United States Court of Appeals
for the Fifth Circuit

No. 19-50506

TAYLOR LOHMEYER LAW FIRM P.L.L.C.,

Plaintiff—Appellant,

versus

UNITED STATES OF AMERICA,

Defendant—Appellee.

Appeal from the United States
Western District of Texas
USDC 5:18CV1161

ON PETITION FOR REHEARING EN BANC

(Opinion - 04/24/2020, 5 Cir., _____, 957 F.3d 505)

Before BARKSDALE, HIGGINSON, AND DUNCAN, *Circuit Judges*.

The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. 35 and 5th Circ. R. 35), the petition for rehearing en banc is **DENIED**.

In the en banc poll, eight judges voted in favor of rehearing (Chief Judge Owen, and Judges Smith, Elrod, Haynes, Willett, Ho, Engelhardt, and Oldham), and nine judges voted against rehearing (Judges Jones, Stewart, Dennis, Southwick, Graves, Higginson, Costa, Duncan, and Wilson).

ENTERED FOR THE COURT:

Rhesa Hawkins Barksdale
United States Circuit Judge

JENNIFER WALKER ELROD, *Circuit Judge*, joined by OWEN, *Chief Judge*, and SMITH, WILLETT, ENGELHARDT, and OLDHAM, *Circuit Judges*, dissenting from the denial of rehearing *en banc*:

The IRS served the Taylor Lohmeyer law firm with a broad summons requesting the identities of the firm's clients who had engaged the firm to achieve certain offshore financial arrangements from 1995 to 2017. The IRS has traditionally served such summonses on financial institutions and commercial couriers. Not lawyers. There is good reason to be wary of investigations that exert pressure on lawyers. The relationship between a customer and a financial institution or commercial courier plays little, if any, role in our system's ability to administer justice—but the same cannot be said of the lawyer-client relationship. When the IRS pursues John Doe summonses against law firms, serious tensions with the attorney-client privilege arise. Courts play a crucial role in moderating the executive power with respect to a John Doe summons. *See United States v. Bisceglia*, 420 U.S. 141, 146 (1975) ("Substantial protection is afforded by the provision that an Internal Revenue Service summons can be enforced only by the courts.").

Hearing this case *en banc* would have helped clarify the boundaries of attorney-client privilege in this precarious area.[1] I write to explain that the opinion can and should be read—consistently with our existing precedent—not to impose any new standard with respect to what is required for the attorney-client privilege to protect client identity.

* * *

Attorney-client privilege matters. And it matters not only for particular parties but for the system of justice at large. "Its purpose is to

[1] Amici, the American College of Tax Counsel and the National Association of Criminal Defense Lawyers, both supported rehearing *en banc*.

encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Although the privilege may at times prevent the government from obtaining useful information, "this is the price we pay for a system that encourages individuals to seek legal advice and to make full disclosure to the attorney so that the attorney can render informed advice." *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 926 F.2d 1423, 1432 (5th Cir. 1991) (*Reyes-Requena II*) (quoting *Matter of Grand Jury Proceeding, Cherney*, 898 F.2d 565, 569 (7th Cir. 1990)). *See also In re Grand Jury Proceedings*, 517 F.2d 666, 674 (5th Cir. 1975) (*Jones*) ("The purpose of the [attorney-client] privilege would be undermined if people were required to confide in lawyers at the peril of compulsory disclosure every time the government decided to subpoena attorneys it believed represented particular suspected individuals.").

Tax, in particular, can be a complex area of law, and our system relies on self-reporting and voluntary compliance. Many individuals, especially with sophisticated business interests, seek assistance to navigate the Internal Revenue Code. Tax attorneys can help clients comply—but only if they have the clients' full disclosure.

We have previously held that client identities are privileged where disclosure would reveal the client's confidential motive for retaining an attorney. "If the disclosure of the client's identity will also reveal the confidential purpose for which he consulted an attorney, we protect both the confidential communication and the client's identity as privileged." *Reyes-Requena II*, 926 F.2d at 1431. *See also Jones*, 517 F.2d at 674–75 ("The attorney-client privilege protects . . . the clients' identities when such protection is necessary in order to preserve the privileged motive.").

Our enduring precedent in *Jones* and *Reyes-Requena II* aligns with the long-established case law of other circuits. *See, e.g.*, *Cherney*, 898 F.2d at 568 ("The client's identity . . . is privileged because its disclosure would be tantamount to revealing the premise of a confidential communication: the very substantive reason that the client sought legal advice in the first place."); *Tornay v. United States*, 840 F.2d 1424, 1428 (9th Cir. 1988) (client identities are privileged when "disclosure of the client's identity or the existence of a fee arrangement would reveal information that is tantamount to a confidential professional communication"); *United States v. Liebman*, 742 F.2d 807, 809 (3d Cir. 1984) (client identities are privileged "where so much of the actual attorney-client communication has already been disclosed that identifying the client amounts to full disclosure of the communication"); *N.L.R.B. v. Harvey*, 349 F.2d 900, 905 (4th Cir. 1965) ("The privilege may be recognized when so much of the actual communication has already been disclosed that identification of the client amounts to disclosure of a confidential communication.").

The amici raised important concerns about how to interpret the opinion in this case. However, the opinion assures us, in its citations to *Jones* and *Reyes-Requena II*, that it does not diverge from our settled precedent. *Taylor Lohmeyer Law Firm P.L.L.C. v. United States*, 957 F.3d 505, 510–11 (5th Cir. 2020). I take the opinion at its word. Whenever disclosing a client's identity would reveal the confidential purpose for which the client consulted the attorney, attorney-client privilege applies. This protection may obtain even if the government does not know the specific, substantive legal advice that was provided to the client.

In the district court, the enforcement order is currently stayed and the case has been administratively closed to facilitate our review of the enforcement order. Once our mandate issues, it may be that the case is reopened and the stay lifted. If so, the May 15, 2019 enforcement order

provides that the Lohmeyer law firm will have the opportunity to produce a privilege log, asserting privilege on particular responsive documents. If the law firm does so, the district court may choose then to conduct an *in camera* review of those documents.[2] I am confident that any such review will be guided by the following: "[i]f the disclosure of the client's identity will also reveal the confidential purpose for which he consulted an attorney, we protect both the confidential communication and the client's identity as privileged." *Lohmeyer*, 957 F.3d at 511 (quoting *Reyes-Requena II*, 926 F.2d at 1431).

[2] The fact that the law firm made "blanket" assertions of privilege was perhaps because the IRS demanded a very broad array of documents to be identified using a client list. When a summons is so structured, a blanket assertion of privilege may be appropriate.