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PRIVILEGES IN THE LAW OF EVIDENCE

THE REALITIES OF ATTORNEY-CLIENT CONFIDENCES

ROBERT ALLEN SEDLER*

JOSEPH J. SIMEONE**

The great Truste, betweene Man and Man, is the Truste of Giving Counsell. For in other Confidences, Men commit the parts of life; Their lands, their Goods, their Children, their Credit, some particular affaيرة; But to such, as they make their Counsellors, they commit the whole: By how much the more, they are obliged to all Faith and integrity.

—Francis Bacon
(Essays, XX, of Counsell)

In determining the extent to which disclosures made from clients to attorneys are protected from revelation, the advantage lies with the proponents of admissibility, as the question has traditionally been viewed as one of evidence law. Opposition to the confidentiality of such disclosures is based on the assumption that confidentiality represents an exception to the principle that all evidence having rational probative value should be admitted in a lawsuit. Therefore, confidentiality of attorney-client communications has been termed a "privilege." Whenever writers on evidence address themselves to questions of admissibility, it is generally presumed that the greatest societal need is that all evidence should be placed before the trier of fact. Dean Wigmore, for example, after excellently refuting Bentham's arguments against attorney-client confidentiality,¹ observed that:

Nevertheless, the privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; Its obstruction is plain and concrete. . . . It is worth preserving for the sake of a general policy; but it is none the less an obstacle to

* Assistant Professor of Law, Saint Louis University School of Law.

** Professor of Law, Saint Louis University School of Law.

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¹ See note 24 *infra* and accompanying text.

the investigation of truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.²

The same philosophy is found in both the Uniform Rules of Evidence and the Model Code of Evidence—all relevant evidence is admissible unless specified persons or matters come within an exception or privilege.³

This view has been applied to the attorney-client communication and has found favor with some courts. As the court observed in *In re Selser*:⁴

Since it results in the exclusion of evidence, the doctrine of privileged communication between attorney and client runs counter to the fundamental theory of our judicial system that the fullest disclosure of facts will best lead to the truth and ultimately to the triumph of justice. . . .

In adjusting this conflict in policy our courts have uniformly recognized that the privilege is not absolute, but rather an exception to a more fundamental policy. It is therefore to be strictly limited to the purposes for which it exists.

Such views as to the nature of the "privilege" have resulted in limitations upon its exercise with the result that often its underlying purpose—as we will develop—is defeated.

It is submitted that the reverse is true: the *admissibility* of communications between attorney and client is an *exception* to a more fundamental policy that all communications between attorney and client should be kept confidential. The Canons of Professional Ethics provide that it is the lawyer's duty to preserve his client's confidences subject to a limited privilege to disclose in certain instances.⁵ Indeed one court has defined the inadmissibility of such communications as "only an echo of the canon's mandate."⁶ An attorney is liable to the client for improper disclosure of confidential information.⁷ Confidentiality is one of the hallmarks of the legal profession. Since the lawyer-client relationship precedes a lawsuit, on a *prior tempore*,

² 8 Wigmore, Evidence § 2291 (McNaughton Rev. 1961) [hereinafter cited as Wigmore].

³ See the discussion of this point in Morgan, "The Uniform Rules and the Model Code," 31 Tul. L. Rev. 145 (1956).

⁴ 15 N.J. 393, 397-398, 105 A.2d 395, 401 (1954).

⁵ See Canon of Professional Ethics 37. A duty takes precedence over a privilege when both are possessed by the same person. See also the discussion in *People v. Shapiro*, 308 N.Y. 453, 458-60, 126 N.E.2d 559, 562 (1955).

⁶ Application of Franklin Washington Trust Co., 1 Misc. 2d 697, 148 N.Y.S.2d 731 (Sup. Ct. 1956).

⁷ See, e.g., *Lakoff v. Lionel Corp.*, 207 Misc. 2d 319, 137 N.Y.S.2d 806 (Sup. Ct. 1955). See also the discussion in *Drinker*, Legal Ethics 131-139 (1953).

prior jure approach, confidentiality would outweigh admissibility. More significantly, it must be remembered that litigation is but one aspect of the lawyer's role and quantitatively, a small one. Litigation is necessary only insofar as it is the only way the client's rights can be protected. The prime method of protection is by the giving of advice as to conduct with a view toward preventing any litigation, and in that relationship secrecy has always been considered to be of great importance. Once it is realized that litigation forms but a small part of the legal assistance furnished, we can look at attorney-client communications in a more realistic light. We tend to place undue emphasis on lost evidence as the result of inadmissibility rather than on the policies fostered by the inadmissibility of certain evidence.⁸

As long as our society recognizes that advice as to matters relating to the law should be given by persons trained in the law⁹—that is, by lawyers—anything that materially interferes with that relationship must be restricted or eliminated, and anything that fosters the success of that relationship must be retained and strengthened. The relationship and the continued existence of the giving of legal advice by persons accurately and effectively trained in the law is of greater societal value, it is submitted, than the admissibility of a given piece of evidence in a particular lawsuit. Contrary to the implied assertions of the evidence authorities, the heavens will not fall if all relevant and competent evidence cannot be admitted.

Therefore, if we can conclude that secrecy of communication is necessary to foster successful attorney-client relationships, then that secrecy should be encouraged, strengthened and preserved. An *exception* to the rule of secrecy should not be made to further the trial of a lawsuit. Unless it can be shown that there is no need for secrecy in the relationship, communications between attorneys and clients should be inadmissible, and the admissibility of any communication involving attorneys and clients should be determined with reference to whether its admissibility will interfere with the successful operation of that relationship.

It has been contended that where proof cannot otherwise be made, the judge should have the discretion to permit the attorney-client communication into evidence.¹⁰ This suggestion proceeds on

⁸ See the discussion of this point in Louisell, "Confidentiality, Conformity and Confusion," 31 Tul. L. Rev. 101, 110 (1956).

⁹ The preserve of giving legal advice is constantly being entered by accountants, real estate brokers and practitioners of similar professions. Indeed, if we are to retain our position as legal advisers, we should not be ready to abandon guarantees that we have asserted to give persons who consult us because of our status as lawyers.

¹⁰ McCormick, Evidence § 91 (1954) [hereinafter cited as McCormick]; Jackson v. Pillsbury, 380 Ill. 554, 576, 44 N.E.2d 537, 547 (1942).

the assumption again that nothing could be more important than that the trier of fact have the opportunity to hear all relevant evidence, ignoring that other societal values, revolving around the effective provision for legal advice, may be harmed by such disclosure.

The question then becomes: Why is secrecy necessary? Historically, it is said to have existed because of the "exalted" status of the barrister and the "lowly" status of the solicitor. The privilege was that of the attorney: the barrister was considered to be a "gentleman" and thus could not be required to disclose confidences of those whom he "assisted"; the solicitor was considered a "servant" and, based on an analogy to the Roman law, the servant was not permitted to break "fides" by disclosing what his "master" revealed to him in confidence.¹¹ However, the view has been advanced that even then the functional basis of confidentiality was recognized. There may have been a desire for confidentiality in other relationships as well; but it was decided that the attorney alone needed full confidentiality to carry out his function—a need was not present, at least to the same degree, in other professions.¹²

Today, however, when the right to confidentiality is analytically that of the client rather than the lawyer,¹³ the question must be posed again: How do we know that secrecy is necessary in order to maintain effective attorney-client relationships? The answer is to be found on the basis of verifiable experience. Apparently lawyers and judges feel that confidentiality is necessary based on what little statistical evidence is available.¹⁴ We can verify this thesis by our own experience as lawyers. We know from experience that people assume that what they tell a lawyer will not be revealed to others; indeed, the lawyer often encourages disclosures by assuring the client that what is said is in confidence.

¹¹ Radin, "The Privilege of Confidential Communications Between Lawyer and Client," 16 Calif. L. Rev. 487, 490-493 (1928); McCormick, § 91; 8 Wigmore § 2290.

¹² See the discussion of this point in Nokes, "Professional Privilege," 66 L.Q. Rev. 88, 89 (1950).

¹³ 8 Wigmore § 2290.

¹⁴ An excellent study was undertaken by the *Yale Law Journal*. See Note, "Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine," 71 Yale L.J. 1226 (1962). The makers of this study interviewed a number of practicing attorneys and judges and solicited their views on confidentiality. Today the historical "method of sociology," as discussed in Cardozo, *Nature of the Judicial Process* (1922), by which judges gave their opinions as to the effect of rules of law on societal interests, has been replaced to a large extent by the employment of actual sociological and related data. To the extent that courts employ the knowledge of the other disciplines within the framework of legal analysis, results are more likely to accord with societal needs.

The client says many things he otherwise would not say because he assumes or is told that what he reveals to the lawyer is confidential. He probably is not thinking of the "attorney-client privilege" as such, and may not even be contemplating litigation when he comes to see the lawyer. People simply assume that what they tell the lawyer is secret, and in fashioning legal rules we cannot ignore that fact. The law in all its aspects must take account of how people act and live; this is particularly true when their actions relate to the role of the legal profession in giving legal advice. Further, the client does not come into the office with a precise legal analysis of his problem and all the relevant facts neatly catalogued. More often than not the lawyer must elicit the information. To the extent that the client is not assured of confidentiality, this process becomes more difficult and the end result less effective.

If communications are not secret, this fact will eventually become known. The lawyer's task of eliciting information necessary to properly advise the client will become more difficult; more vital information will be suppressed. The result can only be the impairment of the effectiveness of the lawyer in counseling the client which, in turn, may result in needless litigation. It is difficult to see how the layman's respect for the legal process will be furthered when the lawyer is required to reveal in open court what was disclosed in the privacy of the lawyer's office. The layman's belief that "what you say can be held against you" would seem not to apply to what he told to the party he expected to protect his legal rights. The courts should be slow to disabuse him of this notion which goes to the essence of successful attorney-client relationships.

In dealing with the attorney-client relationship, the courts and the commentators should not ignore the view of the practitioners who, after all, are the ones that must deal with the clients and on whom society relies to furnish effective legal advice. A recent study was undertaken by the *Yale Law Journal* to examine the practical operation of attorney-client confidentiality and to show its relationship to other communications for which confidentiality was sought.¹⁵ This study was constructed in the best traditions of experimental jurisprudence. The study, conducted on the basis of sound sampling techniques,¹⁶ concluded that (1) more than half of the laymen and nearly three-fourths of the lawyers surveyed agreed that without confidentiality full disclosure would be significantly deterred; and (2) neither judges nor practitioners believed that the rule of confiden-

¹⁵ *Ibid.*

¹⁶ *Ibid.* The exact techniques are described at p. 1227, n.6.

tiality seriously disrupted the administration of justice—indeed only five out of one hundred and forty-nine interviewed thought it had a detrimental effect. While it is not suggested that one study provides the conclusive answer, nonetheless, the reactions of both lawyers and laymen are highly interesting to observe.

In speaking of the necessity for the privilege in practice, an attorney observed as follows:

Some commentators have criticized the modern privilege as an outmoded protection largely benefitting perjurers and an unworthy obstacle to truth-seeking. . . . Indeed, Professor Morgan has strongly hinted that the ALI's Model Code preserves the privilege only as a political concession to the organized Bar. . . . Morgan seems to rest his reasoning on (1) a doubt that the privilege actually stimulates confidences, and (2) a suggestion that at least in civil matters there can be no legitimate motive for a client to wish information to be kept secret.

Argument (1) is of course a question of fact. Yet it is a rare lawyer who has not personally experienced the need for coaxing information from reticent or bashful clients. Whether or not the privilege assists in this process it seems likely that the attorney would pursue his inquiry with less vigor if he anticipated that he himself might be called as a witness. Argument (2) is really the nub of the matter, for there can be no doubt that the privilege sometimes seems to protect one who has done wrong. Yet, if the privilege were abolished, would there be any lasting improvement? Would not the very people who should be unmasked be able to find lawyers who could keep their confidences to themselves?

It seems to this writer that the true subjects of the privilege are the clients who are in the common position of not really "knowing" the facts because they do not understand the significance of what they think they saw or now remember. It is precisely because the facts are subtle, elusive, and often unknowable that counsel (in civil as well as criminal cases) is expected to show them in their best light, just as his adversary has the task of putting them in their worst. The entire process of cross-examining one's own client *in camera*, of finding and presenting facts whose exact contours may never be known, is in our society a vital aspect of legitimate partisanship.¹⁷

The Yale survey indicates that similar views are shared by many other members of the practicing bar. Their counsel should not be discounted, as it is they who must administer the rules which courts set and commentators propose.

This philosophy of the need for confidentiality was also articulated by the drafters of the Model Code of Evidence. In justifying the "privilege," they observed as follows:

¹⁷ Simon, "The Attorney-Client Privilege as Applied to Corporations," 65 Yale L.J. 953, 954 n.6 (1956).

In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential. To the furnishing of such advice the fullest freedom and honesty of communication of pertinent facts is a prerequisite. To induce clients to make such communications, the privilege to prevent their later disclosure is said by the courts and commentators to be a necessity. The social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases.¹⁸

Since secrecy is necessary in order that the attorney-client relationship function and operate properly, and since our policy favoring the effective functioning of a system of legal counsel in all its aspects is greater than the policy favoring the admissibility of a particular piece of evidence in a lawsuit—only one aspect of the legal process—attorney-client confidentiality should be preserved, and few, if any, exceptions should be made when such a communication is sought to be introduced in a lawsuit.

However, it is contended that such confidentiality in a lawsuit is harmful to the administration of justice. Let us examine the nature and extent of such harm and ascertain whether the harm is so great that confidentiality should be abolished even at the price of inhibiting the successful operation of the attorney-client relationship. Let us consider the main arguments that have been made against permitting confidentiality in a lawsuit.

One is that confidentiality in a lawsuit encourages litigation, since if a lawyer refuses to take a case because the client is not entitled to relief on the basis of the facts he presented, the client will consult a less scrupulous lawyer or tell another lawyer a different story. The "lips of the first lawyer are sealed" so goes the refrain, with the result that another lawsuit will occur; moreover, it will be one where perjury and fraud are practiced and the first lawyer cannot be called upon in court to show that the client is now telling a different story than he told the first lawyer.¹⁹

This argument presupposes that the vast majority of people will go to another lawyer and tell him a different story. There is no evidence that people will do so, and it is quite unlikely that too many will. The honest person will either trust the lawyer to whom he went or consult another lawyer to make sure, but it is doubtful if he will appreciably alter the facts. We assume that most people tell the truth

¹⁸ Model Code of Evidence rule 10, comment a (1942).

¹⁹ See discussion in Radin, *supra* note 11, at 493; McCormick § 91; Morgan, *Forward to the Model Code of Evidence* 24, 26 (1942).

and that for those who don't, the threat of perjury is sufficient. We must remember that the client will be cross-examined in civil cases as to the actual facts. If cross-examination and the threat of perjury are effective, the truth will come out at that time. The "sure truth" by having the first lawyer testify seems a questionable benefit in view of (1) the small number of cases where it will be necessary to use him and (2) the fact that denial of confidentiality will potentially affect every attorney-client relationship.

In regard to encouraging litigation, Professor Morgan observes that "it is problematical whether lack of confidentiality will result in useless litigation due to the client's failure to tell the whole truth, but in any event it is outweighed by the unfounded litigation which the privilege fosters."²⁰ He also states that if the client suppresses pertinent information and no lawsuit results, there is no problem. Apparently there is a problem only when the client asserts a groundless claim after seeing a second lawyer, because there he has been lying. This ignores the probability of bad *advice* being given *because* the client suppresses pertinent facts. The great majority of clients' visits do not result in litigation. So even if there are more lawsuits quantitatively, the harm caused by the increase in litigation would clearly seem to be outweighed by the harm done due to improper advice given in a multitude of situations because the lawyer does not possess all the relevant information.

Moreover, where a fraudulent suit has been filed, there is nothing to prevent the first lawyer from disclosing to the second lawyer what the client told him. Although the matter is not specifically covered by the Canons, since the client will presumably testify to untruths, he would be committing perjury which is a crime, and which the lawyer will reveal. In any event, the spirit of the Canon will not be violated by the lawyer's disclosing information to another lawyer, who is not permitted to disclose it either. We must assume that the majority of lawyers will act accordingly and refuse to prosecute the fraudulent case. But, it may be asked, what of those who will not refuse? The Bar, like any other profession, has unscrupulous members, and it possesses the means to deal with them. If the communication was not confidential, there would be the danger that lawyers would "blackmail" clients. In answering this objection to denying confidentiality, Professor Radin observed that the Bar can deal with disreputable members.²¹ The same argument would apply in reverse. The Bar can deal with members who take fraudulent cases. This is a more

²⁰ Morgan, *supra* note 19, at 26-27.

²¹ Radin, *supra* note 11, at 493.

effective device than requiring or permitting the first attorney to testify, particularly in view of the inhibiting effect this would have on all confidences.

Then there is Jeremy Bentham's classic argument that the deterring of a guilty man from seeking legal advice is no harm to justice while the innocent man has nothing to fear from full disclosure and will not be deterred because of non-confidentiality.²² *Mutatis mutandis*, basically the same argument has been made by Professor Morgan.²³ The inherent fallacy in this argument is that the line between innocent and guilty cannot be drawn with such precision as is suggested. Dean Wigmore has successfully rebutted Bentham's contentions.²⁴ In the first place, particularly in civil cases, there is obviously no hard and fast line between guilt and innocence. Indeed, both parties may be morally innocent and each believe his version of the facts is accurate. Each party may have something to fear; moreover, a layman does not necessarily know which testimony is damaging and which is favorable. He may fail to disclose some of the latter as well as the former if he does not have the assurances of secrecy. Wigmore points out that Bentham admitted that abstinence from seeking legal assistance in a good cause is an "evil fatal to the administration of justice." This admission defeats the logic of Bentham's argument, since it can be shown that the "good cause" would suffer from nonconfidentiality. In the criminal area the underlying rationale of the privilege of self-incrimination is equally applicable. It is no secret, as every layman is aware, that the privilege protects "bad people." This is deemed desirable, so as to discourage the state from relying on testimonial compulsion to prove a crime instead of specific evidence of wrongdoing. The state should not be able to abandon its duty to "hunt up evidence" by virtue of the fact that the accused exercised his constitutionally guaranteed right to consult an attorney. Dean Wigmore's refutation of Bentham's classic argument has never been refuted in turn.

Finally, we must remember that today, in civil cases, the client can always be called to testify as to the actual facts.²⁵ All he cannot be asked so far as we are concerned is what he told his attorney. The jury may not believe his version of the facts. What opposing counsel really desires is to have his attorney testify, because if he testified against his former client, this will have a favorable impact on the

²² See the summary of the argument in 8 Wigmore § 2291.

²³ See note 19 *supra*.

²⁴ 8 Wigmore § 2291.

²⁵ 8 Wigmore § 2291, at 554. See the discussion in Simon, *supra* note 17, at 955.

jury—they are more apt to disbelieve a client if his “own attorney” testifies against him. The fact that the former attorney could contradict his client and the “truth” become known is a dubious benefit in view of the necessity for confidentiality. Opposing counsel’s inability to “shake” the client on cross-examination or to introduce other evidence should not be compensated for at the price of impairing the attorney-client relationship. We must assume that “truth” can be discovered without violating attorney-client confidences.

Therefore, it is submitted that the danger from permitting confidentiality is slight and clearly outweighed by the benefits of confidentiality. The rule should be one of inadmissibility with no or few exceptions thereto, rather than favoring admissibility with the exception of the attorney-client privilege. However, the underlying rationale of confidentiality must be considered in determining whether the communication is inadmissible in a particular situation. The rationale is that confidentiality is necessary so that the client will not be deterred from communicating any information to the attorney. The test in determining whether a communication is inadmissible in a particular instance is whether the failure to recognize confidentiality in that instance would have an effect on the feeling of security in disclosure that results from secrecy: Would the client have been likely to have made the particular communication if he had reason to believe it would be divulged? In other words, would the client be inhibited from disclosing the facts if he had reason to believe that the communication was not confidential; were the circumstances such that the client would be deterred or inhibited from disclosing the facts? It is submitted that the substantive questions of admissibility must be answered in light of this test. We will now proceed to examine the substantive law and determine how it comports with this criteria. In doing so we will review the present state of substantive law.

I. THE NATURE OF THE RELATIONSHIP

1. *Who Possesses the Right to Assert Non-Admissibility*

It is now well-settled that the client may assert nonadmissibility on the ground that the evidence involves a confidential communication to an attorney, even when he is testifying as a witness.²⁶ The client may also assert it when he is not a party to the lawsuit by interposing objection in court.²⁷ An assignee has been held to have authority to waive the confidentiality.²⁸ By the same token it would

²⁶ See, e.g., *Shelly v. Landry*, 97 N.H. 27, 79 A.2d 626 (1951).

²⁷ See, e.g., *Ex parte Martin*, 141 Ohio St. 87, 47 N.E.2d 388 (1943).

²⁸ *Buuck v. Kruckeberg*, 121 Ind. App. 262, 95 N.E.2d 304 (1950). See also the discussion in 8 Wigmore § 2328, at 639.

seem that he would have authority to assert confidentiality. The interest he purchased includes various things, one of which would be the confidentiality of certain communications disclosed by his assignor. While there is no question of deterrence here, nonetheless, the right of silence is an asset which the client has transferred and those principles justify the assignee's assertion. Upon the client's death his personal representative may also assert confidentiality.²⁹

The attorney may assert it on behalf of the client where the client is present and a party.³⁰ Under Canon 37 he has a duty to assert it even when the client is not a party nor present and, of course, has the power to do so.³¹ The interesting question arises as to whether a lawyer can refuse to answer when the court has erroneously held that he must testify to a communication he claims was made to him by a client in confidence. In other words, the attorney claims that the court has erroneously denied his claim of attorney-client communication. If the client is a party, it has been held that the attorney must answer even if the claim was erroneously denied or he held in contempt.³² This is because the error, if any, can be rectified on appeal if his client loses; theoretically, his client has not been harmed if he prevails. The possibility of reversal on appeal justifies the requirement of compliance. There can be no question of inhibition, since the attorney is trying to protect the communication and if erroneously denied to the client's detriment, the appellate court will reverse and the confidentiality will not be breached again. But the more difficult problem arises when the client is not a party with the result that no one has standing to appeal—the party against whom the evidence is introduced cannot appeal, since the evidence is competent.³³ If the attorney asserts the confidentiality on behalf of his client, but the court orders him to testify, what course of action should he take? Professor McCormick says he should submit. He has done his duty by calling the confidentiality to the attention of the trial judge; therefore, if he refuses he should be held in contempt even if the trial judge was in error.³⁴

Some lawyers, however, take a different view of their duty under Canon 37 and are more concerned with protecting attorney-client

²⁹ See, e.g., *Martin v. Shaen*, 22 Wash. 2d 505, 156 P.2d 681 (1945).

³⁰ See, e.g., *Schwimmer v. United States*, 232 F.2d 855 (8th Cir. 1956); *People v. Morgan*, 140 Cal. App. 2d 796, 296 P.2d 75 (1956).

³¹ See the discussion of this duty in *State v. Toscano*, 13 N.J. 418, 424, 100 A.2d 170, 172 (1953).

³² *Ex parte Lipscomb*, 111 Tex. 409, 239 S.W. 1101 (1922).

³³ See, e.g., *Schaibly v. Vinton*, 338 Mich. 191, 61 N.W.2d 122 (1953).

³⁴ McCormick § 96.

confidentiality. If such a lawyer is committed for contempt, can he obtain release on habeas corpus on the ground that he was not required to answer the question for the refusal of which he was committed? This was the situation in *Elliot v. United States*,³⁵ where the court held that since the question was improper, the court could not inquire about the matter and its contempt order was void. Such an approach is sound if we accept the proposition that attorney-client confidentiality is entitled to greater weight than this admissibility of evidence. If the attorney feels that protection of the client's confidence is so great that he is willing to risk imprisonment for it, his conduct is commendable rather than reprehensible, particularly when it turns out that he was right and the trial judge was in error.

Now let us consider the converse: the attorney testifies in a lawsuit where his client is not a party and the party against whom the testimony is introduced asserts the fact that the testimony refers to an attorney-client communication. Here the attorney has been permitted to testify.³⁶ This seems equally proper, since the attorney is the guardian of confidentiality in the client's absence. He is the one who is charged with the duty of maintaining confidentiality, and if he believes the client would not object to disclosure here, he may disclose. The matter is between him and his client and is of no concern to the party against whom the evidence is to be introduced. We must remember that such evidence is fully competent if no objection is made by one whose interest is affected by the communication.

2. *What Constitutes the Relationship*

Thus far we have been discussing the confidentiality of attorney-client communications on the assumption that such a relationship has been found to exist. We will now proceed to determine when in fact such a relationship does exist so that what is said is confidential. The relationship is deemed to exist for purposes of confidentiality whenever negotiations are commenced; it is not necessary that the attorney actually accept employment.³⁷ This is sound, as the client must tell the attorney the facts before the attorney decides whether he wishes

³⁵ 23 App. D.C. 456 (1903).

³⁶ *State v. Snook*, 93 N.J.L. 29, 107 Atl. 62 (Sup. Ct. 1919), *aff'd by an equally divided court*, 94 N.J.L. 271, 109 Atl. 289 (E. & A. 1920); *State v. Kump*, 76 Wyo. 273, 301 P.2d 808 (1956).

³⁷ *Alexander v. United States*, 138 U.S. 353 (1890); *Smale v. United States*, 3 F.2d 101 (7th Cir. 1924), *cert. denied*, 267 U.S. 602 (1925); *In re DuPont's Estate*, 60 Cal. App. 2d 326, 140 P.2d 866 (1943); *Shong v. Farmers & Merchants State Bank*, 70 N.W.2d 907 (N.D. 1955).

to accept the retainer, and the client assumes confidentiality as soon as he talks to the lawyer. As indicated previously, it is not necessary that the advice be sought in connection with a lawsuit, as more frequently than not, persons consult lawyers with a view toward avoiding future litigation.³⁸ However, it is not created by the attorney's suggestion that he give legal advice, which suggestion is rejected. In *Burton v. McLaughlin*,³⁹ the attorney was a friend of the decedent and in conversation suggested sua sponte that the decedent add a codicil to his will, which suggestion was immediately rejected. Subsequently the attorney was permitted to testify as to what the decedent said and did at that time. Here the decedent was not consulting him at all and under our rationale was not inhibited in telling him things that he would only tell an attorney. There is no relationship until the client indicates a desire to establish one. The same reasoning limits confidentiality to communications made after the relationship has commenced. The mere fact that an attorney later represents a party does not imbue what was told to him prior to the time the relationship existed with any confidentiality. At the earlier time, the client did not consider him as his attorney.⁴⁰

The relationship exists when the client reasonably believes the party is his attorney, though in fact he is not. In *Foster v. Buchele*,⁴¹ the plaintiff had consulted with the defendant's attorney while plaintiff and defendant were negotiating. The attorney decided to represent the plaintiff, but did not successfully communicate the fact to the defendant. It was held that what the defendant told him subsequent to the time that the attorney believed the relationship had terminated was confidential, since the client did not believe the relationship had terminated. The same feeling of security is present on the part of the client irrespective of whether the attorney believes the relationship has terminated, justifying confidentiality. However, where the client attempts to entice away the other party's attorney, what he tells that attorney is not entitled to confidentiality.⁴² There the client has no reason to assume that what he tells his opponent's attorney in an

³⁸ See the discussion of this point in 8 Wigmore § 2295, at 566.

³⁹ 117 Utah 483, 217 P.2d 566 (1950).

⁴⁰ *Knox v. Knox*, 222 Minn. 477, 25 N.W.2d 225 (1946). This involved an action to declare a constructive trust in property conveyed by the husband to the wife. The attorney had first represented the husband and at that time was informed of the matter to which he subsequently testified. Later he represented the wife in proceedings connected with the property. Obviously the wife was not relying on confidentiality at the time the communication was made.

⁴¹ 213 S.W.2d 738 (Tex. Civ. App. 1948).

⁴² Wigmore treats this as a communication designed to perpetrate a fraud and would deny confidentiality on that ground. 8 Wigmore § 2312, at 609.

attempt to entice him away will be confidential; he is taking a risk, "going into the lion's den," so to speak. On that basis, there is no reason to treat what he said as confidential, as he was in no way led to disclosure under assurances of confidentiality. Rather he would guard what he said with the awareness that the attorney might not decide to "switch."

The next question is whether the relationship can exist for purposes of confidentiality if the recipient of the communication is in fact not an attorney, but the client reasonably believes that he is. Many cases have held such communications confidential,⁴³ and both the Model Code⁴⁴ and the Uniform Rules⁴⁵ recognize that a communication to such a person is confidential. Obviously communications to those persons should be treated as such. If a party holds himself out as an attorney, the client cannot be expected to investigate whether he was admitted to the bar! The client must rely on outward appearances and the assurances that the state will not permit persons to practice law without a license. Since the client makes the communications under an implied assurance of secrecy, confidentiality should attach even though the client was reasonably mistaken.

The relationship is deemed to exist as to communications the insured makes to his insurer.⁴⁶ The insured considers the insurer his agent for purposes of litigation; that is, the insurer must obtain the attorney and the insured assumes that what he tells the insurer will be transmitted to the attorney. Since he does not engage the attorney directly, the insurer is his conduit to the attorney and he assumes that what he tells the insurer is the same as what he tells the attorney. Therefore, the underlying rationale justifying confidentiality is applicable. On the other hand, a factual situation may arise where the party making the statements to an insurer is not entitled to rely on assurances of confidentiality. In *Haskell v. Siegmund*,⁴⁷ an employee was using an automobile of the insured employer and was involved in an accident. The insurer claimed that he was not required to defend under the terms of the policy. Both the insured and employee made statements to him in an effort to persuade him that he was liable. Under those circumstances they could not

⁴³ See, e.g., *People v. Barker*, 60 Mich. 277, 27 N.W. 539 (1886). See also the discussion in 8 Wigmore § 2302, and cases cited n.1.

⁴⁴ Model Code of Evidence rule 210 (1942).

⁴⁵ Uniform Rule of Evidence 26.

⁴⁶ *Vann v. State*, 85 So. 2d 133 (Fla. 1956); *Hollien v. Kaye*, 194 Misc. 2d 821, 87 N.Y.S.2d 782 (Sup. Ct. 1949); *Travelers Indemnity Co. v. Cochrane*, 155 Ohio St. 305, 98 N.E.2d 840 (1951).

⁴⁷ 28 Ill. App. 2d 1, 170 N.E.2d 393 (1960).

assume that the insurer was their agent to transmit the statements to an attorney for a trial on the merits. The issue was whether he would so transmit statements, and the parties were not entitled to rely on confidentiality until that issue was determined. There was no indication that the statements would ever reach a person who would be the attorney for the insured and the employee.

Confidentiality is not applicable to communications made to a judge in private,⁴⁸ the public prosecutor,⁴⁹ or a grand jury⁵⁰ on the basis of the attorney-client relationship. This is not to say that these communications may not be privileged under some other theory,⁵¹ but they cannot be privileged under the theory that they were made to an attorney for the simple reason that the persons to whom the communications were made, were not the attorneys of the person making the communication. If the party thinks that what he is saying is confidential, it is not because he is telling it to his lawyer. Denying confidentiality here does not run counter to the underlying rationale justifying confidentiality of communications between attorney and client.

The next question is to what extent confidentiality exists as to communications made to counsel for a co-defendant. The result seems to depend on whether the parties were conducting a joint defense and this distinction is sound. Where, for example, one defendant was indicted for receiving stolen goods and the other defendant for larceny, it was held that statements made to the attorney for the co-defendant were not confidential.⁵² The parties were not preparing a joint defense, and it was counsel for the first defendant that requested the conference at which the statement was made. But where a joint defense was planned, statements made to the attorney for the other defendant were held to be confidential.⁵³ The cases denying confidentiality emphasized that no joint defense was planned. If there is no joint defense, the client has no reason to believe that what he tells the attorney for the

⁴⁸ *Pritchard v. United States*, 181 F.2d 326 (6th Cir. 1950), *aff'd*, 339 U.S. 974 (1950).

⁴⁹ *State v. Harris*, 147 Conn. 589, 164 A.2d 399 (1960).

⁵⁰ *United States v. H.J.K. Theatre Corp.*, 236 F.2d 502 (2d Cir. 1956), *cert. denied*, 352 U.S. 969 (1957).

⁵¹ Thus, in *People v. Pratt*, 133 Mich. 125, 94 N.W. 752 (1903), the court held that statements made to a judge were entitled to confidentiality. Although the court talked in terms of "attorney-client" privilege, it was clear that the decision was based on policy grounds relating to the role of judges.

⁵² *Vance v. State*, 190 Tenn. 521, 230 S.W.2d 987 (1950), *cert. denied*, 339 U.S. 988 (1950).

⁵³ *Chahoon v. Commonwealth*, 62 Va. 1036 (1871). This case was thoroughly discussed and distinguished in *Vance v. State*, *supra* note 52.

co-defendant will be kept secret. Confidentiality extends only to communications from client to *his* attorney. Where there is a joint defense, the attorney for the co-defendant is working with the client's attorney, and a defendant assumes that what he tells his co-defendant's attorney will be entitled to the same confidentiality as what he tells his own attorney. Frequently they will be holding joint conferences, and it would be anomalous if the attorney for the other party could each testify as to what the other's client said. Where there is no joint defense, the co-defendants may well be partly adversary. One defendant has no reason to believe that an attorney for a co-defendant is concerned with his case; therefore, he is not entitled to rely on assurances of confidentiality when he reveals things to the co-defendant's attorney.

As to practitioners before administrative agencies, *e.g.*, patent agents, it is clear that if the party to whom the communication is made is a member of the bar, the relationship of attorney-client exists even though non-lawyers practice before the agency.⁵⁴ As to non-lawyers, some cases have denied them the status of attorney for purpose of confidentiality, even though they are admitted to practice before the agency.⁵⁵ Dean Wigmore has argued that the relationship should exist between administrative practitioners and clients. He has pointed out that the client must confide in an administrative practitioner the same as an attorney who practices before such an agency.⁵⁶ Moreover, these persons are admitted to practice before the agency in much the same manner as attorneys are admitted before a court. The real thrust of the argument is that the client may well not know whether the administrative practitioner is actually admitted to the bar; it is sufficient for his needs that he is admitted to practice before the agency. With the increase of administrative agencies and the role played by lawyers in the process, the client is entitled to assume that what he tells the administrative practitioner has the same confidentiality as what he tells an attorney in a case not involving administrative agencies. The agency is dealing with legal rights and full disclosure is as necessary here as in any other situation where legal rights are

⁵⁴ See the discussion in *Ellis-Foster Co. v. Union Carbide & Carbon Corp.*, 159 F. Supp. 917 (D.N.J. 1958).

⁵⁵ See, *e.g.*, *Kent Jewelry Corp. v. Kiefer*, 202 Misc. 778, 113 N.Y.S.2d 12 (Sup. Ct. 1952). The statute covering confidentiality referred to "attorney or counselor at law." It was held to be immaterial that an oath was required of the patent attorney, since he was not licensed by the *state* to practice. See also *Falsone v. United States*, 205 F.2d 734 (5th Cir. 1953), *cert. denied*, 346 U.S. 864 (1953) (C.P.A. practicing before Treasury Department and having the same duties as attorneys).

⁵⁶ 8 Wigmore § 2300a.

involved. Because the client cannot draw the distinction between practitioners admitted to the bar and those admitted only before the agency, communications to both should be treated as confidential.

A number of questions as to the existence of the attorney-client relationship for purposes of confidentiality arise because of the fact that lawyers engage in a variety of activities that do not strictly involve legal skills. It is a well-known fact that lawyers perform a multitude of functions which can be performed by non-lawyers. The two most common situations are where the lawyer acts as a "scrivener" and where he acts as a "business adviser." The theory is that confidentiality is applicable only when he is acting as a "lawyer" and not when he is acting in another capacity, even though lawyers frequently act in such a capacity.

It is "black letter law" that confidentiality does not attach when the lawyer is acting as a scrivener.⁵⁷ The theory is that he is employed only to put into legal form the agreement of the parties. His position is no different than that of a real estate broker. But where the attorney drafts a will, he is considered to be acting in his function as an attorney and confidentiality attaches.⁵⁸ Where a real estate transaction is complicated, however, he is deemed to be acting as an attorney, even though he also drafted the deed. Thus confidentiality attached in *Shelley v. Landry*,⁵⁹ where the grantor conveyed real estate to himself and his daughter as joint tenants, having previously sold the property and received back a long-term lease. The purpose of the transaction was to destroy the rights of his estranged wife. The court held that the client was consulting the attorney in his capacity as legal adviser and not as scrivener.

It is submitted that it is impossible to distinguish between his capacity as attorney and that as scrivener on the basis of whether or not the transaction was complicated. The fact that the party goes to a lawyer, knowing that he is a lawyer, rather than to a real estate broker is evidence that he wants legal advice. Even though the transaction is simple, the layman may think it is not and wants the lawyer's assurances that it will be valid. It is not accurate to say that the lawyer is merely embodying the intentions of the parties in a writing, because it is implicit that if their intentions are unenforceable, the lawyer will call this fact to their attention. It is desirable social

⁵⁷ McCormick § 92; 8 Wigmore § 2297. For the use of "black letter law" in judicial opinions, see *Pollock v. United States*, 202 F.2d 281 (5th Cir. 1953), *cert. denied*, 345 U.S. 993 (1953); *Cranston v. Stewart*, 184 Kan. 99, 334 P.2d 337 (1959); *Wilcox v. Spoons*, 359 Mo. 52, 220 S.W.2d 15 (1949).

⁵⁸ 8 Wigmore § 2297.

⁵⁹ 97 N.H. 27, 79 A.2d 626 (1951).

policy that lawyers prepare deeds as well as wills instead of having the parties go to a realtor or employ a "do-it-yourself" form.

More importantly the client knows he is going to an attorney and, therefore, granting the rationale discussed earlier, believes that what he tells the attorney is told in confidence; he does not have the same belief when he has a real estate broker draft the deed. Of course, if the client does not know the drafter is a lawyer, he is not consulting him in that capacity and confidentiality would not attach by happenstance that the drafter is a lawyer. This principle was recognized in *Frierson v. Mississippi Road Supply Co.*,⁶⁰ where the court held that confidentiality attached to a communication made to a lawyer drawing up an apparently uncomplicated bill of sale. When a party consults a lawyer to draft an instrument, confidentiality should attach regardless of the simplicity of the instrument even though such instruments are also prepared by non-lawyers. Since the party chooses to have a lawyer do the work, he is acting under the assumption that what he tells the lawyer will be confidential; his state of mind is not affected by the complexity of the instrument which the lawyer is preparing.

The same principles should be applicable when the lawyer is acting in a "business capacity." There are basically two situations. One is where the lawyer is acting as a business agent for purposes of negotiations and the like. The other is where the lawyer is also an accountant and performs work that could be performed by any accountant, such as preparing tax forms. Again, the black letter rule is that confidentiality does not attach since the attorney is acting in a business, rather than a legal, capacity.⁶¹ The most common situation is where the attorney is employed to negotiate with third parties, usually for the purchase or sale of property or to collect rentals and the like. Some courts will "blue-pencil," that is, hold confidentiality applicable as to communications relating to "legal" matters, but inapplicable as to those relating to "business" ones.⁶² Dean Wigmore says that the court must look to the general purpose of the relationship and ascertain if it involves advice as to legal rights. If it does, all communications should be privileged even though a particular trans-

⁶⁰ 221 Miss. 804, 75 So. 2d 70 (1954).

⁶¹ *Lowy v. Commissioner of Internal Revenue*, 262 F.2d 809 (2d Cir. 1959); *Comercio E Industria Continental v. Dresser Industries*, 19 F.R.D. 513 (S.D.N.Y. 1956); *Gallagher v. Akoff Realty Corp.*, 197 Misc. 460, 95 N.Y.S.2d 796 (Sup. Ct. 1950); *Twitty v. Harrison*, 230 S.C. 174, 94 S.E.2d 879 (1956).

⁶² *Myles E. Rieser Co. v. Lowe's, Inc.*, 194 Misc. 119, 81 N.Y.S.2d 861 (Sup. Ct. 1948). The court held certain portions of letters confidential and others admissible depending on what aspect of the transaction was involved.

action involves business purposes.⁶³ He gives the example of a revelation of the financial condition of a shareholder pursuant to a proceeding to enforce a claim against a corporation, to which he says confidentiality should attach.

It is submitted that the "business purpose" approach, whether or not "blue-pencilling" is involved, is unrealistic. The test should be whether the party was aware that the person he consulted was an attorney and consulted him rather than another business adviser *because* he was an attorney. The layman cannot separate "business" from "legal." He may well want a lawyer to negotiate or collect the rental or perform other business functions because of the possibility of legal problems arising during the course of commercial transactions. Since he considers the party as a lawyer, the rationale justifying confidentiality is applicable. He confides things to an attorney-negotiator that he would not confide to another because he assumes that what he tells a lawyer is confidential. So long as it is recognized as ethically proper for a lawyer to perform certain functions that could be performed by laymen, the public is entitled to rely on assurances that the courts will consider the lawyer a lawyer in all aspects and not only in the ones defined as "legal." Where a party consults a lawyer knowing he is a lawyer, he should be able to rely on confidentiality in regard to what he tells that person. It is the status of the person to whom the communication is addressed rather than the subject matter of the employment, as long as it is work lawyers perform, that should determine whether the communicant may consider what he says as confidential.

As to the lawyer-accountant, it has also been held that there is no confidentiality when the attorney performs work that could be performed by an accountant, usually the preparing of tax forms.⁶⁴ It is known that many lawyers are also accountants and practice as both where this is not prohibited. If the client consults an accountant, where an accountant's privilege is not recognized, he is not entitled to assume confidentiality by the happenstance that the accountant is also a lawyer. But it is highly probable that many persons want lawyers to prepare their tax forms in view of the complexity of tax laws. Quite naturally, they would consult an attorney who possesses the accountant's qualifications to prepare the form, but the attorney's capacity to examine the legal problems that might arise. When they are consulting an attorney, unless it appears that they clearly are not consulting him because of the fact that he is an attorney,

⁶³ 8 Wigmore § 2296.

⁶⁴ See the cases cited in notes 65 and 66, *infra*.

they are entitled to assume confidentiality as would exist if they were consulting him on anything other than a matter that could be handled by an accountant. Sometimes, it is obvious that they are not consulting him as an attorney, and hence there is no reason for confidentiality to attach. In *Olender v. United States*,⁶⁵ for example, the accountant-attorney was hired to prepare a statement of net worth and the tax returns. The client went to an accounting firm to secure his services. More significantly, the defendant had another attorney to whom the accountant-attorney went to secure legal advice as to the return! Here, it was obvious that he was not consulted as an attorney and the client could not rely on assurances of confidentiality. In *Clayton v. Canada*,⁶⁶ the attorney testified that he made his living as a certified public accountant and on that basis the court held confidentiality did not attach. However, his office door read "attorney at law." In the absence of evidence that the client did not consider him an attorney, confidentiality should attach because the client was entitled to rely on the fact that he was an attorney. So long as attorneys are permitted to perform work that can be performed by non-attorneys and there are legal questions that could arise in connection with such work, it must be presumed that the client considered what he disclosed to be confidential as would be any other matter he told an attorney, and the courts should protect this assumption.

The final problem as to the nature of the relationship concerns communications made to an attorney who is a personal friend of the party making the communication. It is no secret that persons try to obtain free legal advice from their attorney-friends. By the same token, attorneys often furnish legal advice and services to their friends with or without fee. The courts seem to find that statements were often communicated to the attorney as a friend and hence confidentiality does not attach. In *Solon v. Lichtenstein*,⁶⁷ for example, the attorney had discussed transfer of cemetery lots, which was held to involve legal advice. The client went on to discuss family arrangements for the division of property upon his death. It was held that that discussion bore no relationship to employment of the attorney and that, therefore, confidentiality did not attach.⁶⁸ And in *Callahan's Estate*,⁶⁹ the attorney had drawn wills for husband and wife. On a social visit they told him that they had destroyed the will for the purpose

⁶⁵ 210 F.2d 795 (9th Cir. 1954).

⁶⁶ 223 S.W.2d 264 (Tex. Civ. App. 1949).

⁶⁷ 39 Cal. 2d 75, 244 P.2d 907 (1952).

⁶⁸ The court also noted that the decedent had discussed the matter with another person, possibly constituting a waiver of confidentiality.

⁶⁹ 251 Wis. 247, 29 N.W.2d 352 (1947).

of reinstating their earlier will to give less to their son who had begun to drink heavily again. It was held that confidentiality did not attach to that communication.

It is submitted that both cases were erroneously decided. The relationship of attorney-client may be a continuing one and is not rendered any less a relationship because the parties are also friends. The parties assume that what they tell their attorney-friend as to matters with which he has dealt is no less confidential than if they revealed the matters to an attorney who was not a friend. We may ask also whether they would have revealed the same matters to him, even if he was their friend, if he was not a lawyer. At least where there was a prior relationship between the parties, anything told the lawyer-friend relating to those matters should be confidential. On the other hand, requests for legal advice at cocktail parties would not indicate that the communicant is relying on confidentiality. Again, the basic test of whether the party revealed matters to the attorney under such circumstances that he was entitled to assume that what he said would be confidential, should suffice to determine when confidentiality should attach.

3. *The Corporate Client*

With the increase of the corporate form of organization and the employment of both outside and house counsel, confidentiality of communications made by the corporate client must be considered separately. The corporation, if it is sufficiently large, employs both house and outside counsel, house counsel being an attorney or attorneys who are employed on a full-time basis as any other corporate employee. They are not kept on retainer, but receive a salary plus other emoluments the same as any other employee.

Where a corporation consults outside counsel, the situation is no different than when an individual consults such counsel, and it is undisputed that confidentiality attaches.⁷⁰ The question here is: Who speaks for the corporation? That is, since a corporation can only act through agents, what agents can be said to have authority to act as the corporation in the sense that what they tell the attorney is confidential in the same manner as an individual client? A proposed test has been "whether the good that the privilege seeks to accomplish—candor between client and attorney—would be defeated unless the

⁷⁰ *Stewart Equipment Co. v. Gallo*, 32 N.J. Super. 15, 107 A.2d 527 (1954). See also Uniform Rule of Evidence 26. However, in *Radiant Burners, Inc. v. American Gas Ass'n*, 207 F. Supp. 711 (N.D. Ill. 1962), it was held that a corporation is not entitled to claim the privilege.

particular agent were permitted to speak for the corporation."⁷¹ Obviously an individual director and officer would have to have such authority as he would be the party who legally has to act for the corporation.⁷² These parties would qualify as managing agents. The other type who would clearly have capacity to speak for the corporation is a communicating agent; that is, one whose position requires him to communicate information to the corporation's outside attorney. The interesting question involves "source agents"; that is, lower-ranking employees. The question of the extent to which their disclosures are considered the revelations of the corporation is the same as that regarding employees of an individual client and will be discussed subsequently. A stockholder certainly cannot be said to speak for the corporation; he is not involved in its operations and does not have the status of agent.⁷³ The test which would insure that at least managing and communicating agents, but not stockholders, can speak for the corporation is sound.

The real dispute in this area is whether communications to house counsel should be confidential; that is, can house counsel or the parties making the communication to him be required to testify as to those communications? The courts have extended the requirement of confidentiality to such communications and have held that what is told to him is in the same category as what is told to an outside attorney.⁷⁴ As one court has observed, "The type of service performed by house counsel is substantially like that performed by many members in large urban law firms. The distinction is chiefly that the house counsel gives advice to one regular client, the outside counsel to several regular clients."⁷⁵ Where the privilege has been extended, it should not be necessary that house counsel be a member of the bar in the state where the communication was made, as many corporations do interstate business, requiring him to act in many states. He is considered an attorney as long as he is admitted to the bar of one state.⁷⁶

⁷¹ Simon, "The Attorney-Client Privilege as Applied to Corporations," 65 Yale L.J. 953, 956 (1956).

⁷² *Id.* at 957.

⁷³ *Id.* at 966.

⁷⁴ *United States v. Aluminum Co. of America*, 193 F. Supp. 251 (N.D.N.Y. 1960); *Georgia-Pacific Plywood Co. v. United States Plywood Corp.*, 18 F.R.D. 463 (S.D.N.Y. 1956); *Leonia Amusement Co. v. Lowes*, 13 F.R.D. 438 (S.D.N.Y. 1952); *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950).

⁷⁵ *United States v. United Shoe Machinery Corp.*, *supra* note 74, at 360.

⁷⁶ *Georgia-Pacific Plywood Co. v. United States Plywood Corp.*, *supra* note 74. The court observed that the corporation had offices in thirty-five states, with the result that house counsel might have to spend most of his time taking bar examinations!

However, confidentiality does not extend to communications between other corporate officials who happen to be lawyers. It is well known that many lawyers who start out in the house counsel's office eventually leave that to assume other managerial positions.⁷⁷ Many of the corporate officials and directors are attorneys, then, and many communications are made to them. In *R.C.A. v. Rauland Corp.*,⁷⁸ it was contended that such communications were entitled to be confidential because made to an attorney. This contention was rejected by the court. The court held it was impossible to distinguish their business from legal functions and concluded that they had received the positions as negotiators in an attempt to keep confidential their negotiating activities, which were directed toward an illegal conspiracy.⁷⁹

It is submitted that the result can be explained more soundly in light of the rationale justifying attorney-client confidentiality. We say that we extend confidentiality to such communications to insure full disclosure to the attorney so that he may properly advise the client. We assume that the client will be deterred from making full disclosure unless such confidentiality is assured. On that basis there is no reason to extend the protection of confidentiality to communications made to corporate officials who happen to be lawyers. They must have the information that has been revealed to them so that they can carry out their functions properly. This information must be given to the negotiator who is an attorney as well as to the one who is not. Therefore, no one is inhibited from giving information on the grounds that it will not be secret. It is true that the corporation may have hoped for confidentiality in putting lawyers in that position, but assuming it wished to complete the transaction, it would have had to put some persons in that position to whom the information would have to be transmitted. Thus, there is no reason to extend confidentiality to such a situation, as there is no inhibition because of lack of confidentiality.

It is submitted that the same reasoning justifies a denial of confidentiality to communications made to house counsel. It is impossible to draw a distinction between his activities in a legal capacity and those in a business one. But more significantly, no one is deterred from telling him anything for fear it will not be confidential.

⁷⁷ Such as president, chairman of the board and the like. Roger Blough of United States Steel is a good example.

⁷⁸ 18 F.R.D. 440 (N.D. Ill. 1955).

⁷⁹ See also the discussion of the need to segregate communications in Simon, *supra* note 70, at 971-972. Courts may be afraid that too much information will be insulated otherwise.

The corporate structure is such that he is the party to whom such communications must be made. He is a member of the corporate team just as the other corporate officials. He has to receive certain information under the corporate organization where legal questions may arise. The situation is no different than where the vice-president receives information because such information is to be routed through his office. If the corporation has established house counsel, information relating to legal matters is to be routed through his office. The rationale justifying confidentiality disappears here because of the lack of inhibition. Just as communications made to the lawyer-vice-president are not protected from disclosure, so should communications made to the lawyer-house counsel not be protected. Each is a member of the corporate team to whom the information *must* be disclosed under corporate policy. The conference with the house counsel does not have the same inference as the conference with the outside attorney—one is a member of the team who happens to be a lawyer; the other is an attorney to whom certain things will be revealed only when there is the assurance of confidentiality.

This was recognized by the court in *Cogdill v. T.V.A.*,⁸⁰ where the court observed the structure of T.V.A. and held that the legal staff was no different than other employees. The court stated:

Even if the attorney-client relationship were inviolate under the Rules, it does not appear that the information asked for here is such as would be obtainable peculiarly by attorneys, particularly in the light of the circumstances of this case. In a government agency, such as the Tennessee Valley Authority, large and extensively departmentalized, with a co-ordinator, or general manager, and a board of directors, it seems reasonable to suppose that no complex matter of information would be exclusively obtained by or become the exclusive property of a single department, but would be the achievement and the property of the over-all unit; that the members of the legal staff would not be free and independent attorneys in the usual sense, but, like the information in their files, subject to the beck and call of their employer, whom otherwise they call their client.⁸¹

This observation is equally apt to a corporation large enough to have house counsel. The import is that the information is given to them in their capacity as members of the team and there is no deterrence in communicating.

The extension of confidentiality to communications to house counsel seems like an effort on the part of the courts to reassure the egos of house counsel that they are still "attorneys" even though they

⁸⁰ 7 F.R.D. 411 (E.D. Tenn. 1947).

⁸¹ *Id.* at 414-415.

are now employed by a corporation. This is irrelevant. The point is that granted, they are lawyers in the full sense, there is no need to extend confidentiality to communications made to them because the same communications would be made even in the absence of confidentiality. Where the rationale for confidentiality has disappeared, house counsel should be subject to the requirement of disclosure as other corporate officials.

4. *Communications to Attorney's Agents*

It is well settled that communications to the attorney's agents, such as his confidential secretary, are entitled to confidentiality as these persons are required to keep secret what they obtain by virtue of their employment.⁸² The client feels free to disclose matters to these persons because they are acting for the attorney. The attorney's sponsorship of these persons is likely to give the client the same assurances of secrecy as if the communication were made directly to the attorney.

The interesting employment of this principle is to render immune from disclosure communications rendered to certain persons where they would not be immune if rendered to those persons in an individual capacity. In *State v. Kociolek*,⁸³ for example, the attorneys for a criminal defendant engaged a psychiatrist to examine the defendant and report his finding to them. Even though communications to a psychiatrist were subject to disclosure, it was held that those in the instant case were not, on the basis of attorney-client confidentiality. Attorney-client confidentiality extends to necessary intermediaries since, when the attorney sends the client to them, he is impliedly assuring the client that anything he tells them will be treated the same as anything he tells the attorney. The client is entitled to assume confidentiality and the courts have upheld this assurance. The same principle has justified a finding of confidentiality as to communications made to physicians examining the client at the attorney's request⁸⁴ and an accountant engaged by an attorney to assist in the defense.⁸⁵

⁸² See, e.g., *Taylor v. Taylor*, 179 Ga. 691, 177 S.E. 582 (1934). Cf. *Wartell v. Novograd*, 48 R.I. 296, 137 Atl. 776 (1927), where the court held that a law student working in the attorney's office was not an agent within the meaning of attorney-client confidentiality.

⁸³ 23 N.J. 400, 129 A.2d 417 (1957).

⁸⁴ *Ex parte Ochse*, 38 Cal. 2d 230, 238 P.2d 561 (1951); *City and County of San Francisco v. Superior Court*, 37 Cal. 2d 227, 231 P.2d 26 (1951).

⁸⁵ *Himmelfarb v. United States*, 175 F.2d 924 (9th Cir. 1949), *cert. denied*, 338

5. *What Constitutes a Communication*

Not all information that an attorney receives from the client is considered a communication for purposes of protection from disclosure. There are certain things that an attorney will discover or will be told by the client that are not entitled to confidentiality, either because it is obvious they were not intended to be confidential or because they must be revealed to establish the existence of the relationship. In ascertaining what constitutes a communication for purposes of confidentiality, those two criteria will be employed. A communication within the meaning of attorney-client confidentiality is defined as a fact that was disclosed by the client and not intended to be revealed to others.

The clear communication is the information imparted to the attorney relating to the reasons why the client consulted the attorney, such as the reasons why he wanted to make a will⁸⁶ or information given in response to the attorney's explanation of the client's legal rights.⁸⁷ Communications include acts that are obviously intended to be confidential such as a handwriting specimen.⁸⁸ At the other extreme would be the receipt of documents the client would be required to produce, which obviously is not a communication.⁸⁹ The client would not be inhibited from delivering these documents to the attorney for fear they will be disclosed, as he is aware or will be made aware by the attorney that the client himself must produce them in response to a subpoena duces tecum. Because of the lack of inhibition, this is not treated as a communication and the attorney can be required to produce them or testify as to their contents. By the same token, information received by the attorney from *others* is not entitled to confidentiality on the basis of the relationship as this information was not received from the client.⁹⁰ Absent the situation where the other

U.S. 860 (1949). Here, however, the court found that the communication was made to the attorney in the presence of the accountant who was not "indispensably necessary." Therefore, it held that the communication to the attorney was not privileged. Implied is a holding that if the communication were made to the attorney *or* the accountant it would be entitled to confidentiality, but not if made in the presence of each other. This is illogical. The court should have considered whether the client was entitled to assume confidentiality when he made the statement, and if the accountant were engaged by the attorney, the client should have been entitled to so assume.

⁸⁶ Youngberg v. Holstrom, 252 Iowa 815, 108 N.W.2d 498 (1961).

⁸⁷ *In re* Van Gorder's Will, 10 Misc. 2d 648, 176 N.Y.S.2d 1018 (Surr. Ct. 1957).

⁸⁸ See the discussion in 8 Wigmore § 2306, at 590.

⁸⁹ See, e.g., Falsone v. United States, 205 F.2d 734 (5th Cir. 1953), *cert. denied*, 346 U.S. 864 (1953); Pearson v. Yoder, 39 Okla. 105, 134 Pac. 421 (1913).

⁹⁰ See, e.g., Greyhound Corp. v. Superior Court, 15 Cal. Rptr. 90, 364 P.2d 266 (1961); Dupree v. Better Way, Inc., 86 So. 2d 425 (Fla. 1956); *In re* Dalton's Estate, 346 Mich. 613, 78 N.W.2d 266 (1956). However, sometimes courts blindly apply this prin-

witness is an employee of the client, which will be discussed subsequently, there is no question of inhibition as the information is not received from the client. Therefore, such information is not considered a communication within the meaning of attorney-client confidentiality.

Equally clear is that the fact of representation cannot be considered a communication, since until negotiations are shown there can be no claim of attorney-client confidentiality.⁹¹ Moreover, the fact of representation may be an issue in the case, such as where a party seeking release on habeas corpus claims he was not represented by an attorney.⁹² It may be stated, then, that where the fact in issue is whether a communication was made, the matter is not treated as a communication within the meaning of attorney-client confidentiality.

Not all situations are so readily categorized, and difficulty is encountered in determining exactly what constitutes a communication within the meaning of attorney-client confidences. The courts are agreed that the existence of a retainer is not a communication,⁹³ but are split as to the terms of a retainer.⁹⁴ The client does not expect the *existence* of a retainer to be confidential; however, as to the terms, it would seem that the client would expect them to be secret unless a dispute should arise between him and the attorney. If a client knew that the terms of the retainer were subject to general disclosure, he might well be inhibited from even consulting the attorney in the first place. A good example might be where a client having marital difficulties consults an attorney and does not want the other spouse to know he or she has such funds to retain an attorney. Inasmuch as the client would be likely to assume the amount of the retainer would be confidential, it should be considered a communication for this purpose.

The authority of an attorney to act for the client may be shown

ciple without considering whether the person making the communication to the attorney could be considered the client's agent, in which event the client would be entitled to assume confidentiality. In *Sale v. United States*, 228 F.2d 682 (8th Cir. 1956), *cert. denied*, 350 U.S. 1006 (1956), for example, the court held that information received from the client's accountant was not entitled to confidentiality.

⁹¹ See, e.g., *Gretsky v. Miller*, 160 F. Supp. 914 (D. Mass. 1958).

⁹² *Behrens v. Hironimus*, 170 F.2d 627 (4th Cir. 1948).

⁹³ See, e.g., *Myer v. Myer*, 189 Misc. 406, 71 N.Y.S.2d 530 (Sup. Ct. 1947), *aff'd*, 272 App. Div. 814, 72 N.Y.S.2d 257 (1947).

⁹⁴ Compare *Registered Country Home Builders, Inc. v. Lanchantin*, 10 App. Div. 2d 721, 198 N.Y.S.2d 767 (1960) (no communication) with *Magida on Behalf of Vulcan Detining Co. v. Continental Can Co.*, 12 F.R.D. 74 (S.D.N.Y. 1951) (communication and entitled to confidentiality).

on the theory that it involves the fact in issue.⁹⁵ The point is that the client does not expect that fact to be confidential if the attorney is effectively to act for him.

Ordinarily the *identity* of the client is not considered a communication, as the client does not intend it to be confidential.⁹⁶ The client will expect the attorney to state who he was if this is necessary to properly represent him. On the other hand, where the circumstances are such that the client would not wish the fact that he consulted an attorney to be disclosed, the identity of the client is entitled to confidentiality. Such a situation was involved in *Baird v. Koerner*.⁹⁷ An attorney had paid a sum of taxes to the Director of Internal Revenue on behalf of undisclosed clients for delinquent taxes. He was contacted through another attorney and did not know the names of the clients. He was requested by the Department of Internal Revenue to disclose the name of the other attorney, who was actually his client and from whom the Department hoped to obtain the names of the parties making payment. It was held that he could not be compelled to disclose. Here all parties wished the names of the parties making payment to be secret; the court observed that the Government was trying by indirection to obtain the identity of persons who made anonymous payment. Since it was intended by the client to be confidential, the identification was considered a communication, which here means a fact not intended to be revealed.

The same principle was applicable in *Ex parte McDonough*,⁹⁸ where the identification of the client would have tended to show an acknowledgment of guilt on his part. The attorney had been employed to represent clients in connection with certain election frauds. The attorney was then asked by the grand jury to reveal who employed him to represent the three who were later indicted. The court held that the person who employed the attorney would wish to have that matter be kept in confidence as revelation would tend to link him with those indicted. Therefore, attorney-client confidentiality attached. Note the analogy to the privilege against self-incrimination. The client would have refused to answer whether he employed an attorney to represent those indicted; the same rationale justifies the attorney's refusal to answer a question that would have the same effect.⁹⁹

⁹⁵ *Pacific Telephone and Telegraph Co. v. Fink*, 141 Cal. App. 2d 322, 296 P.2d 843 (1956) (authority to sign stipulation); *McKeague v. Freitas*, 40 Haw. 108 (1953) (authority to enter into contract).

⁹⁶ See, e.g., *Brunner v. Superior Court*, 51 Cal. 2d 616, 335 P.2d 484 (1959); *In re Richardson*, 31 N.J. 391, 157 A.2d 695 (1960).

⁹⁷ 279 F.2d 623 (9th Cir. 1960).

⁹⁸ 170 Cal. 230, 149 Pac. 556 (1915).

⁹⁹ A contrary result was reached in *People ex rel. Vogelstein v. Warden of County*

The intention for anonymity is the basis of explanation for the result in *In re Kaplan*.¹⁰⁰ There the client retained the attorney to pass certain information to a public investigating body. The attorney was questioned as to this information, which he revealed, but refused to identify his client on the ground that the client feared reprisals from the persons whom he incriminated. It was held the attorney could refuse to reveal the name on the basis of attorney-client confidentiality. The court observed that it was the client's name that needed protection. More realistically, the client would not have come to the attorney—nor given the information to the commission—except for the implied assurance of anonymity. Since the client intended his identity to be confidential, it is a communication within the meaning of attorney-client confidentiality. It is, therefore, inaccurate to state as a general proposition that the identity of the client is not within attorney-client confidentiality. More realistically, the identity is not a protected communication when it was not intended to be confidential, but is within the privilege when the circumstances are such that the client's intent to remain anonymous may be inferred.

What of impressions as to the client's competency and the like that the attorney obtains during the course of his employment? Assuming that there is someone who may raise confidentiality even if the client is dead,¹⁰¹ some courts have held that the attorney could not testify as to the client's competency on the basis of observations made during the course of his employment.¹⁰² These courts observe that communications may include acts as well as words and that the client intended whatever went on in the lawyer's office to be confidential. Persons, particularly older ones, may be concerned with their peculiarities, which to them are natural. They might not reveal certain things that are necessary—if the lawyer is to properly advise them—if they thought that he could testify as to those things. If the attorney would conclude that the testator was not of sound mind, he would not be drawing a will, so the question will arise only when an attorney who did *not* draw the will is testifying the client was

Jail, 150 Misc. 714, 270 N.Y.S. 362 (Sup. Ct. 1934), where the attorney refused to answer a question as to the name of his client in a grand jury investigation. The issue was which of certain defendants allegedly represented by the attorney did not plead guilty to a lottery charge. The grand jury was investigating lotteries and presumably looking for violators to indict. Clearly the client would wish the fact that he was indicted and represented by the attorney at the former trial kept secret.

¹⁰⁰ 8 N.Y.2d 214, 168 N.E.2d 660 (1960).

¹⁰¹ See notes 208-216 *infra*, and accompanying text.

¹⁰² *In re Coon's Estate*, 154 Neb. 690, 48 N.W.2d 778 (1951); *Taylor v. Sheldon*, 172 Ohio St. 118, 173 N.E.2d 892 (1961); *Pollard v. El Paso Nat'l Bank*, 343 S.W.2d 909 (Tex. Civ. App. 1961).

of *unsound* mind. Since the client intended his actions to be confidential and would assume that the attorney would not reveal anything he discovered during those meetings, the client's acts constitute a communication to the attorney. On the other hand, an attorney has been permitted to testify that a client was intoxicated.¹⁰³ This involved a condition over which the client had no control. There was no question of the client's intent that the fact be kept secret so the rationale justifying confidentiality was inapplicable. The client's competency, then, and the acts on which an opinion as to such competency are based constitute a communication when the circumstances are such that the client would assume that what he said and did in the presence of the attorney would not be revealed.

Neither the fact of execution of an instrument¹⁰⁴ nor its attestation¹⁰⁵ can be regarded as a communication within the meaning of attorney-client confidentiality. The word is used to denote, as one court has observed, "the fact that one person has brought an idea to the perception of another."¹⁰⁶ Here the client generally does not intend the fact of execution to be secret; rather he expects the attorney to verify that it was done. Revelation of attestation is necessary for the instrument to be valid. In some circumstances, however, the client may have desired that the execution be kept secret, at least for a period of time. Examples might be where he wanted the fact that he made a will kept secret during his lifetime, or where he executed a deed which he did not want to record. Since in those circumstances, he was relying on attorney-client confidentiality and may not have done the act unless he could rely on such confidentiality, the requirement of disclosure would be improper.

By the same token, money received from others for the benefit of the client is not a communication.¹⁰⁷ Here the client revealed nothing to the attorney so there is no question of inhibition of disclosure. The client does not assume that the *fact* that the attorney received the money would be any more secret than if the client himself received it. Note that this is limited to the fact of receipt by the attorney. Statements by the client that he received the money from the third party, why the money was owing and the like, would clearly be communications within the meaning of attorney-client confiden-

¹⁰³ State v. Fitzgerald, 68 Vt. 125, 34 Atl. 429 (1896).

¹⁰⁴ See, e.g., Marshall v. Marshall, 140 Cal. App. 2d 475, 295 P.2d 131 (1956); *In re Coon's Estate*, *supra* note 102.

¹⁰⁵ See, e.g., *In re Wilkin's Estate*, 199 Okla. 249, 185 P.2d 213 (1947).

¹⁰⁶ *In re Coon's Estate*, *supra* note 102, at 782.

¹⁰⁷ See, e.g., Pollock v. United States, 202 F.2d 281 (5th Cir. 1953); Vicari v. Talamo, 94 So. 2d 712 (La. App. 1957).

tiality. As the foregoing indicates, the test for determining what constitutes a communication should be related to the client's state of mind rather than to the nature of the communication itself. If the circumstances are such that confidentiality was intended, a thing may constitute a communication, though in the absence of such circumstances it would not, merely because there was no intention that it be kept confidential.

6. *Communications by Client's Agents*

Previously we have discussed the question of who speaks for the corporation within the meaning of attorney-client confidentiality and have concluded that managing and communicating agents are deemed to be the client for purposes of such confidentiality.¹⁰⁸ The question then arises as to the extent that statements by employees of the client, either individual or corporate, should be entitled to the same confidentiality. It must be remembered that these parties are not ordinary witnesses. They are identified with the client and may be "part of the team." In order for the client to properly obtain advice from his attorney, it may be necessary that some agents, at least, have the same freedom from inhibition as the client. It is submitted, therefore, that where the agent would be inhibited from fully disclosing matters because of the fear of revelation in the same manner as the client, confidentiality attaches to the agent's statements as well as to those of the client. For example, if the client first interviewed the agent, ascertained the facts he could from him, and then revealed these facts to the attorney—what would be revealed would be confidential. Should the result be any different if the process is "short-circuited" and the conduit eliminated? When, in order for the client's case to be effectively presented to the attorney, communications from the client's employees are involved, they should be entitled to confidentiality under the same criteria as those made by the client himself; that is, if the agent would have been inhibited from revealing what he did because of the possibility of disclosure by the attorney, the communication should be entitled to confidentiality. The problem, then, is to determine when the information sought to be elicited from the attorney was obtained by the agent under such circumstances that inhibition would result from the possibility of disclosure.

As to managing and communication agents of an individual employer, the result should be the same as with a corporate employer. These persons are identified as the employer and consider themselves as acting in that capacity. Consequently they would be deterred

¹⁰⁸ See notes 71-73 *supra* and accompanying text.

under the same circumstances as would he. The problem arises as to communications made by source agents, *e.g.*, the bus driver or salesman, or other agents not so intimately identified with management.

The clearest case where confidentiality should attach is where an independent agent is employed with a view toward litigation. In *Brink v. Multinomah County*,¹⁰⁹ an appraiser had been employed by a condemnor to observe the property in question and make a report to the attorney representing the condemnor. It was held that the attorney could not be required to reveal what was disclosed to him by the appraiser. The court emphasized that the appraiser was not employed until litigation was imminent and that the report was made for use in connection with litigation. What transpired between the appraiser and the attorney was no different than what would have transpired between the client and the attorney. The report was intended for the attorney's use only in the defense of the case.¹¹⁰ Had it been the subject of revelation, it may well have been that the client would not have wanted the appraiser to present it to the attorney, which might have interfered with the effective presentation of the client's case.¹¹¹ Here, the appraiser was performing special services for the client in preparation of the case and in that context, the rationale justifying confidentiality for the client's communications is equally applicable.

The same is true where the employee is "litigation conscious"; that is, his duties require him to be concerned with litigation. In such a situation, his statements, reports and the like should be confidential since he acts for the client in regard to litigation. Thus, documents and reports prepared by claim agents,¹¹² employees of a special department that reported to the claim agent,¹¹³ and railroad conductors who were to submit reports for use of counsel¹¹⁴ have been held entitled to confidentiality. The principle has been held applicable to a report made by any agent with the understanding that it was to be submitted to counsel.¹¹⁵ These parties are making the communications with a view toward litigation and the nature of their duties indicates that

¹⁰⁹ 224 Ore. 507, 356 P.2d 536 (1960).

¹¹⁰ Note the analogy to the work-product rule for discovery purposes. *Hickman v. Taylor*, 329 U.S. 495 (1947).

¹¹¹ Here the attorney was house counsel.

¹¹² *In re Hyde*, 149 Ohio St. 407, 79 N.E.2d 224 (1948).

¹¹³ *State ex rel. Terminal R.R. Ass'n of St. Louis v. Flynn*, 363 Mo. 1065, 257 S.W.2d 69 (1953).

¹¹⁴ *Atlantic Coast Line R.R. Co. v. Williams*, 21 Ga. App. 453, 94 S.E. 584 (1917).

¹¹⁵ *Holm v. Superior Court*, 42 Cal. 2d 500, 267 P.2d 1025 (1954); *Davenport Co. v. Pennsylvania R.R. Co.*, 166 Pa. 480, 31 Atl. 245 (1895).

they are making the reports with regard to legal use. They assume these communications are entitled to confidentiality, as would be the case if they were consulting the lawyer on their own behalf. Consequently, inhibition might result if these communications were not confidential, with the resulting impairment of the employer's obtaining full legal assistance.

The main problem revolves around statements made by low-ranking employees. The question arises as to the extent to which they are litigation conscious as to the particular communications sought to be disclosed; that is, would they be inhibited in what they said because of the possibility of disclosure by an attorney? It should be noted that this problem is most likely to arise in discovery proceedings as their statements and reports would not be likely to qualify as admissions within the hearsay rule because of their low-ranking status.¹¹⁶ In an actual interview with the attorney, confidentiality should attach. The inhibiting factor is equally present; at that juncture, they are in the same position as the employer. Since this is so, and since if he interviewed them first and then reported to the attorney, it would be privileged, the result should be no different if they speak to the attorney directly.

As to reports made by such employees which eventually find their way into the hands of the attorney, the question must be again posed: Would the report or statement have been likely to contain or fail to contain certain information, necessary to the effective securing of legal advice by the employer, depending on whether it is subject to disclosure in the hands of the attorney? A clear situation where the inhibiting factor was present was *Schmidt v. Emery*,¹¹⁷ where the claim agent obtained a statement about the accident from the bus driver after the accident on the advice of the company's attorney. Here the driver knew that what he said was to be transmitted to the attorney and was entitled to assume confidentiality.

But many reports are routine, and the courts have concluded, in some situations at least, that they are not confidential because they are not prepared with a view toward litigation. In other words, if the employee was making a report because regulations required him to do so after every accident and not with a view toward transmittal to the attorney, he would not be inhibited because of fear of disclosure by the attorney as he was not thinking about such disclosure. He may have been inhibited by other factors such as his own liability

¹¹⁶ For a discussion of the status of low-ranking agents for admission purposes, see *State ex rel. Kresge Co. v. Shain*, 340 Mo. 145, 101 S.W.2d 14 (1936).

¹¹⁷ 211 Minn. 547, 2 N.W.2d 413 (1942).

or disciplinary matters, but no additional inhibition exists because of possible revelation by the attorney. Thus, in *Brown v. Saint Paul City Ry. Co.*,¹¹⁸ the court which found confidentiality in *Schmidt v. Emery* found that an accident report made by a trolley conductor was not privileged because it was not shown to be anything other than a routine report which would have had to have been made if no injury occurred and any possibility of litigation was remote. Confidentiality was likewise denied in *Robertson v. Commonwealth*¹¹⁹ where the report was made on the day of the accident by the motorman on a printed form furnished for such purpose.

A series of California cases emphasizes the difficulty in drawing the distinction between reports submitted with a view toward litigation and those made routinely. In *Holm v. Superior Court*,¹²⁰ the court found that reports submitted by a bus driver and photographs made were intended for the use of the attorney and confidentiality attached. The use of photographs in connection with the report would be evidence of consciousness of litigation. In *City and County of San Francisco v. Superior Court*,¹²¹ however, it was held that the list of names and addresses of passengers on a bus which the bus driver delivered to the dispatcher was not entitled to confidentiality. It was found that these were submitted routinely without thought of litigation. In *Jessup v. Superior Court*,¹²² where a child died by drowning in a public swimming pool and the department of public safety subsequently conducted an investigation, it was held that the report delivered to the attorney was entitled to confidentiality. Here, litigation could clearly be expected to result from the incident.¹²³ In *Heffron v. Los Angeles Transit Lines*,¹²⁴ the court concluded that an accident report made by a bus driver pursuant to company rules was confidential. The report was prepared in triplicate, one copy of which went to the attorney for the insurance carrier. However, in *Safeway Stores Inc. v. Superior Court*,¹²⁵ an accident report submitted by the manager of a chain store to the accounting office was held not entitled to confidentiality, though it ultimately went to the insurer. The theory was that, insofar as the manager was concerned, he was making a report to the accounting office.

¹¹⁸ 241 Minn. 15, 62 N.W.2d 688 (1954).

¹¹⁹ 181 Va. 520, 25 S.E.2d 352 (1943).

¹²⁰ *Supra* note 115.

¹²¹ 161 Cal. App. 2d 653, 327 P.2d 195 (1958).

¹²² 151 Cal. App. 2d 102, 311 P.2d 177 (1957).

¹²³ Investigations such as this were always kept confidential by the department.

¹²⁴ 170 Cal. App. 2d 709, 339 P.2d 567 (1957).

¹²⁵ 14 Cal. Rptr. 243 (Cal. App. 1961).

These cases indicate the difficulty in drawing the line.¹²⁶ It has been suggested that the matter be resolved on the basis of burden of proof; that is, the party seeking confidentiality must prove that the report would not have been prepared except for use by counsel.¹²⁷ Some of the cases have concluded against confidentiality on the ground that the employer failed to sustain his burden of showing that the dominant purpose of the reports was submission to counsel.¹²⁸ It is submitted that such reports should not be considered confidential unless, as in *Schmidt v. Emery*, the report was not a routine one and the employee clearly understood it was to be submitted to counsel. To ask whether the employee is thinking in terms of litigation is futile here. To some extent he well may be, but the point is not thrust at him to the same extent as if he were being interviewed by the attorney or was told to make a special report for use by the attorney. More significantly it would seem that the employee's prime concern would be with preparing the report in such a way as to avoid any disciplinary action against himself. His connection with the attorney in such a situation seems too remote to say that he was appreciably inhibited in what he said because of fear that this would be disclosed by an attorney to whom such a report might be submitted. The rationale of attorney-client confidentiality would prevent its application to such a situation.

II. LOSS OF CONFIDENTIALITY

In this portion of the article we are concerned with when confidentiality is lost because the circumstances, either at the time of making or subsequently, indicate that confidentiality was not intended or because of waiver of confidentiality. We will employ the basic criteria in the former section: Are the circumstances such that the client intended the communication to be confidential and would reveal things he otherwise would not disclose in reliance on such confidentiality?

1. *Secrecy*

Where the client does not consider the communication to be confidential, then, of course, it is entitled to no such protection—he reveals nothing that he would not have revealed except for assurances

¹²⁶ See the discussion in McCormick § 100.

¹²⁷ Simon, *supra* note 71, at 978.

¹²⁸ This apparently was the rationale behind the decisions in Safeway Stores, Inc. v. Superior Court, *supra* note 125; Brown v. Saint Paul City Ry. Co., *supra* note 118; and Robertson v. Commonwealth, *supra* note 119.

of confidentiality. If the matter is not revealed to the attorney in secrecy, logically the client has not told him anything he would not have told others because of his status as an attorney. The problem, however, is that courts have been most unrealistic in finding an absence of secrecy because of the presence of another person *without considering who that person is*. Even though a third party is present, and depending on who he is, the client may feel that what he says will be kept secret; that is, the other person present will not reveal it. Therefore, he does not indicate disdain for whether or not the attorney can disclose it. Since he assumes the other person will not reveal what is said, he feels as free in his disclosures to the attorney as if the other party were not present. For example, if a husband and wife went to see the attorney together about the husband's legal problem, confidentiality would exist because (assuming requisite confidence as to wife) what was revealed to the wife would qualify as a marital communication, which is privileged. Since she could not reveal what was said, the communication to the attorney would be equally confidential.¹²⁹ Similarly, if a mother went with a four-year-old son and took him into the attorney's office, it is not supposed that it would be said that what the mother revealed to the attorney would not be entitled to confidentiality. But what if the child were eighteen; or the child were an adult and the parents were aged? Or the child went to see the attorney and was accompanied by the parent? What if the party is accompanied by a close relative or friend? Is this an indication that he did not intend what he revealed to the attorney to be confidential? As will be demonstrated, the courts in this regard have at times ignored normal patterns of human behavior in determining when confidentiality is destroyed because of the presence of others.

Too often the courts tend to think of the one-to-one situation—the client and attorney are conferring in subdued tones after making certain that no one can overhear; in such a situation there can be no doubt that confidentiality was intended. Equally obvious is the situation where confidentiality was not intended. One example would be the disclosure to the attorney of the selling price of property which was known to the other party to the transaction and which could be deduced from the amount of revenue stamps that appeared on the

¹²⁹ *Smith v. State*, 203 Ga. 569, 47 S.E.2d 579 (1948). There the wife and her husband had conferred with the attorney about the wife's filing of a divorce action. The state sought to introduce the conversation as evidence of the wife's motive for killing the husband. See also *State v. Bell*, 212 Mo. 111, 111 S.W. 24 (1908), where it was held that the wife could not be examined as to matters she told the husband's counsel in preparation for the husband's defense. Here the husband was not present.

recorded deed.¹³⁰ Another would be where others are present whose interest might be adverse to the client and who are comparative strangers, such as statements by the grantor to his attorney in the presence of the grantee.¹³¹ By the same token, where the statement was to be delivered by the attorney to third parties, the client obviously did not intend it to be confidential, so there could be no objection to the attorney's disclosing it.¹³²

The disputed area is where third parties are present whose interest is *not* adverse to the client. It is admitted today that the presence of the attorney's assistants does not destroy confidentiality as such persons may be necessary to help conduct the interview. If, as discussed previously,¹³³ communications made to those persons as the attorney's agents would be entitled to confidentiality, obviously their presence while the client was conversing with the attorney would not destroy it. Professor McCormick observes that "confidentiality would not depend on whether the presence of the person in the particular instance was necessary, as that is the way business is done."¹³⁴ The client does not necessarily know whether that person's presence is necessary and is not thinking in those terms. The point is that he is relying on the attorney's sponsorship of these persons and assumes that what he is saying is said in confidence despite their presence.

With this orientation, the result in *Himelfarb v. United States*¹³⁵ is inexplicable. The attorney engaged an accountant to attend the conference with the client on tax matters. The court held that his presence destroyed confidentiality and that the attorney could be required to disclose what was revealed to him. The basis of the decision was that the accountant's presence was not necessary, but was a "mere convenience for the taxpayer." Earlier we have seen that other courts have held communications to an accountant engaged by the attorney as confidential on the ground that they were made to the attorney's agent. A fortiori, the presence of the agent should not render nonconfidential the statement made to the attorney! The court here failed to consider the underlying rationale of attorney-client confidentiality, that the client assumes the statement is confi-

¹³⁰ *Ramacorti v. Boston Redevelopment Authority*, 341 Mass. 728, 170 N.E.2d 323 (1960).

¹³¹ *Short v. Kleppinger*, 163 Neb. 729, 81 N.W.2d 182 (1957).

¹³² See, e.g., *Wilcoxson v. United States*, 231 F.2d 384 (10th Cir. 1956), *cert. denied*, 351 U.S. 943 (1956); *Spencer v. Burns*, 413 Ill. 240, 108 N.E.2d 413 (1952); *In re Stein*, 1 N.J. 228, 62 A.2d 801 (1947).

¹³³ See notes 82-85 *supra* and accompanying text.

¹³⁴ McCormick § 95.

¹³⁵ 175 F.2d 924 (9th Cir. 1949), *cert. denied*, 338 U.S. 860 (1949).

dential because made to the attorney or his agent. The client assumes such confidentiality where the presence of the other party is at the attorney's direction without consideration of whether the presence is "necessary" or merely a "matter of convenience."

The prime example of unrealistic attitudes on the part of some courts is where third persons were present *who would not be expected to be adverse to the client*. Indeed, often the client brings them with him. The test should be whether these persons were such that, in view of their relationship to the client or other circumstances, the client would feel no more inhibited in disclosure because of their presence than he would in their absence. This principle was applied by the court in *People v. Abair*¹³⁶ where four persons were charged with narcotics violations arising out of the same transaction. An attorney discussed the case with all four pending negotiations for representation, indicating that he could represent all four. It was held that what one revealed to him was entitled to confidentiality. The court apparently realized, as indicated by its reference to the fact that the attorney stated he could represent all four, that the client was not inhibited by the presence of the other defendants. They were all indicted for similar offenses arising out of the same transaction—"all in the same boat," so to speak. Under such circumstances, the client considered what he said to be confidential; therefore, it should be protected from disclosure.

What has caused the confusion in this area is the view that the presence of a third person, such as a relative or friend, must "be reasonably necessary for the protection of the client's interests in the particular circumstances."¹³⁷ This is easy enough to apply where the third party was the client's agent who took care of the aged and infirm client and managed her business affairs,¹³⁸ or a private detective hired by the client to keep her husband under surveillance,¹³⁹ or the mother of a young girl who had been seduced, allegedly for the first time.¹⁴⁰ The problem arises in a case such as *Marshall v. Marshall*¹⁴¹ where the statements were made in the presence of the client's

¹³⁶ 102 Cal. App. 2d 765, 228 P.2d 336 (1951).

¹³⁷ McCormick § 95.

¹³⁸ This was involved in *In re Busse's Estate*, 332 Ill. App. 258, 75 N.E.2d 36 (1947). The court emphasized that the older concept that only an interpreter could be present was outmoded in light of the way people conduct their affairs.

¹³⁹ *Foley v. Poschke*, 137 Ohio St. 593, 31 N.E.2d 845 (1951).

¹⁴⁰ *Bowes v. State*, 29 Ohio St. 542 (1876). The mother was characterized "out of decency and propriety" as the daughter's "confidential agent" due to her "youth and supposed modesty."

¹⁴¹ 140 Cal. App. 2d 475, 295 P.2d 131 (1956).

son. Referring to the son as "a stranger," the court held that the client did not intend that the statements be kept in confidence by the attorney. There was nothing to indicate that the relationship between father and son was not normal.

And in *Gordon v. Robinson*,¹⁴² the court denied confidentiality to a statement made in the presence of the client's stepson on the ground that his assistance was not necessary to familiarize the attorney with the circumstances of the case.

It is submitted that the necessity of the presence of the third person bears no relationship to attorney-client confidentiality. Such confidentiality is recognized on the theory that the client must be inhibited in his conversations with the attorney. He does not become inhibited because of the presence of a third person who he assumes will not reveal what has been disclosed. The test should be whether the relationship between the third person and the client was such that the client was no more inhibited in his revelations to the attorney than he would have been if the third person had not been present. People simply do not always go to see an attorney alone or speak to him alone. They may be accompanied by relatives or close friends. Perhaps the presence of these persons is not indispensably necessary, but maybe the client needs their "moral support." Perhaps they also have information to reveal and it is more efficient for the third person and the client to see the attorney together. Irrespective of the reason for their presence, if the client assumes they will keep in confidence what is revealed there, then there is no reason to believe that he does not assume the attorney will do likewise. Since he assumes confidentiality, what he reveals to the attorney should not be subject to disclosure.

As stated at the outset, we often proceed on the assumption that the attorney and the client are conferring free from intrusions of outsiders. But sometimes they are unsuccessful in preventing such intrusion and the question arises as to the effect on confidentiality of a third person's interception of the communication. Obviously this cannot affect confidentiality as between attorney and client. In *In re Lanza*,¹⁴³ the communication was electronically intercepted ("bugged") by the police, who sought to compel the attorney to testify to what was communicated on the ground that it was not "confidential." The demand was denied. The point is that the client assumed confidentiality; namely, that the attorney would not reveal what was

¹⁴² 109 F. Supp. 106 (N.D. Pa. 1952). The case was reversed on other grounds and the question left open, 210 F.2d 192 (3d Cir. 1954).

¹⁴³ 4 App. Div. 2d 252, 164 N.Y.S.2d 534 (1957).

disclosed. Therefore, the fact that others have heard is irrelevant as regards the bar to the attorney's testimony.

But a different issue is presented when it is the eavesdropper that seeks to testify. *There is nothing in the rationale justifying attorney-client confidentiality to prohibit such testimony.* Dean Wigmore has pointed out that the client's peace of mind is protected despite the allowance of such testimony.¹⁴⁴ He is not deterred from telling the attorney anything because of fear of revelation by third parties because he assumes that third parties do not overhear what is said. It is only when the attorney himself improperly reveals the statement to a third party that the third party cannot testify, since in that case the client did assume confidentiality when he disclosed the matter to the attorney.¹⁴⁵ Because of the lack of danger of inhibition, some courts have permitted the eavesdropper to testify, which is fully consistent with the rationale for the attorney-client privilege we have given.¹⁴⁶

If such testimony is to be excluded, then it must be on the basis of other grounds than the rationale justifying attorney-client confidentiality. The Uniform Rules of Evidence, unlike the Model Code, hold such testimony inadmissible.¹⁴⁷ The rationale, as explained by Professor Morgan, is "to give protection against, among other things, modern gadgets, which make the conduct of confidential business in ordinary circumstances practically impossible."¹⁴⁸ This represents a societal policy protecting privacy, particularly from improper police tactics, which is how such eavesdropping often occurs rather than "hearing through the transom." This societal policy is reflected in holding illegally obtained evidence inadmissible in both federal¹⁴⁹ and state¹⁵⁰ prosecutions. In order for the attorney-client relationship to function effectively, they must be permitted to conduct their business in secrecy. Therefore, an eavesdropper should not be per-

¹⁴⁴ 8 Wigmore § 2326.

¹⁴⁵ See Model Code of Evidence rule 210(3) (1942).

¹⁴⁶ See, e.g., *Erlich v. Erlich*, 278 App. Div. 244, 104 N.Y.S.2d 531 (1951); *Clark v. State*, 159 Tex. Crim. 187, 261 S.W.2d 339 (1953). The latter case is best explainable on this ground rather than on the ground that it involved information as to a crime. See the discussion in Quick, "Privileges Under the Uniform Rules of Evidence," 26 U. Cinc. L. Rev. 537, 541 (1957).

¹⁴⁷ Uniform Rule of Evidence 26.

¹⁴⁸ Morgan, "The Uniform Rules and the Model Code," 31 Tul. L. Rev. 145, 146 (1956).

¹⁴⁹ *Weeks v. United States*, 232 U.S. 383 (1914). See also *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950), involving interception of conversations between an attorney and client.

¹⁵⁰ *Mapp v. Ohio*, 367 U.S. 643 (1961).

mitted to testify, even though such testimony would not run counter to attorney-client confidentiality as we are employing the concept.

2. *Advice as to Crime or Wrongdoing*

It is a general rule that confidentiality is not applicable where the client consults the attorney for advice as to the commission of a crime¹⁵¹ in the future or any wrongful scheme, such as procuring admission of a forged document to probate¹⁵² or defrauding the Government by misrepresenting the cost of tuition which the Veterans Administration was to pay.¹⁵³ It should be noted, however, that loss of confidentiality is to be limited to the situation where it is the client who seeks advice as to improper conduct he will commit in the future. In *Ex parte Enzor*,¹⁵⁴ the client had been an election official in the primary and was to serve in the same capacity during the run-off. He told the attorney either that a third party had offered him a bribe or that he had accepted a bribe and asked the attorney what to do. The attorney replied that he should count the ballots correctly. The court held that confidentiality was not lost. If the client had accepted the bribe, then this would be advice as to past action, to which confidentiality clearly attaches. Since he did not ask the attorney whether he could accept a bribe and avoid detection, it was held that he was not seeking advice as to the commission of future wrongdoing and confidentiality was applicable. On the other hand, if the client is, in fact, seeking advice as to future wrongdoing, confidentiality does not attach, even if the attorney is unaware of the improper purpose.¹⁵⁵

By the same token, where the client does not seek advice as to the future commission of wrongdoing or concealing a crime already committed, the fact that the attorney voluntarily offers advice as to such improper conduct should not destroy confidentiality. In *Clark v. State*,¹⁵⁶ the client had murdered his wife and called his attorney. The

¹⁵¹ See McCormick § 99 and cases cited therein; 8 Wigmore § 2298 and cases cited therein. A case applying the traditional rationale is *Clark v. United States*, 289 U.S. 1 (1932). Note that where the testimony comes from a third party, the client cannot claim the privilege against self-incrimination—this comes in as an admission. *Abbott v. Superior Court*, 78 Cal. App. 2d 19, 177 P.2d 317 (1947).

¹⁵² *In re Koellen's Estate*, 167 Kan. 676, 208 P.2d 595 (1949). The court referred to the communication as pertaining to "actual fraud involving moral turpitude."

¹⁵³ *United States v. Weinberg*, 226 F.2d 161 (3d Cir. 1955), *cert. denied*, 350 U.S. 933 (1956).

¹⁵⁴ 270 Ala. 254, 117 So. 2d 361 (1960).

¹⁵⁵ *In re Selser*, 15 N.J. 593, 105 A.2d 395 (1954). The court found that the attorney was unaware of the illegal purpose and said this was immaterial.

¹⁵⁶ *Supra* note 146.

attorney advised him to conceal the murder weapon. When an eavesdropper sought to testify, it was held that the communication was not privileged since it involved advice as to how the client could safely escape arrest and punishment for a crime he had committed.¹⁵⁷ The reasoning is fallacious. It was the attorney who gave improper advice, not the client who sought it. As Professor Quick has pointed out, "If the privilege is in fact the client's rather than the lawyer's, it should be impossible for the lawyer to destroy it by the kind of advice given."¹⁵⁸ Here, the communication related to the concealing of evidence and the fact was that the client did conceal it. Nonetheless, if the client is to have confidence in what he tells the lawyer, he should not have to be concerned lest the lawyer's improper advice destroy confidentiality.

The general rule, denying confidentiality to requests for advice as to the commission of future wrongdoing, when properly applied, is sound and in accord with the underlying rationale of attorney-client confidentiality. However, explanations of the exception in terms of "perversion of the privilege"¹⁵⁹ or "such advice not falling within the just scope of the attorney-client relationship"¹⁶⁰ or "contrary to social policy"¹⁶¹ are unnecessary. Rather the denial of confidentiality can be justified within the boundaries of the rationale we have suggested. If the client is to obtain legal assistance to effectuate his wrongdoing, he *must* disclose his wrongful intention. If the attorney is part of the conspiracy, then the attorney is a member of the team just as the other conspirators and the "client" is no more inhibited in disclosing the matter to the attorney than to the other members of the conspiracy.¹⁶² It should be noted that the attorney could not be required to testify due to the privilege against self-incrimination, but may voluntarily do so,¹⁶³ or if he has revealed it to a third party, the third party may testify.¹⁶⁴

The rationale is applicable even if the attorney is not a part of the conspiracy. Perhaps in such a situation, the client may believe what he tells the attorney is confidential, but more likely he does not and takes the risk. Persons realize they are taking a risk when they disclose wrongful intentions to anyone, and this is not changed

¹⁵⁷ *Ibid.*

¹⁵⁸ Quick, *supra* note 146, at 541.

¹⁵⁹ McCormick § 99.

¹⁶⁰ 8 Wigmore § 2298, at 572.

¹⁶¹ Model Code of Evidence, comments to rule 212 (1942).

¹⁶² This was the factual situation in *United States v. Weinberg*, *supra* note 153.

¹⁶³ See *ibid.*

¹⁶⁴ This was the factual situation in *Abbot v. Superior Court*, *supra* note 151.

because the party is an attorney. As a practical matter, they probably believe the attorney will go along with the scheme and are not considering the question of confidentiality on the basis of attorney-client relationships.

In any event, in so far as the attorney-client relationship itself is concerned, there is a consideration competing with secrecy. Under Canon 37 it is expressly provided that the announced intention to commit a crime is not a confidence that the attorney is bound to respect. He may properly make such disclosures as are necessary to protect those threatened. A slight extension would include all types of wrongdoing to which the exception is thought to apply, which often constitute crimes as well. This indicates that even at the risk to confidentiality, the attorney may act to prevent crime and wrongdoing. If he may act despite the injury to attorney-client confidentiality, then the policy justifying the sacrifice there would also justify permitting him to disclose the matter at a trial.

However, the reference to the canons indicates what we consider a defect in the present administration of confidentiality as to requests for advice in furtherance of wrongdoing. The Canon gives the lawyer the *privilege* to disclose rather than imposing the duty upon him to do so.¹⁶⁵ This distinction is significant. What if the attorney feels in a particular case where he has advised the client not to commit the wrong that his duty not to disclose outweighs his privilege to disclose? He is an officer of the court and is charged with the responsibility of upholding the dignity of his profession and judicial administration. Should he be required to disclose confidences even though made with a desire for advice as to wrongdoing? In the majority of the cases, it is the attorney who is testifying and the client who is trying to prevent the testimony. In *In re Selser*,¹⁶⁶ however, this was not the case. The attorney refused to testify on the ground that the communication was confidential. His conviction for contempt was upheld on the ground that the communication was not confidential since the client sought advice as to the commission of a crime. The court expressly stated that it was the judge's responsibility and not the lawyer's to decide whether the seal of privacy is to be broken.

It is submitted that the court should respect the lawyer's judgment, since only he understands all the facts surrounding the communication. He has a part to play in the administration of justice and only he can gauge whether the injury to attorney-client relations is outweighed by the injury to the administration of justice resulting

¹⁶⁵ We are using the term in the Hohfeldian sense.

¹⁶⁶ *Supra* note 155.

from nondisclosure. It is submitted that this aspect of Canon 37 become a part of the substantive law and that while the attorney may reveal confidences if the client seeks advice as to the commission of wrongdoing, he should not be compelled to do so. In the long run justice cannot be well-served by compelling attorneys to disclose confidences of "bad clients" where the attorney in good faith believes they should be confidential.

3. *Mutual Attorney*

Where two or more parties consult an attorney, this does not mean that the communication was not intended to be confidential. The parties were not inhibited by the presence of each other, but would be inhibited if they thought what they revealed to the lawyer would be divulged just as if each had approached the attorney singly. It is, therefore, well settled that, as against third parties, such communications are entitled to confidentiality.¹⁶⁷

But the problem arises when these parties subsequently have a falling out and litigation results in which one seeks the testimony of the attorney. He clearly can testify, as the testimony does not involve a confidential matter as between the parties.¹⁶⁸ At the time of the communication they would not be inhibited by each other's presence or knowledge any more than they would be in regard to any other dealing. It could also be contended that the parties impliedly agree that the attorney is to testify as to what actually transpired if they do have a dispute among themselves in the future.¹⁶⁹

It becomes necessary then to determine when, in fact, the attorney was acting for both parties so that the communications are not entitled to confidentiality *inter se*. A common situation is where he represented both parties to a joint venture such as the purchase¹⁷⁰ or management of property,¹⁷¹ or the operation of a business.¹⁷² Often he may be performing the same services for both parties such as the drafting of mutual wills,¹⁷³ a family settlement,¹⁷⁴ the transfer

¹⁶⁷ See, e.g., *Hurlburt v. Hurlburt*, 128 N.Y. 420, 28 N.E. 651 (1891). See generally the discussion in *McCormick* § 95.

¹⁶⁸ *Ibid.*

¹⁶⁹ See *Henke v. Iowa Mutual Casualty Co.*, 249 Iowa 614, 87 N.W.2d 920 (1958). This involved an insured and an insurer, where the insurer supplied the attorney.

¹⁷⁰ *In re Buckhardt's Estate*, 129 N.Y.S.2d 34 (Surr. Ct. 1954).

¹⁷¹ *Jenkins v. Jenkins*, 151 Neb. 113, 36 N.W.2d 637 (1949).

¹⁷² *Graham v. Williams*, 166 A.2d 412 (R.I. 1961); *Evans v. Evans*, 8 Utah 2d 26, 327 P.2d 260 (1958).

¹⁷³ *Eicholtz v. Grunewald*, 313 Mich. 666, 21 N.W.2d 914 (1946).

¹⁷⁴ *Walker v. Mason*, 75 Ga. App. 229, 43 S.E.2d 116 (1947).

of property from one to the other,¹⁷⁵ or representing them in litigation.¹⁷⁶

There are some situations where the attorney is held not to be acting for both despite appearances that he may be. In *Beacom v. Daley*,¹⁷⁷ the parties transferred property from one to another and only one attorney was involved. The court, however, held that he may not have been the attorney for both and that this was a question of fact. If he were not the attorney for both, then confidentiality would be applicable in regard to what the party who was his client revealed. In *Nelson v. Glidewell*,¹⁷⁸ the plaintiff called an attorney at the request of a husband and wife, who allegedly made a contract to execute mutual wills and then to devise the property to the plaintiff upon the death of the survivor. The attorney spoke to the husband and wife out of the presence of the plaintiff. Plaintiff sought to introduce the attorney's testimony as to what transpired in that conference on the ground that he was the mutual attorney. The court quite properly held the communications confidential. Here the plaintiff merely called the attorney. More significantly, they spoke to the attorney privately, which indicated they desired it to be confidential as against the plaintiff. They might have been inhibited if she had been present, so the normal confidentiality is applicable. Similarly, in *Russell v. Second Nat'l Bank of Patterson*,¹⁷⁹ where the attorney was not simultaneously acting for both parties and *neither knew he was acting for the other*, it was held he was not the mutual attorney. The lack of knowledge negated the intention that what was told should not be confidential against the other.

The "intention to keep the matter confidential from the other" justifies the conclusion that what the insured or the insurer tells the insurer's attorney is not intended to be confidential against the other.¹⁸⁰ The insured considers that he and the insurer "are in the same boat"; that is, their interests in the transaction are the same. Neither, then, is inhibited in what he tells the attorney for fear the other may discover it; indeed, he will as freely transmit it to the other and, as we have seen, communications to the insurer are considered communications to an attorney.¹⁸¹

¹⁷⁵ *La Barge v. La Barge*, 284 App. Div. 996, 135 N.Y.S.2d 317 (1954); *Potter v. Potter*, 35 Wash. 2d 788, 215 P.2d 704 (1950).

¹⁷⁶ *Grosberg v. Grosberg*, 269 Wis. 165, 68 N.W.2d 725 (1955).

¹⁷⁷ 164 Neb. 120, 81 N.W.2d 907 (1957).

¹⁷⁸ 155 Neb. 372, 51 N.W.2d 892 (1952).

¹⁷⁹ 136 N.J.L. 270, 55 A.2d 211 (E. & A. 1947).

¹⁸⁰ See the discussion of this point in *McCormick* § 95.

¹⁸¹ See note 46 *supra* and accompanying text.

In the area of mutual attorney, the cases are in accord with the underlying rationale of confidentiality and the courts have been most realistic in their approach.

4. *Waiver*

Since confidentiality is granted for the client's benefit, he may, of course, choose to waive the protection attorney-client confidentiality seeks to afford. It may be waived expressly or by failing to assert confidentiality when testimony involving such a communication is introduced at a trial in which the client is a party.¹⁸² It may be waived by the client's guardian¹⁸³ or by the client's personal representative upon his decease.¹⁸⁴ It has also been urged that the client could waive confidentiality by contract,¹⁸⁵ which is sound, since like any interest, the client may dispose of it for consideration. If the client does not desire such protection and has no objection to the matter being disclosed, the rationale given for confidentiality is consistent with this waiver.

It is the concept of implied waiver which is most troublesome and which furnishes courts, which may be basically unsympathetic to confidentiality, with an opportunity to severely restrict it. It is in this area of implied waiver that the "immoral nature" of concealing relevant evidence comes into focus. The two aspects of implied waiver involve the giving of testimony and disclosure of the subject matter of the communication to third persons.

The client does not waive confidentiality merely by taking the stand.¹⁸⁶ But if he testifies to some matters and reveals what he communicated to the attorney in part, the balance of the communication as to the same matter is deemed waived.¹⁸⁷ This really relates to the right of the opponent to cross-examine.¹⁸⁸ Thus if the client admits he told the attorney he was going 65 miles-per-hour, he cannot object on cross-examination if the defendant asks him if he did not also tell the attorney it was in a 50-mile zone. This does not mean that everything he told the attorney as to other matters, *e.g.*, that his hospital bills were a certain amount of money, is waived, but

¹⁸² See, *e.g.*, *Balazinski v. Lebid*, 34 N.J. 277, 168 A.2d 209 (1961).

¹⁸³ See, *e.g.*, *Lietz v. Primcock*, 84 Ariz. 273, 327 P.2d 288 (1958).

¹⁸⁴ See, *e.g.*, *Scott v. Grinnell*, 102 N.H. 490, 161 A.2d 179 (1960).

¹⁸⁵ Model Code of Evidence rule 231; Uniform Rule of Evidence 37.

¹⁸⁶ See, *e.g.*, *State v. Pusch*, 77 N.D. 860, 46 N.W.2d 508 (1950).

¹⁸⁷ See, *e.g.*, *Steen v. First Nat'l Bank*, 298 Fed. 36 (8th Cir. 1924); *Houser v. Frank*, 186 Kan. 455, 350 P.2d 801 (1960).

¹⁸⁸ See the discussion of this point in 8 Wigmore § 2327, at 636.

only that the defendant may cross-examine him as to what is necessary to complete the story of what he did reveal.

As with the client, the attorney's taking the stand and testifying should not constitute a waiver as to all matters revealed to him. However, Dean Wigmore suggests and Professor McCormick agrees that if the attorney testifies as to matters revealed to him by the client, confidentiality is waived as to *all* matters communicated by the client—even as to those unrelated to the attorney's testimony.¹⁸⁹ Professor McCormick notes that there is authority both ways.¹⁹⁰ The rationale is that the attorney should not be both a witness and an advocate, and the client's calling him as a witness constitutes a waiver of confidentiality which attaches only to his role as an advocate. But as far as the client is concerned, the attorney is still his attorney. What he disclosed to him was disclosed in confidence. Granted that ordinarily the attorney should not testify except as to purely formal matters,¹⁹¹ circumstances may make it necessary for the attorney to testify—or perhaps he is just imprudent. In either situation, it cannot be contended that the client intended to waive confidentiality. In fairness to the opponent, he must be given the right to cross-examine the attorney on the communication as to which he testified. The result should be the same as where the client testifies—the attorney can be cross-examined as to the matter he revealed, but not as to other matters revealed to him in confidence.

Where the client¹⁹² or the attorney¹⁹³ has testified to the communication in a past action, confidentiality is obviously waived as to that matter in future actions. The intention to abandon confidentiality has been demonstrated and it cannot be recalled in the future.

Some courts have been very unrealistic in cases which have held that revelation of the subject matter to third parties constitutes a waiver *without considering whether the third party was such that the client would assume it would be kept confidential*. Both the Uniform Rules and the Model Code state that disclosure to anyone constitutes a waiver.¹⁹⁴ The problem is the same as where a third party is present during the making of the communication to the attorney. If under the circumstances the client assumed that what he

¹⁸⁹ *Ibid.* See also McCormick § 97.

¹⁹⁰ McCormick § 97, at 198 n.13 and cases cited therein.

¹⁹¹ See Canon of Professional Ethics 19.

¹⁹² See, e.g., *Agnew v. Superior Court*, 156 Cal. App. 2d 838, 320 P.2d 158 (1958); *Gibson v. Florida Legislative Investigation Comm.*, 108 So. 2d 729 (Fla. 1958).

¹⁹³ See, e.g., *Matison v. Matison*, 95 N.Y.S.2d 837 (Sup. Ct. 1950), *aff'd*, 227 App. Div. 700, 97 N.Y.S.2d 550 (1950).

¹⁹⁴ Model Code of Evidence rule 231; Uniform Rule of Evidence 37.

said would be confidential, we have contended that confidentiality should attach despite the presence of the third party. Again, we will use the example of the spouse. Revealing the communication to the spouse would not constitute a waiver because it could not be revealed by the spouse. However, from the client's standpoint, he may assume that revealing the communication to certain other persons will in no way impair confidentiality; therefore, he does not intend that the attorney shall not keep confidentiality.

In *Solon v. Lichtenstein*,¹⁹⁵ the court blindly stated that disclosure to a third party constituted a waiver of attorney-client confidentiality, as the client "did not regard the statements as confidential upon repetition to the attorney." But the statements were made to a lifelong friend and to his granddaughter! This would not seem to support the conclusion that he did not intend them to be confidential so far as the attorney was concerned. It was not as if he announced them at a lodge meeting.

In *State v. Loponio*,¹⁹⁶ on the other hand, the court found there was no waiver, even though the party to whom the communication was revealed was a complete stranger to the client. The basis was that the client had to reveal the statement to the third party, which was not inconsistent with an intent that it be kept confidential by the attorney. The client was indicted for murder and desired to communicate with an attorney, but could not write in English. He dictated a letter to a fellow prisoner for transmittal to the attorney. The court, drawing an analogy to the interpreter situation, concluded that there was an intention to employ the attorney, so that what was revealed to him should be confidential.

The most realistic approach was taken by the court in *People v. Kor*,¹⁹⁷ since there the court looked to the client's intention with regard to confidentiality by the attorney irrespective of the fact that he revealed the communication to others. It was contended that the communication was not confidential because the defendant had previously said the same things to police officers who were interrogating him. A person may say things at that time out of fear. This does not mean that he does not expect the same statements to be protected from disclosure by his attorney. The court found that he regarded his conversation with the attorney as confidential and observed:

It seems clear that Kor regarded his conference with his attorney as confidential and that he did not intend that his attorney should

¹⁹⁵ 39 Cal. 2d 75, 244 P.2d 907 (1952).

¹⁹⁶ 85 N.J.L. 358, 88 Atl. 1045 (E.&A. 1913).

¹⁹⁷ 129 Cal. App. 2d 436, 277 P.2d 94 (1954).

be a witness against him even to repeat any statements that Kor had made to the officers. It cannot be said that, merely because Kor's conversation with his attorney included statements previously made to officers, he did not regard his conversation with his attorney as confidential and privileged.¹⁹⁸

The question then should be whether the communication to the third person was made under such circumstances that, either due to the relationship between the client and third person (in which he assumed confidentiality) or the conditions or necessity for making such statement to them, he did not intend that what he revealed to the attorney should be disclosed.

A related problem involves communications made by a corporation through its officials to its attorney, which are also a matter of corporate record. In *Schaffer v. Below*,¹⁹⁹ the court brushed aside the contention that this constituted a waiver. The fact is that such records are rarely inspected, even by stockholders, and thus do not demonstrate an intent that the attorney should not keep the communication confidential. If the matter has not been disclosed to anyone outside the corporate confidence according to the corporate procedure, no intent that the attorney should not keep the matter confidential should be inferred.²⁰⁰

To the extent that the court looks to the client's state of mind when he revealed the matter to the attorney and his state of mind when he revealed it to a third person, it is apt to arrive at a sound result. If the circumstances were such that disclosure to the third party would not be inconsistent with an intent to keep the matter confidential as regards the attorney, the court should not find a waiver.

5. *Actions Involving Succession to Client's Property*

It is stated as a general proposition that attorney-client confidentiality is inapplicable in a suit to determine succession to the client's property. Therefore, the attorney can be required to disclose all matters relating to the property. The theories supporting such a view are varied. One is that since all parties are claiming under the decedent, none can invoke confidentiality against the other.²⁰¹ Another

¹⁹⁸ *Id.* at 443, 277 P.2d at 98.

¹⁹⁹ 278 F.2d 619 (3d Cir. 1960).

²⁰⁰ See the discussion of this point in Simon, "The Attorney-Client Privilege as Applied to Corporations," 65 Yale L.J. 953, 985 (1956).

²⁰¹ See *In re Breese's Estate*, 7 Wis. 2d 422, 96 N.W.2d 712 (1959); *Seeba v. Bowden*, 86 So. 2d 432 (Fla. 1956); *Gaines v. Gaines*, 207 Okla. 619, 251 P.2d 1044 (1952); *Forbes v. Volk*, 358 P.2d 942 (Wyo. 1961). As to the effect of this on the

view that has been expressed is that since the client has no interest after his death, confidentiality belongs to his heirs and legatees, any one of whom can waive it.²⁰² Dean Wigmore suggests that confidentiality was intended to be temporary only and, therefore, does not survive the death of the client.²⁰³ Professor McCormick would extend Wigmore's concept of temporary confidentiality to any situation where the decedent's property is involved, even though the parties are not claiming under him. Confidentiality, he states, is personal only.²⁰⁴

Dean Wigmore's analysis comes closest to the underlying rationale of attorney-client confidentiality, but falls short when sought to be extended to all situations involving such property, for, as will be demonstrated, there are circumstances where the decedent intended confidentiality to be applicable in post-mortem disputes over his property.

As indicated previously, the attorney can testify to the execution of a will where he is an attesting witness. This is not considered a communication within the meaning of attorney-client confidentiality as the attestation is made for the purpose of being revealed.²⁰⁵ He may testify as to the client's intention and as to the construction of the will.²⁰⁶ Again, this is material the testator did not intend to be confidential. The attorney is the person whom he would expect to aid in the construction of the will; this might be an additional reason for having the attorney draft the will rather than attempting a "do-it-yourself" job. By the same token he may testify that the client destroyed his will, a fact the client revealed to the attorney to lend authenticity to the act of destruction.²⁰⁷

However, it is conceivable that the decedent revealed matters to the attorney that he did not wish disclosed even after his death, relating to his property. Since, if he had known they would be subject to disclosure, he might not have revealed them to the attorney, the underlying rationale of attorney-client confidentiality would prevent their disclosure even if all parties were claiming under the

representation of a claimant by the testator's attorney, see *In re Kemp's Will*, 236 N.C. 680, 73 S.E.2d 906 (1953); *Cochran v. Cochran*, 333 S.W.2d 635 (Tex. Civ. App. 1960).

²⁰² See *Bradway v. Thompson*, 139 Ark. 542, 214 S.W. 27 (1919); Platz, "The Competency of Attorneys and Physicians to Disclose Privileged Communications in Testamentary Cases," 1939 Wis. L. Rev. 339, 343 (1939).

²⁰³ 8 Wigmore § 2314, at 612.

²⁰⁴ McCormick § 98.

²⁰⁵ And, therefore, is like any information intended to be revealed to third parties; the client is not inhibited by assurances of confidentiality.

²⁰⁶ See, e.g., *Stappas v. Stappas*, 271 Ala. 138, 122 So. 2d 393 (1960); *Webb v. Webb*, 116 Utah 155, 209 P.2d 201 (1949).

²⁰⁷ See, e.g., *Saliba v. Saliba*, 202 Ga. 791, 44 S.E.2d 744 (1947).

decident. This has been recognized in a case where all parties were not claiming under the decedent. In *De Loach v. Meyers*,²⁰⁸ the party seeking to call the attorney claimed she had an oral contract with decedent to execute a will in her favor. It was held that what the decedent told the attorney relating to such a contract was confidential. If the decedent claimed there was no contract, his interest would be adverse to that of the plaintiff. As in any other situation, he consulted the attorney for legal advice and would not want what he said disclosed by the lawyer. The fact that he was dead and the suit involved succession to his property is irrelevant²⁰⁹ when the underlying rationale of attorney-client confidentiality is considered.

The same rationale may justify confidentiality even when all parties to the dispute are claiming under the decedent. In *In re Karras's Estate*,²¹⁰ the attorney was not permitted to testify as to communications made by the client to him in proceedings to probate an alleged lost will of the decedent. There was no issue as to which it was evident that the client would have desired the attorney to testify. By not telling the attorney that he had a lost will (which fact he wanted revealed), the client indicated that he wanted the attorney to keep confidential all matters relating to his property. By the same token it has been held that statements by the client as to the legitimacy of his daughter were not admissible in a suit to deny the child's right to inherit.²¹¹ Her illegitimacy, if any, apparently was not a fact he wanted revealed. This was equally true in a proceeding by the executor to discover property allegedly held by the decedent's joint tenant.²¹² There was no question of construction of the instrument or the like, and the communication did not involve a matter that the client would have clearly wanted revealed after his death.

As to the attorney's testifying to the decedent's mental capacity or undue influence, the attorney should be permitted to testify that the client was *competent* or that he was *not* under the influence of another, but not the converse; that is, he can testify in favor of the will's validity, but not against it. We have previously concluded that

²⁰⁸ 215 Ga. 255, 109 S.E.2d 777 (1959).

²⁰⁹ See also *In re Smith's Estate*, 263 Wis. 441, 57 N.W.2d 727 (1953). There the niece of the deceased husband was asserting a claim against the estate of the deceased wife for property the wife received under the husband's will on the ground that he contracted to leave such property to the niece. It was properly held that communications by the wife to her attorney were to be confidential. Obviously, she assumed they would not be revealed in a suit by persons against her estate.

²¹⁰ 109 Ohio App. 403, 166 N.E.2d 781 (1959).

²¹¹ *In re Olson's Estate*, 73 N.Y.S.2d 876 (Surr. Ct. 1947).

²¹² *In re Duke's Will*, 202 Misc. 446, 108 N.Y.S.2d 875 (Surr. Ct. 1951).

the client's actions and the like by which the attorney arrives at a judgment as to competency of the client constitute a communication within the meaning of attorney-client confidentiality. Persons may be inhibited in their statements if they think the attorney can draw a conclusion that they are of unsound mind and reveal it. Moreover, since some people are aware they may be considered "peculiar," they might not consult an attorney to prepare a will for them if they did not believe he could not reveal their "peculiarities."

Therefore, they did not intend for him to reveal these matters after their death, as with any other communication. Many courts permit the attorney to testify that the client was of sound mind or that he was free from undue influence on the ground that confidentiality is inapplicable after the client's death where all parties claim under him.²¹³ The result is proper, since the client intended that the attorney testify in favor of his competency. As stated previously, an additional reason for going to an attorney is to lend his authenticity to the client's mental state. The reasoning, however, is dangerous when it is employed, as it was in *In re Alexander's Will*,²¹⁴ to permit the attorney to testify to the client's lack of competency. The qualification that the testimony "not disgrace the memory of the deceased" does not meet the objection that the decedent did not intend the attorney to reveal his mental condition. A more realistic approach was followed by the court in *Taylor v. Sheldon*.²¹⁵ There the attorney was summoned to prepare a will, but left without doing so. Presumably he concluded the client was not competent. In a will contest, he was not permitted to testify as to the decedent's mental capacity. The court observed that the purpose of attorney-client confidentiality was to permit complete freedom of disclosure and that "communication" meant "to make known." Here the client consulted the attorney and made known to him various matters including his mental condition, as could be observed from his statements and acts. Since he was entitled to assume all these statements and acts were subject to confidentiality, the attorney was not permitted to disclose them, even though all parties were claiming under the client.

It must be remembered, therefore, that statements such as "confidentiality was intended to exist only during the client's lifetime when all persons are claiming under him" are erroneous and unsound. The

²¹³ See, e.g., *Canty v. Halpin*, 294 Mo. 96, 242 S.W. 94 (1922); *Olsson v. Pierson*, 237 Iowa 1342, 25 N.W.2d 357 (1946); *Warner v. Kerr*, 216 Mich. 139, 184 N.W. 425 (1921); *In re Kemp's Will*, *supra* note 201; *Boyd v. Kilmer*, 285 Pa. 533, 132 Atl. 709 (1926).

²¹⁴ 205 Misc. 894, 130 N.Y.S.2d 648 (Surr. Ct. 1954).

²¹⁵ 172 Ohio St. 118, 173 N.E.2d 892 (1961).

intention was that the attorney should reveal all matters necessary to carry out the desires of the client—the execution of a will, the competency of the client, the destruction of a will and the like—but not that he reveal matters the client did not want disclosed. The criterion is the client's state of mind as to the particular communication, not the circumstances in which the issue of attorney-client confidentiality arises. It is immaterial that all parties are claiming under the client if the communication involves a matter the client assumed the attorney would not reveal.

6. *Use by the Attorney*

It is the general rule that confidentiality does not exist when there is an issue as to the attorney's breach of duty.²¹⁶ This is applicable where the client is suing the attorney, *e.g.*, for a fee or for malpractice,²¹⁷ in disbarment proceedings against the attorney,²¹⁸ or in any situation where the attorney's proper performance of his duty is brought into question, such as where a new attorney moves for a new trial on grounds of the incompetency of the former attorney.²¹⁹

The reason is not that "it would be unjust to permit confidentiality"²²⁰ or that "confidentiality has been waived,"²²¹ but simply that the client would not assume the attorney would not reveal what was disclosed to him in order to defend himself. At the time of the communication, the client does not expect controversy to arise between him and the attorney, so he is not inhibited by the thought that the attorney will reveal the communication. Moreover, if he was thinking about this, he would realize that he must make the disclosures in order to obtain advice and would have to take the risk of revelation upon a subsequent dispute. Lack of confidentiality here can be explained as being consistent with the rationale of attorney-client confidentiality.

CONCLUSION

In this article we have attempted to examine the rationale of attorney-client confidentiality and once established, to comment on the present state of the law in light of the criteria furnished by the rationale. The rationale is that it is socially desirable with a view

²¹⁶ Model Code of Evidence rule 213(b).

²¹⁷ *Have v. Baird*, 12 Ind. 318 (1859).

²¹⁸ *State v. Markey*, 259 Wis. 527, 49 N.W.2d 437 (1951).

²¹⁹ *Everett v. Everett*, 319 Mich. 475, 29 N.W.2d 919 (1947). See *Browning v. Potter*, 129 Colo. 477, 271 P.2d 418 (1954).

²²⁰ As stated in *State v. Markey*, *supra* note 218.

²²¹ As stated in *Everett v. Everett*, *supra* note 219.

toward effective functioning of attorney-client relationships to assure the client of secrecy in his communications with the attorney. We have concluded that people expect such secrecy and would be inhibited if it were not assured—with resultant detriment to the furnishing of proper legal advice. Therefore, all questions must be determined with reference to whether permitting the disclosure of the particular communication under the circumstances would tend to impair the effective functioning of the attorney-client relationship, as the client would be inhibited from revealing vital matters to the attorney for fear of disclosure by him.

We have deliberately, even slavishly, avoided the use of the term, "attorney-client privilege." This is because we think it undesirable that the question be phrased in terms of a "privilege" for the attorney to keep the confidences of his client. Rather, it is submitted that all communications from client to attorney intended by the client to be kept secret are entitled to confidentiality. If this results in the exclusion of evidence—which can be proved by other means, though this may require greater effort on the part of opposing counsel—then this is a price we willingly pay for effective attorney-client relationships. There are other values to be fostered than the admissibility of every piece of relevant evidence. To the extent that the courts are conscious of protecting attorney-client relationships, they should examine the underlying rationale of confidentiality and employ sound criteria to determine whether the *admission of evidence* is privileged despite a claim of attorney-client confidentiality.