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## Justices Asked To Uphold Attorney Privilege In Tax Client List Row

By **Amy Lee Rosen**

Law360 (June 17, 2021, 3:53 PM EDT) -- The U.S. Supreme Court should review a Fifth Circuit decision allowing the Internal Revenue Service to obtain a list of a law firm's tax clients because the decision may undermine the attorney-client privilege, a group of tax attorneys said.

Allowing the government to proceed with a summons to obtain client lists from Taylor Lohmeyer Law Firm PLLC of those suspected to have used the firm to help hide income in foreign countries would create uncertainty, undermine the attorney-client privilege and lead to inconsistent applications in different circuits, the American College of Tax Counsel said in an amicus brief filed Wednesday. The ACTC is a group of top tax professionals nationwide that typically weighs in only on cases before the Supreme Court.

"Fundamental and historical protections of the attorney-client privilege will be adversely affected by the uncertainty created by the Fifth Circuit's decision, potentially subjecting clients' confidential motives for seeking legal advice to disclosure," the brief said. "This will lead to taxpayers being less candid with their attorneys or foregoing legal advice altogether."

Receiving assistance from tax counsel is crucial in helping clients comply with the complexity of the Internal Revenue Code, regulations issued by the Treasury Department and rulings, but to do so attorneys need full disclosure from those they represent, the ACTC said. However, that voluntary disclosure would be hampered if a client thought the mere act of seeking tax advice could be subject to routine discovery by the IRS, the brief said.

While John Doe summonses are important tools for IRS investigations, "serious tensions" arise with respect to the boundaries of the attorney-client privilege, the group said. The Supreme Court should take up the case to ensure a uniform standard exists among all federal courts on whether divulging a client's identity would breach the attorney-client privilege, according to ACTC's brief.

Longstanding precedent shows client identities are privileged when disclosure would reveal someone's confidential motive to retain an attorney, ACTC said.

For example, in a 1960 case called **Baird v. Koerner**, the IRS issued a summons to an attorney who had represented taxpayers accused of violating the tax code. The summons sought to obtain the identities of the clients for whom the lawyer remitted payments to the IRS for additional taxes owed, the brief said.

The Ninth Circuit found those client identities were protected under attorney-client privilege when the revelation of their identities would let the government be able to link a known confidential communication or motive for retaining the attorney, the group said.

Prior Fifth Circuit decisions also follow the holding of Baird, the ACTC said.

In May the **law firm said** in its petition to the Supreme Court that the Fifth Circuit incorrectly allowed the IRS to proceed with a summons seeking the identities of a law firm's clients who received its tax planning advice, asking it to review the decision.

The firm also argued that the Supreme Court should weigh in on the application of attorney-client

privilege to a firm's clients because the appeals courts have applied different standards to client identities. The Fifth Circuit, **in allowing** the IRS to proceed with its John Doe summons against Taylor Lohmeyer, also contravened its own precedent and that of other appeals courts, the law firm said.

In April 2020, the Fifth Circuit **affirmed a decision** from a Texas federal court allowing the IRS to proceed with its John Doe summons of the firm, seeking the identities of clients the agency believed used the firm's advice to hide their income. In reaching that decision, the lower court said the government properly established that the request for information was made with the legitimate purpose of combating tax evasion by identifying Taylor Lohmeyer clients.

Lawrence M. Hill of Steptoe & Johnson LLP, who represents the American College of Tax Counsel, told Law360 the Fifth Circuit's decision enabling the IRS to obtain the identifies of law firm clients through summons threatens to erode the time-honored confidentiality of communications between lawyers and clients. It is important to provide certainty and comfort to clients in knowing that sensitive communications will be safeguarded and not revealed to the government, which is why guidance from the Supreme Court is essential, he said.

"Uniformity of law is necessary to ensure that all clients' communications with their lawyers are treated similarly," he said. "Leaving the circuits split on this issue would lead to inconsistent protections for clients and fundamental systemic unfairness."

Representatives from Taylor Lohmeyer and the government did not immediately respond to questions from Law360.

Taylor Lohmeyer Law Firm is represented by Steven Jon Knight, Charles J. Muller III and Leo Unzeitig of Chamberlain Hrdlicka White Williams & Aughtry.

The government is represented by acting Solicitor General Elizabeth B. Prelogar.

The American College of Tax Counsel is represented by Lawrence M. Hill of Steptoe & Johnson LLP and by Steven Toscher, Robert S. Horwitz and Lacey Strachan of Hochman Salkin Toscher Perez PC.

The case is Taylor Lohmeyer Law Firm PLLC v. U.S., case number 20-1596, in the U.S. Supreme Court.

--Additional reporting by Theresa Schliep and Eli Flesch. Editing by Roy LeBlanc.

*Correction: A previous version of this story misspelled Hill's first and last names. The errors have been corrected.*