

**UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT**

ROSEMARIE D. BRIA,<sup>1</sup> :  
Plaintiff, :  
v. : Civil No. 3:00CV1156(CFD)(Lead Case)  
UNITED STATES OF AMERICA, :  
Defendant. :

UNITED STATES OF AMERICA, :  
Petitioner, :  
v. : Misc. No. 3:01MC21(CFD)(Member case)  
BRYON W. HARMON and ROBERT M. :  
LANE, :  
Respondents, :  
ROSEMARIE BRIA, :  
Intervenor. :

**RULING ON UNITED STATES’ MOTION FOR ENFORCEMENT OF INTERNAL  
REVENUE SERVICE SUMMONSES**

I. Introduction and Background

On December 10, 1999 and January 6, 2000, the United States of America served summonses on Attorneys Robert Lane (“Lane”) and Bryon Harmon (“Harmon”) in connection with an Internal Revenue Service (“IRS”) investigation into an estate tax return filed by Rosemarie D. Bria (“Ms. Bria). In 1997, Ms. Bria and her brother, Dr. William F. Bria (“Dr.

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<sup>1</sup>This case was originally captioned Jane Doe v. United States of America. However, the Amended Petition to Quash [Doc. # 36] substituted Rosemarie D. Bria’s name for that of Jane Doe. The Clerk is directed to make this change.

Bria”), had been named co-executors of their mother’s estate,<sup>2</sup> and Ms. Bria retained Attorney Lane to handle certain legal matters arising from their mother’s death and her responsibilities as co-executrix.<sup>3</sup> Harmon, an attorney in Lane’s firm, also worked on those matters. Attorney Harmon prepared a Form 706, or federal estate tax return, though Ms. Bria terminated the firm’s representation before the return actually was filed. The IRS is investigating whether Ms. Bria understated the value of the estate on the return that was eventually submitted to the IRS.<sup>4</sup> In January and May 2000, Lane and Harmon answered some of the government’s questions and produced certain documents in response to the summonses served upon them, but they invoked the attorney-client privilege with respect to some of the documents and testimony sought by the government.

The instant action consists of two consolidated cases, Bria v. United States, 3:00CV56(CFD) (lead case) and United States v. Harmon, 3:01MC21(CFD) (member case). In the latter—and the one at issue here—the government seeks to enforce the IRS summonses served on Lane and Harmon. Ms. Bria has intervened in this action. She also moved to quash an IRS subpoena in the lead case, Bria v. United States, which has since been resolved by the stipulation of the parties.<sup>5</sup> That stipulation also pertained to this case in that it permitted Ms. Bria’s counsel

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<sup>2</sup>Rosemarie Bria’s mother was Dorothy Bria, the decedent.

<sup>3</sup>The Court assumes that Dr. Bria may also be considered a client of Attorneys Lane and Harmon given that he was co-executor, although the parties have not addressed this issue.

<sup>4</sup>Presumably, the motivation for understating the value of Dorothy Bria’s estate would be that Ms. Bria was a beneficiary of Dorothy’s estate under her will and would benefit from reduced taxes on that estate.

<sup>5</sup>Bria v. United States concerned a subpoena served on the Connecticut Bar Association by the IRS to obtain documents concerning a fee dispute between Ms. Bria and Lane and Harmon

to attend an interview of Lane and Harmon and object to any questions on the basis of attorney-client privilege. In addition, it provided that Ms. Bria's counsel would prepare a privilege log listing the documents as to which they claimed attorney-client privilege and would turn over all other responsive documents.

Ms. Bria's counsel have produced most of the responsive documents, but they continue to object to the production of several documents on the basis of attorney-client privilege. They also have asserted the attorney-client privilege in response some of the questions posed by the IRS agent and government attorney during the interviews of Lane and Harmon, which were held on August 1, 2001. In the motion that is currently pending [Doc. # 39], the government seeks to enforce the summonses to the extent that they pertain to eighteen unproduced documents and to compel the testimony of Attorneys Lane and Harmon concerning the subjects foreclosed by the objections of Ms. Bria's counsel. For the following reasons, the motion for enforcement is granted in part and denied in part.

## II. Discussion

The current dispute essentially involves three legal issues: (1) whether the tax return exception to the attorney-client privilege applies to the testimony and documents at issue; (2) whether the crime-fraud exception to the attorney-client privilege applies to certain testimony; and (3) whether Harmon's testimony concerning Ms. Bria's reasons for terminating Lane and him is privileged.

### A. Applicable law

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following the termination by Ms. Bria of those attorneys on the Dorothy Bria estate matters. As mentioned, Lane and Harmon were discharged before the final estate tax return was filed.

“To invoke the attorney-client privilege, a party must demonstrate that there was: (1) a communication between client and counsel, which (2) was intended to be and was in fact kept confidential, and (3) made for the purpose of obtaining or providing legal advice.” United States v. Construction Prods. Research, Inc., 73 F.3d 464, 473 (2d Cir. 1996).<sup>6</sup> The attorney-client privilege applies to confidential communications, not to facts underlying those communications. Upjohn Co. v. United States, 449 U.S. 383, 395-96 (1981). The party claiming the benefit of the attorney-client privilege has the burden of establishing all the essential elements. von Bulow by Auersperg v. von Bulow, 811 F.2d 136, 144 (2d Cir. 1987).

“There can, of course, be no question that the giving of tax advice and the preparation of tax returns . . . are basically matters sufficiently within the professional competence of an attorney to make them prima facie subject to the attorney-client privilege.” Colton, 306 F.2d at 637. See also In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1037 (2d Cir. 1984) (“Tax advice rendered by an attorney is legal advice within the ambit of the privilege.”). A tax attorney cannot assert a blanket claim of privilege for documents relating to the representation of a client, however, because much of the information transmitted to an attorney by a client is not intended to be confidential, but instead is given for transmittal by the attorney to others, for example, for inclusion in a tax return. Id. at 638. “But [when] the tax preparer . . . was also the taxpayers’ lawyer, . . . it cannot be assumed that everything transmitted to him by the taxpayer was intended to assist him in his tax-preparation function and thus might be conveyed to the IRS, rather than in his legal-representation function.” United States v. Frederick, 182 F.3d 496, 501 (7th Cir. 1999).

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<sup>6</sup>Questions of privilege in a federal income tax investigation are matters of federal law. Colton v. United States, 306 F.2d 633, 636 (2d Cir.1962).

B. Testimony

At Lane and Harmon's interviews, Ms. Bria's counsel asserted attorney-client privilege with respect to the following topics: (1) twelve joint bank accounts, valued at \$407,000, held by the decedent but not listed on the estate tax return that was ultimately filed; (2) a mortgage for property in Cos Cob, Connecticut held by the decedent that also was not listed on the estate tax return;<sup>7</sup> and (3) Ms. Bria's termination of Lane and Harmon's representation. The government argues that questioning on these matters is not foreclosed because the attorneys' responses would not be privileged. Specifically, the government contends that their responses fall under the tax return and crime-fraud exceptions to the attorney-client privilege.

As an initial matter, Ms. Bria's counsel contend that the fact that Attorneys Lane and Harmon did not actually file the estate tax return at issue prevents the application of the tax return exception. The fact that certain information was never transmitted to a third party, however, does not necessarily prevent the application of the exception. "If the client transmitted the information so that it might be used on the tax return, such a transmission destroys any expectation of confidentiality which might have otherwise existed." United States v. Lawless, 709 F.2d 485, 487 (7th Cir. 1983) (reaching this conclusion in a case where an attorney argued that certain information transmitted to him by his client, but not actually used in the tax return at issue, was protected by attorney-client privilege).<sup>8</sup> The relevant inquiry thus is whether the client—in this

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<sup>7</sup>This mortgage also is referred to as the Conlin mortgage.

<sup>8</sup>The Court notes that Ms. Bria's counsel also mention the work-product privilege as a basis for their objections to production of many of the documents at issue. However, pursuant to the Stipulation and Agreement of approved by this Court on May 23, 2001, Ms. Bria's counsel were permitted to compile a privilege log for the purpose of asserting attorney-client privilege. See Stipulation & Agreement [Doc. # 37] ¶ 4. The Court leaves it to the parties to determine

case, Ms. Bria—conveyed the information to be used on the return.

Ms. Bria’s counsel also argue that she retained Lane and Harmon to give advice relating to the probating of Dorothy Bria’s estate, rather than for the purpose of filing estate tax returns. Bria has submitted an affidavit in which she states that she did not retain Lane and Harmon for the principal purpose of filing estate tax returns and that she had the expectation that any communication to Lane and Harmon would be confidential. See Pet.’s Memo. Opp’n Mot. Enforcement Summons, Ex. A. Letters from Lane and Harmon to Ms. Bria, however, indicate that the attorneys were working on the estate’s tax returns and that they requested certain information about the joint bank accounts and mortgage for that purpose. See Exs. Support United States’ Mot. Enforcement IRS Summonses, Exs. 3-5. Moreover, even Ms. Bria’s affidavit did not contend that the preparation of the estate tax return was not within the scope of the legal work to be performed by Lane and Harmon. Thus, it is clear that Lane and Harmon were retained, at least in part, for the purpose of filing estate tax returns, and it is likely that some of their communication related to filing such returns. As a result, the Court will look to specific questions to determine whether the attorneys’ responses will violate the attorney-client privilege.<sup>9</sup>

1. Joint Bank Accounts

The Court concludes that certain responses to questions regarding the joint bank accounts

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whether additional objections may be based on an assertion of work product privilege; the instant ruling is limited to the Court’s determination of the applicability of the attorney-client privilege.

<sup>9</sup>The transcripts from the testimony of Attorneys Lane and Harmon at their IRS interviews are attached to the government’s motion for enforcement as Exhibits 1 and 2. In referring to excerpts from the transcripts, the court will indicate which lawyer was being questioned, and the page and line number where the question is found (e.g. Lane, 6:20-23).

will not violate the attorney-client privilege.<sup>10</sup> Two relate to Ms. Bria's communication of information to Attorneys Lane and Harmon regarding contributions to the accounts (Lane, 47:2-3; Harmon, 25:23-25). This is the type of information that a client could reasonably expect to be included in an estate tax return and transmitted to others. Therefore, these communications are excepted from the attorney-client privilege. Another question to Attorney Harmon concerned his basis for preparing a draft return listing the \$405,000 in the bank accounts as an asset of the estate (Harmon, 30:15-17). To the extent that Harmon's response is based on information received from Ms. Bria about the contents of the accounts, it also will be permitted because the information could reasonably have been expected to be included on the estate tax return. Finally, Harmon may respond to the question regarding his initial determination of whether the joint bank accounts should be included as an asset to the decedent on the draft estate tax return (Harmon, 27:11-13). Again, to the extent that it is based on information received from Ms. Bria, that information is of the type that would be included on the estate tax return. In addition, the Court notes that Attorney Harmon was performing an accounting function when making these calculations, and it is clear that "for the privilege to apply, . . . the attorney must be acting in his capacity as a professional legal adviser at the time the information was transferred." Lawless, 709 F.2d at 487 (noting that the preparation of a tax return is primarily an accounting service).

On the other hand, the government may not ask Harmon about any advice that Ms. Bria requested about how joint bank accounts are treated (Lane, 47:11-12). Any such question was a

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<sup>10</sup>As to the government's question regarding how Attorney Lane knew about the joint bank accounts (Lane, 43:19-20), the question was answered and the Court need not rule further. This is also true with respect to the government's question to Attorney Harmon as to his determination of whether the joint bank accounts should be included in the estate tax return (Harmon, 26:9-10).

confidential communication between a lawyer and client.

The government also argues that it should be permitted to inquire into the joint bank accounts on the basis of the crime-fraud exception to the attorney-client privilege. This exception provides that the attorney-client privilege cannot be used to protect “client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct.” In re Grand Jury Subpoena Duces Tecum, 731 F.2d at 1038. The government speculates that “Bria could have told [Lane and Harmon] who put the money in the accounts and asked how she could otherwise avoid paying tax.” Memo. Support. United States’ Mot. Enforcement of IRS Subpoenas, at 13.

A party wishing to invoke the crime-fraud exception must demonstrate that there is a factual basis for a showing of probable cause to believe that a fraud or crime has been committed and that the communications in question were in furtherance of the fraud or crime. This is a two-step process. First, the proposed factual basis must strike “a prudent person” as constituting “a reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud, and that the communications were in furtherance thereof.” In re John Doe, Inc., 13 F.3d 633, 637 (2d Cir.1994) (quoting In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1039 (2d Cir.1984)). Once there is a showing of a factual basis, the decision whether to engage in an in camera review of the evidence lies in the discretion of the district court. United States v. Zolin, 491 U.S. 554, 563 (1989). Second, if and when there has been an in camera review, the district court exercises its discretion again to determine whether the facts are such that the exception applies.

United States v. Jacobs, 117 F.3d 82, 87 (2d Cir. 1997). Here, the government only speculates as to crimes or fraud that may have been committed by Ms. Bria, and therefore has not satisfied its burden of showing probable cause that a fraud or crime has been committed and that the communications in question were in furtherance of the fraud or crime. Therefore, the crime-fraud exception to the attorney-client privilege does not apply based on the government’s showing.

## 2. Mortgage

Many of the questions posed to Lane and Harmon regarding the Conlin mortgage call for privileged responses. First, the question about “give and take” between Attorney Lane and Ms. Bria or Dr. Bria regarding the value of the mortgage requires a privileged response (Lane, 53:4-7). This question implicates conversations between a lawyer and his client that likely went beyond the transmittal of information for tax return purposes. Similarly, the government may not inquire into any conversation that Lane had with Ms. Bria about how to “handle” the mortgage after speaking with the person who valued the mortgage (Lane, 55:16-19). Such a conversation likely included legal advice, as well as communications from Ms. Bria that she intended to keep confidential. The government also may not inquire into Harmon’s determination of the value of the mortgage, (Harmon, 65:7-9), because the question was asked in the specific context of the probate inventory—not the estate tax return—and Harmon was acting in his capacity as a lawyer with respect to that document. Harmon’s responses to the questions regarding Ms. Bria’s reaction to the draft 706 Form (Harmon, 58:3-4) and Ms. Bria’s understanding of whether the asset would be included in the tax return (Harmon, 128:22-129:2) concern privileged matters because Harmon’s response likely would be based on confidential communications from Ms. Bria. Two of the questions relating to what Ms. Bria may have said about the value of the property with respect to the amount of the note and whether it was uncollectible call for a response based upon confidential communications that are privileged. (Harmon, 74:15-16, 19-22). Finally, any response to the government’s question of whether Harmon communicated to Ms. Bria that the mortgage would be worthless is privileged (Harmon, 85:6-7).

Lane and Harmon may answer questions about the following topics, as their responses would not be privileged: (1) what Ms. Bria and Dr. Bria may have said about the value of the

property with respect to the amount of the note (Harmon, 75:20-22); and (2) how the value of the mortgage for the draft 706 was communicated to Ms. Bria (Harmon, 56:25).

3. Dismissal of Lane and Harmon

As a general rule, absent special circumstances, a client's identity and fee information are not privileged. See Gerald B. Lefcourt, P.C. v. United States, 125 F.3d 79, 86 (2d Cir. 1997); Vingelli v. United States, 992 F.2d 449, 452 (2d Cir.1993); Colton, 306 F.2d at 636. Similarly, "the attorney-client privilege does not extend to billing records and expense reports." Chaudhry v. Gallerizzo, 174 F.3d 394, 402 (4th Cir. 1999). However, "correspondence, bills, ledgers, statements, and time records which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law, fall within the privilege." Clarke v. American Commerce Nat'l Bank, 974 F.2d 127, 129 (9th Cir. 1992); see also Baker v. Dorfman, No. 99 Civ. 9385(DLC), 2001 WL 55437, at \*2 (S.D.N.Y. Jan. 23, 2001) ("The attorney-client privilege protects confidential client information that is contained in legal bills, but fee statements that do not contain detailed accounts of the legal services rendered are not protected from disclosure." (internal quotation omitted)).

The government seeks to question Harmon about why Ms. Bria terminated Lane and him and to ask about the nature of the fee dispute that was apparently involved (Harmon, 43:17-19; 52:2-3). As explained above, information about fees and billing records are generally not covered by the attorney-client privilege. However, where the reason for the termination and the resulting dispute could invite responses which refer to the attorney's legal advice to the client, their strategy, and the client's motive in seeking representation in the first place, they may be privileged. Cf. Clark, 974 F.2d at 129. Given that this is likely that this is the case here, the

questions proposed by the IRS require a privileged response.

C. Documents

Ms. Bria's counsel have claimed privilege with respect to the production of the following documents sought by the government and listed on the privilege log: 12, 14, 16, 17, 20, 21, 25, 26, 28, 34, 35, 36, 40, 42, 44, 45, 48, and 49. See Exs. Support United States' Mot. Enforcement IRS Summonses, Ex. 5. The Court has reviewed the privilege log and the government's responses, and it has examined the disputed documents in camera as well.

The following disputed documents are protected by attorney-client privilege:

Document 12, Lane's October 14, 1997 letter to Ms. Bria and Dr. Bria, reflects communication from a client that was not intended to be conveyed to a third party.

Document 14, a letter from Lane to Ms. Bria and Dr. Bria dated June 16, 1997, contains tax advice concerning estate administration matters and thus is protected by the attorney-client privilege. Its attachment, an order of the Connecticut Court of Probate appointing Ms. Bria and Dr. Bria executors of their mother's estate, is not covered by the privilege, as it was not intended to be kept confidential.

Document 20 reflects confidential communication from Ms. Bria to her attorneys.

Document 21, Harmon's "Miscellaneous Notes," is privileged because it contains confidential communications from Ms. Bria.

Documents 25 and 26, both of which are notes written by Lane, contain tax advice that reaches beyond the mere preparation of estate tax returns.

Document 28, Lane's notes from a telephone call with Ms. Bria, includes her confidential communications to her attorneys and are privileged.

Documents 35 and 36 contain confidential communications from Ms. Bria about matters that relate to legal advice on estate administration rather than estate tax returns and thus are privileged.

Document 40, which contains Harmon's notes regarding the value of the mortgage, is privileged because it reflects discussions based on confidential communications from Ms. Bria.

Documents 42, 44, and 45, which contain Harmon's notes for a meeting with Ms. Bria, relate to legal advice on estate administration matters and thus are privileged.

Similarly, Document 48, Harmon's notes of a telephone call with Ms. Bria, relates to legal advice on estate administration matters and are privileged.

Document 49 contains information similar to that in Document 48 and thus is privileged.

The other disputed documents are not privileged:

Documents 16 and 17, copies of Harmon's October 2, 1997 memorandum to file, contain information that was gathered from discussions with third parties, and thus the privilege does not apply.

Document 34, Lane's "to do" list, also does not reflect tax advice or confidential communication from a client, and consequently is not privileged.

### III. Conclusion

For the foregoing reasons, the United States' Motion for Enforcement of Internal Revenue Service Summonses [Doc. # 39] is GRANTED IN PART, DENIED IN PART as set forth in this opinion.

SO ORDERED this \_\_\_\_\_ day of March, 2002, at Hartford, Connecticut.

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Christopher F. Droney  
United States District Judge