authorized tax practitioner and—

(A) any person,

(B) any director, officer, employee, agent or representative of the person, or

(C) any other person holding a capital or profits interest in the person, and

(2) in connection with the promotion of the direct or indirect participation of the person in any tax shelter (as defined in Section 6662(d)(2)(C)(ii)).

2. Although the cases do not express such policy goals for § 7525, one can regularly find such policies discussed in the attorney-client privilege cases. Such statements have been a part of privilege analyses from the earliest days. *See, e.g.*, Hatton v. Robinson, 31 Mass. (14 Pick.) 416, 422 (1833). Because the attorney-client privilege serves as a model for § 7525, its policy goals should also be germane. Further, because both provide a confidentiality protection for certain communications, the effects of their protections also should be the same.

between a taxpayer and an attorney.[3] Thus, the precedent derived from attorney-client privilege cases may be used to construe similar issues arising under § 7525.[4]

This article will explore the relationship between attorney-client privilege and the protections § 7525 provides taxpayers and their advisers. Several courts have used privilege analysis to evaluate § 7525 issues; the most notable was whether a taxpayer's identity was protected by the statute. Although nothing in § 7525 directly refers to one's identity, there is related privilege precedent. This article will show how these courts used such privilege precedent as a model in rendering their decisions. Furthermore, the extent to which privilege may provide future guidance and, hence, enhance the predictability of § 7525 will also be analyzed.

However, before those cases are discussed, a brief outline of § 7525 will be provided.[5]

II. SECTION 7525: AN OVERVIEW

Under the terms of the IRS Restructuring and Reform Act of 1998, now § 7525 of the tax code, certain communications between taxpayers and their non-attorney advisers are shielded from discovery.[6] In fact, some courts declared that § 7525 extended the attorney-client privilege to tax adviser communications.[7] However, such language should not be taken

3. I.R.C. § 7525(a)(1).

4. *See* United States v. BDO Seidman, 337 F.3d 802, 810 (7th Cir. 2003) ("Because the scope of the tax practitioner-client privilege depends on the scope of the common law protections of confidential attorney-client communications, we must look to the body of common law interpreting the attorney-client privilege to interpret the § 7525 privilege."); *see also* United States v. KPMG LLP, 316 F. Supp. 2d 30, 35 (D.D.C. 2004); Doe v. KPMG, LLP, 325 F. Supp. 2d 746, 752 (N.D. Tex. 2004).

5. Further and more detailed discussion of the provisions of § 7525 than appear in this article is available. *See generally* Alyson Petroni, *Unpacking the Accountant-Client Privilege Under I.R.C. Section 7525*, 18 VA. TAX REV. 843 (1999); Michael Wilson, Note, *Careful What You Wish For: The Tax Practitioner-Client Privilege Established By the Internal Revenue Service Restructuring and Reform Act of 1998*, 51 FLA. L. REV. 319 (1999).

6. I.R.C. § 7525.

7. *See, e.g.*, United States v. Frederick, 182 F.3d 496, 502 (7th Cir. 1999) ("We should consider the possible bearing of a new statute, 26 U.S.C. Section 7525, which extends the attorney-client privilege to 'a federally authorized tax practitioner.'"); Riordan v. Barbosa, No. 395945, 1999 WL 124335, at *6 (Conn. Super. Mar. 1, 1999) ("In recognition of this reality, Congress in 1998, extended the common law attorney-client privilege to communications between a 'federally authorized tax practitioner' and his client-taxpayer.").

Note that tax advice communications may be within the attorney-client privilege, but the privilege requires, at its core, that the taxpayer/client's communications be with an

literally. Section 7525 provides far less protection than the attorney-client privilege.[8] Thus, it would be a mistake to equate the two. It may also inadvertently cause misplaced reliance on the weaker capabilities of § 7525. If shielding communications from discovery is essential, taxpayers would be better off communicating with attorneys under the privilege than with tax advisers under § 7525.

III. REQUIREMENTS FOR § 7525 TO APPLY: SIMILARITIES WITH THE ATTORNEY-CLIENT PRIVILEGE[9]

Three requirements for acquiring the confidentiality protection of § 7525 are similar to elements needed for the application of the attorney-client privilege: first, a focus on the adviser's qualifications; second, a limitation on the scope of the communication; and third, a necessity that confidentiality envelope it.[10]

Tax advice may be obtained from a number of sources. An

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attorney. Section 7525 provides its protection for communication with non-attorney tax advisers, but does not extend protection to communications with an individual engaged in a non-attorney capacity. *See, e.g.*, *Frederick*, 182 F.3d at 502 (attorney-client privilege did not apply when the lawyer was acting in the role of an accountant); Summitt, Ltd. v. Levy, 111 F.R.D. 40, 41 (S.D.N.Y. 1986) (client failed to establish that the role of the person retained was as an attorney rather than an accountant. Thus, no attorney-client privilege arose.).

8. *See infra* text accompanying notes 21-24.

9. For further and more detailed discussion of the attorney-client privilege doctrines discussed in this article, *see* JOHN WILLIAM GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE (3d ed. 2000 & Supp. 2005).

10. Compare the text of § 7525 (reproduced *supra* note 1), with the elements of attorney-client privilege described in the frequently quoted United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950) which states:

The privilege applies only if

- (1) the asserted holder of the privilege is or sought to become a client;
- (2) the person to whom the communication was made
  - (a) is a member of the bar of a court, or his subordinate and
  - (b) in connection with this communication is acting as a lawyer;
- (3) the communication relates to a fact of which the attorney was informed
  - (a) by his client
  - (b) without the presence of strangers
  - (c) for the purpose of securing primarily either
    - (i) an opinion on law or
    - (ii) legal services or
    - (iii) assistance in some legal proceeding, and not
  - (d) for the purpose of committing a crime or tort; and
- (4) the privilege has been
  - (a) claimed and
  - (b) not waived by the client.

(quotation broken into outline form).

accountant often provides it. Return preparation services may make taxpayers aware of every deduction. Professors regularly offer courses that may be taken by those curious about tax questions. As will be explained, none of these providers of tax information necessarily qualify as § 7525 tax advisers, no matter how learned the advice or how experienced the purveyor.

A § 7525 adviser must be a federally authorized tax practitioner, which is statutorily defined to include attorneys, certified public accountants, enrolled agents, and enrolled actuaries.[11] Thus, not every skilled provider of tax advice will qualify. Only those possessing the requisite credentials can participate in protected taxpayer communications.

This provision is similar to a requirement under the attorney-client privilege. The client's communication must be with a lawyer,[12] a member of the bar.[13] Proficiency in law, skillfulness, and artistry even is not sufficient.

This classification of the "expert" is not difficult to apply. There is no need under either § 7525 or the privilege to gauge the adviser's knowledge or assess it using some multi-part factors test. The only question is: does the adviser have the credentials? Divining a court's answer is highly predictable.

A second similarity between § 7525 and the attorney-client privilege is the limitation each places on the scope of the communication. Not every discussion between qualified advisers and their clients is covered. Only those deemed worthy of protection pass muster.

Section 7525 limits its coverage to tax advice communications.[14] The attorney-client privilege only protects legal advice.[15] At first glance these seem like straightforward

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11. I.R.C. § 7525(a)(3)(A), (reproduced *supra* note 1); *see* S. REP. NO. 105-174, at 70 (1998); K.H. Sharp, *A Smile, a Frown, and a Few New Wrinkles: The Changing Face of Practice Before the IRS*, 70 N.D. L. REV. 965, 970-72 (1994).

12. *E.g.*, Old Second Nat'l Bank v. Commercial Union Midwest Ins. Co., No. 99-C-3941, 1999 WL 1068635, at *2 (N.D. Ill. Nov. 18, 1999) (internal communication among corporate employees that was not directed to counsel was not privileged); Byrnes v. Empire Blue Cross Blue Shield, No. 98 Civ 8520, 1999 WL 1006312, at *4 (S.D.N.Y. Nov. 4, 1999) (no privilege attached when a non-attorney actuary conducted independent legal research and communicated it to a client. There was no attorney-client relationship); see also *supra* note 10, for a listing of the *United Shoe* privilege factors.

13. Fin. Techs. Int'l, Inc. v. Smith, No. 99 Civ. 9351, 2000 WL 1855131, at *2, *6-7 (S.D.N.Y. Dec. 19, 2000) (applying New York law) (corporation could not have privileged communications with its general counsel because he was not a member of any bar).

14. *See* text of § 7525(a)(1) *supra* note 1. Merely preparing a tax return has not been deemed as providing tax advice under § 7525. Doe v. Wachovia Corp., 268 F. Supp. 2d 627, 637 (W.D.N.C. 2003); United States v. KPMG, L.L.P., 237 F. Supp. 2d 35, 39 (D.D.C. 2002).

15. *See generally* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §

requirements. Discussions about opera or French neo-classical painting are not covered topics. Since tax (or legal) advice neither be sought nor provided thereunder, such communications would be fully discoverable.

However, not all discussions may be so readily classified. A common issue under the privilege is whether the communications are legal ones (and thus protected) or business-related (and thus discoverable). As one might expect, clearly distinguishing between the two can be a complex undertaking because the line separating them is often blurred.[16]

For example, a discussion of the client's business activity may provide the needed background on which counsel's legal advice is built. Although the communication would be topically mixed (some business, some legal), its primary purpose would be to enable counsel to provide legal advice. The business portion merely provided the springboard and lost its individual identity within the context of the client and attorney's discussions. In short, the business information may be seen as inextricably intertwined with the legal advice. Consequently, the attorney-client communications are not about the business itself, but about the business as the source for the provision of legal advice. After all, counseling clients is not an abstract, theoretical exercise. It is a service that tailors the application of the law to the unique, particular situation at hand.

Although § 7525 does not contain a similar formula to distinguish "tax advice" communications from all others, the attorney-client privilege can provide guidance. Predicting which communications will be considered "tax advice" is readily enhanced by reviewing how courts evaluate the "legal advice" requirement in attorney-client privilege.

For example, consider a communication that focuses on an analysis of a taxpayer's investment objectives. If its purpose is to

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2285, at 527-28 (John T. McNaughton ed., rev. ed. 1961); *United Shoe Mach. Corp.*, 89 F. Supp. at 358-59.

16. *See In re* Ford Motor Co., 110 F.3d 954, 966 (3d Cir. 1997).

> The documents do not contain merely factual material nor do they detail mere business decisions. Certainly, the ultimate decision reached by the Policy and Strategy Committee could be characterized as a business decision, but the Committee reached that decision only after examining the legal implications of doing so. Even if the decision was driven, as the district court seemed to assume, principally by profit and loss, economics, marketing, and public relations, or the like, it was also infused with legal concerns, and was reached only after securing legal advice. At all events, disclosure of the documents would reveal that legal advice.

Id.

evaluate mutual funds that provide income opportunities, § 7525 would not likely apply. The advice would be predominantly investment-oriented. However, if the communication instead is focused on strategies to reduce taxable income (e.g., investing in municipal bonds, IRA investments), the tax function would predominate. Even though investments would still be the topic, it would not be the driving force behind the communication. Instead, it would merely provide the context upon which tax advice could be built. In short, based on privilege precedent, a tax advice purpose should predominate the discussions. Any non-taxation topics may be seen as merely providing the basis from which the tax advice was derived.[17]

A third, and final, similarity between the elements of § 7525 and those of the attorney-client privilege focuses on confidentiality. Although § 7525 requires that the tax advice be "confidential," no standards are provided to delineate this test nor is the term defined.[18] Thus, the attorney-client privilege must again provide guidance.

Under the privilege, attorney-client communications must occur in private and not be intended for future dissemination.[19] Thus, clients do not satisfy the confidentiality test if they presume that the information they provide to counsel will be disclosed later.[20] Counsel here would be no more than a temporary way station before the information goes on its way. Privileged communications require discretion, reticence, and secrecy.

Similarly, the presence of outsiders at the time of the attorney-client communication also compromises its

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17. *See Frederick*, 182 F.3d at 502 (tax advice communications do not occur unless the adviser is doing lawyer's work. A lawyer would provide legal advice about tax law); United States v. BDO Seidman, LLP, No. 02 C 4822, 2003 WL 932365, at *3 (N.D. Ill. Feb. 5, 2003) *aff'd on other grounds*, 337 F.3d 802 (7th Cir. 2003) (no tax adviser role since the agreement between taxpayer and accounting firm excluded providing any tax advice). Although these are not mixed communication cases under § 7525 (none have yet been decided) they do illustrate the need to separate tax advice from other types. In *Frederick* that other type was communication to aid in return preparation; in *BDO Seidman* it was for a general consulting relationship.

18. I.R.C. § 7525(a)(1) (West Supp. 2005). This confidentiality requirement was applied when construing whether a taxpayer's identity was protected by § 7525. *See BDO Seidman*, 337 F.3d at 809; *Doe*, 325 F. Supp. 2d at 746; United States v. Arthur Andersen L.L.P., No. 02-C-6790, 2003 WL 21956404, at *5 (N.D. Ill. Aug. 15, 2003). For further discussion, *see infra* text accompanying notes 44-53.

19. *See* United States v. Jenkens & Gilchrist, P.C., No. 03-C-5693, 2005 WL 1300768, at *1 (N.D. Ill. Mar. 10, 2005).

20. *E.g.*, *id.* (refusing to uphold attorney-client privilege assertion since the client's communications with counsel were expected to be shared with others, particularly to assist in preparation of the client's tax returns).

confidentiality.[21] Clearly, the client does not intend that the conveyed information remain private, since it was not even private when first given to counsel. The privilege will not protect communications that were not made in confidence at the outset.

Using the privilege as a guide, the confidentiality requirement of § 7525 acquires some substance. The taxpayer must value privacy when communicating with the adviser. A brother-in-law's presence during the meeting demonstrates that the information conveyed was not meant for the tax adviser only. Further, providing information that the adviser is to use in upcoming business negotiations, for example, also negates any confidentiality intent. Privilege precedent indicates that the confidentiality requirement of § 7525 should focus on the circumstances surrounding the taxpayer-tax adviser communications and discern from them whether the taxpayer intended that they be confidential.

Thus far, § 7525 tracks the attorney-client privilege quite well. The three basic requirements of each, as noted above, are quite similar, and the precedent surrounding the privilege enhances the predictability of § 7525. Had the drafters of § 7525 stopped here, it would have been accurate to describe the statute as a mere extension of an attorney-client privilege-like protection to another arena.

However, unlike the privilege, the protective scope of § 7525 is severely restricted. Although a taxpayer may structure tax adviser communications within the requirements of § 7525, they may not be protected because of unknowable circumstances that may arise in the future. Thus, the confidentiality promise of § 7525 should not be overvalued. Although § 7525 may act as a post-communication shield, it cannot be relied upon at the actual time of the communications due to its restrictions. The following section outlines them.

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21. *See, e.g., In re* Keeper of the Records, 348 F.3d 16, 23-24 (1st Cir. 2003) (holding that confidentiality cannot protect matters discussed in a three-way telephone conversation between the corporate client, its attorney, and the client's co-business venturer where the attorney advocated the client's position during the telephone call but did not provide any legal advice); James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 142 (D. Del. 1982) ("it is only when facts have been made known to persons other than those who need to know them that confidentiality is destroyed"); State v. Montgomery, 499 So. 2d 709, 711 (La. Ct. App. 1986) ("when the communication is made in the presence of third parties, the intent of confidentiality is generally lacking").

IV. RESTRICTIONS ON THE SCOPE OF § 7525[22]

Under the attorney-client privilege, neither the identity of the opposing party, the nature of the underlying claim in litigation, nor the forum in which the matter is being heard forecloses application of the privilege. Not so with § 7525, which is limited by all three factors.[23]

First, § 7525 does not apply unless the United States is the opposing party.[24] Consequently, private litigants' discovery efforts are not hampered. Since a taxpayer has no way of knowing whether the U.S. might seek access to tax adviser communications, § 7525 cannot be relied upon at the time of the communication to provide confidentiality protection.

Second, § 7525 is inapplicable in criminal matters.[25] Although guarding tax adviser communications from discovery in civil suits may be important, it is hardly the only circumstance in which disclosure would be harmful. If a taxpayer is federally indicted for tax evasion, there is no way to prevent tax adviser communications from losing their § 7525 protection when the prosecution seeks them. This limitation also restricts the usefulness of § 7525 to taxpayers. One would need clairvoyant powers to know in what settings tax adviser communications may be sought.

Finally, the protection of § 7525 is not available in all forums.[26] It may be asserted only in federal court or in IRS proceedings.[27] In state court and in non-IRS administrative forums, taxpayer-tax adviser communications may be discovered without § 7525 getting in the way. In fact, discovery has been ordered by courts that focused on this limiting factor.[28]

When taken together, the restrictions of § 7525 substantially limit its potency. Not only are the circumstances in which it applies narrowly drawn, but also the incentives that the section

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22. Note that § 7525 has a restriction in addition to the ones discussed here. The confidentiality protection does not apply to written tax advice about corporations' participation in a tax shelter. I.R.C. § 7525(b). This restriction did not arise in the § 7525 cases discussed in this article and is thus outside its scope.

23. I.R.C. § 7525(a)(2).

24. *Wachovia Corp.*, 268 F. Supp. 2d at 637 (stating that one reason § 7525 did not apply was that the United States had not appeared as a party).

25. I.R.C. § 7525(a)(2).

26. *Id.*

27. *Id.*

28. Chao v. Koresko, No. 04-MC-74, 2004 WL 1749179, at *1 (E.D. Pa. Aug. 2, 2004) (§ 7525 was not applicable in an action to enforce administrative subpoena under ERISA); *Wachovia Corp.*, 268 F. Supp. 2d. at 637 ("issuance of an administrative summons to a bank, as opposed to a taxpayer, does not appear to be a 'tax proceeding' before the IRS").

can provide are compromised. A promise of confidentiality that cannot be predictably fulfilled will not likely encourage candor.

Nonetheless, § 7525 does provide some protection. The conditions must be just right, but when they are, discovery of taxpayer and tax adviser communications will be thwarted. The balance of this article will concern this aspect of § 7525. Discovery or continued confidentiality will hinge on whether the basic statutory requirements are met. The issue in the cases that follow is whether § 7525 may be used to shield a taxpayer's identity. To do so, the identity information must be deemed tax advice and must be conveyed confidentially. Attorney-client privilege, involving similar issues, was used by the courts in these cases as guidance.

V. USING ATTORNEY-CLIENT PRIVILEGE TO CONSTRUE § 7525:

A. *Is a Taxpayer's Identity Covered?*

The § 7525 taxpayer identity cases arose during IRS investigations of accounting firms and their sales of potentially abusive tax shelters.[29] By statute, the promoters were required to register each shelter with the IRS;[30] noncompliance resulted in certain penalties.[31] In addition, accounting firms had to maintain a list of tax shelter buyers.[32]

These provisions were added to the Internal Revenue Code about twenty years ago. They were designed to enhance enforcement of the tax laws, particularly in the area of abusive tax shelters. Because of these provisions, once such a scheme was identified, a list of participants would be readily available. All, thereafter, would be subject to IRS sanction, not merely those unlucky few whose returns disclosed participation during a random audit.

However, taxpayers resisted the release of their names to the IRS by their accounting firms. They contended that disclosing their identities would reveal that they sought advice about tax shelter participation from their tax advisers. Section

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29. *See generally BDO Seidman*, 337 F.3d at 805-06; *KPMG*, 316 F. Supp. 2d at 31-32; *Doe*, 325 F. Supp. 2d at 748-49; *Arthur Andersen*, 2003 WL 21956404, at *1; *Wachovia Corp.*, 268 F. Supp. 2d at 629; *KPMG*, 237 F. Supp. 2d at 36. Since the factual background of these cases is similar, the recitation in this article of the circumstances under which the § 7525 client identity issue arose was drawn generally from them, particularly from *BDO Seidman*.

30. *See* I.R.C. § 6111 (West Supp. 2005).

31. *See* I.R.C. § 6707 (West Supp. 2004).

32. I.R.C. § 6112 (West Supp. 2006).

7525, they asserted, shielded such information from discovery.

This issue gave rise to two questions: first, whether identity information should be deemed "tax advice;" and second, whether the taxpayers intended that their identities, once revealed to the accounting firms, remain confidential.

B. *Is a Taxpayer's Identity "Tax Advice"?*

Section 7525 only protects "tax advice" communications.[33] Thus, not all tax-related discussions, such as those related to return preparation, are covered.[34] Although "tax advice" is not defined within the statute, use of attorney-client privilege to construe its scope does provide guidance.

At first glance, whether a taxpayer's identity should be deemed a "tax advice" communication seems readily apparent. One's identity has nothing to do with tax law, nor does it affect information about one's duty or rights. An adviser could readily provide first-rate tax advice to a client who provided all necessary financial information anonymously.

However, § 7525 may also be viewed from a less literal perspective. Consider that its confidentiality protection can encourage a taxpayer's candor with an adviser. Further, such discussions are not abstract events, occurring in some metaphysical sphere. Instead, they are grounded in the mundane operation of a tax adviser's practice. Consequently, certain administrative steps, tied to that operation, must take place. An appointment will be made. In doing so, one's name will be provided, as will a billing address. These and similar steps may be seen as prerequisites before any taxpayer-adviser meeting may take place.

In this sense, identity information is inextricably linked with the advising process. Shouldn't § 7525, then, be read broadly to protect it, too?

A similar question arose under the attorney-client privilege, one whose resolution was important for the construction of § 7525.[35] Privileged attorney-client communications must concern

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33. *See* I.R.C. § 7525(a)(1) (West Supp. 2005) (reproduced *supra* note 1).

34. *Frederick*, 182 F.3d at 500, 502 (commenting that § 7525 does not suggest that tax return preparers are entitled to the extended privilege); *Doe*, 325 F. Supp. 2d at 753 (concluding that plaintiffs' identities were not protected by the privilege in § 7525); *KPMG*, 237 F. Supp. 2d at 39 ("[T]his Court finds that the privilege does not protect communications between a tax practitioner and a client simply for the preparation of a tax return.").

35. *See* cases cited *supra* note 29.

"legal advice."[36] Conveyed information tangential to that purpose is outside the protection.[37] Thus, the amount of attorney fees paid,[38] the terms of the attorney's engagement,[39] and the client's identity[40] are usually discoverable.

However, in atypical circumstances, courts may find that the otherwise tangential information is instead privileged. Two somewhat related approaches have been used to reach such conclusions. The first is called the "last link" test.[41] That is, if the tangential information provides the "last link" for incriminating the client in some wrongful activity, it will be deemed privileged.[42] For example, a prosecutor may seek the name of the person who paid a defendant's attorney fees. Ordinarily, such information is fully discoverable. However, if revealing the name would disclose the identity of an otherwise unknown suspect, one who would have been indicted if known, then that name would provide more than just an identity. It would provide the "last link" needed to bring criminal charges.[43] Thus, the tangential information exception would likely apply and the fee payer's identity would be protected.

A second approach for evaluating tangential information seeks to tie the tangential information to the underlying privileged legal advice communication.[44] This approach has been

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36. *BDO Seidman*, 337 F.3d at 811.

37. *See generally* GERGACZ, *supra* note 9.

38. *E.g.*, *In re* Special Grand Jury No. 81-1 (Leon D. Harvey), 676 F.2d 1005, 1009 (4th Cir. 1982) ("Payment of fees and expenses generally is not privileged information because such payments ordinarily are not communications made for the purpose of obtaining legal advice.")

39. *E.g.*, *In re* LTV Sec. Litig., 89 F.R.D. 595, 603 (N.D. Tex. 1981) ("The attorney-client privilege does not encompass such nonconfidential matters as the terms and conditions of an attorney's employment.")

40. *E.g.*, United States v. Liebman, 742 F.2d 807, 809 (3d Cir. 1984) (stating that absent unusual circumstances client identity is not generally protected by the privilege); United States v. Sidley Austin Brown & Wood, L.L.P., No. 03 C 9355, 2004 WL 816448, at *7-8 (N.D. Ill. Apr. 15, 2004) (finding that disclosure of the client's identity would not, in effect, reveal confidential communications merely because the discovering party had copies of form opinion letters in its possession when the form letters did not reveal any specific communications between any particular client and counsel).

41. *E.g.*, United States v. Innella, 821 F.2d 1566, 1567 (11th Cir. 1987).

42. *In re Special Grand Jury No. 81-1 (Leon D. Harvey)*, 676 F.2d at 1009 ("An exception to the no privilege rule is recognized 'where the person invoking the privilege can show that a strong probability exists that disclosure of such information would implicate that client in the very criminal activity for which legal advice was sought.'")

43. *E.g.*, *Innella*, 821 F.2d at 1567.

44. *E.g.*, *In re* Grand Jury Proceedings (GJ90-2), 946 F.2d 746, 748 (11th Cir. 1991) ("The government asserts that it already knew Jones' incriminating motive for seeking legal advice, so that disclosure of his identity will reveal nothing further. This argument is disingenuous, however. The crucial fact is that the person we fictitiously called Jones was the one who was motivated to seek legal advice. Appellant cannot reveal Jones' name

adopted by a majority of the courts and was also used in the § 7525 cases. Under this approach, if the tangential information were revealed, it would be tantamount to revealing the communicated legal advice, too. Finding this connection is the key for bestowing privilege protection.

Typically, when this exception applies, the discovering party already knows about the attorney-client communications, but lacks the name of the participating client. Such information, at this point, serves no purpose. It cannot be tied to any person or used in any proceeding. Attempting to do so would be like playing a DVD without having access to a viewing screen. The player may be reading digitized bits, but without the screen, the information is merely a formless mass.

Consider a client's identity, then, as the DVD viewing screen. In itself, there is no legal advice information conveyed by it. However, when tied to the disconnected bits of information that the discovering party already has, the entire picture comes into view. Thus, because of this unusual discovery context, disclosing a client's identity would, in effect, reveal what that person communicated with counsel.

Neither of the two tangential information exceptions under attorney-client privilege are easy to apply. Their greatest failings are: first, neither provides predictability to the client at the time the tangential information is disclosed to the attorney; and second, identifying the tipping point when the tangential is transformed is not often clear.

A finding of privilege under the tangential information exceptions rests on the quantity and quality of information a future, unknown discovering party knows. The greater amount of information that is known, and the more specific and pointed is the known information, the greater likelihood that something tangential, ordinarily discoverable, will be deemed privileged. Discerning the point when this occurs has been likened to reading the nuances in Mona Lisa's smile.[45]

Notwithstanding the complexity of this area of attorney-client privilege law, the tangential information exception was used as guidance for construing the applicability of § 7525 to taxpayer identity information. As in the privilege cases, taxpayer identity under § 7525 is found to be generally discoverable, and not a part of the protected tax advice communications.[46]

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without also revealing this fact.").

45. *In re* Subpoenaed Grand Jury Witness, 171 F.3d 511, 513 (7th Cir. 1999).

46. *BDO Seidman*, 337 F.3d at 811; *Doe*, 325 F. Supp. 2d at 752; *Arthur Andersen*,

However, the taxpayers in these cases were not making a bald assertion of blanket confidentiality. Instead, they contended that § 7525 accommodated a tangential information exception, as does the privilege. Further, they maintained that using the privilege-tie or majority approach from attorney-client privilege law would similarly protect their identities under § 7525.

Specifically, the taxpayers noted, revealing their names to the IRS would, in effect, disclose the purpose for which they sought tax advice. Such information regarding intent, protected by § 7525, should not be discoverable; and neither, they concluded, should be their names that, once revealed, would simultaneously disclose their motives for communicating.[47]

The courts rejected this argument.[48] Although the courts did suggest that § 7525 could protect tangential information, they found no factual basis for applying the privilege-tie or majority test here. Unlike the privilege cases in which it was applied, the discovering party (the IRS) had too little information to connect with the sought taxpayer's name. All that was known was that the accounting firms had twenty kinds of tax shelter plans available and none of them had yet been found to be abusive, tax-evasion devices. Further, no specific tax advice provided by an accounting firm to an unknown taxpayer had been revealed. In fact, little was known about the taxpayers' relationships with the accounting firms or the interactions that occurred between them. Since the IRS had so little information beforehand, no confidential tax advice would, in effect, have been revealed if the taxpayers' names were discovered.[49]

The courts' analyses were correct. Since § 7525 covers only tax advice, by its terms the statute (and its attorney-client privilege counterpart) requires that a connection be made between the communicated advice and the tangential information that the discovering party sought. Since the taxpayers were unable to show such a connection factually, their § 7525 claim could not be upheld.[50] Nonetheless, the § 7525

2003 WL 21956404, at *5-6.

47. This motive argument, although theoretically accurate, was found by one court to be insufficient. *See Doe*, 325 F. Supp. 2d at 752-53 (taxpayer's motive for communicating was too general to reveal confidentialities and seeking to lower taxes is a common motive for communicating with accounting firms).

48. *See BDO Seidman*, 337 F.3d 802; *Doe*, 325 F. Supp. 2d at 748. *See also KPMG*, 316 F. Supp. 2d at 36-37 (adopting holding of *BDO Seidman* and *Doe*); *Arthur Andersen*, 2003 WL 21956404 at *4-6 (applying district precedent).

49. *See BDO Seidman*, 337 F.3d at 809; *Doe*, 325 F. Supp. 2d at 753-754; *KPMG*, 316 F. Supp. 2d at 35; *Arthur Andersen*, 2003 WL 21956404 at *5.

50. *BDO Seidman*, 337 F.3d at 811 (burden on taxpayer to establish applicability of § 7525).

cases clearly suggest that in a different setting, one in which the IRS had sufficient background information; a taxpayer's identity could be protected.

The attorney-client privilege, thus, provided two levels of guidance. The first was its tangential information exception. By using this privilege doctrine, the § 7525 courts construed the term "tax advice" beyond its literal meaning. In addition, attorney-client privilege law provided guidance for the application of the exception, particularly in the relationship between the information the discovering party possessed and the tangential matter it sought to discover.

C. *Do Taxpayers have an Expectation that their Identities will Remain Confidential?*

Section 7525 requires that the tax advice communications be confidential.[51] The same element surrounds legal advice communications under the attorney-client privilege.[52] This requirement was used by the IRS tax shelter investigation cases to further support their holdings that the taxpayers' identities were not protected by § 7525.

Courts analyze the confidentiality of attorney-client communications based upon the client's intent.[53] Thus, the attorney-client privilege will not attach unless the communications are made under circumstances in which confidentiality is expected. For example, if the client assumes that the attorney will pass the information on to others, then there is no confidential intent when providing it.[54] Rather, the intent is that the information be conveyed. A later assertion of privilege does not protect what the client has no privacy interest in providing to counsel in the first place.

Under attorney-client privilege law, the client's intent or expectation may either be explicit or inferred. For example, courts have found that when a statute requires that information

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51. I.R.C. § 7525 (West Supp. 2005) (reproduced *supra* note 1).

52. *United Shoe Mach. Corp.*, 89 F.Supp. at 358-59. *See generally* GERGACZ, supra note 9, at §§ 3.56-3.66.

53. Judicial opinions use language of client intent when determining whether the client and attorney communications occurred with a sufficient privacy interest to warrant granting the client's privilege request. *See, e.g., In re* Grand Jury Subpoena to Attorney (Under Seal), 679 F. Supp. 1403, 1410 (N.D.W. Va. 1988) (quoting United States v. (Under Seal), 748 F.2d 871, 874 (4th Cir. 1984)) ("The difficult question is how to determine when a client intends or assumes that his communication will remain confidential.").

54. "[W]here a business proposal is sent to counsel for legal advice, with an accompanying expressed intent to disclose the proposal the proposal to a third party, the communication will not be deemed to be made in confidence and thus will not be privileged." *In re* Ampicillin Antitrust Litig., 81 F.R.D. 377, 390 (D.D.C. 1978).

provided to counsel be made public, no confidentiality expectation, and thus no privilege, arises.[55] In this setting, the statute stands in the way of any client confidentiality intent. And disclosure is what one should expect by providing covered information to counsel.

The § 7525 cases used this client-intent approach when evaluating whether a taxpayer's name should be deemed confidential when provided to a tax adviser. According to this model, communication of identity information must be made with a reasonable expectation that it will not be later disclosed.[56]

The courts held that such an expectation could not arise.[57] By statute, accounting firms are required to keep a list of those to whom they sell tax shelters.[58] This list is available for later IRS review.[59] Thus, irrespective of any taxpayer subjective intent, confidentiality cannot be maintained for any disclosed identity information.[60] The statute forecloses that possibility.

Note the context, and thus the importance, of this finding. Irrespective of any circumstances that could make identity information protected tax advice, identity information is not deemed confidential in a tax-shelter setting. Consequently, the protection of § 7525 cannot apply.

This finding is consistent with guidance provided by the attorney-client privilege. The § 7525 holdings are in line with privilege cases in which discovery was permitted when client-provided information was statutorily required to be disclosed.[61] Neither the privilege nor § 7525 arises unless confidentiality can be maintained.

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55. United States *ex rel.* Burns v. A.D. Roe Co., 904 F. Supp. 592, 594 (W.D. Ky. 1995) (holding that a client who provided an attorney with information that was required to be filed under the False Claims Act did not communicate it in confidence); *In re* Grand Jury Investigation, 772 N.E.2d 9, 26 (Mass. 2002) (holding that the attorney-client privilege did not exist under Massachusetts' child abuse reporting statute).

56. *BDO Seidman*, 337 F.3d at 812 ("This list-keeping provision precludes the Does from establishing an *expectation of confidentiality* in their communications with BDO, an essential element of the attorney-client privilege and, by extension, the § 7525 privilege.").

57. *Id.* at 813; Doe v. KPMG, L.L.P., No. 03-CV-2036-H, 2004 WL 797719, at *6 (N.D. Tex. Apr. 12, 2004); *KPMG*, 316 F. Supp. 2d at 44; *Arthur Andersen*, 2003 WL 21956404, at *8.

58. I.R.C. § 6112(a) (West Supp. 2006).

59. I.R.C. § 6112(b).

60. *BDO Seidman*, 337 F.3d at 812; *KPMG*, 2004 WL 797719, at *6; *KPMG*, 316 F. Supp. 2d at 44; *Arthur Andersen*, 2003 WL 21956404, at *8.

61. *A.D. Roe Co.*, 904 F. Supp. at 594 (holding that a client who provided an attorney with information that was required to be filed under the False Claims Act did not communicate it in confidence); *In re Grand Jury Investigation*, 772 N.E.2d at 26-27 (holding that the attorney-client privilege did not exist under Massachusetts' child abuse reporting statute).

VI. CONCLUSION

The protection of § 7525 was sought for taxpayers' identities that had been disclosed to their tax advisers. The attorney-client privilege provided a guide that the courts used to construe the statute. Two issues arose. First, could one's name be deemed protected § 7525 tax advice? Here, the attorney-client privilege tangential-information precedent was used to provide guidance. The second issue focused on whether the advice was communicated confidentially. Again, the attorney-client privilege provided a context for evaluating this requirement.

The taxpayers didn't prevail on either issue. Disclosure of their names would not thereby be tantamount to revealing tax advice communications. Thus, § 7525 did not protect them. This test is identical to the one used by a majority of courts facing similar attorney-client privilege situations.

Similarly, the attorney-client privilege was also used to assess the confidentiality requirement of § 7525. Since a taxpayer's name, by statute, could not be kept secret, there could be no confidentiality intent when providing it to a tax adviser. This focus on the taxpayer's intent was derived from analysis used to evaluate confidentiality under the attorney-client privilege. Without a confidential intent, the protection does not apply.

These § 7525 issues turned on the particular factual settings in which they arose. Thus, factual nuances were an important consideration. This feature is also a hallmark of attorney-client privilege law and the principles derived from it.

The attorney-client privilege thus provides a broad base for analysis of § 7525 issues. As new communication-protection questions arise between taxpayers and tax advisors, consulting the attorney-client privilege can provide a heightened level of predictability.