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The Attorney-Client Privilege

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NOTE

THE ATTORNEY-CLIENT PRIVILEGE

I. INTRODUCTION

A. *History and Background of the Privilege*

History suggests that the attorney-client privilege is the oldest of the evidentiary privileges.[1] It probably arose at common law during the 1500's, concurrent with the right to trial by jury.[2] Judges initially viewed the privilege as a vindication of "*the oath and the honor* of the attorney."[3] However, during the late 1700's, courts began to assert that the privilege's purpose was to encourage clients to make full disclosure to their counsel, by "*providing subjectively for the client's freedom of apprehension.*"[4] In 1871, the Virginia Supreme Court[5] stated that "[i]f the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skillful person, or would only dare to tell his counsel half his case."[6] Today, courts continue to state that the benefits of full disclosure justify the privilege, and frequently assert that without such full disclosure an attorney may not be able to adequately advise his client.[7]

Although the attorney-client privilege has been established for hundreds of years under the common law, many states have enacted attorney-client privilege statutes.[8] The federal courts continue to follow the common law rules for the privilege in cases involving federal law.[9] However, in diversity cases,[10] federal courts must use the applicable state

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1. 8 J. WIGMORE, EVIDENCE § 2290 (J. McNaughton ed. 1961).
2. *Id.*
3. *Id.* (emphasis in original).
4. *Id.* (emphasis in original).
5. Chahoon v. Commonwealth, 62 Va. (21 Gratt.) 822 (1871).
6. *Id.* at 838.
7. *See* Upjohn Co. v. United States, 449 U.S. 383, 389-92 (1981); Fisher v. United States, 425 U.S. 391, 403 (1976). *See generally* 8 J. WIGMORE, *supra* note 1, § 2291.
8. *See, e.g.*, CAL. EVID. CODE §§ 950-62 (West 1966); FLA. STAT. ANN. § 90.502 (West 1979); *see also* 8 J. WIGMORE, *supra* note 1, § 2292.
9. The following rule applies in federal court cases:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, . . . shall be determined in accordance with State law.

FED. R. EVID. 501.

10. When the federal court's jurisdiction is based on diversity, state law provides the rule of decision. However, if the federal court's jurisdiction is based on a federal regulation, statute, or the United States Constitution, the federal law provides the rule of decision. *See, e.g.*, Richards of Rockford, Inc. v Pacific Gas & Elec. Co., 71 F.R.D. 388 (N.D. Cal. 1976); *see*

privilege statute or the state's rules derived from common law. Virginia has not codified the privilege, possibly because the attorney-client privilege is so well entrenched in the common law that no statute on point is necessary.[11]

This note will review the attorney-client privilege,[12] focusing in part on Virginia's interpretation of the privilege. The privilege will be defined and the necessary elements explained. Exceptions to the privilege and the client's ability to waive the privilege will also be discussed. The note will also review two controversial uses of the privilege: the protection of client identity and fee information,[13] and the attorney's knowledge of instrumentalities of a crime.[14] The note will conclude with a summary of current views regarding the scope of the privilege.

B. *General Definition of the Privilege*

There are eight essential components of the attorney-client privilege:

> (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.[15]

The claimant has the burden of proving that the elements of the privilege

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also FED. R. EVID. 501. The United States Supreme Court proposed a codification of the common law in regard to the privilege. Proposed FED. R. EVID. 503. However, Proposed Rule 503 was not adopted by Congress. *See* Note, *Confidential Communication Privileges Under Federal and Virginia Law*, 13 U. RICH. L. REV. 593 (1979). If Rule 503 had been passed, the federal courts would be compelled to apply it in all federal court cases, including diversity cases. *Id.* at 595. Although Rule 503 was never adopted, it has been cited as persuasive authority. *See, e.g.*, United States v. McPartlin, 595 F.2d 1321, 1336-37 (7th Cir. 1979) (asserting that Proposed Rule 503 is a useful guide to federal courts in developing the common law).

11. Virginia still relies on the common law in determining its application. *See Chahoon*, 62 Va. (21 Gratt.) at 836 ("'There is no rule of law better settled than 'that a counsel, solicitor or attorney shall not be permitted to divulge any matter which has been communicated to him in professional confidence.' '") (quoting 2 STARKIE, EVIDENCE 395).

12. Topics related to the attorney-client privilege, such as the work product doctrine of evidence, are beyond the scope of this note. The work product doctrine provides a qualified privilege for writings which are prepared in anticipation of litigation. It differs from the attorney-client privilege in that it is a qualified privilege which may not protect the material if good cause is shown, *see* FED. R. CIV. P. 26, whereas the attorney-client privilege, once established, is absolute unless waived by the client. *See* Hickman v. Taylor, 329 U.S. 495 (1974).

13. *See infra* notes 104-207 and accompanying text.

14. *See infra* notes 208-95 and accompanying text.

15. NLRB v. Harvey, 349 F.2d 900, 904 (4th Cir. 1965) (quoting 8 J. WIGMORE, *supra* note 1, § 2292).

are satisfied.[16] Once proved, the privilege belongs to the client and not to the attorney,[17] and may be waived only at the client's option.[18] It does not cease merely because the attorney-client relationship has ended. The attorney-client privilege applies regardless of whether the communication is sought to be put in evidence by direct examination, cross-examination, "or *indirectly as by bringing out facts brought to knowledge solely by reason of a confidential communication.*"[19] Both the attorney's and the client's testimony regarding a confidential consultation are privileged.[20] A court will not compel a litigant or his attorney to testify even if the failure to reveal the confidential communication impedes the administration of justice.[21]

In *In re Shargel*,[22] the Court of Appeals for the Second Circuit stated that "[t]he underlying theory . . . is that encouraging clients to make the fullest disclosure to their attorneys enables the latter to act more effectively, justly, and expeditiously, and that these benefits outweigh the risks posed by barring full revelation in court."[23] However, since the attorney-client privilege prevents disclosure of relevant evidence and impedes the quest for truth,[24] "it must be strictly construed within the narrowest possible limits consistent with the logic of its principle."[25] The Supreme Court has stated that the privilege will be applied only when necessary to achieve its purpose of protecting the confidential relation-

16. *See In re* Shapiro, 381 F. Supp. 21, 22 (N.D. Ill. 1974); *see also* Robertson v. Commonwealth, 181 Va. 520, 540, 25 S.E.2d 352, 360 (1943) ("Since exemption from production is the exception and not the rule, the burden is on the party claiming the privilege to show that he is entitled to it. His mere assertion that the matter is confidential and privileged will not suffice.").

17. *See* Parker v. Carter, 18 Va. (4 Munf.) 273, 287 (1814); *see also* Hunter v. Kenney, 77 N.M. 336, 442 P.2d 623 (1967) (holding that the privilege is the client's alone and that the attorney has an affirmative duty to assert it unless it is waived by the client). *But cf.* United States v. King, 536 F. Supp. 253 (C.D. Cal. 1982) (holding that an attorney could raise the privilege as a defense to an obstruction of justice charge). *See generally* 8 J. WIGMORE, *supra* note 1, § 2327.

18. *See* Virginia State Bar v. Gunter, 212 Va. 278, 287, 183 S.E.2d 713, 719 (1971) (citing Grant v. Harris, 116 Va. 642, 648-49, 82 S.E. 718, 719 (1914)).

19. State v. Sullivan, 60 Wash. 2d 214,___, 373 P.2d 474, 476 (1962) (emphasis in original) (quoting 58 AM. JUR. *Witnesses* § 466 (1948)).

20. *See* 8 J. WIGMORE, *supra* note 1, § 2324, and cases cited therein.

21. *See Gunter*, 212 Va. at 287, 183 S.E.2d at 719.

22. 742 F.2d 61 (2d Cir. 1984).

23. *Id.* at 62 (quoting J. WEINSTEIN & M. BERGER, EVIDENCE ¶ 503(02) (1982)); *see also* C. MCCORMICK, EVIDENCE § 87, at 205 (3d ed. 1984) (someone criminally accused may withhold acknowledgment of guilt in fear of his counsel's compelled testimony); 8 J. WIGMORE, *supra* note 1, § 2291, at 554.

24. *See In re* Grand Jury Proceedings (Jones), 517 F.2d 666, 671-72 (5th Cir. 1975) ("The purpose of the privilege—to suppress truth—runs counter to the dominant aims of the law.").

25. 8 J. WIGMORE, *supra* note 1, § 2291, at 554 (footnote omitted).

ship between the attorney and client.[26]

II. Scope of the Privilege

A. *Legal Services*

1. Defining "Legal Services"

The attorney-client privilege generally requires that a communication be made to an attorney[27] in anticipation of his employment. However, the communication may be privileged even if his employment does not follow.[28] Furthermore, the fact that no payment is made for the legal services does not necessarily negate the privilege.[29]

The attorney-client privilege will apply to both communications concerning litigation and communications regarding legal advice not pertaining to litigation. In *NLRB v. Harvey*,[30] the Fourth Circuit Court of Appeals held that the privilege extends to communications concerning an opinion of law, general legal services, or assistance in some legal proceeding.[31] The *Harvey* opinion provides general guidance for attorneys in asserting the privilege, but it does not address specific instances of when the privilege is inapplicable. Therefore, most jurisdictions have adopted more specific rules in deciding what constitutes legal services.

For example, where an attorney merely drafts an agreement, such as a deed, which embodies the parties' intent, most courts have held the privilege inapplicable because the attorney's professional role is minimal.[32] In

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26. Fisher v. United States, 425 U.S. 391, 403 (1976).

27. A question arises, however, as to whether the privilege applies when a person mistakenly confides in a person he believes to be an attorney, but who in fact is not. Although there is a split of authority, the better view appears to be that such a communication is privileged. *E.g.*, C. McCormick, *supra* note 23, § 88, at 208 n.2 (citing People v. Barker, 60 Mich. 277, 27 N.W. 539 (1886) (confession to a detective pretending to be an attorney held privileged)). *But cf.* Dabney v. Investment Corp. of America, 82 F.R.D. 464 (E.D. Pa. 1979) (communication to an unsupervised law student was not privileged). The Virginia Supreme Court has not yet addressed this issue.

28. Baird v. Koerner, 279 F.2d 623, 635 (9th Cir. 1960).

29. *See* Hodge v. Garten, 116 W. Va. 564, ___, 182 S.E. 582, 583 (1935) (where an attorney provided substantial services for a client, the fact that the client did not pay for all of the services did not render the privilege inapplicable in regard to the services not paid for).

30. 349 F.2d 900 (4th Cir. 1965).

31. *Id.* at 905.

32. *See, e.g.*, Cranston v. Stewart, 184 Kan. 99, ___, 334 P.2d 337, 340 (1959). *But cf.* Hodge v. Garten, 116 W. Va. 564, ___, 182 S.E. 582, 583 (1935) (the privilege applies to communications involving the drafting of a deed). It has also been held that when an attorney is acting as an accountant, the privilege does not apply. *In re* Shapiro, 381 F. Supp. 21, 22-23 (N.D. Ill. 1974) (asserting, however, that the privilege does apply with regard to the preparation of tax forms, if the preparation is combined with significant other legal services rendered by an attorney). *See generally* C. McCormick, *supra* note 23, § 88; 81 Am. Jur. 2d *Witnesses* § 182 (1976).

Virginia, the prevailing view is that as long as an attorney is acting in the line of his profession, he is bound by the privilege.[33] Thus in *Parker v. Carter*,[34] the Virginia Supreme Court held that an attorney employed to draft a deed was performing legal services and was therefore bound to conceal the facts disclosed by his client.[35] However, in *Cook v. Hayden*,[36] the court noted that other jurisdictions view an attorney preparing a deed as a "mere scrivener," and hold that the privilege does not apply.[37] Since *Parker* is over a century old,[38] and is against the weight of modern authority, the Virginia Supreme Court may overrule *Parker* and hold the privilege inapplicable where the attorney is acting as a "mere scrivener."

2. Who Receives Legal Services: The Corporate Client

The corporate setting creates special problems in deciding whether the attorney-client privilege applies. Traditionally, when corporate employees communicated with the corporation's attorney, the privilege only extended to those employees within the "control group" of the corporation.[39] However, in *Upjohn Co. v. United States*,[40] the United States Supreme Court rejected the control group test and asserted that the privilege could apply to lower echelon employees. The Court held that such employees may assert the privilege if they possess important information which an attorney must know in order to adequately advise the corporation.[41]

In *Upjohn*, the Court enumerated six factors to be considered in decid-

33. Parker v. Carter, 18 Va. (4 Munf.) 273, 285-86 (1814).

34. *Id.*

35. *Id.* at 285.

36. 183 Va. 203, 31 S.E.2d 625 (1944).

37. *Id.* at 224, 31 S.E.2d at 633. In *Cook*, the Virginia Supreme Court avoided the issue of whether preparing a deed constitutes legal services, and held that the privilege did not apply because of the presence of the adverse party at the time of the communication. *Id.* at 224, 31 S.E.2d at 634. For a discussion of the effects of a third person's presence during communications, see *infra* notes 69-86 and accompanying text.

38. It was decided in 1814.

39. Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 400-01 (E.D. Va. 1975) (the "control group" test should be applied). Under the "control group" test, communications by an employee of the corporation will be privileged only where the "communicant [is] in a position to control or take a substantial part in a decision about any action to be taken upon the advice of the lawyer, or [where] the communicant [is] a member of the group having such authority." *Id.* at 400. However, some jurisdictions believed that the "control group" formulation was overly restrictive and adopted various forms of a "subject matter" test. This test asserts that if the employee is acting in the scope of his employment and makes communications at the direction of his superiors, the privilege applies. Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970), *aff'd per curiam by an equally divided Court*, 400 U.S. 348 (1971); Marriott Corp. v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497, ___, 277 S.E.2d 785, 791-92 (1981).

40. 449 U.S. 383 (1981).

41. *Id.* at 391-92.

ing whether the privilege applies.[42] However, the Court did not explain the significance of the factors and failed to articulate any firm guidelines for their application.[43] Further, the *Upjohn* decision is limited to cases arising under federal question jurisdiction, leaving the state courts free to determine how far the privilege extends in the corporate context.[44]

B. *Subject Matter of the Privilege*

Once an attorney-client relationship exists and the attorney performs legal services, an attorney must consider the scope of the privilege. The general rule is that the privilege applies only to confidential communications.[45] Courts have interpreted this rule to include both the communications made by the client to the attorney and the attorney's statements in response to the client's communications.[46] Otherwise, "the compelled disclosure of an attorney's communications or advice to the client [would] effectively reveal the substance of the client's confidential communication to the attorney."[47]

Since the privilege depends on a communication, considerable authority holds that the privilege applies only to words spoken by the client and not to an attorney's observation of the client's physical and mental state.[48] Furthermore, in *Parsons v. Commonwealth*,[49] the Virginia Supreme Court held that a prosecutor's question about the employment of counsel for a co-defendant charged with the same offense did not require

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42. The factors which the Court considered in determining that the privilege was applicable in *Upjohn* were that (1) the communications were made by Upjohn employees at the direction of corporate superiors, (2) so that Upjohn could receive legal advice from counsel; (3) the communications concerned matters within the scope of the employee's duties (4) which were not available from upper-level directors; (5) the employees were told the purpose of the communications; and (6) the communications were considered confidential when made and were not disseminated outside the corporation. Note, *The Attorney-Client Privilege and the Corporate Client: Where Do We Go After* Upjohn?, 81 MICH. L. REV. 665, 673 n.20 (1983) (citing *Upjohn*, 449 U.S. at 394).

43. *Id.* at 673 (citing *Upjohn*, 449 U.S. at 394).

44. See the discussion of FED. R. EVID. 501, *supra* note 10 and accompanying text. The Virginia Supreme Court has also held that "[a] statement by the accredited agent of a corporation, giving his account of how an accident occurred, and given for the use of counsel in pending or threatened litigation is likewise privileged." Robertson v. Commonwealth, 181 Va. 520, 25 S.E.2d 352, 360 (1943) (suggesting that the corporation's privilege may extend to communications made by any accredited agent of the corporation).

45. *See supra* text accompanying note 15.

46. United States v. King, 536 F. Supp. 253, 260-61 (C.D. Cal. 1982) (citing United States v. Ramirez, 608 F.2d 1261, 1268 n.12 (9th Cir. 1979)).

47. *King*, 536 F. Supp. at 261 (quoting *In re* Fischel, 557 F.2d 209, 211 (9th Cir. 1977)).

48. *See; e.g.*, Cook v. Hayden, 183 Va. 203, 224, 31 S.E.2d 625, 633-34 (1944) (identifying prior cases that limited the attorney-client privilege to the client's verbal communications; case decided on different grounds).

49. 154 Va. 832, 152 S.E. 547 (1930).

the client to disclose a confidential communication to an attorney.[50] The court reasoned that since the client was not required to disclose anything he had said to his own attorney, the privilege did not apply.[51] Finally, the privilege usually does not apply to questions concerning the identity of the client and the payment of fees for legal services.[52]

The applicability of the privilege to an attorney's receipt of client documents presents a special situation. The general rule with regard to such documents is that "*[w]hen the client himself would be privileged* from production of the document, either as a party at common law . . . or as exempt from self incrimination, the attorney having possession of the document is not bound to produce."[53] However, if the client himself could have been compelled to produce the document, the attorney may also be compelled to do so.[54] In *Robertson v. Commonwealth*,[55] the Virginia Supreme Court asserted that an accident report compiled by a client, for the bona fide purpose of later being transmitted to an attorney for advice regarding pending or anticipated litigation, is privileged.[56] The court held that "such [a] statement is itself a part of the communication from the client to his counsel."[57] However, the court noted that an accident report prepared in the ordinary course of the client's business was not privileged, whether in possession of the client or the attorney.[58] This rule advances the purpose of the privilege by encouraging full disclosure while preventing a client from protecting nonprivileged documents by merely handing them over to his attorney.[59]

The evidentiary privilege applied to written documents is also applicable to tangible evidence and instrumentalities of a crime.[60] Thus, if a client turns over such evidence, the attorney may be compelled to produce

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50. *Id.* at 849, 152 S.E. at 553.

51. *Id.*

52. *See infra* notes 104-207 and accompanying text.

53. Fisher v. United States, 425 U.S. 391, 404 (1975) (quoting 8 J. WIGMORE, *supra* note 1, § 2307) (emphasis in original).

54. *Id.* at 403-04 (numerous citations omitted).

55. 181 Va. 520, 25 S.E.2d 352 (1943).

56. *Id.* at 539-40, 25 S.E.2d at 360.

57. *Id.* at 539, 25 S.E.2d at 360 (citing 8 J. WIGMORE, *supra* note 1, § 2318, at 677).

58. *Id.* at 540, 25 S.E.2d at 360. As already noted, the person claiming the privilege has the burden of proving it. *See supra* note 16 and accompanying text. To determine if an accident report or other document is a communication from client to attorney, the court should consider the client's intent *at the time the report was written.* If it was compiled in the ordinary scope of business with no intention of being transmitted to an attorney, it does not become a communication even though at some later date it does communicate to the attorney the circumstances surrounding the incident. *See id.* at 539, 25 S.E.2d at 360.

59. *See Fisher*, 425 U.S. at 403-04; *see also* People v. Ryan, 40 Ill. App. 2d 352, 189 N.E.2d 763 (1963) (a statement given by an insured to his insurer, when the insurance company had a duty to defend, was privileged), *rev'd on other grounds*, 30 Ill. 2d 456, 197 N.E.2d 15 (1964).

60. *See infra* notes 208-95 and accompanying text.

it because it was not privileged while in the client's possession.[61]

Although an attorney may be compelled to produce tangible evidence of a crime, communications in regard to a crime which has already been committed are privileged.[62] On the other hand, the privilege does not extend to communications made while contemplating a crime or perpetrating a fraud.[63] In *Virginia State Bar v. Gunter*,[64] a commonwealth's attorney allegedly agreed to represent the plaintiff in a civil suit prior to the civil defendant's pleading guilty to a criminal charge involving the same incident.[65] The Virginia Supreme Court held that communications made by the commonwealth's attorney to his lawyer prior to a disciplinary proceeding were not privileged because such communications "were made in the furtherance of an intended fraud on the [bar] committee."[66]

C. *The Confidentiality Requirement*

Generally, the attorney-client privilege will apply only if the communication was confidential,[67] and will not apply where the communication was made to an attorney for purposes of public disclosure.[68] Also, the privilege may not apply when the communication was made to, or in the presence of, a third person.[69] For example, in *Cook v. Hayden*,[70] the Vir-

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61. *See In re* Ryder, 263 F. Supp. 360, 366 (E.D. Va. 1967). *Ryder*'s distinction between fruits and instrumentalities of a crime, which may be seized while in the client's possession, and "mere evidence", which may not be seized, is no longer valid. Shortly after the holding in *Ryder*, the United States Supreme Court held that "mere evidence" was subject to a reasonable seizure. Warden v. Hayden, 387 U.S. 294, 300-10 (1967). The logical extension of *Ryder*'s rationale is that an attorney may be compelled to produce "mere evidence" which his client gives him.

62. *See, e.g.*, State v. Douglas, 20 W. Va. 770 (1882) (holding that it was reversible error for an attorney to testify as to where a client told him a weapon could be found). *See generally* Annot., 16 A.L.R.3D 1029 (1967) (citing numerous cases).

63. *See, e.g.*, Codgill v. Commonwealth, 219 Va. 272, 276, 247 S.E.2d 392, 395 (1978); Virginia State Bar v. Gunter, 212 Va. 278, 287, 183 S.E.2d 713, 719 (1971); *see also* United States v. King, 536 F. Supp. 253, 261 (C.D. Cal. 1982) ("[A] client cannot invoke the privilege where the desired legal advice relates not to the client's past wrongdoing, but to his intended or continuing criminal conduct."). *But cf.* McNeill v. Thomas, 203 N.C. 219, ___, 165 S.E. 712, 714 (1932) (rejecting exception on the basis of disclosure of contemplated acts not clearly criminal).

64. 212 Va. 278, 183 S.E.2d 713 (1971).

65. *Id.* at 279, 183 S.E.2d at 714.

66. *Id.* at 288, 183 S.E.2d at 719-20 (attorney's attempt to postdate letter evidencing conflict of interest revealed by communications). Furthermore, the Virginia court asserted that this exception to the privilege applies even if the client did not disclose his fraudulent purpose to his attorney at the time of the communication. *Id.* at 287, 183 S.E.2d at 719.

67. *See supra* text accompanying note 15; *see also* Cook v. Hayden, 183 Va. 203, 224, 31 S.E.2d 625, 633-34 (1944) (a communication made in the presence of the client's adverse party was not confidential and therefore not privileged).

68. *See* State v. Sullivan, 60 Wash. 2d 214, ___, 373 P.2d 474, 476 (1962).

69. *See Cook*, 183 Va. at 224, 31 S.E.2d at 633-34.

70. 183 Va. 203, 31 S.E.2d 625.

ginia Supreme Court held that where the grantee was present at an interview which took place between the grantor and his attorney, and the grantee testified as to what occurred at the interview, the attorney-client privilege did not exist. Therefore, the attorney's testimony concerning the interview was properly admitted.[71] Furthermore, a communication by one party to an opposing party's attorney is not privileged.[72]

A difficult question arises when a third person, of whom the client is unaware, hears the client's communication. Under such circumstances, most courts have ruled that the eavesdropper may testify.[73] McCormick suggests that if the client used reasonable precautions to prevent being overheard, the eavesdropper, as well as the attorney, should be prevented from testifying.[74] However, the majority view generally ignores the circumstances of the conversation.[75]

There are several other possible exceptions to the general rule that a third person's presence destroys the privilege. In *Chahoon v. Commonwealth*,[76] the Virginia Supreme Court asserted that a statement made by a defendant to his co-defendants' attorneys was privileged.[77] The court also held that the co-defendants' communications to their attorneys, in the defendant's presence, were privileged.[78] Furthermore, the privilege

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71. *Id.* at 224, 31 S.E.2d at 633-34; *cf.* Atlantic & N.C.R. Co. v. Atlantic & N.C. Co., 147 N.C. 368, ___, 61 S.E. 185, 192 (1908) (communications to a lawyer representing one party to a lease negotiation are not privileged when they involve a fact necessarily known to both parties).

72. *See, e.g.*, Hall v. Rixey, 84 Va. 790, 794 (1888) (communications made by an assignor to the assignee's attorney were not privileged); *cf.* Virginia-Lincoln Furniture Corp. v. Southern Factories & Stores Corp., 162 Va. 767, 784-85, 174 S.E. 848, 855 (1934) (communication by a client to his attorney was not privileged when the client knew that the attorney had previously worked for the opposing party and the parties were originally working together for their common advancement).

73. *See, e.g.*, Commonwealth v. Griffen, 110 Mass. 181 (1872) (conversation overheard by concealed officers); Clark v. State, 159 Tex. Crim. 187, 261 S.W.2d 339 (1953) (long distance telephone call between attorney and client overheard by the operator); *cf.* State v. Sullivan, 60 Wash. 2d 214, ___, 373 P.2d 474, 475-76 (1962) ("Although a third party overhearing a conversation between an attorney and client may testify, the attorney is not thereby qualified."). *But see* Parker v. Carter, 18 Va. (4 Munf.) 273 (1914) (a statement made in a crowded courthouse was privileged).

74. C. McCormick, *supra* note 23, § 74.

75. *See* cases cited *supra* note 73.

76. 62 Va. (21 Gratt.) 822 (1871).

77. *Id.* at 843; *see also* United States v. McPartlin, 595 F.2d 1321, 1335-36 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979) (statements made by a co-defendant to defendant's attorney's investigator were privileged).

78. *Chahoon*, 62 Va. (21 Gratt.) at 841-42. The Virginia court asserted:

> They had the same defence to make, the act of one in furtherance of the conspiracy, being the act of all, and the counsel of each was in effect the counsel of all, though, for purposes of convenience, he was employed and paid by his respective client. They had a right, all the accused and their counsel, to consult together about the case and the defence, and it follows as a necessary consequence, that all information, derived

generally applies if the communication is made to the attorney's or client's agent if the agent is employed to aid the attorney in rendering legal services to the client.[79] Thus, the privilege will protect communications made to the attorney's clerk,[80] stenographers,[81] and private investigators.[82]

However, one Virginia case found the privilege inapplicable to communications made by a client to the client's or attorney's agent. In *Jones v. Commonwealth*,[83] the Virginia Supreme Court held that the defendant's communication to a polygraph expert employed by the defendant was not privileged.[84] The court never mentioned the attorney-client privilege but emphasized that the defendant had initiated the request for the test.[85] This decision has been criticized on the basis that the defendant perceived the polygraph test as private and arranged for the session to aid his attorney in rendering legal services.[86]

III. LIMITATIONS

A. *Waiver*

The attorney-client privilege will not apply where the client, by his conduct, waives his right to assert the privilege.[87] An express waiver of the privilege is easy to determine. However, implied waivers can be a pit-

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> by any of the counsel from such consultation, is privileged, and the privilege belongs to each and all of the clients, and cannot be released without the consent of all of them.

Id. at 842.

79. *See, e.g.*, United States v. Kovel, 296 F.2d 918 (2d Cir. 1961) (presence of accountant hired by lawyer or client while client is relating a complicated tax story to the lawyer does not destroy attorney-client privilege); Foley v. Poschke, 137 Ohio St. 593, ___, 31 N.E.2d 845, 846 (1941) ("The general rule that communications between an attorney and his client in the presence of a third person are not privileged does not apply when such third person is the agent of either the client or the attorney.").

80. 8 J. WIGMORE, *supra* note 1, § 2301.

81. *Id.*

82. *McPartlin*, 595 F.2d at 1335-36; *see also* People v. Meredith, 29 Cal. 3d 682, ___, 631 P.2d 46, 50-51, 175 Cal. Rptr. 612, 616-17 (1981) (the privilege is not terminated if an attorney tells his investigator the contents of the client's communications); *cf.* NLRB v. Harvey, 250 F. Supp. 639, 640-41 (W.D. Va. 1966) (the privilege applies to an attorney's advice to a client to hire an investigator since such advice constitutes legal services). Further, "the *attorney-client* privilege can be invoked to prevent a physician to whom the client was sent by his attorneys for examination, as distinguished from advice and treatment, from divulging the results of the examination." San Francisco Unified School Dist. v. Superior Court, 55 Cal. 2d 451, ___, 359 P.2d 925, 927, 11 Cal. Rptr. 373, 375 (1961) (emphasis in original).

83. 214 Va. 723, 204 S.E.2d 247 (1974).

84. *Id.* at 725-27, 204 S.E.2d at 249-50.

85. *Id.* at 725, 204 S.E.2d at 249.

86. *Nineteenth Annual Survey of Developments in Virginia Law: 1973-1974*, 60 VA. L. REV. 1542, 1547-48 (1974).

87. Grant v. Harris, 116 Va. 642, 648-49, 82 S.E. 718, 719 (1914).

fall for clients. Certain actions, such as alleging inadequacy of counsel and testifying at trial, may constitute an unintentional implied waiver.[88]

If a client attacks his attorney's conduct, he waives the privilege, and the attorney may testify regarding privileged communications in order to defend himself.[89] Where a prisoner files a petition for habeas corpus based upon inadequacy of counsel, the Virginia Code provides that the privilege is waived "to the extent necessary to permit a full and fair hearing for the alleged grounds."[90]

Generally, when a party testifies as to communications with his attorney, he has waived the privilege and has no grounds for objection if the other party calls the attorney to the stand.[91] However, if the party offers his own testimony concerning matters other than communications made to his attorney, there is no waiver of the privilege, and neither the party nor his attorney must testify regarding confidential communications.[92] Similarly, calling the attorney to the stand does not result in a waiver unless the attorney is questioned as to the privileged matter.[93]

B. *Death of the Client*

The Virginia court has had several occasions to consider whether the client's death affects the attorney-client privilege. The issue arises most often when a court must decide whether an attorney may testify regarding the meaning of his client's will. In *Hugo v. Clark*,[94] the client testator

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88. *See* 8 J. WIGMORE, *supra* note 1, § 2327.

89. Pruitt v. Peyton, 243 F. Supp. 907, 909 (E.D. Va. 1965) (where the client filed a petition for habeas corpus on the grounds of inadequate counsel, the attorney could testify in regard to the services he supplied).

90. VA. CODE ANN. § 8.01-654 (Repl. Vol. 1984).

91. Grant v. Harris, 116 Va. 642, 650, 82 S.E. 718, 720 (1914); *see also* Duplon Corp. v. Deering Milliken Research Corp., 397 F. Supp. 1146, 1162 (D.S.C. 1974) (once a party testifies as to part of a communication, fairness requires that the privilege should not apply even though the party did not intend to waive it). *But cf.* Tate v. Tate's Ex'r, 75 Va. (1 Matt.) 522, 532-33 (1881) (even if a party responds to questions concerning privileged information during cross-examination, the opposing party cannot call his attorney to testify). *See generally* 8 J. WIGMORE, *supra* note 1, § 2327; Annot., 51 A.L.R.2D 521 (1957) and cases cited therein.

92. *See* 8 J. WIGMORE, *supra* note 1, § 2327 ("The client's offer of his *own testimony* in the cause *at large* is not a waiver for the purpose either of cross-examining him to the communications or of calling the attorney to prove them." (emphasis in original)).

93. *Tate's Ex'r*, 75 Va. (1 Matt.) at 533 (dicta). According to Dean Wigmore,

> [t]he client's offer of the *attorney's testimony* in the cause at large is not a waiver so far as the attorney's knowledge has been acquired casually as an ordinary witness. But otherwise it is a waiver for, considering that the attorney ought in general not to be used as a witness, the client ought to be discouraged from utilizing his attorney in double and inconsistent capacities . . . .

8 J. WIGMORE, *supra* note 1, § 2327 (citation omitted) (emphasis in original).

94. 125 Va. 126, 99 S.E. 521 (1919).

originally devised all of his property to Clark. The client then directed his attorney to draft a second will in which he devised all of his property to charity. Before dying, the client revoked the second will. Clark claimed that since the second will was revoked, he was entitled to the property. The client's heirs claimed that the testator intended to invalidate the first will when he wrote the second will and that they were entitled to the property by operation of law. The trial court held that the testator's attorney, who had drawn up the second will, could not testify concerning the effect of the second will.[95] The Virginia Supreme Court reversed and held that the privilege did not apply in a will contest to an attorney who had participated in the preparation and execution of what is alleged to be a last will.[96]

In *Eason v. Eason*,[97] the issue was whether an attorney, whose relationship with the testatrix had terminated prior to her death, and who had not been involved in drawing her will, could testify as to the testatrix's capacity. The Virginia Supreme Court stated that even if such testimony should have been admitted, it was merely cumulative.[98] The court thereby avoided the attorney-client privilege issue and decided the case under the harmless error rule.[99]

Other courts have reached different conclusions regarding the effect of the client's death on the attorney-client privilege. Some courts, without differentiating between types of claimants, have held that no privilege exists once the testator dies and that therefore the testator's attorney may testify concerning the will's contents.[100] Such courts either view the attorney's role in drafting a will as that of a mere scrivener[101] or consider client confidentiality as intended to be only temporary.[102] However, other courts have held that the privilege may be invoked against claimants adverse to the interests of the deceased client, his estate, or his successors.[103]

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95. *Id.* at 127-28, 99 S.E. at 521-22.

96. *Id.* at 135, 99 S.E. at 524.

97. 203 Va. 246, 123 S.E.2d 361 (1962).

98. *Id.* at 254, 123 S.E.2d at 367.

99. *Id.* Arguably, once the client dies, the privilege should no longer apply in any instance. It is doubtful that such a rule would inhibit full disclosure to any substantial degree. Furthermore, courts have frequently stated that because of the privilege's tendency to suppress the truth, it should be narrowly construed. *See, e.g.*, Virginia-Lincoln Furniture Corp. v. Southern Factories & Stores Corp., 162 Va. 767, 784, 174 S.E. 848, 855 (1934). *See generally* 8 J. WIGMORE, *supra* note 1, § 2291, at 554.

100. *See, e.g.*, Adams v. Flora, 445 S.W.2d 420, 422 (Ky. 1969); Seeba v. Bowden, 86 So. 2d 432, 434 (Fla. 1956); Saliba v. Saliba, 202 Ga. 791, ___, 44 S.E.2d 744, 753 (1947).

101. *See* Note, *Wills and the Attorney-Client Privilege*, 14 GA. L. REV. 325, 330 (1979-80). For a discussion of the "mere scrivener" rule, see *supra* text accompanying notes 32-38.

102. *See* Note, *supra* note 101, at 331.

103. *See, e.g.*, Glover v. Patton, 165 U.S. 394, 406 (1897) (dicta); Emerson v. Scott, 39 Tex. Civ. App. 65, ___, 87 S.W. 369, 369-70 (1905) (asserting that although the privilege may

C. *Subject Matter of the Attorney-Client Relationship*

A significant factor underlying the availability of the attorney-client privilege has been the *purpose* for which the attorney seeks protection against disclosure. The context of attorney-client communications may influence some courts to recognize the privilege in order to preserve the client's reasonable expectation of confidentiality. Conversely, society's interests in the swift administration of justice, in free access to information, or in the prevention of future harm may lead the courts to place severe limitations on the availability of the privilege.

Conflicting interests of confidentiality and disclosure are particularly acute in the criminal context. A criminal defendant may have his liberty and his reputation at stake during a trial. Consequently, his attorney must force the prosecutor to prove every aspect of the criminal charge and will zealously protect against disclosure of incriminating communications. However, if such information can prevent the commission of future crimes, courts may find the privilege inapplicable under the circumstances.

IV. Application of the Attorney-Client Privilege to Client Identity and Fee Information

A. *General Disclosure Requirements for Client Identity and Fee Information*

Generally, information regarding a client's identity or fee information is not protected by the attorney-client privilege.[104] Where the issue has arisen, most courts have held that neither the client's identity nor the payment of fees is a confidential communication between the attorney

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not apply if all parties to the action claim property through the will, it may be asserted by the client's heirs, representatives and devisees against a party not claiming through the will or under the testator).

104. For cases stating the general rule, see *In re* Shargel, 742 F.2d 61, 62 (2d Cir. 1984); *In re* Witness Before The Special March 1980 Grand Jury, 729 F.2d 489, 491 (7th Cir. 1984); Phaksuan v. United States (*In re* Osterhoudt), 722 F.2d 591, 593 (9th Cir. 1983); Schofield v. United States, 721 F.2d 1221, 1222 (9th Cir. 1983); *In re* Grand Jury Proceedings (Freeman), 708 F.2d 1571, 1575 (11th Cir. 1983); Lahodny v. United States (*In re* Marger/Merenbach), 695 F.2d 363, 365 (9th Cir. 1982); Waxman v. United States (*In re* Sales), 695 F.2d 359, 361 (9th Cir. 1982); *In re* Grand Jury Proceedings (Twist), 689 F.2d 1351, 1352 (11th Cir. 1982); *In re* Grand Jury Proceedings (Pavlick), 680 F.2d 1026, 1027 (5th Cir. 1982); *In re* Special Grand Jury No. 81-1 (Harvey), 676 F.2d 1005, 1009 (4th Cir. 1982); United States v. Hodge & Zweig, 548 F.2d 1347, 1353 (9th Cir. 1977); *In re* Grand Jury Proceedings (Jones), 517 F.2d 666, 670-71, *reh'g denied*, 521 F.2d 815 (5th Cir. 1975); NLRB v. Harvey, 349 F.2d 900, 904 (4th Cir. 1965); Colton v. United States, 306 F.2d 633, 637-38 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); Baird v. Koerner, 279 F.2d 623, 630-31 (9th Cir. 1960); United States v. Pape, 144 F.2d 778, 782 (2d Cir.), *cert. denied*, 323 U.S. 752 (1944). *See also* C. McCormick, *supra* note 23, § 90.

and his client.[105] Despite this general rule, some courts have held that the client's identity and fee information are privileged under certain circumstances.[106]

The case most often cited for the exception is *Baird v. Koerner*.[107] Courts influenced by *Baird* have recognized that the rule excluding client identity and fee information from the protection of the privilege is a flexible one.[108] Subsequent cases, however, have misstated the *Baird* rule, thereby creating considerable confusion as to when the privilege will apply.[109]

The *Baird* decision and its progeny may be explained by two rationales supporting nondisclosure of client identity and fee information: the incrimination rationale and the confidential communication rationale.[110] McCormick has stated that

> [i]t is arguable that the decisions following *Baird* . . . [have] blazed a false trail in making the exceptions to the rule turn largely upon the severity of potential harm to the client rather than upon the question whether the protection afforded works in aid of a legitimate function of the attorney in his professional role.[111]

This part of the note will first examine the confidential communication rationale supporting the *Baird* decision. Second, it will discuss the cases following *Baird* and reliance on the incrimination rationale. Third, this section will review the recent decisions that have strongly criticized the incrimination rationale and have reasserted the confidential communication rationale underlying *Baird*. Finally, this section will discuss the impact these decisions will have on the attorney-client privilege and on the relationship between the attorney and his client.

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105. *See generally supra* note 1.

106. *See supra* notes 7-9 and accompanying text.

107. 279 F.2d 623 (9th Cir. 1960).

108. *See* C. McCormick, *supra* note 23, § 90, at 216.

109. *See, e.g., Osterhoudt*, 722 F.2d at 593 ("[A]ppellant's confusion as to the meaning of the exception is based upon a misstatement of the *Baird* rule in subsequent opinions.").

110. The distinctions between reliance on the incrimination rationale or on the confidential communication rationale are subtle. As the *Shargel* court stated,

> [W]e have consistently held that client identity and fee information are, absent special circumstances not privileged. This result follows from defining the privilege to encompass only those confidential communications necessary to obtain informed legal advice. This definition, which focuses upon facilitating the role of the lawyer as a professional advisor and advocate, is to be distinguished from the so-called "incrimination rationale," which focuses upon whether the materials sought may be used as evidence against the client.

Shargel, 742 F.2d at 62 (citation omitted).

111. C. McCormick, *supra* note 23, § 90, at 216 (footnotes omitted).

B. *The Baird Decision*

In *Baird v. Koerner*,[112] an attorney sent a check to the IRS on behalf of certain unnamed clients.[113] He indicated that it had been determined that additional taxes were due.[114] The IRS then subpoenaed the attorney to compel him to reveal his clients' identities.[115] Asserting the attorney-client privilege, the attorney refused to answer the subpoena.[116]

The Ninth Circuit held that the clients' identities were privileged.[117] The court adopted a careful, case-by-case analysis and held, "[i]f the identification of the client conveys information which ordinarily would be conceded to be part of the usual privileged communication between attorney and client, then the privilege should extend to such identification in the absence of other factors."[118] In *Baird*, disclosure of the clients' identities would have revealed not only their names but also that they owed taxes.[119] Under these circumstances, the disclosure of the clients' identities would have revealed confidential communications between the clients and their attorney, including the clients' motivations for seeking legal advice.[120]

The court also stated in dicta that the disclosure of a client's identity "may well be the link that could form the chain of testimony necessary to convict an individual of a federal crime."[121] It is important to note that the court's decision, however, is based upon the fact that so much information had already been disclosed that revelation of the clients' identities would have disclosed a confidential communication.[122]

C. *Development of the Incrimination Rationale*

The development of the incrimination rationale for nondisclosure of client identity and fee information began with the Fifth Circuit's decision in

112. 279 F.2d 623 (9th Cir. 1960).
113. *Id.* at 626.
114. *Id.*
115. *Id.* at 627.
116. *Id.*
117. *Id.* at 633.
118. *Id.* at 632.
119. *Id.* at 630.
120. *See generally* J. WIGMORE, *supra* note 1, at § 2291 (the ultimate motive for seeking legal advice should be privileged).
121. *Baird*, 279 F.2d at 633 (footnote omitted).
122. *Id.* at 631-32; *see also* NLRB v. Harvey, 349 F.2d 900 (4th Cir. 1965) (relying on *Baird* and holding that revealing the client's name would have disclosed a confidential communication). *Harvey* also expanded the *Baird* rule when it stated that, "[t]he privilege may be recognized when so much of the actual communication has already been disclosed [not necessarily by the attorney, but by independent sources as well] that identification of the client amounts to disclosure of a confidential communication." *Id.* at 905.

United States v. Jones.[123] The *Jones* decision initiated a judicial shift from the confidential communication rationale announced in *Baird* to an emphasis on the incrimination rationale.[124]

In *Jones*, six criminal attorneys from south Texas were subpoenaed before a grand jury investigating the alleged narcotics and income tax violations of certain named individuals.[125] The subpoenas directed the attorneys to bring with them all records, retainer agreements, books, and receipts showing payment of attorney's fees for the accounts of specific, named clients who had either recently been convicted of or were then under arrest or indictment for large-quantity marijuana offenses.[126] The prosecutor stated that he sought the information from the attorneys because he had other information that certain individuals had paid large fees to their attorneys while reporting small incomes to the IRS.[127] The attorneys refused to answer the subpoenas, asserting the attorney-client privilege. They were subsequently held in contempt of court.[128]

Relying on *Baird*, the Fifth Circuit stated that the attorney-client privilege should apply when "so much of the substance of the communications is already in the government's possession that additional disclosures would yield *substantially probative links in an existing chain of inculpatory events or transactions*."[129] The court held that prosecutors could not summon attorneys before the grand jury to obtain client names or fee information when that information would be useful to the government for the sole purpose of corroborating or supplementing incriminating information already possessed by the government.[130]

The Fifth Circuit later took the incrimination rationale in *Jones* one step further in *In re Grand Jury Proceedings (Pavlick)*.[131] In *Pavlick*, an attorney refused to tell a federal grand jury the name of the individual who had paid him money for representing three defendants in a drug conspiracy case. The attorney asserted that his disclosure of the fee informa-

123. 517 F.2d 666 (5th Cir. 1975).

124. *See infra* text accompanying note 129.

125. *Jones*, 517 F.2d at 668-69.

126. *Id.* at 668.

127. *Id.* at 673. The government counsel stated that "[t]he problem is this: Mr. A. says he made twenty-thousand dollars, but in fact he paid these attorneys thirty thousand in a particular year of unreported income and unreported expenses. It is conceivable that there may be income tax violations." *Id.*

128. *Id.* at 669.

129. *Id.* at 674 (emphasis added).

130. *Id.* at 672 (quoting *Baird*, 279 F.2d at 633).

131. 680 F.2d 1026 (5th Cir. 1982) (en banc). See also Comment, *The Attorney-Client Privilege As a Protection of Client Identity: Can Defense Attorneys Be The Prosecution's Best Witnesses?*, 21 AM. CRIM. L. REV. 81 (1983), for a thorough analysis of the *Pavlick* decision.

tion would violate the attorney-client privilege and result in his client's indictment.

The *Pavlick* court recognized the general obligation of an attorney to disclose client identity and fee information, but the court refused to require disclosure and relied on the rationale in *Jones*.[132] The court stated that the privilege would apply "when the disclosure of the client's identity by his attorney would have supplied the *last link* in the existing chain of *incriminating evidence* likely to lead to the client's indictment."[133] The *Pavlick* court's reasoning for the incrimination rationale varied significantly from the standard announced in *Jones*, which had required that the evidence need be only a "substantially probative link."[134]

The Ninth Circuit adopted another variation of the incrimination rationale in the case of *United States v. Hodge & Zweig*.[135] In *Hodge & Zweig*, two attorneys were summoned by the IRS and directed to produce various fee information pertaining to a named client.[136] The attorneys refused, asserting the attorney-client privilege,[137] and the district court ordered their compliance.

The Ninth Circuit, relying on *Baird*, reversed the district court, stating that "[a] client's identity and the nature of that client's fee arrangements may be privileged where the person invoking the privilege can show that a strong probability exists that disclosure of such information would implicate that client in the very criminal activity for which legal advice was sought."[138] This "legal advice" exception relied on the incrimination rationale, rather than the confidential communication rationale actually announced in *Baird*.

These three decisions following *Baird* adopted variations of the rationale, even though the *Baird* court expressly relied on the confidential com-

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132. *Pavlick*, 680 F.2d at 1027. The grand jury granted immunity to the defendants and each waived his right to claim the attorney-client privilege. Each defendant stated that he did not know who posted bond or who was paying Pavlick. *Id.* One defendant stated that when he was recruited for the drug-smuggling venture, he was promised that he would be taken care of if arrested. *Id.*

133. *Pavlick*, 680 F.2d at 1027 (emphasis added). The court refers specifically to *Jones* when stating this rule.

134. *Jones*, 517 F.2d at 674; *see also Pavlick*, 680 F.2d at 1033 (Politz, J., dissenting) (asserting that the majority opinion's reliance on *Jones* for the standard was misplaced).

135. 548 F.2d 1347 (9th Cir. 1977).

136. *Id.* at 1349. The fee information sought was (1) payments from the client for his own defense, (2) payment from the client for the defense of others, and (3) records of payments received from any other persons on behalf of the client.

137. *Id.* at 1350-51. The attorneys also asserted a fifth amendment claim that the court rejected. *Id.* at 1351.

138. *Id.* at 1353 (citing *Baird*, 279 F.2d at 630).

munication rationale. This use of multiple rationales in applying the attorney-client privilege to client identity and fee information situations has created considerable confusion among the federal circuits.[139]

D. *Recent Criticism of the Incrimination Rationale*

In four recent circuit court decisions the incrimination rationale has been strongly criticized.[140] These cases suggest that the confusion as to the meaning of the exception and the development of the incrimination rationale are based upon a misstatement of the *Baird* rule.[141]

In *In re Osterhoudt*,[142] a grand jury subpoena directed an attorney to disclose the amounts and dates of payments of fees by a named client.[143] The government sought the information for possible income tax and controlled substance prosecutions.[144] The district court denied the motion to quash and the client appealed.[145]

The client asserted the "legal advice" exception[146] as announced in *Hodge & Zwieg*.[147] He stated the exception should apply because he hired the attorney to represent him in the very same grand jury investigation for which the information was sought.[148] The Ninth Circuit rejected the "legal advice" rationale and held that "[f]ee arrangements usually fall outside the scope of the privilege simply because such information ordinarily reveals no confidential professional communication between attorney and client, and *not because such information may not be incriminating*."[149]

The Ninth Circuit stated that subsequent cases have mistakenly formulated the *Baird* exception to the general disclosure requirement.[150] The

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139. *See* cases cited *supra* note 104.

140. *See In re* Shargel, 742 F.2d 61 (2d Cir. 1984); *In re* Witnesses Before The Special March 1980 Grand Jury, 729 F.2d 489 (7th Cir. 1984); *In re* Osterhoudt, 722 F.2d 591 (9th Cir. 1983); *In re* Grand Jury Investigation No. 83-2-35, 723 F.2d 447 (6th Cir. 1983).

141. *March 1980 Grand Jury*, 729 F.2d at 492-93; *Osterhoudt*, 722 F.2d at 593; *Grand Jury Investigation* No. 83-2-35, 723 F.2d at 452-54.

142. 722 F.2d 591 (9th Cir. 1982).

143. *Id.* at 592.

144. *Id.*

145. *Id.*

146. *Id.*

147. 548 F.2d 1347 (9th Cir. 1977); *see also supra* notes 135-38 and accompanying text.

148. *Osterhoudt*, 722 F.2d at 592.

149. *Id.* at 593 (emphasis added).

150. *Id.* The court referred to the following language in *Baird*:

> The name of the client will be considered privileged matter where the circumstances of the case are such that the name of the client is material only for the purpose of showing an acknowledgement of guilt on the part of such client of the very offenses on account of which the attorney was employed . . . .

Baird, 279 F.2d at 633 (quoting 97 C.J.S. *Witnesses* § 283(e) (1957)).

court noted that "[t]he principle of *Baird* was not that the privilege applied because the identity of the client was *incriminating*, but because in the circumstances of the case disclosure of the identity of the client was in substance a disclosure of the *confidential communication* . . . ."[151]

In *In re Witnesses Before the Special March 1980 Grand Jury*,[152] the Seventh Circuit also rejected the use of the incrimination rationale in connection with disclosure of fee information.[153] The attorneys in the case had refused to produce fee information on their client to a grand jury.[154] The district court held that because the fee information might become a link in a chain of evidence which might incriminate the client, the attorney-client privilege prevented the production of the information.[155]

The Seventh Circuit reversed the district court decision and held that "[b]ecause the attorney-client privilege protects only confidential communications, we decline the . . . invitation to adopt a rule protecting any fee information which might incriminate the client."[156] The court also stated that a "client's identity or fee arrangement may be privileged where so much is already known that the identity or fees would reveal the client's confidential communication that he or she may, for example, have been involved in specific criminal conduct."[157]

In criticizing the incrimination rationale, the court noted that the mere possibility that fee information might incriminate the client does not transform such information into a confidential communication.[158] The court explained that "[t]he fact that the information is incriminating may provide all parties with their motives to seek its disclosure or protection; however, the application of the privilege turns not upon incrimination *per se* but upon whether disclosure would in effect reveal information which has been confidentially communicated."[159]

The Sixth Circuit also rejected the incrimination rationale in *In re Grand Jury Investigation No. 83-2-35*.[160] The case arose out of a Federal Bureau of Investigation inquiry into the theft of numerous checks drawn on fictitious corporations. The FBI had traced one of the checks to the attorney's law firm.[161] The attorney, asserting the attorney-client privilege, refused to disclose the identity of the client to whose credit the pro-

151. *Osterhoudt*, 722 F.2d at 593 (emphasis added).
152. 729 F.2d 489 (7th Cir. 1984).
153. *Id.* at 494.
154. *Id.* at 490. All three attorneys acknowledged representing the same person.
155. *Id.*
156. *Id.* at 494-95.
157. *Id.* at 494.
158. *Id.* at 492.
159. *Id.* at 494.
160. 723 F.2d 447 (6th Cir. 1983).
161. *Id.* at 448.

ceeds had been applied.[162] The attorney informed the court that disclosure of his client's identity could implicate that client in criminal activity, and that therefore, he was justified in invoking the attorney-client privilege.[163]

The Sixth Circuit reviewed the cases which had developed the incrimination rationale.[164] The court rejected the "last link" exception articulated in *Pavlick*, stating that "the exception is simply not grounded upon the preservation of confidential *communications* and hence not justifiable to support the attorney-client privilege."[165] The court also noted that "[a]lthough the last link exception may promote concepts of fundamental fairness against self-incrimination, these concepts are not proper considerations to invoke the attorney-client privilege."[166] The court concluded that the "last link" exception "has no roots in concepts of confidential communication [and cannot] support an abdication of the general rule . . . ."[167]

The most recent decision criticizing the incrimination rationale is *In re Shargel*.[168] In *Shargel*, a federal grand jury issued a subpoena requiring an attorney, Mr. Shargel, to produce records of any monies or property transferred to him by or on behalf of ten named individuals.[169] Eight of the ten had been recently indicted for violating the Racketeer Influenced and Corrupt Organization Act.[170] The government stated that it sought the information as evidence of unexplained wealth, tax violations, and payment of fees by benefactors.[171] Mr. Shargel refused to disclose the information, asserting the attorney-client privilege.[172]

In the district court proceeding, Shargel asserted that disclosure of fee information and client identity would disclose confidential communications he had with the six clients who had consulted with him before they were subpoenaed, indicted, or arrested.[173] His two claims were that (1)

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162. *Id.* at 448-49.

163. *Id.* at 449. In fact, an FBI agent had told the attorney and the judge that an arrest would be made immediately following the disclosure of the identity of the client.

164. *Id.* at 452-55.

165. *Id.* at 454 (emphasis in original).

166. *Id.*

167. *Id.* Although the court was willing to recognize the "legal advice" exception, it held that because the attorney failed to move for an ex parte in camera hearing, he had not met his burden of production. *Id.* at 454-55.

168. 742 F.2d 61 (2d Cir. 1984).

169. *Id.* at 62.

170. 18 U.S.C. § 1961 (1982).

171. *Shargel*, 742 F.2d at 62.

172. *Id.* In asserting the privilege Shargel stated that he had provided legal representation to eight of the ten individuals, six of those eight in connection with the acts named in the RICO indictment, and the other two he represented in other matters.

173. *In re* Grand Jury Subpoena Duces Tecum (Shargel), No. M11-199 (S.D.N.Y. Apr. 27, 1984), *aff'd sub nom. In re* Shargel, 742 F.2d 62 (2d Cir. 1984).

the subpoenaed material "reflects each client's concern that he was in trouble and thus, in practical effect, discloses a confidential communication"[174] and (2) "in this multiple client situation, the timing of the several representations vis-a-vis each other might reveal more of those same clients' confidential communications (e.g., that client *A* was involved with clients *B* and *C*)."[175]

The district court held that Shargel's first claim was not persuasive because his clients might have consulted him for any number of reasons unrelated to the present indictment.[176] As to the second claim, the court held that it would not apply under the circumstances because of the government's expressed intent not to infer conspiratorial conduct based on Shargel's joint representation of eight of the individuals named in the subpoena.[177] However, the court went on to say that if the government were to assert that inference, then disclosure of their identities would constitute a communication between Shargel and his clients.[178] The court also stated that the information "would be more than merely incriminating . . . . [It] would be effectively revealing a confidential communication, namely that six of his clients were acting in concert with each other at a time before they had reason to seek his advice."[179]

Although the district court clearly recognized that disclosure of the subpoenaed information would reveal a confidential communication, it denied the motion to quash.[180] The court required only that the government refrain from using the information to prove the communications in the pending RICO prosecution, but otherwise allowed the government to use the information for whatever purpose it might choose.[181]

The Second Circuit affirmed the lower court, rejecting Shargel's argument that once the attorney-client privilege attaches to a communication, the government may not use the information for any purpose.[182] Judge Winter, writing the opinion for the court, stated that "[t]he identification of individuals as clients of Mr. Shargel neither discloses nor implies a confidential communication."[183] He rejected the argument that a confidential communication about criminal activity may be inferred from consultation with a criminal law specialist.[184]

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174. *In re* Grand Jury Subpoena Duces Tecum (Shargel), slip op. at 2.
175. *Id.*
176. *Id.* at 4.
177. *Id.* at 5.
178. *Id.* at 5 n.1.
179. *Id.*
180. *Id.* at 5.
181. *Id.*
182. Brief for Appellant at 14-16, *In re Shargel*, 742 F.2d 62 (2d Cir. 1984).
183. *Shargel*, 742 F.2d 61.
184. *Id.* at 64 n.4.

The court held that a general rule requiring disclosure of the fact of consultation does not place the attorney in the professional dilemma of cautioning against disclosure and thus rendering perhaps ill-informed advice.[185] The court explained that no such dilemma is created, because the information will not be protected "even though the client may strongly fear the effects of disclosure, *including incrimination.*"[186] Judge Winter stated that "[t]his result follows from defining the privilege to encompass only those confidential communications necessary to obtain informed legal advice, which focuses upon facilitating the role of the lawyer as a professional advisor and advocate, . . . [as] distinguished from the so-called 'incrimination rationale' . . . ."[187] He further stated that "[w]hile the attorney-client privilege historically arose at the same time as the privilege against self-incrimination, it was early established that the privileges had distinct policies and that . . . the attorney's reluctance to incriminate his client was not a valid reason to invoke the attorney-client privilege."[188]

E. *Future of the Incrimination Rationale*

Baird v. Koerner[189] created an exception to the general rule that client identity and fee information are not protected by the attorney-client privilege. Several cases relying on the *Baird* exception have misstated the general rule and have created a much broader "incrimination rationale" for nondisclosure. These cases have ignored the potential harm that the incrimination rationale would create. As the *Shargel* court noted, "a broad privilege against the disclosure of the identity of clients and fee information might easily become an immunity for corrupt or criminal acts."[190] Thus, the rationale for the attorney-client privilege is premised not on the fear of incriminating the client, but on the need for effective communication between the attorney and his client.

The incrimination rationale continues to survive in the Fifth Circuit. It has held that the attorney-client privilege should apply when "so much of the communication is already in the government's possession that additional disclosures would yield substantially probative links in an existing chain of inculpatory events or transactions."[191] The Fifth Circuit relied on *Baird* in reaching its holding, but incorrectly emphasized the result of the revelation—incrimination of the client—rather than whether the revelation would disclose a confidential communication.

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185. *Id.* at 63.
186. *Id.* (emphasis added).
187. *Id.* at 62.
188. *Id.* at 63.
189. 279 F.2d 623 (9th Cir. 1960).
190. *In re* Shargel, 742 F.2d 61 (2d Cir. 1984).
191. *In re* Grand Jury Proceedings (Jones), 517 F.2d 666, 674, *reh'g denied*, 521 F.2d 815 (5th Cir. 1975).

The Fifth Circuit realized that its decision in *Jones* would not be followed by other courts.[192] In fact, except for another Fifth Circuit decision, *Pavlick*, it has not been widely accepted. The Seventh Circuit, in *In re Witnesses Before the Special March 1980 Grand Jury*,[193] rejected the *Jones* holding.[194] The Seventh Circuit stated that "[t]he fact that the information is incriminating may provide all parties with their motives to seek its disclosure or protection; however, the application of the privilege turns not upon incrimination *per se* but upon whether disclosure would in effect reveal information which has been confidentially communicated."[195]

In addition, the Fifth Circuit adopted a variation of the incrimination rationale—the "last link" exception. The court held that the attorney-client privilege would apply "when the disclosure of the client's identity by his attorney would have supplied the last link in the existing chain of incriminating evidence likely to lead to the client's indictment."[196] This "last link" exception was rejected by the Sixth Circuit in *In re Grand Jury Investigation No. 83-2-35*.[197] The Sixth Circuit stated that the last link exception "is simply not grounded upon the preservation of confidential *communications* and hence not justifiable to support the attorney-client privilege."[198] The court also stated that "[a]lthough the last link exception may promote concepts of fundamental fairness against self-incrimination, these concepts are not proper considerations to invoke the attorney-client privilege."[199]

The Ninth Circuit created another variation of the incrimination rationale by its decision in *United States v. Hodge & Zweig*.[200] This case was later rejected by the Ninth Circuit in *In re Osterhoudt*.[201] In *Hodge & Zweig*, the court had held that "[a] client's identity and the nature of the client's fee arrangements may be privileged where the person invoking the privilege can show that a strong probability exists that disclosure of the information would implicate that client in the very criminal activity for which legal advice was sought."[202] In its subsequent rejection of this version of the incrimination rationale, the Ninth Circuit in *Os-*

192. *Id.* at 668. ("In all candor, we need not and do not purport to reach a result which may be reconciled in all respects with every decision by every other court.").
193. 729 F.2d 489 (7th Cir. 1984).
194. *Id.* at 494.
195. *Id.*
196. *In re* Grand Jury Proceedings (Pavlick), 680 F.2d 1026 (5th Cir. 1982).
197. 723 F.2d 447 (6th Cir. 1983).
198. *Id.* at 454 (emphasis in original).
199. *Id.*
200. 548 F.2d 1347 (9th Cir. 1977).
201. 722 F.2d 591 (9th Cir. 1983).
202. *Hodge & Zweig*, 548 F.2d at 1353 (citing Baird v. Koerner, 279 F.2d 623, 630 (9th Cir. 1960)).

terhoudt held that "[f]ee arrangements usually fall outside the scope of the privilege simply because such information ordinarily reveals no confidential professional communication between attorney and client, and not because such information may not be incriminating."[203] The court also stated that "[t]he principle of *Baird* was not that the privilege applied because the identity of the client was incriminating, but because in the circumstances of the case disclosure of the identity . . . was in substance a disclosure of the confidential communication."[204]

Although the Second, Sixth, Seventh and Ninth Circuits have all rejected the incrimination rationale, it may still be applicable elsewhere. However, it is unlikely that the incrimination rationale will survive, except in the Fifth Circuit where *Jones* and *Pavlick* were decided. The most recent decisions have strongly criticized the incrimination rationale, and the trend among the circuits is to draw a bright line rule that client identity and fee information are not protected by the attorney-client privilege. Only under the unique facts of *Baird* does it appear that the privilege will be applied.

Today, it appears that *Baird* will be read as narrowly as possible. It also appears that the confidential communication cannot simply be volunteered by the attorney. For instance, in *Shargel* the court stated that "[a]lthough Mr. Shargel's affidavit volunteers a connection beween his consultation with these six clients and the subsequent RICO proceeding, this connection could not have been inferred from the disclosure of client identity and fee information."[205]

Although the purpose of the attorney-client privilege will be frustrated somewhat by not extending it to client identity and fee information,[206] the alternative of allowing the legal profession to fall prey to corrupt and criminal activities clearly outweighs this concern. By not allowing the attorney-client privilege to attach to client identity and fee information, attorneys can adequately advise their clients as to what information will be privileged. This will enable clients to make full disclosure to their attorneys, free from apprehension that the privileged information will be used against them. As the Second Circuit concluded in *Shargel*, "[t]he bar and the system of justice will suffer little if all involved are aware that assumed safety from disclosure does not exist."[207]

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203. *Osterhoudt*, 722 F.2d at 593.

204. *Id.*

205. *Shargel*, 742 F.2d at 64.

206. *See id.* at 63 ("[T]he fact of consultation and the payment of a fee may be preconditions to seeking legal advice, and we would be less than candid not to concede that the lack of a privilege against disclosure . . . may discourage some persons from seeking legal advice at all.").

207. *Id.* at 64.

V. The Attorney-Client Privilege and Instrumentalities of a Crime

A facet of the attorney-client privilege of particular concern to the criminal defense attorney deals with instrumentalities of a crime. The practitioner is faced with two competing principles—fidelity to his client and the maintenance of confidentiality versus his role as an officer of the court.[208] The criminal defense attorney must also consider the defendant's constitutional right to counsel and right against self-incrimination and his own potential for criminal culpability in deciding how to handle the instrumentalities problem.[209]

This part of the note will review present legal views regarding an attorney's possession of instrumentalities of a crime as opposed to attorney-client communications regarding instrumentalities. Ethical and legal considerations posed by such situations will then be examined. Finally, a proposal will be advanced to aid attorneys in dealing with instrumentalities. The focus herein will be on how an attorney can safeguard the attorney-client privilege while avoiding ethical violations which could subject him to discipline.[210]

A. *Communications and Tangible Evidence—The Issue of Possession*

The parameters of the attorney's duties and obligations with regard to the instrumentalities of a crime depend on the immediacy and directness of the attorney's involvement with, and access to, the instrumentalities. Two opinions by the Legal Ethics Committee of the Virginia State Bar illustrate the importance of the attorney's knowledge of and control over

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208. *See* Comment, *The Problem of an Attorney in Possession of Evidence Incriminating His Client: The Need for a Predictable Standard*, 47 U. Cin. L. Rev. 431, 436 (1978) ("The attorney has the same legal duty as any other citizen to cooperate with government investigations and to provide evidence sought by the government.").

209. In addressing the situation, courts have long recognized the competing principles confronting the attorney:

> In the present case we do not have a situation that readily lends itself to the application of one of the general rules applicable to the attorney-client privilege. Here, we enter a balancing process which requires us to weigh that privilege (which is based on statute and common law), and . . . the privilege against self-incrimination (which is constitutional), against the public's interest in the criminal investigation process.

State *ex rel.* Sowers v. Olwell, 64 Wash. 2d 828, ___, 394 P.2d 681, 684 (1964) (an attorney can retain possession of physicial evidence for a reasonable period of time before surrendering the evidence to the government).

210. Proceedings regarding the withholding of evidence and effective assistance of counsel, while important tangential considerations, are beyond the scope of this note. Furthermore, while some overlap is unavoidable, this part of the note will deal primarily with the attorney's role regarding instrumentalities of a crime. Questions involving a lawyer's actions concerning fruits of a crime include considerations of safeguarding property rights and receiving stolen property.

such evidence.

Legal Ethics Opinion 386 reads:

> An attorney representing a defendant in a criminal matter has no obligation to reveal to the Commonwealth's Attorney the whereabouts of a weapon discovered during his investigation, when the attorney did not remove or take steps to conceal the weapon. . . . If the attorney determined to disclose the existence of a weapon, the attorney's client should be informed prior to any disclosure. . . . The attorney has no duty, however, to protect a third party who is not his client who may become involved in removal or concealment of such weapon.[211]

Legal Ethics Opinion 551 states:

> A defense attorney has a legal duty to turn over any documents which are fruits or instrumentalities of the crime. The attorney must first inform his client of his intention to reveal the documents. Furthermore, it is incumbent upon the defense attorney to determine what evidence constitutes fruits or instrumentalities of the crime. [DR 7-108(A)[212] & 6-101(C)[213] and *In re Ryder*[214]].[215]

The opinions are valuable insofar as they (1) confirm the absence of a duty on the part of the attorney to reveal the location of instrumentalities discovered during his investigation, and (2) mandate disclosure if the attorney has gone beyond mere discovery and observations of the object(s) in question. The key to mandatory revelation lies in the possession, or lack thereof, of the instrumentality by the attorney.[216]

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211. Va. State Bar Legal Ethics Comm. Op. 386 (1983).

212. "A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce." VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108(A) (1983).

213. "A lawyer shall keep a client reasonably informed about matters in which the lawyer's services are being rendered." *Id.* DR 6-101(C).

214. 381 F.2d 713 (4th Cir. 1967). See *infra* notes 217-20 and accompanying text for a discussion of the *Ryder* case.

215. Va. State Bar Legal Ethics Comm. Op. 551 (1983).

216. Other jurisdictions are in accord with Virginia on this point. *See, e.g.*, 53 U.S.L.W. 2330 (Gen. Jan. 8, 1985) (discussing Formal Opinion 1984-76 of the California State Bar Standing Committee on Professional Responsibility and Conduct).

In 1981, the Ethics Committee of the Criminal Justice Section of the American Bar Association proposed a more flexible disclosure standard. The "Ethical Standard to Guide Lawyer Who Receive [sic] Physical Evidence Implicating His Client in Criminal Conduct" reads as follows:

> (a) A lawyer who receives a physical item under circumstances implicating a client in criminal conduct shall disclose the location of or shall deliver that item to law enforcement authorities only: (1) if such is required by law or court order, or (2) as provided in paragraph (d).
>
> (b) Unless required to disclose, the lawyer shall return the item to the source from whom the lawyer receives it, as provided in paragraphs (c) and (d). In returning the item to the source, the lawyer shall advise the source of the legal consequences pertaining to possession or destruction of the item.

A leading case in this area is *In re Ryder*,[217] a disciplinary proceeding. In that case, a Richmond, Virginia, attorney transferred what appeared to be the weapon used in a bank robbery, and the money garnered from that robbery, from his client's safety deposit box to his own. The courts that considered and reviewed the *Ryder* case flatly rejected any notion that the attorney-client privilege protected Ryder's actions.[218] Ryder was suspended from the practice of law for eighteen months for his initiative in concealing the evidence.[219]

As one commentator has noted, "[t]he *Ryder* opinion is partly based on the impropriety of the attorney's taking the initiative in procuring incriminating evidence."[220] What if, instead of taking the initiative to gain possession of the evidence and alter its location, the attorney takes no initiative, but yet is the receiver of an instrumentality of a crime? Acceptance of the instrumentality would make the attorney an active participant in withholding evidence from the police, prosecution, and courts.

Whether the attorney actively or passively engages in the concealment of the instrumentality, the attorney nonetheless faces a strong argument against application of the attorney-client privilege:

> Even though delivered to the attorney by the client in the strictest of confidence, physical evidence generally does not have the same immunity from disclosure under the attorney-client privilege as confidential verbal commu-

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(c) A lawyer may receive the item for a period of time during which the lawyer: (1) intends to return it to the owner; (2) reasonably fears that return of the item to the source will result in destruction of the item; (3) reasonably fears that return of the item to the source will result in physical harm to anyone; (4) intends to test, examine, inspect or use the item in any way as part of the lawyer's representation of the client; or (5) cannot return it to the source. If the lawyer retains the item, the lawyer shall do so in a manner that does not impede the lawful ability of law enforcement to obtain the item.

(d) If the item received is contraband, or if in the lawyer's judgment the lawyer cannot retain the item in a way that does not pose an unreasonable risk of physical harm to anyone, the lawyer shall disclose the location of or shall deliver the item to law enforcement authorities.

(e) If the lawyer discloses the location of or delivers the item to law enforcement authorities under paragraphs (a) or (d), or to a third party under paragraph (c)(1), the lawyer shall do so in the way best designed to protect the client's interests.

29 CRIM. L. REP. (BNA) 2465-67 (Aug. 26, 1981). For a discussion of this proposed standard, see Martin, *Incriminating Criminal Evidence: Practical Solutions*, 15 PAC. L.J. 807, 869-72 (1984).

217. 263 F. Supp. 360 (E.D. Va. 1967) (per curiam), *aff'd per curiam*, 381 F.2d 713 (4th Cir. 1967). For commentary, see Note, *Professional Responsibility and* In re Ryder: *Can an Attorney Serve Two Masters?*, 54 VA. L. REV. 145 (1968); Comment, *An Attorney in Possession of Evidence Incriminating His Client*, 25 WASH. & LEE L. REV. 133 (1968).

218. *Ryder*, 263 F. Supp. at 365-67; *Ryder*, 381 F.2d at 714.

219. 263 F. Supp. at 370.

220. Comment, *Disclosure of Incriminating Physical Evidence Received From a Client: The Defense Attorney's Dilemma*, 52 U. COLO. L. REV. 419, 437 (1981).

> nications. The courts cannot compel the attorney to reveal the existence or location of physical evidence if he learns of it as the direct result of a verbal communication from his client. Should the attorney take possession of the physical evidence, however, he cannot legally withhold it if ordered by the court to produce it. In most instances, physical evidence simply is not privileged.[221]

A number of courts, while recognizing that the attorney-client privilege does not extend to physical evidence, nonetheless acknowledge the difficult dilemma faced by the attorney torn between fidelity to his client and fulfillment of his duty to the court. As a result, a rule has been fashioned in some jurisdictions that allows attorneys to avoid the possibly devastating effects that production of instrumentalities of a crime can generate. Succinctly stated, "a criminal defense attorney has an obligation to turn over to the prosecution physical evidence which comes into his possession . . . . After turning over such evidence, an attorney may have either a right or a duty to remain silent as to the circumstances under which he obtained such evidence . . . ."[222] In essence, the doctrine means that the evidence itself does not come under the privilege, but the source of the evidence, i.e., the fact that the state received the instrumentality from the defense attorney who in turn received it from his client, would be privileged.

In addition to turning over physical evidence, the attorney must be aware of the possible ramifications if he alters the evidence. For example, in *State v. Fisher*,[223] an attorney received a one year suspension from the practice of law for altering evidence in a murder case.[224] Such alterations of evidence are not always easy to detect, e.g., wiping fingerprints off a

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221. Comment, *supra* note 201, at 438; *see also* Comment, *Ethics, Law, and Loyalty: The Attorney's Duty to Turn Over Incriminating Physical Evidence*, 32 STAN. L. REV. 977, 981 (1980) (stating that the attorney-client privilege rarely applies to physical evidence unless the evidence was created in the course of the attorney-client consultation).

222. Morrell v. State, 575 P.2d 1200, 1207 (Alaska 1978) (attorney did not violate attorney-client privilege, ethical principles, or his client's right to effective assistance of counsel by aiding client's friend in revealing physical evidence to the state); *accord* People v. Lee, 3 Cal. App. 3d 514, 526, 83 Cal. Rptr. 715, 722 (1970) (public defender properly surrendered blood-stained shoes given to attorney by client's wife); Anderson v. State, 297 So.2d 871, 875 (Fla. Dist. Ct. App. 1974) (attorney-client privilege prohibited attorney or his employee from disclosing the source of allegedly stolen items delivered by the client to the attorney's employee); People v. Nash, 110 Mich. App. 428, ___, 313 N.W.2d 307, 314 (1981), *aff'd in part, rev'd in part*, 418 Mich. 196, 341 N.W.2d 439 (1983) (defendant's attorney did not violate the attorney-client privilege by relinquishing physical evidence to the state; however, evidence produced at trial revealing that the objects were obtained from the attorney did violate the privilege).

223. 170 Neb. 483, 103 N.W.2d 325 (1960).

224. The attorney forced the end of a dowel through a hole in a leather belt, thereby enlarging the hole and damaging the belt's probative value. *Id.* at ___, 103 N.W.2d at 328; *see also In re* Bear, 578 S.W.2d 928 (Mo. 1979) (en banc) (reprimand given to attorney for erasing a tape recording which was to be used as evidence in a criminal matter).

weapon; nonetheless, the attorney still has a duty to preserve the "integrity" of the evidence.[225]

One court has included the duty to reveal the circumstances under which the evidence was found within the attorney's duty to produce instrumentalities of the crime in his possession. The California Supreme Court held that "whenever defense counsel removes or alters evidence, the [attorney-client] privilege does not bar revelation of the original location or condition of the evidence in question."[226] If carried to its logical conclusion, any alterations in the integrity or the location of the evidence may fall outside of the privilege, and defense counsel may be forced to testify as to the original condition of the evidence (e.g., the condition of the knife before being cleaned of blood).

Even if a defense attorney does not take possession of an instrumentality of a crime, he must remain cautious in counseling his client in reference to the object. The loss of the attorney-client privilege is not the only pitfall. If an attorney counsels his client to dispose of or conceal such evidence, the client's action may violate the law,[227] and the attorney may

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225. 29 CRIM. L. REP. (BNA) 2466 (comments by attorney Charles English in reference to the "Ethical Standard to Guide Lawyer Who Receive [sic] Physical Evidence Implicating His Client in Criminal Conduct," proposed by the Ethics Committee of the Criminal Justice Section of the American Bar Association. *See supra* note 216.).

226. People v. Meredith, 29 Cal. 3d 682, 695, 631 P.2d 46, 54, 175 Cal. Rptr. 612, 620 (1984) (footnote omitted). In *Meredith*, defense counsel's investigator removed a partially burned wallet from a garbage can behind the defendant's house. Counsel examined the wallet, which belonged to a murder victim, then turned it over to the police. The court ruled that such actions prevented the state from observing the wallet in its original location, and that the attorney-client privilege did not prevent the state from presenting evidence regarding the location of the wallet and the garbage. For additional commentary, see Note, People v. Meredith: *The Attorney-Client Privilege and the Criminal Defendant's Constitutional Rights*, 70 CALIF. L. REV. 1048 (1982); Note, *The Attorney-Client Privilege: Hear No Evil, See No Evil, Speak No Evil?* People v. Meredith, 20 HOUS. L. REV. 921 (1983).

Justice Brickley of the Supreme Court of Michigan relied on the *Meredith* decision in formulating his opinion in People v. Nash, 418 Mich. 196, 341 N.W.2d 439 (1983). He wrote that there is

> a difference between an attorney observing evidence and knowing of its location and an attorney taking possession of evidence from a place he has learned about from his client. In the latter case, the attorney diminishes, if not destroys, the usefulness of evidence. And it makes no difference that the "place" from where the evidence is taken is the client.

Id. at ___, 341 N.W.2d at 450. As a result, Justice Brickley would not hold the source of the evidence to be a privileged communication, regardless of whether that source was the client himself. None of the justice's colleagues joined in those parts of his opinion dealing with the attorney-client privilege.

227. *See, e.g.*, CAL. PENAL CODE § 135 (West 1970):

> DESTROYING EVIDENCE. Every person who, knowing that any book, paper, record, instrument in writing, or other matter or thing, is about to be produced in evidence upon any trial, inquiry, or investigation whatever, authorized by law, willfully destroys or conceals the same, with intent thereby to prevent it from being produced, is guilty of a misdemeanor.

be subject to both ethical[228] and legal[229] sanctions.[230]

The privilege is not lost, however, where the attorney's involvement does not go beyond communications and observations. In *People v. Belge*,[231] an attorney was indicted for violating public health laws for failing to disclose the location of a murder victim's body. Belge learned of the location through his client, and he inspected the body without disturbing it. In dismissing the indictment, the court relied in part on the attorney-client privilege as a justification for the attorney's failure to disclose.[232] Other courts have concurred in the *Belge* decision in commenting on communications and observations in the context of the attorney-client privilege.[233]

B. *Ethical and Legal Considerations*

1. The Model Code of Professional Responsibility

A criminal defense attorney confronted with instrumentalities of a crime must always concern himself with his ethical obligations. However, instead of alleviating an attorney's concerns, the applicable Model Code provisions aggravate the conflicts in his obligations.[234]

]228. In his representation of a client, a lawyer shall not:

. . . .

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

MODEL CODE DR 7-102(A) (1982).

229. *See infra* notes 263-68 and accompanying text.

230. Clark v. State, 159 Tex. Crim. 187, 261 S.W.2d 339 (1953). For example, one instance in which the attorney's advice to his client regarding instrumentalities was not privileged was the case of a telephone operator who overheard the attorney advise his client to dispose of a murder weapon. In refusing to extend the attorney-client privilege to this exchange, the court noted that such advice "was not in the legitimate course of professional employment in making or preparing a defense at law." *Id.* at ___, 261 S.W.2d at 347.

231. 83 Misc. 2d 186, 372 N.Y.S.2d 798 (Sup. Ct.), *aff'd mem.*, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (1975), *aff'd*, 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976).

232. *Id.* at ___, 372 N.Y.S.2d at 800-03. For commentary on the circumstances surrounding *Belge*, see Comment, *Legal Ethics: Confidentiality and the Case of Robert Garrow's Lawyers*, 25 BUFFALO L. REV. 211 (1975).

233. *See, e.g.*, People v. Meredith, 29 Cal. 3d 682, 693, 631 P.2d 46, 52, 175 Cal. Rptr. 612, 618 (1981) ("The attorney-client privilege is not strictly limited to communications, but extends to protect observations made as a consequence of protected communications.") (footnote omitted).

234. This conflict is not new to the Model Code, but was present in the old American Bar Association's Canons of Professional Ethics. One commentator noted that "[b]y imposing broad duties of undivided fidelity to the client and devotion to his interests, yet at the same time candor and fairness to the court, the Canons seemed to suggest that both the withholding of physical evidence and its disclosure were required." Comment, *supra* note 220, at 419 (footnote omitted).

a. Canon 4—Fidelity to Client

Canon 4[235] of the Model Code deals with the confidential relationship between an attorney and his client. "The confidentiality principle is the product of a fiduciary relationship which exists between a lawyer and his client. It is greater in scope than the lawyer-client privilege . . . ."[236] The purpose behind such a principle is to "ensure that a client may freely inform his lawyer of any and all pertinent facts and circumstances."[237]

Disciplinary Rule 4-101(B) prohibits an attorney from "[r]evealing a confidence or secret of his client"[238] or "using a confidence or secret of his client to the disadvantage of the client."[239] A literal reading of such rules indicates that the actions of the client in bringing the instrumentalities of a crime to the attorney impose a duty on the attorney not to reveal the existence of such instrumentalities or turn them over to the proper authorities. However, the Model Code is not absolute.

Disciplinary Rule 4-101(C) provides a number of "escape valve" provisions under which an attorney *may* disclose such information. Interestingly, the language of DR 4-101(C) is permissive rather than mandatory in reference to the attorney's disclosure of confidences or secrets.[240] In particular, DR 4-101(C) provides that an attorney *may* reveal confidences or secrets with the consent of his client after full disclosure,[241] or as "per-

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235. "A Lawyer Should Preserve the Confidences and Secrets of a Client." MODEL CODE Canon 4 (1981).

236. Abramovsky, *Confidentiality: The Future Crime—Contraband Dilemmas*, 85 W. VA. L. REV. 929, 931 (1983).

237. *Id.*

238. MODEL CODE DR 4-101(B)(1) (1981); *see also id.* EC 4-1, 4-4.

239. *Id.* DR 4-101(B)(2); *see also id.* EC 4-5.

240. The Final Draft of the American Bar Association's MODEL RULES OF PROFESSIONAL CONDUCT (1982) continues to utilize such permissive language:

> Rule 1.6 Confidentiality of Information
>
> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer *may* reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
>
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (Final Draft 1982) (emphasis added).

For commentary, see generally Crystal, *Confidentiality Under the Model Rules of Professional Conduct*, 30 U. KAN. L. REV. 215 (1982).

241. MODEL CODE DR 4-101(C)(1) (1981).

mitted under Disciplinary Rules or required by law or court order."[242] In addition, disclosure of confidential information is permitted if necessary to prevent the client from committing a crime,[243] or to allow the attorney to collect a fee or defend against a charge of wrongdoing.[244]

b. Canon 7—Duty to the Court—Zealous Representation *Within* the Bounds of the Law

The key word in the text of Canon 7[245] is "within"—i.e., the attorney's actions must be "within" the law. To this end, most of the wording of Canon 7 is mandatory rather than permissive. For example, DR 7-102(A) speaks of disclosing what "is required by law,"[246] not assisting a client in activity which a lawyer "knows to be illegal,"[247] and not engaging in "illegal conduct."[248] DR 7-109(A) also uses mandatory language: "A lawyer *shall not* suppress any evidence that he or his client has a legal obligation to reveal or produce."[249]

Canon 7 suggests that the obligation to reveal instrumentalities of a crime depends upon the legality or illegality of withholding such objects. In turn, the applicability of the attorney-client privilege will determine whether the attorney can lawfully withhold evidence of a crime. Thus, Canon 7 would not be violated if the attorney-client privilege can be successfully invoked in refusing to reveal instrumentalities.

2. The Fifth Amendment Privilege Against Self-Incrimination

The fifth amendment to the United States Constitution provides in

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242. *Id.* DR 4-101(C)(2). See *infra* notes 269-86 and accompanying text for a discussion of the legal requirement to reveal instrumentalities.

243. *Id.* DR 4-101(C)(3). Courts have long recognized that the attorney-client privilege must give way to the importance of preventing future criminal acts on the part of the client: "[T]he interests of public justice further require that no shield such as the protection afforded to communications between attorney and client shall be interposed to protect a person who takes counsel on how he can safely commit a crime." Clark v. State, 159 Tex. Crim. 187, ___, 261 S.W.2d 339, 347 (1953). Such a ruling gives support to the attorney who determines that he will, in accordance with the permissive language of DR 4-101(C), reveal his client's intention to commit a crime.

For a general discussion of the problems confronting an attorney in a DR 4-101(C)(3) situation, see Note, *The Attorney's Duty to Reveal a Client's Intended Future Criminal Conduct*, 1984 DUKE L.J. 582 (advocating a rule that allows the attorney a considerable amount of discretion in deciding whether to reveal a client's intent to commit a crime).

244. MODEL CODE DR 4-101(C)(4) (1981).

245. "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." *Id.* Canon 7 (1981).

246. *Id.* DR 7-102(A)(3).

247. *Id.* DR 7-102(A)(7).

248. *Id.* DR 7-102(A)(8).

249. *Id.* DR 7-109(A) (emphasis added); *see also id.* EC 7-27.

part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[250] The client's privilege against self-incrimination is an important concern for the attorney confronted with instrumentalities of a crime.

The United States Supreme Court has set guidelines as to what types of evidence, when revealed, constitute self-incrimination. In *Schmerber v. California*,[251] the Court stated "that the [fifth amendment] privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature . . . ."[252] Schmerber had challenged his conviction under a state drunk driving law that required the extraction of blood from his body. The Court held that blood could be taken because the extraction process was neither testimonial nor communicative. Instead, it was merely a means of gathering real evidence, and it is well-settled that "[t]he privilege against self-incrimination refers only to communicative and not 'real' evidence."[253] Instrumentalities of a crime would, of course, be considered "real" evidence.

The Supreme Court has also addressed the question of the transferability of the fifth amendment privilege against self-incrimination from the client to his attorney. In *Fisher v. United States*,[254] the defendants were under investigation for possible federal income tax violations. The defendants gave relevant documents to their attorneys. Thereafter, the Internal Revenue Service sought disclosure of the documents. The Court, emphasizing the personal nature of the fifth amendment privilege, held that the attorney could be compelled to disclose the documents.[255]

Lower court rulings also support the proposition that the fifth amendment privilege is not transferable. The Seventh Circuit Court of Appeals

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250. U.S. CONST. amend. V.

251. 384 U.S. 757 (1966).

252. *Id.* at 761.

253. *See, e.g.*, State v. Dillon, 93 Idaho 698, ___, 471 P.2d 553, 565 (1970).

254. 425 U.S. 391 (1975).

255. As the Court noted:

> The Fifth Amendment protects a person from being compelled to be a witness against himself. Here, the taxpayers retained any privilege they ever had not to be compelled to testify against themselves and not to be compelled themselves to produce private papers in their possession. *This* personal privilege was in no way decreased by the transfer. It is simply that by reason of the transfer of the documents to the attorneys, those papers may be subpoenaed without compulsion on the taxpayer. The protection of the Fifth Amendment is therefore not available . . . . A party is privileged from producing evidence but not from its production . . . .

Id. at 398-99 (quoting Johnson v. United States, 228 U.S. 457, 458 (1913) (emphasis in original). For commentary on *Fisher*, see Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of* Fisher v. United States, 95 HARV. L. REV. 683 (1982).

stated in *In re January 1976 Grand Jury (Genson v. United States)*,[256] "no basis is discernible for thinking that the Fifth Amendment testimonial privilege was intended to allow an attorney to suppress or secrete the physical fruits of an armed robbery."[257] In *Genson*, the court ruled that an attorney could not use the fifth amendment to prevent the U.S. government from obtaining cash that the attorney's clients, suspects in a bank robbery, had turned over to the attorney. While *Genson* dealt with the fifth amendment privilege in the context of the fruits of a crime, an attorney confronted with instrumentalities of a crime is in an analogous situation.[258]

3. The Sixth Amendment and the Right to Effective Assistance of Counsel

One reason for allowing an attorney to withhold evidence through invocation of the right to counsel is that a client will be less likely to confide in his attorney if the attorney can be compelled to produce incriminating evidence.[259] Even if this view of the sixth amendment is too broad, a defense counsel is still obliged to keep his client's secrets and confidences.[260]

In many cases, courts look to the effect of disclosure on attorney competency in determining whether a defendant's sixth amendment rights have been violated by his attorney's actions in revealing evidence. However, where nondisclosure would breach a legal obligation imposed on the attorney by law, there can be no violation of the defendant's sixth amendment rights when defense counsel reveals the existence of physical evidence.[261] The client must be aware, and the attorney must make him

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256. 534 F.2d 719 (7th Cir. 1976).

257. *Id.* at 724.

258. A number of lower courts have addressed the problem of instrumentalities (or other physical evidence) and the transferability of the client's fifth amendment privilege to the attorney. *See, e.g.*, United States v. Authement, 607 F.2d 1129, 1131-32 (5th Cir. 1979) (the instrumentality of the alleged crime—brass knuckles—was properly obtained from the defendant's attorney without violating the fifth amendment); Gipson v. State, 609 P.2d 1038, 1043-44 (Alaska 1980) (the state could obtain a defense expert's report on tests performed on the firearm used in an alleged murder without violating the defendant's privilege against self-incrimination); State *ex rel.* Sowers v. Olwell, 64 Wash. 2d 828, ___, 394 P.2d 681, 686 (1964) ("There is no reason to extend the privilege against self-incrimination to the attorney because the client is already protected in his relations with his attorney by the attorney-client privilege."). See *supra* note 209, and *infra* notes 282-85 and accompanying text for explanation of the *Olwell* holding.

259. Comment, *supra* note 220, at 443; *see also* Freedman, *Where the Bodies Are Buried: The Adversary System and the Obligation of Confidentiality*, 10 CRIM. L. BULL. 979, 985 (1974); Comment, *Fruits of the Attorney-Client Privilege: Incriminating Evidence and Conflicting Duties*, 3 DUQ. L. REV. 239, 241 (1965).

260. *See supra* notes 235-44 and accompanying text.

261. *See* Morrell v. State, 575 P.2d 1200, 1211-12 (Alaska 1978). The client was charged with, inter alia, kidnapping. The client's friend discovered a legal pad on which the client

aware, of the lawyer's other duties as an officer of the court. Telling the attorney about a crime or the location of the instrumentalities or fruits involved therein does not remove the attorney from his relatively passive role of information-gatherer, confidante, and advocate. However, when the client puts such instrumentalities or fruits in the hands of the attorney, the attorney moves from a passive posture to the active position of concealing evidence from the court, contrary to his duties as an officer of that court.[262]

4. The Attorney's Criminal Culpability

The attorney confronted with instrumentalities of a crime, in addition to concerning himself with constitutional, legal, and ethical questions, must also be alert not to engage in criminal activity. One commentator stated that "[a] determination that [an attorney's] conduct is outside 'proper' conduct for an attorney or outside the attorney-client privilege is a prerequisite for the conduct to be criminal, because, if within the privilege, the conduct is ipso facto legal."[263]

Possible criminal liability for an attorney can arise from statutes involving obstruction of justice,[264] concealment or destruction of evidence,[265] tampering with evidence,[266] hindering apprehension or prosecution,[267] and accessory liability.[268]

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had allegedly sketched a kidnapping plan. After revealing the pad to counsel, who reasonably concluded that a state statute required disclosure, counsel aided the friend in transferring it to the police.

262. For a detailed discussion regarding the effective assistance of counsel in instrumentality-related situations, see Martin, *supra* note 216, at 838-46.

263. Comment, *The Right of a Criminal Defense Attorney to Withhold Physical Evidence Received from His Client*, 38 U. CHI. L. REV. 211, 218 (1970).

264. *See, e.g.*, 18 U.S.C. § 1503 (1982).

265. *See, e.g.*, CAL. PENAL CODE § 135 (West 1970). A recent Oklahoma disciplinary proceeding applied that state's anticoncealment statute. In State *ex rel.* Oklahoma Bar Ass'n v. Harlton, 669 P.2d 774 (Okla. 1983), the court affirmed an attorney's five year suspension from the practice of law for the attorney's part in concealing a shotgun used in the commission of a crime.

266. *See, e.g.*, MODEL PENAL CODE § 241.7 (Proposed Official Draft 1962); *see also In re* Bear, 578 S.W.2d 928 (Mo. 1979) (attorney who erased a tape recording to be used in a criminal matter was reprimanded for tampering with evidence).

267. *See, e.g.*, 18 PA. CONS. STAT. ANN. § 5105 (Purdon 1983). Two Cundersport, Pennsylvania, attorneys were recently convicted of violating this statute by retaining possession of a gun butt that a client allegedly used in a murder. Stewart, *Legal Limbo: How Two Lawyers Fell Into an Ethical Thicket Defending a Murder*, Wall St. J., Feb. 27, 1985, at 1, col. 1.

268. *See, e.g.*, VA. CODE ANN. § 18.2-19 (Repl. Vol. 1982). For cases treating an attorney's action as accessory involvement, see *In re* Ryder, 381 F.2d 713, 714 (4th Cir. 1967); State *ex rel.* Oklahoma Bar Ass'n v. Harlton, 669 P.2d 774, 777 (Okla. 1983); Clark v. State, 159 Tex. Crim. 187, ___, 261 S.W.2d 339, 347 (1953).

5. Disclosure Under Legal Requirement

In certain circumstances, an attorney may be required by law to reveal the confidences of his client.[269] Whether an attorney is "required by law or court order"[270] to turn over instrumentalities of a crime depends in large part on the existence and scope of the attorney-client privilege.

Much of the litigation in this area arises from the government's use of subpoenas or search warrants in an attempt to obtain evidence from an attorney or a third party. In *Fisher v. United States*,[271] the attorney received a summons directing him to turn over certain tax-related documents. The Court ruled that the summons, if directed towards the taxpayer himself, would not involve self-incrimination.[272] Thus, the attorney-client privilege could not prevent a prosecutor from obtaining the documents from the attorney.[273]

The Supreme Court has also ruled that a search warrant can be used to obtain documents from an attorney's office,[274] and search the property of a third party for fruits, instrumentalities or the evidence of a crime.[275] Lower courts have followed the dictates of the Supreme Court in ruling on production of evidence.[276]

Furthermore, courts generally accept the view that evidence received by the attorney from a non-client third party is not protected by the attorney-client privilege.[277] Hence, such evidence is readily obtainable from the attorney, and the attorney may also be required to testify as to its source.[278]

In another situation involving a possible legal duty to disclose, the attorney in *People v. Belge*[279] was indicted for violation of public health

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269. Crystal suggests that an attorney has a duty to disclose the confidences of his client "if the failure to disclose would constitute a crime, expose the lawyer to civil liability, or violate a court or administrative order or rule. A client's mere violation of the law does not mean that a lawyer has a legal duty to disclose confidential information." Crystal, *supra* note 240, at 219.

270. MODEL CODE DR 4-101(C)(2) (1981).

271. 425 U.S. 391 (1976); *see supra* text accompanying notes 254-55.

272. 425 U.S. at 409-14.

273. *Id.* at 405.

274. Andresen v. Maryland, 427 U.S. 463 (1976).

275. Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

276. United States v. Authement, 607 F.2d 1129 (5th Cir. 1979) (subpoena duces tecum used to obtain brass knuckles from the defendant's attorney); People v. Investigation Into a Certain Weapon, 113 Misc. 2d 348, 448 N.Y.S.2d 950 (Sup. Ct. 1982) (subpoena duces tecum required attorney to produce ammunition and clip before grand jury).

277. Morrell v. State, 575 P.2d 1200, 1210 (Alaska 1978); Dyas v. State, 260 Ark. 176, ___, 539 S.W.2d 251, 256 (1976); People v. Lee, 3 Cal. App. 3d 514, 527, 83 Cal. Rptr. 715, 723 (Ct. App. 1970).

278. *Morrell*, 575 P.2d at 1210.

279. 83 Misc. 2d 186, 372 N.Y.S.2d 798 (Sup. Ct.), *aff'd mem.*, 50 A.D.2d 1088, 376

laws. In dismissing the indictment, the court said that the attorney's duty to his client outweighed any duty the attorney had to obey "the trivia of a pseudo-criminal statute."[280] However, the court noted that, if Belge had been indicted for "obstruction of justice under a proper statute, [then] the work of this Court would have been much more difficult than it is."[281]

Other courts have attempted to deal with the problem of required disclosure by balancing the attorney's duties to his client against the public interest in criminal investigations. In *State ex rel. Sowers v. Olwell*,[282] the Supreme Court of Washington ruled that evidence could be withheld under the attorney-client privilege "for a reasonable period of time" to enable the attorney to prepare his defense.[283] As one commentator has pointed out, however, this holding causes more problems than it solves.[284] Nowhere does the court define the term "reasonable time." Furthermore, if in fact the attorney needed the evidence to prepare his case, "[t]hat purpose could be adequately served by requiring that the evidence be promptly turned over to the authorities, while providing that the attorney be entitled to repossession for such time as required to aid him in preparing his case."[285]

The Model Code provides a final alternative for the lawyer presented with instrumentalities of a crime. If the client "[i]nsists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules,"[286] the lawyer may be permitted to withdraw.

C. *Analysis and Proposal*

Analysis of the dilemma faced by the attorney confronted with instrumentalities of a crime leads to the conclusion that neither the fifth or sixth amendments nor the attorney-client privilege provides a justifiable reason to withhold instrumentalities of a crime in the attorney's possession. Likewise, the Model Code of Professional Responsibility is sufficiently ambiguous to be of little use to the defense attorney who seeks to suppress such evidence for ethical reasons. This is not to suggest, however, that the defense attorney must become an arm of the state, providing unlimited assistance in the prosecution of his client. The attorney can attempt to provide some balance between his legal obligation to produce the evidence and his ethical obligation to aid his client and preserve cli-

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N.Y.S.2d 771 (1975), *aff'd*, 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976); *see supra* text accompanying notes 231-32.

280. *Id.* at ___, 372 N.Y.S.2d at 803.

281. *Id.*

282. 64 Wash. 2d 828, ___, 394 P.2d 681, 684 (1964); *see supra* note 209.

283. *Id.*

284. Comment, *supra* note 263, at 228.

285. *Id.*

286. MODEL CODE DR 2-110(C)(1)(c) (1981).

ent confidences.

Prevention is often the best cure.[287] With this in mind, the defense attorney will do well to avoid the situation of being presented with instrumentalities. This can be accomplished by informing the client at the first meeting of the attorney-client privilege in regard to communications. The client should be made aware, however, that the privilege is not without limit, and that only communications are privileged. Physical evidence does not fall within the privilege, and the attorney is duty-bound not to withhold such evidence from the prosecution.

Undoubtedly, some clients will ignore the attorney's initial warnings and insist on delivering instrumentalities of a crime to the attorney. If that happens, the attorney should not take possession of the object(s), and the client should be reminded of the instructions given him at the initial meeting.[288] Admittedly, in some cases, the "refusal to accept evidence is a strong indication to the client that he should destroy it."[289] Granted, if such an indication occurs, the result is not desirable. The evidence will either be destroyed,[290] thereby obstructing justice, or the client will be caught in his attempt to destroy the evidence. Unfortunately, there may be no perfect solution to this dilemma. However, the procedure outlined here insulates the attorney from active participation in the suppression of evidence and allows him to protect the confidences and secrets of his client.[291]

If the client ignores these repeated warnings, the attorney should inform him that by leaving the evidence with the lawyer, he impliedly consents to having it turned over to the prosecutor. Such a procedure would insulate the attorney from disciplinary charges. Disclosure of secrets and confidences is permissible with the consent of the client.[292]

Once a client has ignored all warnings and placed the instrumentalities in the possession of the attorney, the attorney must produce the evidence. It must be remembered, however, that the attorney, by performing such an act, is not abandoning his client's defense. While the object itself cannot be excluded from evidence, the attorney-client privilege provides the

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287. Other commentators have noted the need for client education in such a situation. *See* Martin, *supra* note 216, at 873-74; Comment, *supra* note 220, at 449.

288. See Note, *supra* note 217, at 190-92, for a discussion of the various alternatives available to an attorney in such a situation.

289. Comment, *supra* note 263, at 213.

290. For a discussion of the destruction of evidence issue, see generally Note, *Legal Ethics and the Destruction of Evidence*, 88 YALE L.J. 1665 (1979).

291. *See* Saltzburg, *Communications Falling Within the Attorney-Client Privilege*, 66 IOWA L. REV. 811, 829-35 (1981) (arguing that once evidence is shared with the attorney and then destroyed, the attorney-client privilege should not apply to prevent the attorney from testifying about the evidence.

292. MODEL CODE DR 4-101(C)(1); *see also id.* EC 4-2.

necessary safeguard to prevent the lawyer from becoming a witness against his client. In addition, if the *Olwell* rule were universally adopted, it would prevent the prosecution from commenting on the source of the evidence.[293]

In addition, once the client places an instrumentality in the possession of the attorney, the attorney is faced with the dilemma of choosing a method of delivery to the prosecutor. One school of thought advocates the use of "anonymous methods of return . . . such as registered mail with no return address, a cooperative police officer, or the least attractive method—'clandestine' return."[294]

The use of an anonymous form of return, however, may only compound an attorney's ethical and legal problems. The value of an instrumentality of a crime lies not in the physical object itself, but in the object's connection to the alleged crime. Although anonymous delivery of the object to the proper authorities does not impair the prosecution's case, the police and prosecution are still faced with the difficult task of linking the anonymous instrumentality to the alleged crime. In that regard, the attorney may well be guilty of abusing his professional responsibility not "to take possession of and secrete the . . . instrumentalities of a crime."[295]

The attorney confronted with instrumentalities of a crime faces a dilemma that carries no ideal solution. However, the three-part solution of prevention by client education, required disclosure of items in the attor-

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293. As the *Olwell* court stated:

> We think the attorney-client privilege should and can be preserved even though the attorney surrenders the evidence he has in his possession. The prosecution, upon receipt of such evidence from an attorney, where charge against the attorney's client is contemplated (presently or in the future), should be well aware of the existence of the attorney-client privilege. Therefore, the state, when attempting to introduce such evidence at the trial, should take extreme precautions to make certain that the source of the evidence is not disclosed in the presence of the jury and prejudicial error is not committed. By thus allowing the prosecution to recover such evidence, the public interest is served, and by refusing the prosecution an opportunity to disclose the source of the evidence, the client's privilege is preserved and a balance is reached between these conflicting interests. The burden of introducing such evidence at a trial would continue to be upon the prosecution.

State *ex rel.* Sowers v. Olwell, 64 Wash. 2d 828, ___, 394 P.2d 681, 685 (1964) (footnote omitted).

294. 29 CRIM. L. REP. (BNA) 2466 (Aug. 26, 1981) (remarks of attorney Charles English in reference to the "Ethical Standard to Guide Lawyer Who Receive [sic] Physical Evidence Implicating His Client in Criminal Conduct," proposed by the Ethics Committee of the Criminal Justice Section of the American Bar Association); *see supra* note 216.

Clandestine return of physical evidence poses other risks for the criminal defendant and his attorney. One case found that the person making the clandestine return could not rely on the attorney-client privilege, even if he were a fellow attorney. The attorney-client privilege would not apply because the attorney making the delivery was not retained for legal advice and counsel. Hughes v. Meade, 453 S.W.2d 538, 542 (Ky. Ct. App. 1970).

295. *In re* Ryder, 381 F.2d 713, 714 (4th Cir. 1967).

ney's possession, and a prohibition on the introduction of evidence concerning the source of the instrumentality would adequately protect the attorney from active participation in obstruction of justice while not violating his client's confidence. In this regard and because of the need for a clear standard, the Model Code of Professional Responsibility should be amended to include the following:

> A lawyer shall, in a criminal matter, upon initial contact with the client, inform the client of the existence of the attorney-client privilege and the scope of the privilege in regard to protection of communications between attorney and client. The client shall also be informed that the privilege does not extend to physical evidence. As an officer of the court, an attorney is obliged to produce physical evidence which falls into his possession. If, after such information has been made available to the client, the client then places physical evidence in the possession of the attorney, the client will be deemed to have consented to the revelation of the evidence to the proper authorities.

VI. CONCLUSION

The modern purpose of the attorney-client privilege is to encourage clients to make full disclosure to their attorneys, free from apprehension that the information will be used against them.[296] In order for the privilege to attach, a client must seek legal advice from a professional legal advisor who is acting in such a capacity. Further, the attorney-client communication must be made in confidence, and the communication must relate to the purpose for seeking legal advice.[297] In *In re Shargel*,[298] the Second Circuit stated that "[t]he underlying theory . . . is that encouraging clients to make the fullest disclosure to their attorneys enables the latter to act more effectively, justly, and expeditiously, and that these benefits outweigh the risks posed by barring full revelation in court."[299] However, because the attorney-client privilege prevents disclosure of relevant evidence and impedes the quest for truth, some commentators have argued that the privilege should be strictly limited and that it should not apply at all in civil litigation.[300] The rationale for eliminating the privilege in civil litigation is that a net gain for truth-telling would result, the justice system would be enhanced, and the result of a trial would not be dependent upon the relative abilities of the attorneys.[301] The *Shargel* court, for example, stated that the privilege must be strictly construed

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296. *See* Upjohn v. United States, 449 U.S. 383, 389 (1981); Fisher v. United States, 425 U.S. 391, 403 (1976). *See generally* C. MCCORMICK, *supra* note 23, § 87.

297. *See supra* note 15 and accompanying text.

298. 742 F.2d 61 (2d Cir. 1984).

299. *Id.* at 62 (quoting J. WEINSTEIN & M. BERGER, EVIDENCE ¶ 503(02) (1982)).

300. *See* 8 J. WIGMORE, *supra* note 1, § 2291; Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege*, 54 U. COLO. L. REV. 51, 51 (1982).

301. Frankel, *supra* note 300, at 52-53.

within the narrowest possible limits consistent with the logic of its principle.[302]

Other commentators have argued that an absolute privilege should be maintained in both civil and criminal litigation.[303] Proponents of this view assert that under our present judicial system, it is absolutely necessary that a party to litigation secure counsel and that abolition of the privilege would discourage the full disclosure necessary for a fair trial.[304] Furthermore, if the privilege is abolished, a party with a valid claim or defense may fail to confide in his attorney since he is unaware of the law's complexities.[305] In addition, if the privilege is abolished, a client may not confide in an attorney at all, and therefore, the abolition of the privilege may not result in any significant gain of information.[306]

Other scholars have taken the compromise view that the privilege should apply in civil litigation only when its benefit to the attorney-client relationship outweighs its cost in suppressing the truth.[307] Such reasoning would formalize the informal balancing that appears to take place in the client identity/fee and instrumentality cases. However, the benefit/cost balancing test may be hard to apply in practice. It is easy to imagine the scale being tipped to the side of abandoning the privilege whenever communications to an attorney have a substantial bearing on the issues at trial. This may lead to the same ultimate effect as abandoning the privilege because a client may feel obligated to conceal important facts from his attorney.

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302. *Shargel*, 742 F.2d at 62.

303. *See* Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597 (1980).

304. *Id.* at 604.

305. *Id.* at 605-07.

306. *Id.* at 609-10.

307. *See, e.g.*, 8 J. WIGMORE, *supra* note 1, § 2217; *see also* Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464 (1977) (asserting that although criminal defendants have a constitutional right to the privilege under the fifth and sixth amendments to the United States Constitution, the privilege should only apply to other parties when the balancing process weighs in their favor).