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Attorney-Client Communications of Criminal Defendants: Evidentiary and Constitutional Protections

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ATTORNEY-CLIENT COMMUNICATIONS OF CRIMINAL DEFENDANTS: EVIDENTIARY AND CONSTITUTIONAL PROTECTIONS

Federal courts disagree over the nature and degree of interference with a criminal defense by government agents that an accused must show to establish a violation of his sixth amendment right to counsel.[1] Courts agree, however, that the right to counsel requires government agents to respect the privacy of communications between an accused individual and his attorney.[2] The attorney-client privilege also protects defense preparations by preventing courts from compelling clients and attorneys to disclose their confidential communications.[3] Although courts have recognized an interrelationship between the privilege and the right and between the protections they provide,[4] few courts have attempted to identify precisely the interaction of these protections.[5] Such a determination would aid in defining the limits of permissible governmental intrusion upon attorney-defendant communications and provide a basis upon which to reconcile the differing views of the federal courts on the issue.

This Note proposes a resolution of current conflicts regarding the de-

1. *Compare, e.g.,* Briggs v. Goodwin, 698 F.2d 486, 494-45 (prosecutorial knowledge of defense strategy obtained through governmental intrusion upon attorney-client confidences constitutes prejudicial violation of defendant's sixth amendment rights), *vacated on other grounds,* 712 F.2d 1444 (D.C. Cir. 1983) *with* United States v. Irwin, 612 F.2d 1182, 1187 (9th Cir. 1980) (defendant's sixth amendment rights violated only when prosecution actually uses confidential information gained through government intrusion). For a more detailed discussion of current conflicts in sixth amendment interpretation, see *infra* notes 63-76 and accompanying text.

2. *E.g.,* Granviel v. Estelle, 655 F.2d 673, 679-83 (5th Cir.), *cert. denied,* 455 U.S. 1003 (1981); United States v. Brugman, 655 F.2d 540, 546 (4th Cir. 1981); United States v. Rosner, 485 F.2d 1213, 1224 (2d Cir. 1973), *cert. denied,* 417 U.S. 950 (1974); United States v. *In re* Warrant Authorizing Interception of Oral Communications, 521 F. Supp. 190, 197 (D.N.H. 1981), *vacated on other grounds,* 673 F.2d 5 (1st Cir. 1982); Pobliner v. Fogg, 438 F. Supp. 890, 892 (S.D.N.Y. 1977).

3. For a discussion of the boundaries of the protection afforded by the attorney-client privilege, see *infra* notes 12-20 & 40 and accompanying text.

4. *E.g.,* Bishop v. Rose, 701 F.2d 1150, 1157 (6th Cir. 1983); United States v. Melvin, 650 F.2d 641, 645 (5th Cir. 1981); United States v. Levy, 577 F.2d 200, 209 (3d Cir. 1978); Beckler v. Superior Court, 568 F.2d 661, 662 & n.2 (9th Cir. 1978). For other discussions of this interrelationship, see Amicus Curiae Brief for the United States at 24 n.13, Weatherford v. Bursey, 429 U.S. 545 (1977); Memorandum of Amici Curiae Regarding Invasion of Joint Defense at 5, United States v. Pioggia, Cr. No. 82-231-K (D. Mass. Aug. 18, 1983), *appeal docketed sub nom.,* United States v. Barkett, Cr. No. 84-1029 (1st Cir. Jan. 12, 1984).

5. *See, e.g.,* Beckler v. Superior Court, 568 F.2d 661, 662 & n.2 (9th Cir. 1978). *But see* United States v. Melvin, 650 F.2d 641, 645 (5th Cir. 1981) (privilege provides exact contours of right's requirement of confidentiality).

marcation of permissible and impermissible governmental intrusions upon confidential communications between the criminally accused and their attorneys. Part One of this Note presents the law governing the attorney-client privilege[6] and the sixth amendment right to counsel[7] in federal courts. Part Two sets forth both the distinctions and similarities between the protections afforded by the privilege and the right.[8] These distinctions and similarities provide a basis for formulating the standard that courts should employ when deciding whether government interceptions of attorney-client confidences violate the sixth amendment. In Parts Three and Four this Note concludes that the right to counsel should prohibit all prosecutorial knowledge of confidential attorney-criminal defendant communications[9] and that the courts should disregard the question whether government agents deliberately intercepted the communications.[10]

I. THE EVIDENTIARY AND CONSTITUTIONAL PROTECTIONS OF ATTORNEY-CLIENT COMMUNICATIONS

A. The Attorney-Client Privilege

The attorney-client privilege prevents involuntary disclosure in court of confidential attorney-client communications. The generally recognized[11] parameters of the attorney-client privilege provide as follows: (1) Where legal advice of any kind is sought[12] (2) from a professional

6. *See infra* notes 11-42 and accompanying text.

7. *See infra* notes 43-88 and accompanying text.

8. *See infra* notes 89-124 and accompanying text.

9. *See infra* notes 125-46 and accompanying text.

10. *See infra* notes 131-41 and accompanying text.

11. When federal law governs, principles of the common law determine the boundaries of the attorney-client privilege. FED. R. EVID. 501. The federal courts generally rely upon Wigmore's encapsulation of the principles of the privilege. *See infra* text accompanying notes 12-19; United States v. El Paso Co., 682 F.2d 530, 538 n.9 (5th Cir. 1982), *cert. denied,* 104 S. Ct. 1927 (1984); *In re* Fischel, 557 F.2d 209, 211 (9th Cir. 1977); United States v. Goldfarb, 328 F.2d 280, 281 (6th Cir.), *cert. denied,* 377 U.S. 976 (1964); Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 319 (7th Cir.) (en banc), *cert. denied,* 375 U.S. 929 (1963); Bouscher v. United States, 316 F.2d 451, 457 (8th Cir. 1963). Occasionally, courts refer to a restatement of the privilege, similar to Wigmore's, set forth in United States v. United Shoe Mfg. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950). *See* United States v. Kelly, 569 F.2d 928, 938 (5th Cir.), *cert. denied,* 439 U.S. 829 (1978); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1977). For a listing of state codifications of the privilege, see 8 J. WIGMORE, EVIDENCE § 2292, at 55 n.2 (J. McNaughton rev. ed. 1961).

12. C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 95, at 199-201 (2d ed. 1972); 8 J. WIGMORE, *supra* note 11, §§ 2294-96, 2298-99, at 558-66, 572-80. The privilege

legal advisor in his capacity as such,[13] (3) the communications relating to that purpose,[14] (4) made in confidence[15] (5) by the client,[16] (6) are at the client's instance permanently protected[17] (7) from disclosure by the client or by the legal advisor,[18] (8) except when the client waives the protection.[19] Federal courts also extend the privilege to confidential communications from attorney to client which, if disclosed, arguably could reveal privileged client communications.[20]

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does not protect, however, a client who seeks advice relating to his involvement in an ongoing or future illegal act. C. MCCORMICK, *supra*, § 95, at 199; 8 J. WIGMORE, *supra* note 11, §§ 2298-99, at 572-80.

13. C. MCCORMICK, *supra* note 12, § 88, at 179-82; 8 J. WIGMORE, *supra* note 11, §§ 2300-05, at 580-87. Generally, the client must believe that he is consulting an attorney and must manifest his intent to seek professional advice. C. MCCORMICK, *supra* note 12, § 88, at 179; 8 J. WIGMORE, *supra* note 11, §§ 2296-97, at 566-72.

14. C. MCCORMICK, *supra* note 12, §§ 89-90, at 182-87; 8 J. WIGMORE, *supra* note 11, §§ 2306-10, at 588-99. Acts as well as words can constitute communication. C. MCCORMICK, *supra* note 12, § 89, at 183-84. The privilege protects written and oral communications, including documents existing prior to the creation of the attorney-client relationship which were privileged on other grounds when the client transferred them to the attorney. *Id.* § 89, at 185. *See also* Fisher v. United States, 425 U.S. 391 (1976). While the attorney does not have to disclose communicated facts, the client may only refuse to disclose that he communicated these facts; the underlying facts are not privileged. C. MCCORMICK, *supra* note 12, § 89, at 183-84. Neither the fact of employment nor the identity of the attorney or the client constitute privileged matters. *Id.* § 90 at 185.

15. C. MCCORMICK, *supra* note 12, § 91, at 187-91; 8 J. WIGMORE, *supra* note 11, §§ 2311-16, at 599-618. The client must either expressly demand or reasonably assume confidentiality. C. MCCORMICK, *supra* note 12, § 91, at 188. The presence of a third party during the communication does not automatically negate confidentiality. Weatherford v. Bursey, 429 U.S. 545, 554 (1977). When a third party is present, courts ask whether confidentiality remained a reasonable assumption and whether the presence of the third party was reasonably necessary, such as for the purpose of preparing a joint defense. C. MCCORMICK, *supra* note 12, § 91, at 189-90.

16. C. MCCORMICK, *supra* note 12, §§ 89-90, at 182-87; 8 J. WIGMORE, *supra* note 11, §§ 2317-20, at 618-29. Certain communications from attorney to client are also privileged. *See infra* note 20 and accompanying text.

17. C. MCCORMICK, *supra* note 12, § 92, at 192-94; 8 J. WIGMORE, *supra* note 11, §§ 2321-23, at 629-31. The protection of the privilege generally survives the client, except in cases involving the validity or interpretation of the client's will. C. MCCORMICK, *supra* note 12, § 94, at 197.

18. C. MCCORMICK, *supra* note 12, § 87, at 175-79; 8 J. WIGMORE, *supra* note 11, §§ 2324-26, at 631-34.

19. C. MCCORMICK, *supra* note 12, § 93, at 194-97; 8 J. WIGMORE, *supra* note 11, §§ 2327-29, at 634-41. Waiver may arise expressly from the client's intentions or implicitly from his actions. *See* C. MCCORMICK, *supra* note 12, § 93, at 194-97; 8 J. WIGMORE, *supra* note 11, §§ 2327-29, at 634-41.

20. *E.g.*, Upjohn Co. v. United States, 449 U.S. 383, 390 (1981); Mead Data Cent., Inc. v. United States Dep't of Air Force, 566 F.2d 242, 254 (D.C. Cir. 1977); *In re* Fischel, 557 F.2d 209, 211 (9th Cir. 1977); Garner v. Wolfinbarger, 430 F.2d 1093, 1096 n.7 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956). McCormick observes that the protection of attorney communications is inconsistent with the modern view that the promotion of client candor justifies the privilege. C. MCCORMICK, *supra* note 12, § 89, at 182-85. Apparently, courts tolerate this inconsistency to avoid

Courts apply the privilege absolutely. Whenever a client demonstrates that sought-after information properly comes within the scope of the privilege's protection, a court will afford that protection. The client does not need to show that disclosure would prejudice his case.[21]

Although courts originally developed the privilege to protect the attorney's honorable status in society,[22] they currently justify it on the ground that it is essential to a fair system of adjudication.[23] The fair and efficient administration of an adversary system of justice requires effective lawyer performance,[24] which can result only when a client discloses all the infor-

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inadvertent disclosure of privileged client communications. *See, e.g.,* Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980). For an elaboration of the modern justification for the privilege, see *infra* notes 23-34 and accompanying text.

21. *See supra* notes 12-20 and accompanying text. *See also infra* notes 40-41 and accompanying text.

22. 8 J. WIGMORE, *supra* note 11, § 2290, at 542-43. Originating in the late sixteenth century, the privilege was "a consideration for *the oath and the honor* of the attorney rather than for the apprehensions of his client." *Id.* at 543 (emphasis original). Apparently this early justification for the privilege derived from Roman law. Radin, *The Privilege of Confidential Communication Between Lawyer and Client,* 16 CALIF. L. REV. 487, 487-89 (1928). During the latter half of the eighteenth century, courts decided that the benefits from the privilege failed to offset the social loss resulting from the exclusion of relevant testimony. *See* 8 J. WIGMORE, *supra* note 11, § 2290, at 543. Wigmore quoted one court's complete repudiation of the point of honor doctrine:

> [I]f this point of honour was to be so sacred as that a man who comes by knowledge of this sort from an offender was not to be at liberty to disclose it, the most atrocious criminals would every day escape punishment; and therefore it is that the wisdom of the law knows nothing of that point of honour.

Id. § 2286, at 531 n.16 (quoting Hill's Trial, 20 How. St. Tr. 1362 (1777)). Note that the cost of the privilege is not as great in civil as in criminal cases, because in the latter, the combination of the privilege and the fifth amendment allows both attorney and client to refuse to testify. *See infra* notes 28-34 and accompanying text. For a comprehensive discussion of the early history of the privilege, see Hazard, *An Historical Perspective on the Attorney-Client Privilege,* 66 CALIF. L. REV. 1061 (1978).

23. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Trammel v. United States, 445 U.S. 40, 51 (1980); Fisher v. United States, 425 U.S. 391, 403 (1976); Hunt v. Blackburn, 128 U.S. 464, 470 (1888); *In re* Grand Jury Proceedings, 604 F.2d 798, 802 (3d Cir. 1979); United States v. Buckley, 586 F.2d 498, 502 (5th Cir. 1978), *cert. denied,* 440 U.S. 982 (1979); Mead Data Cent., Inc. v. United States Dep't of Air Force, 566 F.2d 242, 254 n.25 (D.C. Cir. 1977); *In re* Fischel, 557 F.2d 209, 211 (9th Cir. 1977); United States v. Goldfarb, 328 F.2d 280, 281 (6th Cir.), *cert. denied,* 377 U.S. 976 (1964); C. MCCORMICK, *supra* note 12, § 87, at 176; 8 J. WIGMORE, *supra* note 11, § 2290, at 543. *See generally* M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975).

As Wigmore indicates, the present form of the privilege differs from that of the original privilege in three ways. First, the client, rather than the attorney, now asserts the privilege. Second, the protection extends to all legal advice, rather than just that related to ongoing litigation. Third, the attorney can no longer waive the privilege. 8 J. WIGMORE, *supra* note 11, § 2290, at 544.

24. *E.g.,* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (sound legal advice and advocacy serves public interest in the administration of justice).

mation that the attorney needs to give informed advice.[25] Uninhibited client disclosure occurs only when a client knows that a court cannot compel either the attorney or the client to disclose the content of attorney-client communications.[26] In contrast, an incomplete privilege based, for example, on a balancing of society's interest in arriving at an accurate result against the desirability of client candor would inject uncertainty into the client's mind, thereby discouraging candor.[27] The fair and effi-

25. *See, e.g.,* United States v. Buckley, 586 F.2d 498, 502 (5th Cir. 1978) ("[T]he policy behind the attorney-client privilege . . . is to encourage the free-flowing communication and candid disclosure so vitally necessary to effective representation by counsel"), *cert. denied,* 440 U.S. 982 (1979).

26. Hunt v. Blackburn, 128 U.S. 464, 470 (1888); *see also In re* Fischel, 557 F.2d 209, 211 (9th Cir. 1977) (purpose of privilege is to encourage client candor "without fear of future disclosures of such confidences").

27. *See* Upjohn Co. v. United States, 449 U.S. 383, 393 (1981); *In re* Grand Jury Investigation, 599 F.2d 1224, 1235 (3d Cir. 1979); United States v. Buckley, 586 F.2d 498, 503 (5th Cir. 1978), *cert. denied,* 440 U.S. 982 (1979). Two arguments undermine the assertion that the need for certainty justifies an absolute privilege. First, notwithstanding their awareness of the absolute privilege, prospective clients naturally hesitate to be completely candid because of the difficulty in ascertaining whether their communication will satisfy the strictly construed elements of the privilege. *See infra* text accompanying note 40. Second, it is possible that some clients, though uncertain due to the lack of an absolute privilege, would realize that the cost of withholding information from their attorney would outweigh the risks of in-court disclosure. *See* Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement,* 91 HARV. L. REV. 464, 470-73 (1977) [hereinafter cited as Note, *Fixed Rules*]. *See generally* Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine,* 71 YALE L.J. 1226 (1962) (an empirical study on the effect of privilege upon client candor) [hereinafter cited as Note, *Functional Overlap*].

Several commentators advocate a balancing approach. *E.g.,* C. MCCORMICK, *supra* note 12, § 87, at 175-79; 8 J. WIGMORE, *supra* note 11, § 2285, at 527-28; Note, *Fixed Rules, supra,* at 473-77. A balancing approach rests on the belief that the benefits of the privilege are often too speculative to pursue, given the high cost of excluding evidence. *See* 8 J. WIGMORE, *supra* note 11, § 2291, at 554. *Contra* Barnhart, *Privilege in the Uniform Rules of Evidence,* 24 OHIO ST. L.J. 131 (1963). Balancing is consistent with a privilege the purpose of which is to better the judicial system. The efficacy and fairness of the system advance incrementally both when a court admits evidence to obtain a more complete factual basis for decision, and when a court excludes evidence to encourage client candor and thereby increase the efficacy of lawyers' representation. *See* Note, *Fixed Rules, supra,* at 470-73.

Unlike the balancing approach, an absolute privilege promotes the historical goal of preserving the honorable status of the bar. *See supra* note 22 and accompanying text. Admitting privileged evidence is not an alternative means to such an end. Hence, there is no balance to strike. Thus, the application of the privilege supports the argument that client candor is merely a benefit, whereas the purpose of the privilege is the preservation of "the adversary system's sentiment of loyalty." C. MCCORMICK, *supra* note 12, § 87, at 176.

Regardless of whether courts ultimately adopt a balancing approach, however, privileged communications also qualifying for sixth amendment protection will never be subjected to the uncertainty of balancing. *See* Glasser v. United States, 315 U.S. 60, 69-70 (1942). Several commentators suggest that the attorney-client privilege rises to the level of a constitutional right. *See* Seidelson, *The Attorney-Client Privilege and Client's Constitutional Rights,* 6 HOFSTRA L. REV. 693, 727 (1978); Note,

cient administration of an adversary system of justice, therefore, requires the protection of confidential attorney-client communications from involuntary disclosure in court.[28]

The adversary system's need for the attorney-client privilege is especially critical in the context of criminal prosecutions. Unlike the civil

Government Intrusions into the Defense Camp: Undermining the Right to Counsel, 97 HARV. L. REV. 1143, 1145 (1984) [hereinafter cited as Note, *Governmental Intrusions*]; Note, *Fixed Rules, supra,* at 485-87. These commentators mistake coextensive protection for equivalent legal significance. Unlike a constitutional right, the privilege seeks to benefit the individual only as a means of accomplishing a social purpose. *See infra* notes 100-101 and accompanying text. Furthermore, the privilege and right to counsel afford protections of different scope, with different remedies. *See infra* notes 109-22 and accompanying text. The privilege need not be elevated to constitutional status because, as indicated by the overlapping protection of attorney-client communications by the privilege and the right, the Constitution itself, by means of the sixth amendment, provides the protection that the commentators attribute to the privilege. While the courts have observed that constitutional protections incorporate privilege concepts, they have not identified a constitutionally guaranteed privilege. *See, e.g.,* Maness v. Meyers, 419 U.S. 449, 466 n.15 (1975); Bradt v. Smith, 634 F.2d 796, 800 (5th Cir.), *cert. denied,* 454 U.S. 830 (1981); Beckler v. Superior Court, 568 F.2d 661, 662 (9th Cir. 1978); OKC Corp. v. Williams, 461 F Supp. 540, 546 (N.D. Tex. 1978); *cf.* Fisher v. United States, 425 U.S. 391, 402-05 (1976) (attorney-client privilege protects client's documents transferred to attorney for purpose of seeking legal advice if the documents were, prior to transfer, protected by client's fifth amendment privilege against self-incrimination).

28. This argument has not convinced all commentators on the merits of the attorney-client privilege. A few scholars have challenged the privilege on its face, arguing that only the guilty need its protection, of which they are undeserving. *See, e.g.,* 5 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 302-12 (1827); 7 THE WORKS OF JEREMY BENTHAM 473-79 (Bowring ed. 1843). Wigmore responded to such arguments by observing that in civil actions, it is unlikely that one side is absolutely guilty and the other absolutely blameless. 8 J. WIGMORE, *supra* note 11, § 2291, at 552. After considering both sides of the debate, McCormick found the privilege ultimately justified by the adversary system and its inherent need for unencumbered loyalty by attorneys to their clients. C. MCCORMICK, *supra* note 12, § 87, at 177.

Underlying McCormick's argument is the practical recognition that, while the societal benefits of the privilege are speculative, *see* 8 J. WIGMORE, *supra* note 11, § 2291, at 554; *contra* Barnhart, *supra* note 27, attorneys prosper because the privilege encourages prospective clients to seek counsel when they might otherwise be afraid to discuss their affairs. C. MCCORMICK, *supra* note 12, § 87, at 177; 8 J. WIGMORE, *supra* note 11, § 2291, at 553. Furthermore, absent the privileges some lawyers conceivably would choose not to remain in a profession in which courts would require them to betray client confidences. C. MCCORMICK, *supra* note 12, § 87, at 177; 8 J. WIGMORE, *supra* note 11, § 2291, at 553. The federal courts, however, have not adopted McCormick's argument, adhering instead to the client candor justification. For an exceptional case, see United States v. Upjohn Co., 600 F.2d 1223, 1225 (6th Cir. 1979) (privilege based both upon sentiment of loyalty and encouraging candor), *rev'd on other grounds,* 449 U.S. 383 (1981).

If correct, McCormick's "necessity of loyalty" argument indicates that the actual rationale behind the privilege has not changed since its origin. *See supra* note 22 and accompanying text. Nevertheless, client candor would remain important as an incidental benefit tipping the societal cost-benefit balance in favor of retaining the privilege. *See supra* note 22 and accompanying text. By articulating client candor as an incidental benefit, rather than the purpose, of the privilege, courts could perhaps undercut arguments in favor of a balancing approach to the privilege. *See supra* note 27.

litigant, who, despite the privilege, remains subject to examination regarding underlying facts,[29] the criminal defendant has the additional protection of the fifth amendment privilege against self-incrimination.[30] Because the prosecution cannot compel the defense attorney to testify regarding confidential communications, it has no direct access to facts known only by the defendant unless the defendant waives his fifth amendment privilege.[31]

Without the protection of the attorney-client privilege, by disclosing incriminating information to his attorney, the defendant risks compelled in-court disclosure by the attorney, which would vitiate his fifth amendment rights.[32] Alternatively, the accused could choose to withhold incriminating facts from his attorney, thereby rendering his attorney's representation less effective, and undermining his sixth amendment rights to effective counsel.[33] Hence, absent protection of attorney-client communications, the system impermissibly would force the criminal defendant to choose one constitutional right at the expense of another.[34]

Notwithstanding the benefits that result from the privilege, a fair adversary system of justice cannot justify the costs of the privilege in terms of encouraging candor in a particular attorney-client relationship, or on the "microcosmic" level.[35] When an individual asserts the privilege in court, he already has had an opportunity to be candid with his attorney; attempts to encourage candor at this point would be mistimed.[36] A fair system can justify application of the privilege in a particular case only in

29. *E.g.*, Upjohn Co. v. United States, 449 U.S. 383, 395-96 (1981) (quoting City of Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962)). *See supra* note 14.

30. "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V.

31. The prosecution, however, could still obtain information which neither the attorney-client privilege nor the fifth amendment protect. *See infra* note 50.

32. Note, *Fixed Rules, supra* note 27, at 485-86 (criminal defendant, without attorney-client privilege, would have to "surrender his testimony to the court" to gain effective representation).

33. *See* Seidelson, *supra* note 27, at 713; Note, *Fixed Rules, supra* note 27, at 485-86. Some clients possibly would realize, however, that the costs of withholding information from their lawyer outweigh the risk of compelled disclosure. Note, *Fixed Rules, supra* note 27, at 486 n.95.

34. The Supreme Court has found "intolerable" situations in which "one constitutional right should have to be surrendered in order to assert another." Simmons v. United States, 390 U.S. 377, 394 (1968).

35. This Note uses the term "microcosmic" as a concise reference to single attorney-client relationships in the context of single cases. Conversely, "macrocosmic" refers to attorney-client relationships collectively.

36. While exceptional situations may arise in which the client will decide during the trial to "come clean" with his lawyer, legitimate efforts to encourage candor must begin at the onset of the attorney-client relationship.

terms of encouraging candor in all future attorney-client relationships, or on the "macrocosmic" level.[37] Potential clients, after observing that courts do not compel disclosure of confidential attorney-client communications, are more likely to be frank with their attorneys. Society arguably gains more from the resulting increase in fairness of its judicial system than it loses from the inaccessibility of relevant testimony in particular cases.[38]

Because it renders relevant evidence unavailable, the privilege's microcosmic pursuit of macrocosmic candor conflicts with the judicial system's microcosmic pursuit of final resolutions based upon complete factual records.[39] To ease this conflict, courts strictly construe the privilege to protect only disclosures that might not have been made but for the privilege.[40] Despite this strict construction, however, courts will not compel the disclosure of communications within the privilege's established boundaries.[41]

In summary, the attorney-client privilege is an evidentiary privilege operating within a distinct framework. By recognizing this privilege, courts intend to enhance the efficacy and fairness of the adversary system which they supervise. Hence, the microcosmic benefits of the privilege are but means to a macrocosmic end. While courts prevent abuse of the privilege by narrowly defining its parameters, they do not dilute its mac-

37. *See supra* note 35.

38. *But see supra* note 28 (criticisms of the privilege).

39. A similar tension arises in the context of exclusion of evidence on constitutional grounds. *See, e.g.*, United States v. Leon, 104 S. Ct. 3405, 3412-16 (1984) (fourth amendment); Harris v. New York, 401 U.S. 222, 224-26 (1971) (fifth amendment); Massiah v. United States, 377 U.S. 201, 206-07 (1964) (sixth amendment). Privileges hinder the fact-finding process to protect outside interests, while exclusionary rules do so to protect the integrity of the fact-finding process itself. *See* C. MCCORMICK, *supra* note 12, § 92, at 192.

40. *E.g.*, Trammel v. United States, 445 U.S. 40, 50 (1980); Fisher v. United States, 425 U.S. 391, 403 (1976); Weil v. Investment/Indicators, Research & Mgt., Inc., 647 F.2d 18, 24 (9th Cir. 1981); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980); *In re* Grand Jury Investigation, 599 F.2d 1224, 1235 (3d Cir. 1979); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1977); Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 319 (7th Cir.) (en banc), *cert. denied*, 375 U.S. 929 (1963).

41. *E.g.*, Martin v. Lauer, 686 F.2d 24, 32-33 (D.C. Cir. 1982); *In re* Walsh, 623 F.2d 489, 492-93 (7th Cir.), *cert. denied*, 449 U.S. 994 (1980); United States v. Buckley, 586 F.2d 498, 503 (5th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979). Courts will deny government witnesses the privilege, however, when its exercise would unduly restrain the criminal defendant's right to cross-examination. *E.g.*, United States v. Coven, 662 F.2d 162, 171 (2d Cir. 1981), *cert. denied*, 456 U.S. 916 (1982).

Courts often state that the purpose of the privilege limits its scope. *See, e.g.*, Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980). The formulation of the prerequisites to assertion of the privilege, rather than a balancing test, provides the limitations.

rocosmic benefits by requiring proof of prejudice or by subjecting claimants to the uncertainties of a balancing process.[42]

B. Sixth Amendment Right to Counsel

The sixth amendment guarantees the criminal defendant the right to the assistance of counsel.[43] Originally, the right to counsel meant only that the accused could have an attorney conduct his defense.[44] As prosecutors became more adroit, however, the Supreme Court recognized that fair trials depended upon professional representation of all defendants, including indigents.[45] The court further concluded that because the right to the assistance of counsel would not guarantee a fair trial unless the defendant received meaningful representation, "assistance" meant effec-

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42. *See supra* note 27 (discussing balancing process).

43. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI. The fourteenth amendment extends the right to counsel to defendants in state criminal proceedings. Gideon v. Wainwright, 372 U.S. 335, 342 (1963). The right only applies in criminal suits which may result in imprisonment. Scott v. Illinois, 440 U.S. 367, 373 (1979); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972). It is operative from the initiation of formal adversary proceedings, Brewer v. Williams, 430 U.S. 387, 398 (1977), through and including the sentencing process, Green v. United States, 365 U.S. 301, 304 (1961). Prior to adversary proceedings, the right to counsel arises from the fifth amendment protection against self-incrimination. Miranda v. Arizona, 384 U.S. 436, 469 (1966); *see also* Edwards v. Arizona, 451 U.S. 477, 480 n.7 (1981) ("adversary criminal proceedings" are necessary to trigger the sixth amendment right to counsel). For a discussion of the scope and application of the right to counsel, see Project: *Criminal Procedure,* 71 GEO. L.J. 339, 589-92 (1982).

44. *E.g.,* United States v. Van Dryce, 140 U.S. 169 (1891); Nabb v. United States, 1 Ct. Cl. 173 (1864). The sixth amendment encapsulated the American abandonment of the English common-law rule forbidding the participation of counsel in criminal cases. *See* F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 109-10 (1969); Holtzoff, *The Right to Counsel Under the Sixth Amendment,* 20 N.Y.U. L. REV. 1, 1-22 (1944).

45 *See, e.g.,* United States v. Cronic, 104 S. Ct. 2039, 2043-46 (1984); Strickland v. Washington, 104 S. Ct. 2052, 2063 (1984). In Johnson v. Zerbst, 304 U.S. 458 (1938), the Court stated:

> [The right to counsel] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned Counsel. That which is simple, orderly and necessary to the lawyer—to the untrained layman—may appear intricate, complex and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter, this Court has pointed to ". . . the humane policy of the modern criminal law . . ." which now provides that a defendant ". . . if he be poor . . . may have counsel furnished him by the state . . . not infrequently . . . more able than the attorney for the state."

Id. at 462-63 (quoting Patton v. United States, 281 U.S. 276, 308 (1930)). For similar expressions regarding the necessity of lawyers in criminal cases, see Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

tive assistance.[46]

The effectiveness of counsel's assistance depends both upon the particular lawyer's ability and upon whether the legal system allows the lawyer to perform according to that ability.[47] Thus, under the sixth amendment, the accused can challenge either the adequacy of his attorney's ability and efforts,[48] or governmental interference with those efforts.[49] If the prosecution intercepts attorney-client communications that reveal defense plans or the defendant's confidential inculpatory statements, it gains an advantage that unconstitutionally undermines the defense counsel's efforts to provide effective representation.[50] The threat of prosecutorial intrusion upon the defense camp also reduces client candor, further diminishing the efficacy of defense representation.[51]

In *Weatherford v. Bursey*, the Supreme Court held that government interception of attorney-client communications does not automatically violate the sixth amendment.[52] The Court recognized that the tension

46. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (citing Glasser v. United States, 315 U.S. 60, 76 (1942)).

47. Strickland v. Washington, 104 S. Ct. 2052, 2064 (1984).

48. The adequacy of legal assistance exceeds the scope of this Note. The Supreme Court requires proof of both deficit performance and sufficient prejudice to support a claim of ineffectiveness. *See* Strickland v. Washington, 104 S. Ct. 2052, 2067, 2071 (1984); *see also* United States v. Cronic, 104 S. Ct. 2039 (1984).

49. For a discussion of government interference other than interception of attorney-client communications, see Project, *supra* note 43, at 600 n.1813. *See also* United States v. Cronic, 104 S. Ct. 2039 (1984). Government conduct in the absence of counsel, after the commencement of adversary proceedings, must stay within the limitations imposed by Massiah v. United States, 377 U.S. 201 (1964), and its progeny.

50. *E.g.*, Briggs v. Goodwin, 698 F.2d 486, 493-95, *vacated on other grounds*, 712 F.2d 1444 (D.C. Cir. 1983); United States v. Costanzo, 625 F.2d 465, 469 (3d Cir. 1980); United States v. Irwin, 612 F.2d 1182, 1185 (9th Cir. 1980); United States v. Scott, 521 F.2d 1188, 1191 (9th Cir. 1975), *cert. denied*, 424 U.S. 955 (1976). The prosecutor does, however, have certain powers of discovery. *See* FED. R. CRIM. P. 6, 12.1, 12.2, 15, 16, 17. *See generally* Allis, *Limitations on Prosecutorial Discovery of the Defense Case in Federal Courts: The Shield of Confidentiality*, 50 S. CAL. L. REV. 461 (1977).

51. *See* Note, *Government Intrusions*, *supra* note 27, at 1145-46. Unlike protection under the attorney-client privilege, *see supra* notes 35-38 and accompany text, microcosmic protection of communications constitutes an end of, rather than a means employed by, the right to counsel. Like the attorney-client privilege protection, however, the right to counsel's microcosmic protection of communications theoretically engenders macrocosmic candor, which in turn will enable the lawyer to perform more effectively. For further discussion of the similarities and differences in the rationales supporting protection of attorney-client communications by the attorney-client privilege and the sixth amendment right to counsel, see *infra* notes 89-124 and accompanying text.

52. Weatherford v. Bursey, 429 U.S. 545, 558 (1977). For arguments that *Weatherford* distorts precedent so as to avoid a per se rule, thereby limiting the rights of the accused, see *id.* at 561-68 (Marshall, J., dissenting); Comment, *Government Intrusion upon Attorney-Client Relationships—*

between the benefits of sixth amendment protection and its costs, specifically restraints upon investigation, required a more flexible approach.[53] Without adopting a precise analysis, the Court suggested several pertinent questions for courts to ask when determining whether the government has committed an unconstitutional intrusion.[54]

Weatherford's "suggested questions" consider both the purpose and the resulting prejudice of an interception. Under "purpose," the Court asked whether the government intentionally intercepted attorney-client communications.[55] The Court raised several questions concerning resulting prejudice: did the intruding agent testify as to the substance of overheard communications?[56] did the intruding agent inform the prosecutor of overheard defense strategy?[57] did government evidence stem from overheard communications?[58] did the government use overheard communications to the substantial detriment of the accused?[59] The Court failed to indicate whether an affirmative response to only one of these questions would support a claim of unconstitutional intrusion.[60]

Building upon the Supreme Court's suggestions in *Weatherford*, the circuit courts have agreed that a prejudicial government intrusion upon attorney-client communications[61] violates the sixth amendment, whether or not the intrusion is intentional.[62] Disagreement prevails, however, as

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Weatherford v. Bursey, 27 DEPAUL L. REV. 203 (1977); Recent Decisions, 16 DUQ. L. REV. 269-82 (1977-78). Some state courts have circumvented *Weatherford*, imposing more exacting standards based upon state constitutional provisions. *See* Comment, *supra*, at 215 n.84.

53. Although the Court recognized that a per se rule would provide the most effective prophylactic against improper intrusions, it held that such a rule would unnecessarily impede legitimate government undercover work. Weatherford v. Bursey, 429 U.S. 545, 557 (1977).

54. Weatherford v. Bursey, 429 U.S. 545, 554, 558 (1977). *See infra* notes 55-60 and accompanying text. The *Weatherford* Court did not confirm that it will find government interceptions of attorney-client communications unconstitutional in the appropriate circumstances, but its language implies such a position. 429 U.S. at 554.

55. 429 U.S. at 558.

56. *Id.* at 554, 558.

57. *Id.*

58. *Id.*

59. *Id.* at 554. The Court did not elaborate upon the phrase "substantial detrimental use."

60. The Court stated its suggested factors twice, once conjunctively and once disjunctively. *Id.* at 554, 558. Although "purposeful intrusion" appears only in the conjunctive version, the Court may then have been merely noting all of the circumstances absent under the facts of the case, rather than establishing alternatively sufficient elements.

61. *See infra* notes 63-72 and accompanying text. The present discussion assumes that the communications qualify for sixth amendment protection. For a discussion of the prerequisites to sixth amendment protection, see *infra* notes 89-124 and accompanying text.

62. When knowledge is the only ground for finding prejudice, *see infra* notes 63-72 and accompanying text, the government may raise the defense of harmless error. *See, e.g.*, United States v.

to what constitutes a prejudicial intrusion.

When the government intercepts defense strategy, the majority of courts hold that the government's knowledge of such information constitutes prejudice.[63] The minority position rejects knowledge as the threshold of prejudice, instead requiring proof that the government actually used[64] the intercepted strategy to the substantial detriment of the accused.[65] The split between a "knowledge" and a "use" threshold reflects a dispute over the desirability of requiring the accused to establish that government agents used their knowledge of defense plans.[66]

Franklin, 598 F.2d 954, 956-57 (5th Cir.) (information obtained was available from other sources), *cert. denied,* 444 U.S. 870 (1979); United States v. Ostrer, 422 F. Supp. 93, 106 (S.D.N.Y. 1976) (information obtained did not affect prosecutorial actions). The Supreme Court has ruled that assistance which is ineffective because of counsel incompetence can be harmless. *See* Strickland v. Washington, 104 S. Ct. 2052 (1984).

63. The Third and the District of Columbia Circuits expressly hold that knowledge constitutes prejudice. *See* Briggs v. Goodwin, 698 F.2d 486, 494-95, *vacated on other grounds,* 712 F.2d 1444 (D.C. Cir. 1983); United States v. Levy, 577 F.2d 200, 208-10 (3d Cir. 1978). Other circuits implicitly support this position. *See* United States v. Brugman, 655 F.2d 540, 546 (4th Cir. 1981) (considering whether government has learned details of trial preparation); United States v. Saade, 652 F.2d 1126, 1138 (1st Cir. 1981) (to make colorable claim, accused need only allege government overheard communications); United States v. Dien, 609 F.2d 1038, 1043 (suggests government knowledge of privileged information sufficient), *aff'd on other grounds,* 615 F.2d 10 (2d Cir. 1979); United States v. Franklin, 598 F.2d 954, 956 (5th Cir.) (knowledge of defense strategy may create sufficiently realistic possibility of injury), *cert. denied,* 444 U.S. 870 (1979); United States v. Peters, 468 F. Supp. 364, 365-68 (S.D. Fla. 1979) (proof that prosecutor listened to taped conversations regarding defense strategy sufficient).

64. "Use" typically means the introduction of evidence originating in the overheard conversation. *Weatherford,* however, mentioned both evidentiary and other uses. Weatherford v. Bursey, 429 U.S. 545, 554 (1977). It may not be necessary for the use to alter trial results to constitute a violation of the sixth amendment. *See* Briggs v. Goodwin, 698 F.2d 486, 494, *vacated on other grounds,* 712 F.2d 1444 (D.C. Cir. 1983). *But see* Strickland v. Washington, 104 S. Ct. 2052 (1984) (assistance which is ineffective because of counsel incompetence can be harmless).

65. United States v. Irwin, 612 F.2d 1182, 1187 (9th Cir. 1980); Mastrain v. McManus, 554 F.2d 813, 821 & n.10 (8th Cir.), *cert. denied,* 433 U.S. 913 (1977); United States v Boffa, 89 F.R.D. 523, 533 (D. Del. 1981). The Sixth Circuit at least temporarily has adopted the "prejudicial use" threshold. *See* Bishop v. Rose, 701 F.2d 1150, 1157 (6th Cir. 1983) ("Since the confidential information was used [here] for the benefit of the prosecution and to the detriment of the defendant, it is unnecessary for us to decide whether the communication of such information, without more, may sufficiently establish prejudice to support a finding of a Sixth Amendment violation.").

66. *See* Briggs v. Goodwin, 698 F.2d 486, 494-95, *vacated on other grounds,* 712 F.2d 1444 (D.C. Cir. 1983); United States v. Levy, 577 F.2d 200, 208-10 (3d Cir. 1978). The D.C. Circuit stated: "The prosecution makes a host of discretionary and judgmental decisions in preparing its case, and it would be virtually impossible to sort out how any particular piece of information . . . was consciously factored into each of those decisions." Briggs v. Goodwin, 698 F.2d at 494-95. *See also* United States v. Cooper, 397 F. Supp. 277, 284 (D. Neb. 1975) (dangers of subtle use either evidentially or strategically). *See generally* Note, *Government Intrusions, supra* note 27.

Courts among the minority have not decided what constitutes a minimum level of prejudicial use.

When the government intercepts nonstrategic information, few courts hold that prosecutorial knowledge alone violates the sixth amendment.[67] Instead, most courts require actual use of the intercepted information[68] or take no position as to the necessity of showing prejudice resulting from the use of nonstrategic information.[69]

Among the circuits ruling that knowledge establishes a prejudicial, and thereby unconstitutional, intrusion, two schools of thought exist as to which government representatives must know the information before the accused suffers prejudice. The first considers knowledge by either investigators or prosecutors sufficient.[70] The second requires that the prosecutor involved in the case receive the information.[71] Within the second school, the District of Columbia Circuit employs a rebuttable presumption that investigators passed the intercepted information along to

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Consequently, these courts do not reject the possibility that the prosecutor's subconscious use of defense strategy could qualify as a sufficiently prejudicial use. Rather, the minority courts require objective evidence of subconscious prosecutorial use. *See* Bishop v. Rose, 701 F.2d 1150, 1157 (6th Cir. 1983); United States v. Irwin, 612 F.2d 1182, 1187 (9th Cir. 1980); Mastrain v. McManus, 554 F.2d 813, 821 (8th Cir.), *cert. denied,* 433 U.S. 913 (1977); United States v. Boffa, 89 F.R.D. 523, 533 (D. Del. 1981).

67. The Third and District of Columbia Circuits indicate that government knowledge of any privileged information may violate the sixth amendment. *See* Briggs v. Goodwin, 698 F.2d 486, 494-95, *vacated on other grounds,* 712 F.2d 1444 (D.C. Cir. 1983); United States v. Levy, 577 F.2d 200, 208-10 (3d Cir. 1978). The Second Circuit suggests that it agrees. *See* United States v. Dien, 609 F.2d 1038, 1043, *aff'd on other grounds,* 615 F.2d 10 (2d Cir. 1979).

68. *See* United States v. Brugman, 655 F.2d 540, 546 (4th Cir. 1981); United States v. Irwin, 612 F.2d 1182, 1187 (9th Cir. 1980); Mastrian v. McManus, 554 F.2d 813, 821 & n.10 (8th Cir.), *cert. denied,* 433 U.S. 913 (1977). *See also* Bishop v. Rose, 701 F.2d 1150, 1157 (6th Cir. 1983) (perhaps only a temporary position; *see supra* note 63).

69. *See* United States v. Saade, 652 F.2d 1126, 1138 (1st Cir. 1981); United States v. Franklin, 598 F.2d 954, 956 (5th Cir.), *cert. denied,* 444 U.S. 870 (1979).

70. *See* United States v. Costanzo, 625 F.2d 465, 469 (3d Cir. 1980)(FBI's knowledge perhaps sufficient); United States v. Franklin, 598 F.2d 954, 956 (5th Cir.) (must be at least an official assigned to the case), *cert. denied,* 444 U.S. 870 (1979); United States v. Levy, 577 F.2d 200, 208-09 (3d Cir. 1978) (knowledge could affect either the investigation or the prosecution); United States v. Orman, 417 F. Supp. 1126, 1136 (D. Colo. 1976) (accused prejudiced because agents can structure their testimony on basis of knowledge even if they disclose nothing to the prosecution). In *Weatherford,* the Supreme Court rejected the appellate court's conclusion that an investigator's knowledge was sufficient, on the basis of the trial court's express finding that the investigator did not pass information to the prosecutor, and the limited scope of the investigator's testimony. Weatherford v. Bursey, 429 U.S. 545, 556 (1977).

71. *See* Klein v. Smith, 559 F.2d 189, 197 (2d Cir. 1977), *cert. denied,* 434 U.S. 987 (1978); United States v. Natale, 494 F. Supp. 1114, 1125 (E.D. Pa. 1979), *aff'd mem.,* 631 F.2d 726 (3d Cir. 1980); United States v. O'Neill, 484 F. Supp. 799, 801-2 (E.D. Pa.), *aff'd mem.,* 639 F.2d 774 (3d Cir. 1980); United States v. Meinster, 478 F. Supp. 1131, 1133 (S.D. Fla. 1979).

the prosecution.[72]

The circuits also disagree over whether a deliberate[73] government intrusion into attorney-client communications, absent prejudice, violates the sixth amendment right to counsel. The Third Circuit finds deliberate intrusion sufficient.[74] The District of Columbia and Fifth Circuits seem to agree.[75] The Second, Eighth and Ninth Circuits require prejudice.[76]

An accused who proves a sixth amendment violation has several remedies.[77] The courts ordinarily will suppress the evidence[78] or order a new trial,[79] depending upon the stage of the prosecution in which the intrusion is discovered.[80] Courts have also granted broader relief, such as dis-

72. *See* Briggs v. Goodwin, 698 F.2d 486, 495, *vacated on other grounds,* 712 F.2d 1444 (D.C. Cir. 1983). The government may rebut the presumption by showing the existence of "Chinese wall" procedures isolating the prosecutors from such information. *Id.* at 495 n.29. For cases involving "Chinese wall" procedures, see United States v. Natale, 494 F. Supp. 1114 (E.D. Pa. 1979), *aff'd mem.,* 631 F.2d 726 (3d Cir. 1980); United States v. O'Neill, 484 F. Supp. 799 (E.D. Pa.), *aff'd mem.,* 639 F.2d 774 (3d Cir. 1980); United States v. Meinster, 478 F. Supp. 1131 (S.D. Fla. 1979).

73. In this context, "deliberate" means that the government installs an electronic surveillance device, or induces the presence of an informant. *See* United States v. Brugman, 655 F.2d 540, 546 (4th Cir. 1981). "Deliberate" intrusion does not include the self-initiated acts of an informant, *see* United States v. Natale, 494 F. Supp. 1114, 1125 (E.D. Pa. 1979), *aff'd mem.,* 631 F.2d 726 (3d Cir. 1980), the immunization of witnesses, *see* United States v. Griffin, 579 F.2d 1104, 1110 (8th Cir. 1978), *cert. denied,* 439 U.S. 981 (1979), or an independent decision by a codefendant to change his plea to guilty and then to testify, *see* United States v. Kilrain, 566 F.2d 979, 983 (5th Cir. 1978), *cert. denied,* 439 U.S. 819 (1979).

74. *See* United States v. Morales, 635 F.2d 177, 179 (3d Cir. 1980) (showing of intentional government intrusion would support claim of per se violation without showing of prejudice); United States v. Levy, 577 F.2d 200, 210 (3d Cir. 1978) (finding of sixth amendment violation warranted without showing of prejudice when government officials actively sought confidential information).

75. *See* Briggs v. Goodwin, 698 F.2d 486, 493 n.22 (intentional government intrusion *may* violate sixth amendment per se), *vacated on other grounds,* 712 F.2d 1444 (D.C. Cir. 1983); United States v. Franklin, 598 F.2d 954, 956 (5th Cir.) (dismissal of indictment inappropriate when "[g]overnment did not purposely infiltrate the defense camp . . ."), *cert. denied,* 444 U.S. 870 (1979).

76. *See* United States v. Irwin, 612 F.2d 1182, 1186-87 (9th Cir. 1980) (sixth amendment only violated if government intrusion substantially prejudiced defendant); United States v. Dien, 609 F.2d 1038, 1043 (intentional invasion and resulting prejudice necessary to establish sixth amendment violation), *aff'd,* 615 F.2d 10 (2d Cir. 1979); Mastrian v. McManus, 554 F.2d 813, 821 (8th Cir.) (right to counsel only violated if intercepted information actually benefited the prosecution), *cert. denied,* 433 U.S. 913 (1977). *See also* United States v. Tramunti, 425 F. Supp. 342, 343 (S.D.N.Y. 1976) (government intrusion must prejudice defendant to violate sixth amendment).

77. *See generally* Annot., 5 A.L.R.3d 1360, 1390-98 (1966).

78. *See, e.g.,* Gilbert v. California, 388 U.S. 263, 272-73 (1967); Massiah v. United States, 377 U.S. 201, 207 (1964); *see also* Weatherford v. Bursey, 429 U.S. 545, 552 (1977) (dictum) (evidence obtained in violation of the sixth amendment cannot be used in seeking conviction).

79. *See, e.g.,* O'Brien v. United States, 386 U.S. 345, 345 (1967); Black v. United States, 385 U.S. 26, 28-29 (1966).

80. United States v. Morrison, 449 U.S. 361, 364-65 (1980). In *Morrison,* the Court stated that

missing of the indictment.[81] In *United States v. Morrison*,[82] however, the Supreme Court held that dismissal is usually too extreme a remedy, unless there exists a substantial threat of continued impairment of counsel's ability to provide effective assistance.[83] Despite *Morrison*, the circuits occasionally order dismissal without finding continuing prejudice.[84] A constitutional violation also supports a petition for a writ of habeas corpus.[85] Finally, the accused may seek damages from the intruding agent,[86] or initiate contempt or criminal proceedings against that agent.[87]

Thus, the criminal defendant may challenge the admission of evidence,

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a new trial is only warranted when the sixth amendment violation has already tainted the trial. Prior to trial, suppression of the evidence usually provides a sufficient remedy. *Id.*

81. *See, e.g.*, United States v. Levy, 577 F.2d 200, 210 (3d Cir. 1978). In *Levy*, the court held that the introduction of intercepted information into the public domain during trial necessitated dismissal of the indictment. According to the court:

> Any effort to cure the violation by some elaborate scheme . . . would involve . . . the same sort of speculative enterprise . . . already rejected. Even if new case agents and attorneys were substituted, we would still have to speculate about the effects of the old case agents' discussions with key government witnesses. More important, public confidence in the integrity of the attorney-client relationship would be ill-served . . . . We need not decide whether dismissal would be required when defense strategy has been disclosed to government agents but has not become public information.

Id See also United States v. Valencia, 541 F.2d 618, 623 (6th Cir. 1976) (dismissal of indictment appropriate when prosecution learned of defendant's involvement by intercepting other defendant's confidential communications); United States v. Peters, 468 F. Supp. 364, 366 (S.D. Fla. 1979) (defense strategy intercepted); United States v. Orman, 417 F. Supp. 1126, 1136-37 (D. Colo. 1976) (dismissal warranted because government agents could use intercepted defense strategy to alter their testimony).

82. 449 U.S. 361 (1980).

83. *Id.* at 365-67. *See also* United States v. Sander, 615 F.2d 215, 219 (5th Cir.), *cert. denied*, 449 U.S. 835 (1980).

In *Morrison* the government did not intercept communications. Instead the "interference" consisted of questioning the defendant without the presence of counsel, and suggesting to the defendant that counsel was incompetent.

84. *See, e.g.*, United States v. Gouveia, 704 F.2d 1116, 1125-26 (9th Cir. 1983), *rev'd on other grounds*, 104 S. Ct. 2292, 2297 n.4 (1984); *see also* United States v. Melvin, 650 F.2d 641, 644 (5th Cir. 1981) (*Morrison* does not foreclose dismissal). The drastic remedy of dismissal may successfully deter future governmental intrusions, thereby increasing public confidence in the judicial system. *See* Note, *Government Interceptions of Attorney-Client Communications*, 49 N.Y.U. L. REV. 87, 102 (1974). It also may so outrage the public as to offset any increase in confidence.

85. *See* Annot., *supra* note 77, at 1390.

86. When state agents violate the sixth amendment, those injured may sue for damages under 42 U.S.C. § 1983. *See* Weatherford v. Bursey, 429 U.S. 545 (1977); Briggs v. Goodwin, 698 F.2d 486, 496-97 (endorsing sixth amendment cause of action), *vacated on other grounds*, 712 F.2d 1444 (D.C. Cir. 1983). Similarly, there may be recourse against federal agents. *See* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) (cause of action for damages implied under fourth amendment; suggests similar cause of action under sixth amendment).

87. *See* Annot., *supra* note 77, at 1398-99.

the validity of a conviction, and in some cases the viability of an indictment, on grounds of unconstitutional government interception of attorney-client communications. Depending upon the jurisdiction, the success of a sixth amendment claim hinges upon proof of an intentional intrusion, government possession of attorney-client confidences, or government use of intercepted confidences. In all cases, however, the criminal defendant must first establish that the intercepted communications qualify for sixth amendment protection.[88]

II. COMPARISON OF EVIDENTIARY AND CONSTITUTIONAL PROTECTIONS

A. Similarity of Protection Afforded

Although the attorney-client privilege and the right to counsel may afford different degrees of protection, both protect attorney-client communications to the extent of the less broad.[89] In addition, some of the prerequisites for the protections of the privilege and the right overlap completely, suggesting possible cross-application of precedent.[90]

The common parameters of the attorney-client privilege and the sixth amendment's protection of attorney-client communications are as follows:[91] (1) Where legal advice pertaining to a pending criminal prosecution is sought[92] (2) from a professional legal advisor acting in his capacity as such,[93] (3) the communications relating to that purpose,[94] (4) made in

88. *See infra* notes 89-124 and accompanying text.

89. *See infra* text accompanying notes 109-19. For example, a criminal defendant seeking legal advice relating to a pending prosecution can invoke the protection of both the privilege and the right as to communications pertaining to that purpose. *See infra* text accompanying notes 119-22.

90. *See* United States v. Melvin, 650 F.2d 641, 645-46 (5th Cir. 1981) (application of privilege's construction of confidentiality in right to counsel case); United States v. Levy, 577 F.2d 200, 209 (3d Cir. 1978) (sixth amendment insulates all attorney-client confidences from the government enforcement agencies responsible for investigating and prosecuting the case); *see also* United States v. Blasco, 702 F.2d 1315, 1329 (5th Cir.) (overstated breadth of *United States v. Melvin* as holding sixth amendment protection extends to all communications protected by the attorney-client privilege), *cert. denied,* 104 S. Ct. 275 (1983). For a comparison of privilege and right waiver standards, see *infra* notes 123-24 and accompanying text.

91. Wigmore's summary of the parameters of the attorney-client privilege provides the format for this synopsis. *See supra* text accompanying notes 12-19.

92. *See infra* text accompanying notes 109-10. The protection of the right like that of the privilege, *see supra* note 12, does not extend to communications regarding ongoing or contemplated crimes. *E.g.,* United States v. Valencia, 541 F.2d 618, 621 (6th Cir. 1976); United States v. King, 536 F. Supp. 253, 264-65 (C.D. Cal. 1982).

93. *Compare supra* note 13 and accompanying text (existence of attorney-client relationship necessary to invoke attorney-client privilege) *with* United States v. Costanzo, 625 F.2d 465, 468 (3d

confidence[95] (5) by the accused or the legal advisor,[96] (6) are at the instance of the client protected for the duration of the involved formal adversary proceedings,[97] (7) from disclosure by the accused or by the legal advisory,[98] (8) except upon waiver.[99]

B. Differences Between Protection Afforded

The attorney-client privilege and the right to counsel rest on different theoretical underpinnings. Society grants a testimonial privilege to an individual not for his benefit, but for the benefit of the public.[100] Thus macrocosmic, not microcosmic, candor justifies the attorney-client privilege.[101] Accordingly, courts strictly construe the availability of the privilege,[102] but afford its protections regardless of whether or not compelled disclosure would prejudice the individual.[103]

In contrast, the sixth amendment affords the criminally accused an

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Cir. 1980) (communications with "attorney-advisor" protected by sixth amendment); United States v. Scott, 521 F.2d 1188, 1191-92 (9th Cir. 1975) (right to counsel protects confidential communications only in context of attorney-client relationship), *cert. denied,* 424 U.S. 955 (1976); United States v. Fanning, 477 F.2d 45, 48 (5th Cir.) (government intrusion into attorney-client relationship violates sixth amendment), *cert. denied,* 414 U.S. 1006 (1973) *and* United States v. Alderisio, 424 F.2d 20, 24-25 (10th Cir. 1970) (government interception of communications between defendant and codefendant's attorney does not violate right to counsel). *But see* United States v. Valencia, 541 F.2d 618, 621-22 (6th Cir. 1976) (protection of sixth amendment extends to defendants prejudiced by government interception of codefendant's communications with attorney).

94. *See infra* notes 111-12 and accompanying text.

95. Confidentiality is a prerequisite to protection of both the attorney-client privilege, *see supra* note 15 and accompanying text, and the right to counsel, *see* United States v. Blasco, 702 F.2d 1315, 1329 (5th Cir.), *cert. denied,* 104 S. Ct. 275 (1983); United States v. Melvin, 650 F.2d 641, 645-46 (5th Cir. 1981); United States v. Freeman, 519 F.2d 67, 68 (9th Cir. 1975); United States v. Gartner, 518 F.2d 633, 637-38 (2d Cir.), *cert. denied,* 423 U.S. 915 (1975); United States v. King, 536 F. Supp. 253, 265-66 (C.D. Cal. 1982). Courts may ignore the requirement of confidentiality, however, if a confined accused had no opportunity to converse with his attorney privately. *See infra* note 124.

96. *See supra* notes 16-20 and accompanying text; *see also* United States v. Seale, 461 F.2d 345, 364-66 (7th Cir. 1972) (government interception of attorney-client confidences communicated through intermediaries violates sixth amendment). *But see* United States v. Mancusco, 378 F.2d 612, 618 (government interrogation of defendant's accountant, who assisted in preparation of defense, does not violate right to counsel), *modified,* 387 F.2d 376 (4th Cir. 1967), *cert. denied,* 390 U.S. 955 (1968).

97. *See infra* notes 113-14 and accompanying text.

98. *See infra* notes 115-16 and accompanying text.

99. *See infra* notes 123-24 and accompanying text.

100. Trammel v. United States, 445 U.S. 40, 50 (1980) (quoting Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

101. *See supra* notes 28-38 and accompanying text.

102. *See supra* note 40 and accompanying text.

103. *See supra* notes 12-20 and accompanying text.

absolute right to counsel,[104] regardless of any consequential cost to society.[105] The right protects attorney-client communications solely to guarantee an accused a fair criminal trial, not to promote any public interest.[106] Thus, under the right to counsel, microcosmic protection is its own end, rather than, as under the privilege, a means that generates macrocosmic candor.[107] Accordingly, sixth amendment claimants must show that an intrusion was prejudicial to the individual to obtain protective measures.[108]

In practice, the attorney-client privilege provides broader protection of communications than does the right to counsel. The privilege applies to all attorney-client confidences,[109] whereas the right protects only the criminal defendant seeking legal advice relating to a pending or ongoing prosecution.[110] Concomitantly, the privilege extends to communications relating to the purpose of seeking legal advice,[111] while the right extends only to communications relating to the purpose of seeking legal advice regarding a pending or ongoing criminal action.[112] Finally, unlike the permanent protection of the attorney-client privilege,[113] the protection afforded by the right to counsel covers only the period from onset to termination of formal adversary proceedings.[114]

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104. *See supra* notes 43-45 and accompanying text.

105. *See generally* F. HELLER, *supra* note 44.

106. *See supra* notes 47-50 and accompanying text.

107. *See supra* notes 28-38 and accompanying text. Sixth amendment protection of a particular attorney-client relationship increases client candor on a macrocosmic level. *See supra* note 51. If courts rejected the theory that microcosmic protection engenders macrocosmic candor, *see, e.g.*, Note, *Functional Overlap, supra* note 27, at 1236, then the privilege would have little support beyond the original "oath and honor" argument. *See supra* notes 22-23, 28 and accompanying text. The right to counsel, however, remains entrenched in the Constitution. Furthermore, a court could properly retract the protection of the privilege in a particular case when a significant reduction of overall client candor would not result. *But see supra* note 27 and accompanying text (application of the privilege requires certainty). A retraction of sixth amendment protection, however, would violate the Constitution regardless of the degree of macrocosmic impact.

108. *See supra* note 60 and accompanying text. A prejudicial intrusion directly subverts the microcosmic protection that the right seeks to achieve. A deliberate but unprejudicial intrusion, in contrast, merely discourages candor at the macrocosmic level. This Note consequently argues that a deliberate intrusion is neither necessary nor sufficient for a finding of a sixth amendment violation. *But see supra* notes 73-76 and accompanying text.

109. *See supra* note 12 and accompanying text.

110. *See supra* note 43.

111. *See supra* note 14 and accompanying text.

112. *E.g.*, United States v. Saade, 652 F.2d 1126, 1138 (1st Cir. 1981); United States v. Seale, 461 F.2d 345, 364 (7th Cir. 1972); United States v. Cooper, 397 F. Supp. 277, 285-86 (D. Neb. 1975).

113. *See supra* note 17 and accompanying text.

114. *See supra* note 43; *see also* United States v. Choate, 527 F.2d 748, 751-52 (9th Cir. 1975),

In some respects, however, the right affords broader protection than does the privilege. The privilege and the right prevent compelled disclosure by the client or his attorney in court.[115] The right, however, also prevents voluntary disclosure by government agents and informants who improperly obtain confidential information.[116] Furthermore, in some jurisdictions, the right protects against prosecutor knowledge,[117] and perhaps investigator knowledge,[118] of intercepted attorney-client communications. Some circuits interpret the right more broadly to forbid any intentional, albeit fruitless, government intrusion.[119] The privilege excludes only testimony concerning the protected communication, regardless of the adversary's knowledge or conduct.[120]

The right also offers broader remedies than does the privilege. To remedy an unconstitutional intrusion, courts not only may suppress evidence or order a new trial, as under privilege law, but also may dismiss indictments.[121] Finally, only the right provides a basis for a claim of damages.[122]

The attorney-client privilege and the right to counsel also have different standards of waiver. The client can waive the privilege either intentionally or implicitly.[123] An accused, in contrast, traditionally waives sixth amendment protection only when, knowing his rights, he voluntarily relinquishes them.[124]

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cert. denied, 425 U.S. 971 (1976), *cert. denied,* 449 U.S. 951 (1980); Zweibon v. Mitchell, 516 F.2d 594, 634 n.100 (D.C. Cir. 1975), *cert. denied,* 425 U.S. 944 (1976), *cert. denied,* 453 U.S. 912, 928 (1981), United States v. Boffa, 513 F. Supp. 517, 522 (D. Del. 1981), *modified,* 688 F.2d 919 (3d Cir. 1982), *cert. denied,* 103 S. Ct. 1272, 1280 (1983).

115. *See supra* note 18-19 & 63-69 and accompanying text.

116. *See supra* notes 63-69 and accompanying text.

117. *See supra* notes 63 & 67 and accompanying text.

118. *See supra* notes 70-71 and accompanying text.

119. *See supra* notes 73-76 and accompanying text.

120. *See supra* note 18 and accompanying text.

121. *See supra* notes 78-87 and accompanying text.

122. *See supra* note 86 and accompanying text; *see also* Bradt v. Smith, 634 F.2d 796, 800 (5th Cir) (rejecting the privilege as basis for recovery under 42 U.S.C. § 1983), *cert. denied,* 454 U.S. 830 (1981). *Bradt* only rejects the privilege as a basis for a § 1983 claim in the context of civil action in a state court. *Id.* Currently, courts have not conferred constitutional status on the privilege. *E.g.,* Maness v. Meyers, 419 U.S. 449, 466 n.15 (1975); Beckler v. Superior Court, 568 F.2d 661, 662 & n.2 (9th Cir. 1978); OKC Corp. v. Williams, 461 F. Supp. 540, 546 (N.D. Tex. 1978), *aff'd,* 614 F.2d 58 (5th Cir.), *cert. denied,* 449 U.S. 952 (1980). Future courts may, however, find the privilege to have constitutional significance in some circumstances. For an argument against attacking a constitutional aspect to the privilege, see *supra* note 42.

123. *See supra* note 19 and accompanying text.

124. *E.g.,* Johnson v. Zerbst, 304 U.S. 458, 464 (1938). For both the right and the privilege,

In summary, the right addresses the problem of assuring the individual a fair trial, while the privilege aims at maintaining a fair system. In practice, the privilege affords broader protection than does the right insofar as it protects a wider range of communications, for a longer time. The right, however, offers broader protection because it restricts a larger group of people from disclosing information against the defendant's will, and because it authorizes more extensive remedies. The right to counsel's protection of attorney-client communications also may exceed the protection of the privilege because unintentional unconfidentiality resulting from the defendant's ignorance of his rights may not constitute waiver.

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however, confidentiality is a prerequisite to protection. *E.g.*, United States v. Melvin, 650 F.2d 641, 645-46 (5th Cir. 1981) (attorney-client privilege protects communications intended to be confidential and made with reasonable expectation of confidentiality); United States v. Gartner, 518 F.2d 633, 637-38 (2d Cir.) (government interception does not violate sixth amendment when communications are not made in confidence), *cert. denied*, 423 U.S. 915 (1975).

The defendant, however, can undermine confidentiality without being aware of the resulting loss of sixth amendment protection. *See, e.g.*, United States v. Melvin, 650 F.2d 641, 646 (5th Cir. 1981) (confidentiality waived when defendant invites government informant who is not part of defense team to an attorney-client conference and there is no reasonable expectation of confidentiality). The resulting unreasonableness of an expectation of confidentiality must be apparent to the defendant. *See* Weatherford v. Bursey, 429 U.S. 545, 554 (1977); United States v. Melvin, 650 F.2d 641, 646 (5th Cir. 1981).

In light of his ability to undermine confidentiality, it is arguable that the accused can implicitly waive this aspect of his sixth amendment right. *Cf.* C. MCCORMICK, *supra* note 12, § 93, at 194-97; 8 J. WIGMORE, *supra* note 11, §§ 2327-29, at 634-41 (materials discussing rationale underlying implicit waiver in context of attorney-client privilege). *But cf.* Bustamante v. Eyman, 456 F.2d 269, 273-74 (9th Cir. 1972) (defendant is incapable of waiving rights under the confrontation clause of the sixth amendment).

Regardless of the requirement of confidentiality, a distinction remains between the standard of waiver that courts apply to the privilege as opposed to that applied in sixth amendment cases in which the government has the client in its custody. The right to counsel includes the right of incarcerated clients to consult privately with their attorney. *E.g.*, Via v. Cliff, 470 F.2d 271, 274-75 (3d Cir. 1972); Fuller v. United States, 407 F.2d 1199, 1213 n.20 (D.C. Cir.), *cert. denied*, 393 U.S. 1120 (1968); Moore v. Janing, 427 F. Supp. 567, 575-76 (D. Neb. 1976); Martinez Rodriguez v. Jiminez, 409 F. Supp. 582, 594 (D.P.R.), *aff'd*, 551 F.2d 877 (1st Cir. 1977); Morales v. Turman, 326 F. Supp. 677, 679-80 (E.D. Tex. 1971). Prison officials may, however, impose restrictions necessary to maintain security and order. *See generally* Harrison, *Confidentiality of Attorney-Client Consultation in the Prison Setting*, 3:2 N.E.J. PRISON L. 539 (1977). Prisoners also have the right to correspond with attorneys without undue interference. *E.g.*, Wolff v. McDonnell, 418 U.S. 539, 575-76 (1974); Nolan v. Scafati, 430 F.2d 548, 550-51 (1st Cir. 1970); Smith v. Robbins, 328 F. Supp. 162, 164-65 (D. Me. 1971), *modified*, 454 F.2d 696 (1st Cir. 1972). Absent facilities affording sufficient privacy, the client may converse with his attorney without waiving sixth amendment protection of the communication. *E.g.*, Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Because the privilege does not create a right to private attorney-client consultations, a lack of private facilities does not preclude waiver.

III. Resolving Conflicts in Current Sixth Amendment Intrusion Standards

The tension between the benefits of confidentiality and the cost of an incomplete factual record justifies similar standards of protection under the privilege and the right.[125] Similar standards are also appropriate because both the privilege and the right seek to encourage client candor.[126] The right to counsel's distinct goal of protecting the individual from unfair prosecutorial advantage, however, may justify different standards of protection.[127] Currently, the circuits' constitutional restrictions upon governmental intrusions vary because of disagreement on the issues of deliberateness,[128] the threshold of prejudice,[129] and protected communications.[130] Considered jointly, the similarities and differences between the privilege and the right to counsel provide a basis upon which to resolve the disagreement over each of these three issues.

A. Deliberateness

For sixth amendment purposes, a deliberate government intrusion is neither a necessary nor a sufficient ground for court protection of attorney-client communications.[131] To assure effective assistance of counsel, the courts must encourage client candor and prevent unfair prosecutorial advantage.[132] Absolute protection of privileged communications, strictly construed, sufficiently advances the privilege's goal of encouraging client candor.[133] Logically, absolute protection of communications qualifying for constitutional protection would sufficiently encourage client candor for sixth amendment purposes as well. The proper focus, then, should be upon what the government intercepted and not upon why it committed the intrusion. Because the prosecutor gains no unfair advantage from an

125. *See supra* notes 39 & 53 and accompanying text.

126. *Compare supra* notes 24-38 and accompanying text (client candor justification for attorney-client privilege) *with supra* note 51 and accompanying text (client candor rationale for right to counsel)

127. *See supra* note 50 and accompanying text.

128. *See supra* notes 73-76 and accompanying text.

129. *See supra* notes 63-69 and accompanying text.

130. *Id.*

131. Deliberateness may remain relevant when courts attempt to fashion appropriate remedies for sixth amendment violations. *See* cases cited *supra* notes 77-87.

132. *See supra* notes 50-51 and accompanying text.

133. *See supra* notes 39-42 and accompanying text.

unsuccessful intentional intrusion, the distinction between the goals of the right and the privilege does not undermine this conclusion.

Proponents of a strict rule against purposeful intrusions argue that by penalizing such activity, the courts prevent a chilling effect upon client candor[134] and deter future governmental intrusions.[135] No chilling effect results, however, if clients know a court will deem a governmental intrusion harmless only when the intrusion fails to intercept protected communications.[136] Second, no additional deterrence results from a prohibition against deliberate intrusions.[137] Agents will have no reason to attempt to intercept communications if they know they cannot give the information gained to the prosecutor.[138] While it is possible that an agent who does not pass intercepted information along to the prosecutor may sructure his testimony in accordance with that information,[139] it seems unlikely that some "structuring," short of disclosure, will have a prejudicial effect.[140] Inquiring into the motivation for, rather than the results of, such activities, however, unnecessarily inhibits legitimate government undercover and surveillance activities.[141]

B. Threshold of Prejudice

To uphold a meaningful guarantee of the assistance of counsel, courts must establish government knowledge of protected communications as the threshold of prejudice. Suppression of use sufficiently advances macrocosmic candor for purposes of the right just as it encourages candor for purposes of the privilege. When the prosecution becomes aware of de-

134. *E.g.*, Smith v. Robbins, 328 F. Supp. 162, 165 (D. Me. 1971), *modified*, 454 F.2d 696 (1st Cir. 1972); Memorandum of Amici Curiae Regarding Invasion of Joint Defense at 4, United States v. Pioggia, Cr. No. 82-231-K (D. Mass. Aug. 18, 1983), *appeal docket sub nom.*, United States v. Barkett, Cr. No. 84-1029 (1st Cir. Jan. 12, 1984).

135. *E.g.*, United States v. Constanzo, 625 F.2d 465, 469 (3d Cir. 1980); Comment, *supra* note 56, at 211.

136. While the threat of intrusion might chill the disclosure of unprotected information, the fact that it is unprotected reveals that courts are not concerned with whether the client is candid as to such information. *Cf.* Parker v. United States, 358 F.2d 50 n.3 (7th Cir. 1965) (mere possibility of government intrusion without proof of actual intrusion does not deny right to effective assistance of counsel).

137. It is important to emphasize "additional." This Note does not assert that a deterrence argument is meritless. *See* Note, *supra* note 87.

138. *See supra* notes 68-70 and accompanying text.

139. *See* United States v. Orman, 417 F. Supp. 1126, 1136 (D. Colo. 1976).

140. *See* Weatherford v. Bursey, 429 U.S. 545, 556 (1977) (limited scope of investigator's testimony unprejudicial).

141. *See supra* note 53 and accompanying text.

fense strategy or other confidential matters, however, it gains an unfair advantage over the defense.[142] Prosecutorial knowledge thus obstructs the right to counsel's distinct goal of preventing unfair advantage, necessitating a stricter standard of protection than that available under the privilege, which seeks only to prevent the use of confidential information.

A knowledge threshold need not unduly inhibit the undercover and surveillance work of government investigators.[143] "Chinese wall" procedural safeguards, which isolate the attorneys who will prosecute the case from investigatory personnel, would protect the efficacy of defense counsel's representation.[144]

C. Protected Communications

Uniform adoption of a "knowledge" threshold of prejudice obviates the need for courts to distinguish between defense strategy and other confidential matters. Privilege law separates the confidential from the nonconfidential, as well as communication from underlying fact.[145] These distinctions allow the courts to encourage client candor without unnecessarily enlarging the scope of protection. Unless the right to counsel's goal of preventing unfair advantage requires different protection, these distinctions should govern its scope as well.

The courts apparently justify separate treatment of strategic and nonstrategic information by noting the difficulty of proving use of strategic information.[146] A "knowledge" threshold renders proof of use unnecessary, thereby invalidating the "difficulty of proof" justification. Only "use" threshold jurisdictions are burdened with the need to distinguish strategic information from nonstrategic to prevent unfair prosecutorial advantage.

IV. CONCLUSION

The courts should ignore the government's motives when examining an interception of attorney-client confidences. Instead courts should focus upon whether the intrusion resulted in prosecutorial knowledge of the content of protected communications. A "knowledge" threshold of

142. *See supra* note 50 and accompanying text.

143. *See supra* note 53 and accompanying text.

144. *See supra* notes 70-72 and accompanying text; *see also supra* notes 139-140 and accompanying text (regarding investigator knowledge).

145. *See supra* notes 14-15 and accompanying text.

146. *See supra* notes 63-66 and accompanying text.

prejudice advances the goal of client candor which underlies both the privilege and the right. In turn, greater client candor enhances lawyer effectiveness. In addition, a "knowledge" threshold prevents the prosecution from gaining an unfair advantage.

An understanding of the similarities and differences between the attorney-client privilege and the sixth amendment right to counsel also makes for better lawyering. The privilege prevents a court from compelling attorney or client to disclose the content of their confidential communications: underlying facts remain subject to compelled disclosure. By knowing when the sixth amendment protection applies, the attorney can secure for his client much more significant protection. Furthermore, proficiency in attorney-client privilege and right to counsel principles enables the attorney to cross-apply precedent in appropriate circumstances, and informs him that it is arguable that the sixth amendment protection remains despite an inadvertent waiver of the privilege.

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