

# Washington University Law Review

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Volume 68  
Issue 1 *Symposium on Criminal Discovery*

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January 1990

## The Application of the Attorney-Client Privilege to Non-Testifying Experts: Reestablishing the Boundaries Between the Attorney-Client Privilege and the Work Product Protection

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### Recommended Citation

Edward J. Imwinkelried, *The Application of the Attorney-Client Privilege to Non-Testifying Experts: Reestablishing the Boundaries Between the Attorney-Client Privilege and the Work Product Protection*, 68 WASH. U. L. Q. 19 (1990).  
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## SYMPOSIUM

# THE APPLICABILITY OF THE ATTORNEY-CLIENT PRIVILEGE TO NON-TESTIFYING EXPERTS: REESTABLISHING THE BOUNDARIES BETWEEN THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT PROTECTION

EDWARD J. IMWINKELRIED\*

“One of [the] realities [of litigation in our adversary system] is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial.”

— Mr. Justice Powell in an opinion joined in by  
Mr. Justice Brennan in *United States v. Nobles*.<sup>1</sup>

In the 1989 Tyrrell Williams Memorial Lecture which inspired this symposium, Mr. Justice Brennan spoke out in favor of more reciprocal discovery in criminal cases.<sup>2</sup> A strong case certainly can be made for allowing the criminal defendant fuller discovery.<sup>3</sup> However, because discovery is designed to be a two-way street, we cannot overlook the question of the adequacy of prosecution discovery in criminal cases.

One of the principal impediments to prosecution discovery is the existence of common-law and statutory privileges such as those surrounding the attorney-client and physician-patient relationships. Privileges obstruct factual inquiry and can result in the suppression of relevant, relia-

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1. 422 U.S. 225, 238 (1975).

2. Brennan, *The Criminal Prosecution: Sporting Event or Quest For Truth? A Progress Report*, 68 WASH. U.L.Q. 1 (1990).

3. Imwinkelried, *The Worst Surprise of All: No Right to Pretrial Discovery of the Prosecution's Uncharged Misconduct Evidence*, 56 FORDHAM L. REV. 247 (1987). Mr. Justice Brennan cites this article at several points in the footnotes to the text of his remarks. Brennan, *supra* note 2, at 3 n.4, 6 n.20, n.49.

ble evidence. For that reason, the Supreme Court has observed that “[e]videntiary privileges in litigation are not favored . . . .”<sup>4</sup> The general trend in privilege law bears out the Court’s observation. The courts have not only been reluctant to create new privileges,<sup>5</sup> in many cases, they also have expanded waiver doctrines<sup>6</sup> and special exceptions<sup>7</sup> to defeat privilege claims.

There is, however, a notable exception to this trend: the applicability of the attorney-client privilege to experts hired by litigators as pretrial consultants. Suppose, for example, that before trial, criminal defense counsel is trying to decide whether to advise her client to plead insanity. She hires a psychiatrist as an expert consultant to evaluate her client. The psychiatrist meets with the client and then submits a report to counsel which concludes that the defendant was sane at the time of the *actus reus*. Although the defense ultimately decides to present an insanity defense, counsel understandably decides against calling this psychiatrist as a witness. However, can the prosecutor call the psychiatrist or obtain a copy of the psychiatrist’s report to defense counsel?

The defense cannot rely on any privilege other than attorney-client to block the prosecution’s discovery attempts. Even if the psychiatrist is a licensed physician in the jurisdiction, the defense cannot rely on the physician-patient privilege for several reasons: most jurisdictions limit the privilege to civil cases,<sup>8</sup> the privilege applies only when the client consults the physician with a view to treatment,<sup>9</sup> and the patient-litigant exception to the privilege comes into play when the defense places the client’s mental condition in issue by pleading insanity.<sup>10</sup> Likewise, the defense cannot successfully invoke the psychotherapist-patient privilege. Although many jurisdictions recognize that privilege in criminal cases, they apply the privilege only when the client consults the psychotherapist

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4. *Herbert v. Lando*, 441 U.S. 153, 175 (1979).

5. *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982).

6. *Zenith Radio Corp. v. United States*, 588 F. Supp. 1443 (Ct. Int’l Trade 1984), *rev’d on other grounds*, 764 F.2d 1577 (Fed. Cir. 1985).

7. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C.L. REV. 443 (1986). *See also* *United States v. Zolin*, 109 S. Ct. 2619 (1989).

8. R. CARLSON, E. IMWINKELRIED & E. KIONKA, *MATERIALS FOR THE STUDY OF EVIDENCE* 605 (2d ed. 1986).

9. 2 D. LOUISELL & C. MUELLER, *FEDERAL EVIDENCE* § 215, at 844 (1985).

10. 2 J. HOGAN, *MODERN CALIFORNIA DISCOVERY: CIVIL AND CRIMINAL* § 12.19 (4th ed. 1988).

with a treatment motive.<sup>11</sup> Moreover, as in the case of the physician-patient privilege, under the patient-litigant exception the client waives the psychotherapist privilege by raising an insanity defense.<sup>12</sup> Finally, the defense cannot argue that the work product doctrine altogether bars prosecution discovery. Some jurisdictions do not accord any material absolute protection under the work product doctrine.<sup>13</sup> Other jurisdictions do so by statute or common law, but they tend to confine absolute work product protection to written material reflecting the attorney's personal mental impressions and legal theories.<sup>14</sup>

Can the defense rely on the attorney-client privilege to block the prosecution's discovery efforts?<sup>15</sup> The early view was that the privilege was inapplicable.<sup>16</sup> With the support of respected commentators,<sup>17</sup> some jurisdictions still adhere to that view.<sup>18</sup> However, a sharp split in authority exists on the question.<sup>19</sup> A large body of case law extends the attorney-client privilege to expert information.<sup>20</sup> Since the mid-1970s, there has

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11. *Id.* § 12.21, at 145.

12. *Id.* § 12.24.

13. R. CARLSON, E. IMWINKELRIED & E. KIONKA, *supra* note 8, at 653.

14. See FED. R. CIV. P. 26(b)(3); Feldman, *The Work Product Rule in Criminal Practice and Procedure*, 50 U. CIN. L. REV. 495 (1981); RESTATEMENT OF THE LAW GOVERNING LAWYERS § 136 (Tent. Draft No. 2, 1989) ("With respect to a lawyer's work on a client's cause in anticipation of litigation or for trial, the lawyer may invoke on behalf of the client an immunity: (1) That absolutely bars from discovery or evidentiary use the mental impressions and other thought processes of the lawyer . . .").

15. Simon, *Pretrial Discovery of Expert Information in Federal and State Courts: A Guide for the Expert*, 5 J. POLICE SCI. & ADMIN. 247 (1977).

16. 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2016 (1970).

17. Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455 (1962); Long, *Discovery and Experts Under the Federal Rules of Civil Procedure*, 39 WASH. L. REV. 665, 699 (1964); Note, *Discovery of Retained Nontestifying Experts' Identities Under the Federal Rules of Civil Procedure*, 80 MICH. L. REV. 513, 520-21 (1982). The Note asserts that the Friedenthal and Long articles had "thoroughly debunked the notion" that the attorney-client privilege applies. *Id.* at 520 n.33. However, like the reports of Mark Twain's death, the assertion of the demise of that notion turned out to be exaggerated.

18. *United States v. Talley*, 790 F.2d 1468 (9th Cir.), *cert. denied*, 479 U.S. 866 (1986); *Noggle v. Marshall*, 706 F.2d 1408 (6th Cir.), *cert. denied*, 464 U.S. 1010 (1983); *State v. Schneider*, 402 N.W.2d 779 (Minn. 1987); *State v. Carter*, 641 S.W.2d 54 (Mo. 1982), *cert. denied*, 461 U.S. 932 (1983).

19. 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 503(a)(3)[01], at 503-24 to 27 (1988).

20. *United States v. Alvarez*, 519 F.2d 1036 (3d Cir. 1975); *In re Int'l. Harvester's Disposition of Wis. Steel Litig.*, 666 F. Supp. 1148, 1157 (N.D. Ill. 1987) (collecting cases); *United States v. Layton*, 90 F.R.D. 520 (N.D. Cal. 1981) (one of the cases arising out of the "Jonestown massacre" in Guyana); *Houston v. State*, 602 P.2d 784 (Alaska 1979); *San Francisco v. Superior Court*, 37 Cal.

been a marked trend favoring this extension.<sup>21</sup> Commentators<sup>22</sup> and courts<sup>23</sup> have pronounced that the trend has now attained the status of the majority view in the United States. One court stated that today the view is "almost universally accepted . . ."<sup>24</sup> The California Evidence Code adopts the view,<sup>25</sup> and the advisory committee's note to proposed Federal Rule of Evidence 503 on the attorney-client privilege supports the view as well.<sup>26</sup>

The courts have carried the majority view to great lengths. For example, they recognize the applicability of the attorney-client privilege to expert information in both civil and criminal cases.<sup>27</sup> They apply the doctrine to a wide variety of experts, including psychiatrists,<sup>28</sup> physicians,<sup>29</sup> polygraphists,<sup>30</sup> accountants,<sup>31</sup> questioned document examiners,<sup>32</sup> engineers,<sup>33</sup> and appraisers.<sup>34</sup> The cases almost uniformly hold that the expert's written report is immune from discovery.<sup>35</sup> Moreover, a

2d 227, 231 P.2d 26 (1951); *State v. Melvins*, 155 N.J. Super. 316, 382 A.2d 925 (1978); *Burney v. State*, 642 S.W.2d 765 (Tex. Crim. App. 1982).

21. *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1047 (E.D.N.Y. 1976), *aff'd*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977); Annotation, *Applicability of Attorney-Client Privilege to Communications Made in Presence of or Solely to or by Third Person*, 14 A.L.R. 4th 594, 606 (1982).

22. 2 J. HOGAN, *supra* note 10, § 13.10 at 238 ("substantial majority"); 2 J. WEINSTEIN & M. BERGER, *supra* note 19, ¶ 503(a)(3)[01], at 503-28 n.16 (1988) ("clear majority view"); Matte, *Privileged Communications between Attorney-Client-Polygraphist*, 51 N.Y. ST. BAR J. 466, 501 (1979); Casenote, *Disclosures by Criminal Defendant to Defense-Retained Psychiatrist Hold Within Scope of Attorney-Client Privilege which Defendant Does Not Waive by Pleading Insanity*, 9 BALT. L. REV. 99, 111 (1979) ("overwhelming majority"); Casenote, *Narrowing the Attorney-Client Privilege: A Crippling Blow to the Insanity Defense*, 51 UMKC L. REV. 386, 397 (1983) ("the vast majority").

23. *Miller v. District Court*, 737 P.2d 834, 838 (Colo. 1987); *State v. Carter*, 641 S.W.2d 54, 62 (Mo. 1982), *cert. denied*, 461 U.S. 932 (1983); *Haynes v. State*, 739 P.2d 497 (Nev. 1987).

24. *State v. Pratt*, 284 Md. 516, 520, 398 A.2d 421, 423 (1979).

25. 24 C. WRIGHT & K. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 5485, at 389-90 (1986) (discussing California Evidence Code § 952 and the accompanying California Law Revision Commission comment).

26. M. GRAHAM, *HANDBOOK OF FEDERAL RULES* § 503.1, at 317 (2d ed. 1986).

27. Matte, *supra* note 22, at 500.

28. *State v. Pratt*, 284 Md. 516, 398 A.2d 421 (1979).

29. *City & County of San Francisco v. Superior Court*, 37 Cal. 2d 227, 231 P.2d 26 (1951).

30. Matte, *supra* note 22, at 501.

31. 2 J. WEINSTEIN & M. BERGER, *supra* note 19, 503(a)(3)[01], at 503-24 to 25.

32. Annotation, *supra* note 21, at 640-41.

33. *Id.* at 648-50.

34. 2 J. HOGAN, *supra* note 10, § 13:10.

35. *Ballew v. State*, 640 S.W.2d 237 (Tex. Crim. App. 1982); Annotation, *supra* note 21, at 633, 640, 644; Casenote, *Narrowing the Attorney-Client Privilege: A Crippling Blow to the Insanity Defense*, 51 UMKC L. REV. 386, 389 n.25 (1983).

substantial number of courts accept the premise that all the witness' knowledge is privileged.<sup>36</sup> On that premise, the opposition may not call the expert as a witness at trial,<sup>37</sup> depose the expert before trial,<sup>38</sup> or perhaps even contact the expert outside the courtroom.<sup>39</sup> The cloak of secrecy surrounding the expert information becomes virtually impenetrable when the attorney decides against calling the expert as a witness.<sup>40</sup> Unlike the physician-patient and psychotherapist-patient privileges, the attorney-client privilege is not subject to an automatic patient-litigant exception;<sup>41</sup> the defense may raise the issue of the defendant's mental condition and yet suppress all the psychiatrist's knowledge. This expansive view of the attorney-client privilege allows the attorney to insulate completely the expert from discovery.<sup>42</sup> This view effectively converts a narrow privilege doctrine into a broad incompetency rule,<sup>43</sup> absolutely barring all use of the expert by the opposition.

The thesis of this Article is that the majority view is unsound and indiscriminate.<sup>44</sup> The first part of the Article analyzes the client's direct communications with the expert, acknowledging that, at least in some circumstances, those communications should be protected absolutely under the attorney-client privilege. The balance of the Article, however, differentiates between the client's communications and the rest of the ex-

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36. 2 D. LOISELL & C. MUELLER, *supra* note 9, § 209, at 752; Friedenthal, *supra* note 17, at 463.

37. See *United States v. Alvarez*, 519 F.2d 1036 (3d Cir. 1975); *Houston v. State*, 602 P.2d 784 (Alaska 1979); *Miller v. District Court*, 737 P.2d 834 (Colo. 1987); *Hutchinson v. People*, 742 P.2d 875 (Colo. 1987); *State v. Toste*, 178 Conn. 626, 424 A.2d 293 (1979); *Pouncy v. State*, 353 So. 2d 640 (Fla. Dist. Ct. App. 1977); *Pratt v. State*, 39 Md. App. 442, 387 A.2d 779 (1978).

38. *Pouncy v. State*, 353 So. 2d 640 (Fla. Dist. Ct. App. 1977); 2 J. HOGAN, *supra* note 10, § 12.7, at 96; Friedenthal, *supra* note 17, at 468.

39. Comment, *Discovery of the NonWitness Expert Under Federal Rule of Civil Procedure 26(b)(4)(B)*, 67 IOWA L. REV. 349, 364 (1982). See also E. IMWINKELRIED & T. BLUMOFF, PRETRIAL DISCOVERY: STRATEGY AND TACTICS § 4.04 (Supp. 1988).

40. If the attorney called the expert as a witness, there obviously would be a waiver of any privilege. *Brown v. Trigg*, 612 F. Supp. 1576 (N.D. Ind. 1985), *aff'd*, 791 F.2d 598, 601 (7th Cir. 1986); *Ballew v. State*, 640 S.W.2d 237 (Tex. Crim. App. 1982).

41. *People v. Lines*, 13 Cal. 3d 500, 531 P.2d 793, 119 Cal. Rptr. 225 (1975); 2 J. HOGAN, *supra* note 10, § 13.11, at 247-48.

42. 2 J. HOGAN, *supra* note 10, § 13.10, at 236.

43. A competency rule can completely bar a person from the witness stand. R. CARLSON, E. IMWINKELRIED & E. KIONKA, *supra* note 8, at 121. In contrast, a privilege rule has the much less drastic effect of precluding the witness from testifying to certain facts. *Id.* at 603-04.

44. Although in the criminal context this issue obviously has constitutional ramifications under the fifth amendment due process clause and the privilege against self-incrimination, that constitutional analysis is not within the scope of this Article. See generally *Taylor v. Illinois*, 484 U.S. 400 (1988); *Wardius v. Oregon*, 412 U.S. 470 (1973); *Williams v. Florida*, 399 U.S. 78 (1970).

pert's information, including the expert's conclusions and reasoning process. The Article asserts that one can draw a principled distinction between the client's communications and the rest of the expert's information. The second part of the Article argues that the rest of the expert information in its own right does not qualify under the attorney-client privilege. The third and final part of the Article focuses on the admittedly close relationship between the client's communications with the expert and the rest of the expert's information. This part contends that even given the difficulty in some cases of severing the references to the communications from the balance of the expert's report, the opposition—the prosecution in our hypothetical—is entitled to discover the balance of the report.

### I. THE CLIENT'S DIRECT COMMUNICATIONS WITH THE EXPERT

The statement that majority and minority views exist on the application of the attorney-client privilege to expert information is an oversimplification. In fact, a three-way split in authority exists over whether the attorney-client privilege attaches to the client's communications with experts such as a psychiatrist. One school of thought maintains that the privilege does not attach.<sup>45</sup> The jurisdictions subscribing to this view point out that the privilege applies only to communications between attorney and client and that the expert is not an attorney. A second, compromise school asserts that the privilege applies only if the client makes statements to the expert or reveals to the expert private data such as his mental condition—information which realistically emanates from the client.<sup>46</sup> Courts adhering to this view characterize the expert as an essential intermediary for communication between client and attorney.<sup>47</sup> A third school of thought proposes that the privilege attach whenever the attorney or client discloses information to an expert consulted for purposes of trial preparation. The cases extending the privilege to appraisers and engineers embrace this position.<sup>48</sup> In these cases, at the attorney's request the expert evaluated property viewable by the public and sometimes even in the opposing party's possession.

In the context of applying attorney-client privilege to expert consul-

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45. *Noggle v. Marshall*, 706 F.2d 1408 (6th Cir.), *cert. denied*, 464 U.S. 1010 (1983); 2 D. LOUISELL & C. MUELLER, *supra* note 9, § 209, at 752 n.41.

46. *Utah Dep't. of Transp. v. Rayco Corp.*, 599 P.2d 481 (Utah 1979).

47. 2 J. HOGAN, *supra* note 10, § 13.10.

48. *Id.* § 13.10, at 239-40; Annotation, *supra* note 21, at 643-54.

tants, as in general attorney-client privilege analysis, two factors are critical: the identity of the communicating parties and the substance of the communication.<sup>49</sup> Our society has decided that only certain relationships are so important that they deserve the special protection of an evidentiary privilege.<sup>50</sup> In Dean Wigmore's words, the relationship must be "one which in the opinion of the community ought to be sedulously fostered."<sup>51</sup> The identity of the communicating parties determines whether the parties' relationship is a protected one. However, even the existence of a protected relationship between the parties is alone insufficient to invoke a privilege; the information sought to be suppressed must also constitute a "communication" between the parties.<sup>52</sup> Privilege law does not allow parties to suppress all information in their possession. The purpose of privilege law is to promote particular relationships by facilitating the flow of information between persons standing in the special relationship. In light of that rationale, only communications warrant protection. When the privilege is analyzed in terms of these two factors, neither the first nor the third school of thought on the scope of the attorney-client privilege represents a tenable position.

#### A. *The Importance of the Identity of the Communicating Parties*

Although the core concept of the attorney-client privilege is protection for direct communications between the attorney and client, the privilege should not be confined to such communications. It is often impossible or impractical for the attorney and client to communicate personally. Hornbook law states that the privilege extends to exchanges of information between the client and the attorney's agent<sup>53</sup> or representative.<sup>54</sup>

The problem is defining the concept of the attorney's agent. All courts and commentators agree that clerks and secretaries fall within the definition.<sup>55</sup> They are convenient intermediaries for communication between

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49. Friedenthal, *supra* note 17, at 457.

50. R. CARLSON, E. IMWINKELRIED & E. KIONKA, *supra* note 8, at 612.

51. 8 J. WIGMORE, EVIDENCE § 2285 (McNaughton rev. ed. 1961).

52. *Id.* § 2313, at 610.

53. 4 MOORE'S FEDERAL PRACTICE ¶ 26.60[2], at 26-190 n.3 (2d ed. 1989).

54. 2 J. WEINSTEIN & M. BERGER, *supra* note 19, ¶ 503(a)(3)[01], at 503-24.

55. *Id.*; 8 J. WIGMORE, *supra* note 51, § 2301, at 583 ("It has never been questioned that the privilege protects communications to the attorney's clerk and his other agents (including stenographers) for rendering his services."); 24 C. WRIGHT & K. GRAHAM, *supra* note 25, § 5486, at 402.



the attorney and client,<sup>56</sup> and society would gain nothing by forcing attorneys to communicate face-to-face with clients and forego the use of such intermediaries.<sup>57</sup> Similarly, all authorities concur that interpreters qualify as attorneys' agents for purposes of the attorney-client privilege.<sup>58</sup> In this instance, necessity justifies the application of the privilege: when the attorney and client do not speak the same language, they could not communicate without the interpreter's intervention. The applicability of the privilege should not turn on the niceties of agency law;<sup>59</sup> even when the interpreter is not a regular employee of the attorney, the useful function performed by the interpreter justifies the extension of the privilege. The privilege attaches even though the interpreter is technically an independent contractor.<sup>60</sup>

A similar functional analysis of the role of the attorney's expert consultant dictates that the expert ought to be considered the attorney's agent for privilege purposes. As the Supreme Court remarked in *United States v. Nobles*, "[o]ne of those realities [of litigation in our adversary system] is that attorneys often must rely on the assistance of [expert consultants] in preparation for trial."<sup>61</sup> Consulting such experts is not merely a convenience for the attorney;<sup>62</sup> it is a necessity.<sup>63</sup> Unless the attorney happens to be cross-trained as a psychiatrist, the attorney lacks the expertise to investigate competently the client's mental condition. In any matter raising a serious question about a client's mental condition,

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56. 2 D. LOUISELL & C. MUELLER, *supra* note 9, § 209, at 754 (clerks, paralegals, secretaries, office managers, and switchboard operators all are "useful functionaries of modern legal practice").

57. 24 C. WRIGHT & K. GRAHAM, *supra* note 25, § 5486, at 401.

58. *Id.* at 402.

59. *Id.*; RESTATEMENT OF THE LAW GOVERNING LAWYERS § 120 comment h, illustration 8 (Tent. Draft No. 2, 1989) ("The fact that a secretary or other representing agent is a temporary employee or other temporary agent of the lawyer does not, by itself, deny the protection of the privilege. The privilege may also extend to communications shared with a lawyer's communicating or representing agents who are not directly employed by the lawyer or the lawyer's law office but who serve as independent contractors or as employees of organizations that hire and pay the lawyer.").

60. *People v. George*, 104 Misc. 2d 630, 428 N.Y.S.2d 825 (1980) (the court rejected the prosecutor's argument that the definition of an attorney's agent should include only direct employees of the attorney); *Matte*, *supra* note 22, at 468 ("It is the non-lawyer's function, not his professional status which will ultimately determine whether he will be protected by the attorney-client privilege.").

61. *United States v. Nobles*, 422 U.S. 225, 238 (1975).

62. *Matte*, *supra* note 22, at 469.

63. *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961) ("The complexities of modern existence prevent attorneys from effectively handling client's affairs without the help of others . . .").

investigation of the condition is mandatory. An attorney who neglects to investigate arguably would be guilty of ineffective assistance of counsel in a criminal case<sup>64</sup> or malpractice in a civil action.<sup>65</sup>

The first school, by refusing to apply the attorney-client privilege even to the client's direct communications with the expert, creates a harsh dilemma for the attorney: it discourages resort to otherwise necessary expert consultants by creating the risk that opposing counsel may later call the expert to testify about the client's statements.<sup>66</sup> As one state supreme court judge commented, by sending the client to an expert without the protection of the privilege, the attorney might well be "stick[ing] the client's] head into a noose."<sup>67</sup> Commentators have charged that the first school deals "a crippling blow" to pretrial investigation<sup>68</sup> and makes it "virtually impossible" to prepare adequately for trial.<sup>69</sup>

Those commentators may be guilty of hyperbole, but the first school unquestionably deters thorough pretrial investigation.<sup>70</sup> By consulting the expert, the client may be creating an opposing witness.<sup>71</sup> This opposing witness can testify to one of the most prejudicial types of evidence, an admission from the client's own mouth. Such an admission is routinely admissible over a hearsay objection<sup>72</sup> and is sufficient standing alone to support a finding of fact against the client unless there is some special corroboration requirement.<sup>73</sup> Further, the trier of fact is likely to attach great weight to a confession by the client.<sup>74</sup> In short, the client could be

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64. *United States v. Alvarez*, 519 F.2d 1036, 1046 (3d Cir. 1975) ("The effective assistance of counsel with respect to the preparation of an insanity defense demands recognition that a defendant be as free to communicate with a psychiatric expert as with the attorney he is assisting."); *State v. Mingo*, 77 N.J. 576, 392 A.2d 590 (1978); Casenote, *supra* note 35, at 395.

65. 2 R. MALLIN & J. SMITH, *LEGAL MALPRACTICE* § 24.22 (3d ed. 1989); D. MEISELMAN, *ATTORNEY MALPRACTICE: LAW AND PROCEDURE* § 10.18 (1980).

66. Simon, *supra* note 15, at 249.

67. *State v. Carter*, 641 S.W.2d 54, 63 (Mo. 1982) (Seiler, J., dissenting), *cert. denied*, 461 U.S. 932 (1983).

68. Casenote, *supra* note 35, at 386.

69. Casenote, *Disclosures by Criminal Defendant to Defense-Retained Psychiatrist Hold Within Scope of Attorney-Client Privilege which Defendant Does Not Waive by Pleading Insanity*, 9 BALT. L. REV. 99, 103 (1979).

70. Simon, *supra* note 15, at 265.

71. *United States v. Alvarez*, 519 F.2d 1036 (3d Cir. 1975).

72. FED. R. EVID. 801(d)(2)(A).

73. See generally R. CARLSON, E. IMWINKELRIED & E. KIONKA, *supra* note 8.

74. Imwinkelried, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465, 1488 (1985) ("A confession may be the most damning type of evidence . . .").

creating a monster, a witness whose testimony could potentially guarantee the opposition's victory.

Moreover, the first school encourages attorneys to consult the wrong kind of expert. If the attorney can assume that the attorney-client privilege will protect the client's disclosures to the expert, the attorney confidently can send the client to an objective, fair-minded expert.<sup>75</sup> An objective expert will give the attorney the sort of frank case evaluation<sup>76</sup> the attorney needs to engage in serious settlement negotiations with the opposition.<sup>77</sup> However, when the attorney cannot make that assumption but nevertheless sends the client to an expert, the attorney is much more likely to consult an expert who will slant her views.<sup>78</sup> One of the perennial complaints about the American system of expert testimony is that the system relies too heavily on biased, venal witnesses.<sup>79</sup> Widespread adoption of the first school would likely exacerbate that problem. Hence, in the interests of justice,<sup>80</sup> the client's direct communications with the expert should not be discoverable.<sup>81</sup> Rather, courts should deem them to be communications between the client and an agent of the attorney.

#### *B. The Importance of the Substance of the Information Transmitted to the Expert*

The last subsection explained that the identity of the communicating parties requires the rejection of the first school, which grants the client's communications with the expert no protection under the attorney-client privilege. Functionally those communications should be considered communications between a client and his attorney. The next factor, the substance of the information transmitted to the expert, leads to a rejection of the third school's polar extreme position that the privilege should apply whenever the attorney or client transmits information to an expert consulted for purposes of trial preparation. That school of thought over-

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75. 2 J. HOGAN, *supra* note 10, § 13.12, at 251.

76. *Id.*

77. Comment, *supra* note 39, at 359.

78. 2 J. HOGAN, *supra* note 10, § 13.9, at 235.

79. C. MCCORMICK, EVIDENCE § 17 (3d ed. 1984); Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40 (1901); Ford & Holmes, *Exposure of Doctors' Venal Testimony*, 1965 TRIAL LAW. GUIDE 75; Friedenthal, *supra* note 17, at 485-86.

80. Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part Two, An Empirical Study and a Proposal*, 1977 U. ILL. L. F. 169, 201.

81. 2 J. HOGAN, *supra* note 10, § 13.12, at 250.

looks the additional requirement under privilege law that the information to be suppressed constitute a "communication" from the client.

As previously stated, courts subscribing to the third school apply the attorney-client privilege to the analysis of real property by appraisers and engineers.<sup>82</sup> In these cases, the expert analyzes property that at least to an extent can be viewed by the public. The appraisal or engineering analysis sometimes relates to property owned or possessed by the opposing party.

There is a difference in kind between a client's revelation of his mental condition to a psychiatrist and an appraiser's evaluation of a parcel of realty. In the former case, the client is the source of the confidential information being divulged to the expert.<sup>83</sup> The client reveals intensely personal information to enable the expert to translate the data into a form usable by the attorney.<sup>84</sup> The expert, therefore, is a conduit for information passing from the client to the attorney.<sup>85</sup> Statements made by the client to the expert unquestionably constitute communications from the client.<sup>86</sup> Further, without straining common sense, the concept of communication from the client can be expanded to encompass revelations of the client's physical or mental condition<sup>87</sup> and perhaps confidential records. A reasonable person could characterize all of these disclosures as revelations of information originating from the client.

However, when the attorney asks an appraiser to evaluate a parcel of realty and the appraiser gains her knowledge by inspecting the premises, the expert's knowledge is not based on any revelations of intensely personal information from the client.<sup>88</sup> Passersby may be able to see everything the appraiser sees. In these circumstances, the expert's knowledge rests on sources other than communications from the client; and it is indefensible to apply the privilege.<sup>89</sup> Courts should hold the expert's knowledge unprotected under the attorney-client privilege whether the hiring party is the government in a civil condemnation action or the accused in a realty fraud prosecution. Or suppose that a civil or criminal

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82. *See supra* note 48 and accompanying text.

83. 2 J. HOGAN, *supra* note 10, § 13.10, at 240-42.

84. Federal Trade Comm'n v. TRW, Inc., 628 F.2d 207 (D.C. Cir. 1980).

85. Friedenthal, *supra* note 17, at 457, 465.

86. United States v. Layton, 90 F.R.D. 520, 524-25 (N.D. Cal. 1981) (tape recordings of interviews between a defendant and a psychiatrist who was not called as a trial witness).

87. City & County of San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951).

88. Utah Dep't of Transp. v. Rayco Corp., 599 P.2d 481 (Utah 1979).

89. Friedenthal, *supra* note 17, at 466-67.

defendant hires an accident reconstruction expert to analyze the design of the stretch of highway where a fatal collision occurred. The defense hopes to establish that the cause of the accident was the highway's defective design rather than the defendant's careless driving. After visiting the accident scene and reviewing public highway department engineering records relating to the stretch of highway, the accident reconstruction expert forms her opinion. It is inappropriate to apply the attorney-client privilege to her knowledge<sup>90</sup> because the information acquired does not constitute a communication from the client.<sup>91</sup> Extending the attorney-client privilege in such a situation stretches the concept of "communication" from the client beyond its breaking point.<sup>92</sup>

Hence, only the second school of thought on the scope of the attorney-client privilege passes muster. The first school's position is flawed because it rests on an unduly narrow definition of the attorney's agent. That definition should not depend on formalities of agency law. Instead, the definition should encompass any person who functions as a necessary intermediary for communication between attorney and client. The third school's view is likewise unsound because it is based on an excessively broad definition of communication. The definition should not encompass every bit of knowledge acquired by the expert. When the client makes statements to the expert or exposes personal information such as his mental condition to the expert, the expert serves as a conduit for the effective communication between client and attorney; the data realistically emanates from the client. The attorney-client privilege is designed to incentivize the client's communication.<sup>93</sup> However, there is no justification for cloaking expert information with the attorney-client privilege when the expert acquires the information from other sources.

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90. *Cf. Grand Lake Drive-In v. Superior Court*, 179 Cal. App. 2d 122, 3 Cal. Rptr. 621 (1960) (in a slip and fall case, a party hired an engineering expert to evaluate the sidewalk where the slip and fall occurred).

91. *Id.* at 126, 3 Cal. Rptr. at 625; *San Diego Professional Ass'n v. Superior Court*, 58 Cal. 2d 194, 373 P.2d 448, 23 Cal. Rptr. 384 (1962). *See also* 2 WEINSTEIN & BERGER, *supra* note 19, ¶ 503(A)(1)[01], at 503-28.

92. 2 J. HOGAN, *supra* note 10, § 13.10, at 238.

93. Allen, Grady, Polsby & Yashko, *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*, 20 J. LEGAL STUD. — (1990).

## II. THE PRIVILEGED STATUS OF THE REST OF THE EXPERT'S INFORMATION IN ITS OWN RIGHT

### A. *Like the Client's Communications, Is the Rest of the Expert's Information Entitled to Absolute Protection Under the Attorney-Client Privilege?*

The last section addressed the privileged status of the client's communications with the expert and concluded that the client's statements to the expert and disclosures of personal information such as mental condition should be protected absolutely under the attorney-client privilege. Courts should not allow a prosecutor or opposing civil attorney to discover the parts of an expert's report reflecting those statements and disclosures.

However, that conclusion does not end our inquiry. The typical expert report contains far more than recitations of the client's statements and personal revelations. Typically, the attorney asks the expert to evaluate the significance of the facts in the case.<sup>94</sup> In essence, the expert's analysis proceeds syllogistically,<sup>95</sup> applying a major premise to a minor premise to derive a conclusion. The minor premise consists of the case-specific information. Some of this information, such as the client's personal communications, may be protected absolutely under the attorney-client privilege. However, the minor premise often includes information from other sources which do not merit protection under the attorney-client privilege. The major premise is the theory or principle on which the expert relies. In a psychiatric evaluation, the expert probably will employ a set of diagnostic criteria, a symptomatology, for the mental illness which she suspects the defendant is suffering from. The expert will arrive at her opinion by applying the criteria to the defendant's case history. Each step in the expert's syllogism will be reflected at least partially in the expert's report. The sum of the expert's information about the case thus includes much more than the client's communications.

Does the expert's information beyond the client's communications qualify for any privilege protection? In the past, unfortunately, courts have tended to lump together the privileged status of the client's commu-

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94. R. CARLSON, E. IMWINKELRIED & E. KIONKA, *supra* note 8, at 429 (Although an attorney can consult an expert solely to learn either facts in the expert's possession or scientific principles with which the expert is familiar, "by far the most common role for the expert . . . is the . . . role of evaluator; the expert . . . applies . . . theories to the facts and draws a conclusion.").

95. Imwinkelried, *The "Bases" of Expert Testimony: The Syllogistic Structure of Scientific Testimony*, 67 N.C.L. REV. 1 (1988).

nications and the expert's other information. They have refused to distinguish between the different types of information in the expert's possession.<sup>96</sup> According to one court, "There is no distinction between the factual data gathered by an expert and the opinions which he forms from studying that data. If one is not privileged, neither is the other."<sup>97</sup>

However, several commenators<sup>98</sup> and courts<sup>99</sup> have recognized that there is a distinction between the client's communications and the rest of the expert's information. The rest of the expert's information does not qualify as a communication from the client. Some other parts of the expert's information, such as the ultimate opinion, may result partially from the client's communications, but to argue that the rest of the expert's information therefore merits treatment as a privileged communication is to confuse cause and effect. The history of federal privilege law and public policy mandate drawing a line between the client's communications with the expert and the balance of the expert's information about the case.

### 1. *The History of Federal Privilege Law*

As Section Two B will demonstrate, expert information generally qualifies for the conditional work product privilege.<sup>100</sup> In 1970, pursuant to statutory authority,<sup>101</sup> the Supreme Court amended Federal Rule of Civil Procedure 26(b)(3) governing the discoverability of expert information.<sup>102</sup> Rule 26(b)(4)(B) addresses discovery from experts whom the opposing side has decided not to call as trial witnesses. The current rule provides that in "exceptional circumstances" a party may obtain discovery from such experts.<sup>103</sup>

Before the adoption of the 1970 amendments, some courts had held that the attorney-client privilege absolutely protected information in the possession of experts who would not testify at trial.<sup>104</sup> Those courts ig-

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96. 2 J. HOGAN, *supra* note 10, § 13.10, at 245.

97. *Oceanside Union School Dist. v. Superior Court*, 58 Cal. 2d 180, 191, 373 P.2d 439, 446, 23 Cal. Rptr. 375, 382 (1962).

98. Friedenthal, *supra* note 17, at 469.

99. *State v. Tensley*, 249 N.W.2d 659 (Iowa 1977); *People v. Sorna*, 88 Mich.App. 351, 276 N.W.2d 892 (1979) (construing the Michigan statute).

100. *See infra* notes 144-56 and accompanying text.

101. The current version of the statutory authority is 28 U.S.C. § 2072 (1982).

102. C. McCORMICK, *EVIDENCE* § 96, at 235 (3d ed. 1984).

103. Comment, *supra* note 39, at 350.

104. Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study*, 1976 U. ILL. L. F. 895, 900.

nored the distinction between information the expert obtained from the client's communications and information gleaned from other sources. Emphasizing that distinction, two commentators, Dean Friedenthal<sup>105</sup> and Jeremiah Long,<sup>106</sup> wrote articles in the 1960s criticizing those holdings. The Advisory Committee that drafted the 1970 amendments found those articles persuasive. The Committee not only included textual language in Rule 26(b)(4)(B) to authorize discovery from experts the opposition had decided against calling as trial witnesses;<sup>107</sup> it also expressly cited the two articles in the note accompanying the 1970 amendment.<sup>108</sup> The note does not specifically repudiate the view that the attorney-client privilege applies to all the expert's information.<sup>109</sup> However, the combination of the approving reference to the articles and the explicit authorization of discovery in Rule 26(b)(4)(B) has convinced most students of the issue that the 1970 amendments implicitly reject the view that the attorney-client privilege applies to the balance of the expert's information.<sup>110</sup>

In addition, the language and legislative history of the Federal Rules of Evidence suggest that Congress did not intend to repeal the discovery authorization in Rule 26(b)(4)(B). Congress approved the Federal Rules of Evidence in 1974, and the rules took effect on July 1, 1975.<sup>111</sup> The draft of the rules which the Supreme Court submitted to Congress included a proposed Rule 703 on the attorney-client privilege.<sup>112</sup> However, the proposed privilege rules proved to be so controversial that Congress balked at enacting them.<sup>113</sup> Instead, Congress enacted only Rule 501.<sup>114</sup> In pertinent part, the rule reads:

Except as otherwise provided 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 [or] 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

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105. Friedenthal, *supra* note 17.

106. Long, *supra* note 17.

107. Comment, *supra* note 39, at 349.

108. Graham, *supra* note 104, at 907.

109. *Id.* at 902 n.34.

110. *Id.* at 901-07; Simon, *supra* note 15, at 250; Note, *Discovery of Retained Nontestifying Experts' Identities Under the Federal Rules of Civil Procedure*, 80 MICH. L. REV. 513, 521 (1982).

111. R. CARLSON, E. IMWINKELRIED & E. KIONKA, *supra* note 8, § 23.

112. *Id.* at 633-34.

113. 2 D. LOUISELL & C. MUELLER, *supra* note 9, § 200.

114. FED. R. EVID. 501.



experience.<sup>115</sup>

Rule 501 authorizes continued judicial development of the attorney-client privilege. However, the introductory phrase manifests Congress' intent to leave undisturbed rules that the Supreme Court had promulgated previously "pursuant to statutory authority." Rule 26(b)(4)(B) is a "rule[ ] prescribed by the Supreme Court pursuant to statutory authority." There is no indication in the legislative history of Rule 501 that Congress intended to repeal the discovery authorization in Rule 26(b)(4)(B). Because that rule authorizes some discovery from experts whom the opposition has decided against calling as trial witnesses, the courts cannot extend the attorney-client privilege to bar all discovery from such experts. In federal court and in states with rules modeled after the pertinent provisions of the Federal Rules of Civil Procedure and Evidence, the rules preclude the courts from embracing the view that the attorney-client privilege absolutely protects the rest of the expert's information.

## 2. *Public Policy*

Even if the courts were writing on a clean slate, it is unwise as a matter of public policy to extend absolute protection to all of the expert's information about the case. As previously stated, by blurring the distinction between the client's communications and the rest of the expert's information, several courts have concluded that the attorney-client privilege protects all of the expert's information.<sup>116</sup> Reasoning from that conclusion, those courts understandably have held that the opposing party may neither depose the expert before trial<sup>117</sup> nor call the expert as a trial witness.<sup>118</sup> If all the expert's information is absolutely privileged, anything the expert said at the deposition or trial would violate the privilege. Ultimately, this line of reasoning transforms an evidentiary privilege into a sweeping incompetency rule, completely barring any testimony by the expert.

The decided trend in American competency law has been to relax competency standards.<sup>119</sup> Congress accelerated that trend by adopting

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115. *Id.*

116. *See supra* note 36 and accompanying text.

117. *See supra* note 38 and accompanying text.

118. *See supra* note 37 and accompanying text.

119. C. McCORMICK, EVIDENCE §§ 61-62, 71 (3d ed. 1984).

Federal Rule of Evidence 601.<sup>120</sup> That rule states that “[e]very person is competent to be a witness except as otherwise provided in these rules.”<sup>121</sup> Although there are rules regulating the competency of judges<sup>122</sup> and jurors,<sup>123</sup> no rule even faintly suggests the complete incompetency of any type of expert witness.

The price of rendering an expert completely incompetent is intolerably high. By expanding the attorney-client privilege to this extreme, the courts in effect would be allowing one party to place an expert in quarantine.<sup>124</sup> That expansion of the attorney-client privilege enables the party to deprive both the opposition and the trier of fact of the benefit of valuable expert witnesses.<sup>125</sup> The courts should not permit one party to corner the market on expert witnesses.<sup>126</sup> It is particularly unfair to do so on the arbitrary basis that that party first consulted the expert.<sup>127</sup> The drastic consequences of extending the attorney-client privilege to all the expert information make that extension unacceptable as a matter of policy.

### 3. *The Majority's Misconceived Analogy*

Given the history of federal privilege law and the cost of extending the attorney-client privilege to all the expert information, it may seem surprising that the majority of courts appears to have approved the extension.<sup>128</sup> However, the majority status of the doctrine attests to the power of analogy.

In one of the seminal cases for the majority view, *United States v. Kovel*,<sup>129</sup> Judge Friendly coined the analogy between interpreters and experts such as accountants. At one point in his opinion, the judge compared the role of an accountant consultant to that of a “linguist” interpreting the client’s statements in a foreign language for the attor-

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120. FED. R. EVID. 601.

121. *Id.*

122. FED. R. EVID. 605.

123. FED. R. EVID. 606.

124. 2 J. HOGAN, *supra* note 10, § 13.12, at 257. *See also* *United States v. Toledo*, 25 M.J. 270 (1987), *reaff'd on rehearing*, 26 M.J. 104 (1988) (the defense may not annex an expert to the defense team).

125. *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038 (E.D.N.Y. 1976), *aff'd*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977); *Pouney v. Florida*, 353 So. 2d 640, 642 (Fla. Dist. Ct. App. 1977); *State v. Carter*, 641 S.W.2d 54, 58 (Mo. 1982), *cert. denied*, 461 U.S. 932 (1983).

126. 2 J. HOGAN, *supra* note 10, § 13.12, at 253.

127. 8 C. WRIGHT & A. MILLER, *supra* note 16, § 2032, at 256 n.84.

128. *See supra* notes 22-24 and accompanying text.

129. 296 F.2d 918 (2d Cir. 1961).

ney.<sup>130</sup> That passage gave birth to one of the most famous analogies in evidence law. The comparison has been repeated again and again by courts,<sup>131</sup> treatise writers,<sup>132</sup> and law review commentators.<sup>133</sup>

To be sure, there is a large element of truth in the analogy. As previously noted, the attorney's lack of expertise and inability to evaluate facts such as the client's mental condition necessitate the expert's mediation between attorney and client. In turn, that necessity justifies treating the client's communications with the expert as revelations to the attorney.

However, in one respect the analogy is dangerously misleading. The interpreter's solitary function is to translate the client's oral and written communications with the attorney. For that reason, all the interpreter's knowledge is privileged; it consists entirely of the client's communications. The analogy has bemused courts favoring the majority view. They have assumed simplistically that because the expert's function is analogous to the interpreter's, all the expert's knowledge must be protected.

On closer scrutiny, the analogy breaks down. When the third party intermediary is a clerk or interpreter, the intermediary performs an essentially ministerial function.<sup>134</sup> Although he may relay information and alter its form from oral to written or Spanish to English, the intermediary does not change the substantive content of the information.<sup>135</sup> He is a mere conduit of information from the client to the attorney.<sup>136</sup> The expert's role is radically different. The expert adds "an important increment" of his knowledge to evaluate the client's communications and other case-specific information.<sup>137</sup> The expert does far more than a clerk or interpreter.<sup>138</sup> The expert creates new information<sup>139</sup> and thereby becomes an independent source of information about the case.

When a court applies the attorney-client privilege to the client's personal communications with the expert, the only information lost is the information contained in the communications themselves; the very same

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130. *Id.* at 922.

131. *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1047 (E.D.N.Y. 1976), *aff'd*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977).

132. 2 D. LOUISELL & C. MUELLER, *supra* note 9, § 209, at 751; 24 C. WRIGHT & K. GRAHAM, *supra* note 25, § 5485, at 387.

133. Casenote, *supra* note 69, at 104.

134. *Federal Trade Comm'n v. TRW, Inc.*, 479 F. Supp. 160, 163 n.7 (D.D.C. 1979).

135. 2 J. HOGAN, *supra* note 10, § 13.10, at 237.

136. Friedenthal, *supra* note 17, at 463, 465.

137. *Id.* at 463.

138. 2 J. HOGAN, *supra* note 10, § 13.10, at 237.

139. *Id.*

information would have to be suppressed if the client made the statements directly to the attorney. However, if the court extends the privilege to the rest of the expert's information, the extension entails a loss of additional information<sup>140</sup>: the information the expert has manufactured<sup>141</sup> by applying a theory or principle to the data in the case. The cases extending the privilege in this manner overlook not only that additional loss of information but also the fundamental distinction between the client's communications to the expert and the expert's other information. In approving the discovery of a defense investigator's notes of a third party's statement in *United States v. Nobles*,<sup>142</sup> the Supreme Court noted that "[t]he fact that these statements of third parties were elicited by a defense investigator on [defendant's] behalf does not convert them into [the defendant's] personal communications."<sup>143</sup> By parity of reasoning, the fact that information is generated by a defense expert does not convert it into a communication from the defendant. Because it is not a communication from the client, the rest of the expert's information in its own right is not entitled to absolute protection under the attorney-client privilege.

*B. Is the Rest of the Expert's Information Entitled to Qualified Protection Under the Work Product Privilege?*

The last section demonstrated that the balance of the expert's information is not entitled to an absolute privilege because it is not a communication between client and attorney; rather, it is information created by the expert. However, one must not leap to the conclusion that the information does not warrant any protection. Quite the contrary, precisely because of its creative origin, the information is an ideal candidate for qualified protection under the work product privilege.

The *raison d'être* of the work product doctrine is to incentivize the creation of information for litigation.<sup>144</sup> In economic terms, the doctrine is designed to stimulate the production of information useful in litigation.<sup>145</sup> It rewards the creative efforts of attorneys by according their

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140. 24 C. WRIGHT & K. GRAHAM, *supra* note 25, § 5486, at 402.

141. Friedenthal, *supra* note 17, at 460.

142. 422 U.S. 225 (1975).

143. *Id.* at 234.

144. Allen, Grady, Polsby & Yashko, *supra* note 93; Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309.

145. Easterbrook, *supra* note 93.

work product at least a qualified privilege.<sup>146</sup> Under the doctrine, only material reflecting the attorney's personal thought processes receives absolute protection.<sup>147</sup> However, "the cases . . . make clear that the work-product [also] protects the confidentiality of work that is not strictly the lawyer's . . . ."<sup>148</sup> The doctrine likewise operates when the attorney employs aides to create information.<sup>149</sup> In *Nobles*,<sup>150</sup> although the Court granted the prosecution discovery of the defense investigator's notes, the Court did so on the theory that the defense waived the work product privilege by calling the investigator as a witness.<sup>151</sup> The Court acknowledged that, as a practical matter, attorneys "must rely on the assistance of investigators and other agents" to generate the information needed for trial.<sup>152</sup>

The same reasoning applies to the expert's information other than the client's communications. At the attorney's request, the expert manufactures new information by applying her expertise to the case-specific facts.<sup>153</sup> To continue the economic metaphor, this is precisely the type of productive manufacturing activity that the work product doctrine is designed to stimulate. Several courts<sup>154</sup> and commentators<sup>155</sup> have recognized that the conditional work product doctrine—not the attorney-client privilege—should regulate the discoverability of the balance of the expert's information. To encourage attorneys to employ experts to create useful legal information, the courts should accord the expert's information a qualified privilege. The courts can accommodate the opposing party's legitimate interests by giving the opposition the opportunity to defeat the privilege by establishing a special need for the expert's information.<sup>156</sup>

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146. Allen, Grady, Polsby & Yashko, *supra* note 93.

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

148. Allen, Grady, Polsby & Yashko, *supra* note 93.

149. *Id.*, at — n.94 (citing *Sersted v. American Can Co.*, 535 F. Supp. 1072 (E.D. Wis. 1982) (investigator)); *Dingler v. Halcyon Lijn N.V.*, 50 F.R.D. 211 (E.D. Pa. 1970); *Ex parte May*, 393 So. 2d 1006 (Ala. 1981) (insurance adjuster); *Long Drug Stores v. Howe*, 134 Ariz. 424, 657 P.2d 412 (1983); *Rakes v. Fulcher*, 210 Va. 542, 172 S.E.2d 751 (1970).

150. *United States v. Nobles*, 422 U.S. 225 (1975).

151. *Id.* at 236-40.

152. *Id.* at 238.

153. Friedenthal, *supra* note 17, at 460.

154. *Id.* (citing cases); *Pouncy v. State*, 353 So. 2d 640 (Fla. Dist. Ct. App. 1977).

155. 2 J. HOGAN, *supra* note 10, § 13.10, at 237; Friedenthal, *supra* note 17, at 473.

156. See FED. R. CIV. P. 26(b)(4)(B) ("exceptional circumstances"); Comment, *supra* note 39 at 355.

### III. THE PRIVILEGED STATUS OF THE REST OF THE EXPERT'S INFORMATION IN LIGHT OF ITS RELATIONSHIP TO THE CLIENT'S DIRECT COMMUNICATIONS WITH THE EXPERT

The first part of this Article advanced the thesis that the attorney-client privilege absolutely protects the client's direct communications with the expert. Hence, the prosecution has no right to discover the parts of the expert's report reflecting those communications or to force the expert to divulge those communications at a deposition or trial. However, the client's communications are not the full extent of the expert's knowledge of the case. The expert's information also includes other case-specific facts and the theory the expert relies on to evaluate the significance of the facts. For instance, the psychiatrist's report may not only recite the client's statements and the psychiatrist's observations of the client's mental condition but may also refer to third parties' descriptions of the client's behavior and the symptomatology for a particular mental disorder. The second part of this Article concluded that the latter information falls outside the attorney-client privilege. The information qualifies as conditional work product material, but the opposing party can override the work product privilege by demonstrating a compelling need for the information. The upshot is that, in our hypothetical, the prosecutor might be entitled to discover all of the expert's report other than the parts describing the client's statements and the psychiatrist's observations of the client's mental state. Likewise, at a deposition or trial, the prosecutor could question the psychiatrist to elicit that information.

Permitting the prosecution to ask those questions and inspect those sections of the expert's report would satisfy the prosecution's discovery needs. The prosecution is entitled to learn only the unprivileged case-specific facts in the expert's possession and the expert's insight involving a certain scientific theory or principle she finds potentially applicable to the case. In our hypothetical, the prosecution thus may discover third parties' descriptions of the client's behavior and the expert's conclusion that the defendant may suffer from only a mild form of neurosis. The prosecution has no right to discover the expert's information which functionally amounts to communications between client and attorney. At first blush, this discovery may seem limited. However, in most jurisdictions prosecutors would be delighted to obtain that extent of discovery. Under the majority view today, the defense has a powerful argument that

all of the expert's information is protected absolutely under the attorney-client privilege.<sup>157</sup> Prosecutors would view the adoption of the conception of the attorney-client privilege proposed by this Article as a distinct improvement over the status quo.

Defense attorneys in jurisdictions currently following the majority view likely will voice the strongest objections to this Article's position. They may object that, in its own right, the rest of the expert's information is entitled to an absolute privilege. But, the distinction between the client's communications and the rest of the expert's information is so fundamental that their objection would border on the frivolous. A more serious contention, however, is that although the distinction may be clear in theory, in practice it will be extremely difficult to segregate absolutely privileged communications from the other expert information entitled to only conditional protection. Based on that contention, defense counsel may urge courts to cloak all expert information with an absolute privilege.

More specifically, the defense contention could take the form of two related arguments. Defense counsel may argue initially that the two types of information are likely to be so inextricably intertwined in the expert's report and mind that they cannot realistically be severed. The defense may attempt to characterize the expert information in a given report as linguistically inseparable. Defense counsel may contend further that even when it is linguistically feasible to segregate the two types of information, grave problems still exist. Before trial, the disclosure of the remaining expert information might give the prosecution valuable investigative leads. In addition, if the prosecution calls the expert as a witness at trial, the trier of fact may give undue weight to the fact that the defense earlier consulted the same expert. This part of the Article considers the merits of those two arguments.

#### *A. The Possibility of Segregating the Two Types of Expert Information*

At first, this defense argument may seem counterintuitive. If a party knowingly intermeshes conditionally privileged information with absolutely privileged information, logic certainly does not demand that all the information be deemed absolutely privileged. To the contrary, one can argue plausibly that the party has assumed the risk of waiving the absolute protection for the latter information. The party should realize that

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157. See *supra* note 36 and accompanying text.

he is intermingling otherwise absolutely protected material with material which the opposing party can discover on a proper showing of need. The party runs the risk that the judge will find the opposing party has the requisite need and therefore order the discovery of all the intertwined information.

Nevertheless, the defense argument has a solid basis in precedent. The case law governing two privileges, the federal privilege for confidential government deliberations and the privilege for an informer's identity, supports the defense argument. The federal courts recognize a limited predecisional, deliberative privilege.<sup>158</sup> The purpose of the privilege is to encourage candor in government decisionmaking: if government decisionmakers are generally assured confidentiality, theoretically their internal discussions will be franker, and the end product—the final government decision—will be of higher quality.<sup>159</sup> The privilege ordinarily protects only advisory opinions, recommendations, and deliberations that are an integral part of the decisionmaking process.<sup>160</sup> It usually does not apply to raw, factual data the government gathers during decisionmaking.<sup>161</sup> However, some cases extend the privilege's protection to factual data when the data is so intertwined with protected opinions that they cannot feasibly be segregated.<sup>162</sup>

The cases on the informer's privilege also lend support to the defense argument. To encourage persons to report law violations to government agencies, the courts have fashioned a conditional privilege for the informer's identity.<sup>163</sup> The courts usually limit the scope of the privilege to the informer's identity itself;<sup>164</sup> this is the information which, if disclosed, could enable a criminal to retaliate against the informer. The privilege ordinarily does not extend to the content of the informer's report.<sup>165</sup>

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158. *Falcone v. Internal Revenue Serv.*, 714 F.2d 646 (6th Cir. 1983), *cert. denied*, 466 U.S. 908 (1984).

159. R. CARLSON, E. IMWINKELRIED & E. KIONKA, *supra* note 8, at 716.

160. *Armstrong Bros. Tool Co. v. United States*, 463 F. Supp. 1316, 1320 (Cust. Ct. 1979).

161. *Liuzzo v. United States*, 508 F.Supp. 923, 937 (E.D. Mich. 1981). *See also* *Ryan v. Dep't of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980).

162. *Dow Jones & Co. v. U.S. Dep't of Justice*, 724 F. Supp. 985 (D.D.C. 1989); *Corporacion Insular de Seguros v. Garcia*, 709 F.Supp. 288, 296 (D.P.R. 1989); Howard & Crowley, *Part II: Litigation—Chapter 3: Pleading, Discovery, and Pretrial Procedure for Litigation Against Government Spying*, 55 U. DET. J. URB. L. 931, 970 (1978).

163. C. McCORMICK, EVIDENCE § 111 (3d ed. 1984).

164. E. IMWINKELRIED, P. GIANNELLI, F. GILLIGAN & F. LEDERER, COURTROOM CRIMINAL EVIDENCE § 1710, at 440 (1987).

165. *Id.*



However, in rare cases the contents of the report are such that, for all practical purposes, their revelation would enable the criminal to identify the informant. In these cases the courts have held that the report and the informer's identity are so closely intertwined that the privilege must be expanded to encompass the report as well.<sup>166</sup>

Assume *arguendo* that, as a matter of law, the absolute attorney-client privilege should apply to all the expert information if it is infeasible to separate the client's communications from the rest of the expert information. Even given this legal assumption, the defense argument for an absolute privilege is factually flawed: in almost all cases, it will be feasible to segregate the two types of expert information.

In the past, the courts have found it possible to draw similar lines between types of expert information.<sup>167</sup> Before the 1970 amendment to Federal Rule of Civil Procedure 26, some courts employed a "property right" theory to decide the discoverability of expert information.<sup>168</sup> Under the theory, the expert had a property right in her expertise. Her opinions and conclusions were protected because the expert necessarily had employed her property—her expertise—to generate the opinions.<sup>169</sup> However, the factual data gathered by the expert was unprotected because the expert did not use her expertise to create that data.<sup>170</sup> Thus, under the old "property right" theory, the judge had to sever the expert report roughly along the lines advocated by this Article.

In one context, the courts continue to draw the same severance line under Rule 26. Suppose that a party to a lawsuit employs an in-house expert on her regular payroll. In the normal course of his duties, the expert gains some factual information which becomes relevant in a later lawsuit. When the lawsuit is filed, the party asks the employee to use his expertise to evaluate the significance of the factual information. Abundant case law holds that the courts should treat the expert as an ordinary witness to the extent that he acquired factual data in the normal course of work before litigation was anticipated.<sup>171</sup> The opposing party then can discover the factual data without showing any particular need; the data is discoverable so long as it is logically relevant to the subject matter of

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166. *Id.*

167. *See, e.g., In re Investment Bankers, Inc.*, 30 Bankr. 883, 889 (Bankr. D. Colo. 1983) (separating an investigator's opinions from the "largely factual, investigative information" in a report).

168. Graham, *supra* note 104, at 935; Long, *supra* note 17, at 671.

169. Graham, *supra* note 104, at 935.

170. *Id.*

171. *Id.* at 936.

the litigation.<sup>172</sup> However, the expert also has formed opinions about the significance of the factual data. The cases hold that, under Rule 26, these opinions constitute work product material and the opposing party must show need to discover them.<sup>173</sup> When the party cannot establish sufficient need, this line of authority requires the lower court judge to sever the protected opinions from the discoverable factual data.<sup>174</sup>

Because it has proven feasible for discovery judges to draw the lines just described, judges also should be able to draw the line with respect to an expert's report. Again, an expert's evaluation of the facts in a case is syllogistic.<sup>175</sup> The expert's starting point is a major premise such as a set of diagnostic criteria for a particular mental illness. The minor premise is the case-specific information, perhaps including the client's statements, the psychiatrist's observations of the client's mental condition, and third parties' descriptions of the client's behavior and mental state. The expert applies the diagnostic criteria to the case-specific information and thereby derives an opinion about the client's sanity. The only material in the report entitled to absolute protection is the information consisting of client communications, namely, the client's statements and the psychiatrist's observations of the client's condition. All the other material qualifies only for conditional work product protection, and hence the prosecution can discover it upon an appropriate showing of need. In a good forensic report, the expert will segregate hard factual data, such as a client's statements, from the evaluative parts of the analysis.<sup>176</sup>

In *United States v. Nobles*,<sup>177</sup> the Supreme Court approved a procedure similar to the procedure urged by this Article. In that case, the lower court informed the parties that it would examine the investigator's report *in camera* and make any necessary excisions.<sup>178</sup> The examination established that the report did not "reflect[ ] any information that [the defend-

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172. *Id.*

173. *Id.* at 941-42.

174. *Id.*; 8 C. WRIGHT & A. MILLER, *supra* note 16, § 2033, at 125-26 (Supp. 1988) (citing *Tahoe Ins. Co. v. Morrison-Knudsen Co.*, 84 F.R.D. 362 (D. Idaho 1979) and *Nelco Corp. v. Slater Elec. Inc.*, 80 F.R.D. 411 (E.D.N.Y. 1978)).

175. Imwinkelried, *The "Bases" of Expert Testimony: The Syllogistic Structure of Scientific Testimony*, 67 N.C.L. REV. 1 (1988).

176. For discussions of the appropriate format of a forensic analysis, see R. ALLEN, E. FERSTER & J. RUBIN, *READINGS IN LAW AND PSYCHIATRY* 119-30 (rev. ed. 1975); P. GIANNELLI & E. IMWINKELRIED, *SCIENTIFIC EVIDENCE* § 19-3, at 692-702 (1986) (medical examiner's report).

177. 422 U.S. 225 (1975).

178. *Id.* at 229.

ant personally] conveyed to the investigator . . . .”<sup>179</sup> Justice Brennan joined in Justice Powell’s lead opinion stressing that the statements reflected in the investigator’s report were not “personal communications” from the defendant.<sup>180</sup>

Even in the rare cases in which severance is impractical, there is still a remedy short of extending the attorney-client privilege to all the expert information: adapting the summary procedure authorized by the 1980 Classified Information Procedures Act.<sup>181</sup> Suppose that a defendant seeks discovery of a document referring to state or military secrets. Furthermore, the secrets are so intermingled with the unprivileged matter in the document that it is infeasible to segregate the unprivileged matter by redacting the references to the secrets. In that event, the Act allows the government to prepare a summary of the document’s contents, deleting all mention of the secrets. The summary must give the defendant adequate discovery of the unprivileged contents of the document. The judge makes an *in camera* comparison of the document and the summary to ensure the summary’s adequacy.

Courts can apply this procedure by analogy to reports containing expert information. In the infrequent cases in which the privileged client communications cannot be separated from the conditionally protected work product, the defense may prepare a summary of the report, omitting any reference to the client communications. As under the Classified Information Procedures Act, the judge then could review the summary to make certain that it did not withhold any relevant information other than client communications. This combination of severance and summary techniques should give the client’s communications to the expert workable, ample protection.

*B. Other Practical Problems Which Will Arise If the Court Protects the Client’s Communications with the Expert But Allows the Prosecution to Discover the Other Expert Information*

Even when the client’s communications and the other expert information are linguistically separable, defense counsel may argue that the court nevertheless should protect other expert information absolutely. Counsel

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179. *Id.* at 234.

180. *Id.*

181. Classified Information Procedures Act, 18 U.S.C. app. § 4 (1982); E. IMWINKELRIED, P. GIANNELLI, F. GILLIGAN & F. LEDERER, COURTROOM CRIMINAL EVIDENCE § 1709 (1987).

will argue that the linguistic severability does not eliminate two other practical problems.

One problem arises before trial: granting the prosecution discovery of the other expert information sometimes will give the prosecution “strong clues”<sup>182</sup> about the absolutely protected information. For instance, suppose that, after a showing of need, the judge grants the prosecution discovery of the part of a psychiatric report applying the diagnostic criteria to the case-specific facts. That part of the report may refer to a symptom precluding a diagnosis of psychosis. The prosecution cannot discover the client’s communication admitting the symptom, but the rest of the report may alert the prosecution to the possibility of conducting a factual investigation to establish that symptom. The defense will argue that the judge’s discovery order breaches the confidentiality of the absolutely protected material and that the only proper course is to extend the attorney-client privilege to all the expert information.

This defense argument misconceives the scope of the attorney-client privilege. Most constitutional exclusionary rules, such as the rule enforcing the prohibition against unreasonable searches, have two components. One component is the basic rule excluding the illegally obtained evidence itself.<sup>183</sup> To use Justice Frankfurter’s expression, the prosecution may not introduce the “poisonous tree”—the illegally seized object or the unlawfully coerced confession.<sup>184</sup> The second component is the derivative evidence rule: to maximize the deterrence of police misconduct, the rule also forbids the prosecution from introducing the “fruit of the poisonous tree.”<sup>185</sup> Thus, if the police use the illegally obtained object or confession as an investigative lead and that lead takes them directly to other evidence, the derivative evidence is inadmissible against the defendant.<sup>186</sup>

In contrast, common-law and statutory privileges such as the attorney-client privilege lack a derivative evidence component.<sup>187</sup> For example, assume that an attorney breaches confidentiality by informing the police that the defendant told him that the defendant confessed her guilt to her brother. The police follow up on the investigative lead and contact the

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182. 2 J. HOGAN, *supra* note 10, § 13.12, at 250.

183. C. MCCORMICK, EVIDENCE § 165 (3d ed. 1984).

184. *Id.* § 176 (citing Justice Frankfurter in *Nardone v. United States*, 308 U.S. 338 (1939)).

185. *Id.*

186. E. IMWINKELRIED, P. GIANNELLI, F. GILLIGAN & F. LEDERER, *supra* note 164, §§ 2201-03.

187. *Id.* § 1605, at 399-400 (citing *United States v. Seiber*, 31 C.M.R. 106 (1961)); *State v. Sandini*, 395 So. 2d 1178 (Fla. Dist. Ct. App. 1981), *cert. denied*, 456 U.S. 926 (1982)).

brother, who agrees to testify against the defendant. Had the police obtained the investigative lead about the defendant's brother by violating the fourth amendment, the derivative evidence component of the constitutional exclusionary rule might bar the prosecution from calling the brother as a trial witness.<sup>188</sup> However, the defendant cannot suppress the brother's testimony on the theory that the police obtained the testimony from a violation of the attorney-client privilege.<sup>189</sup> The attorney-client doctrine is merely a common-law privilege. Because the privilege lacks constitutional status, the courts refuse to enforce the privilege by the extraordinary remedy of suppressing even evidence derived from a violation of the privilege.

Defense counsel correctly point out that granting the prosecution discovery of expert information other than the client's communications with the expert occasionally will give the prosecution indirect investigative leads about privileged information. However, as just noted, the scope of the exclusionary rule enforcing common-law and statutory privileges is narrower than that of the constitutional exclusionary rules. Even when the police obtain a direct investigative lead through a violation of the attorney-client privilege, they can use that lead to discover independent, admissible evidence. A fortiori, when the police obtain an indirect investigative lead from the disclosed portions of a defense expert's report and they use the lead to derive independent evidence, that evidence should not be suppressed. Giving the government indirect investigative leads may place a strain on the attorney-client privilege; but standing alone, it cannot be considered a violation of the privilege.

A second problem can arise at trial. Assume the prosecution calls the former defense consultant as a witness. During the witness' direct examination, the prosecutor may attempt to elicit the fact that the defense attorney and the defendant earlier consulted the witness. The previous consultation is logically relevant to the witness' credibility. The witness' willingness to discuss the case with the defense is some evidence of the witness' lack of bias against the defendant. On direct examination of an expert, attorneys commonly elicit the expert's testimony that, in the past, the expert has testified for both sides—plaintiffs as well as defendants, or

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188. *United States v. Ceccolini*, 435 U.S. 268 (1978); *Wong Sun v. United States*, 371 U.S. 471 (1963); E. IMWINKELRIED, P. GIANNELLI, F. GILLIGAN & F. LEDERER, *supra* note 164, § 2211.

189. E. IMWINKELRIED, P. GIANNELLI, F. GILLIGAN & F. LEDERER, *supra* note 164, § 1605.

prosecution as well as defense.<sup>190</sup> However, there is a probative danger in admitting that testimony. The jury may treat the testimony as evidence that the defense admits the witness is an authoritative expert and give the testimony undue weight.<sup>191</sup>

As in the case of the pretrial problem of giving the prosecution investigative leads, this problem admits of a less drastic solution than suppressing all expert information. As several commentators have suggested, the trial judge could admonish the prosecutor and expert to refrain from any mention of the defense's previous consultation with the witness.<sup>192</sup> The admonition can be justified under the legal relevance doctrine, codified in Federal Rule of Evidence 403.<sup>193</sup> That statute allows the judge to exclude logically relevant evidence when, in the judge's estimation, the admission of the evidence will create a substantial risk that the jury will decide the case on an improper basis.<sup>194</sup> Relevant evidence poses that risk when the trier of fact will probably overvalue the probative worth of the evidence.<sup>195</sup> If the jury is likely to ascribe too much significance to the defense's earlier consultation with this prosecution witness,<sup>196</sup> Rule 403 empowers the judge to bar any mention of the fact.

If mention of the fact slips out during the expert's direct examination, the defense would not be without remedies. The defense can move to strike the mention and to have the judge give the jury a curative instruction to disregard.<sup>197</sup> Even when a witness refers to prejudicial, inadmissible evidence, a strongly worded curative instruction from the judge can provide a sufficient antidote.<sup>198</sup> If even a curative instruction is unlikely

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190. See, e.g., R. CARLSON & E. IMWINKELRIED, *DYNAMICS OF TRIAL PRACTICE: PROBLEMS AND MATERIALS* § 11.10, at 193-94 (1989).

191. Graham, *supra* note 80, at 196.

192. *Id.* at 195-96; Comment, *supra* note 39, at 370.

193. FED. R. EVID. 403.

194. FED. R. EVID. 403 advisory committee's note.

195. Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U. C. DAVIS L. REV. 59, 81 (1984); Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 895 (1988); Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1027 (1977); Travers, *An Essay on the Determination of Relevancy Under the Federal Rules of Evidence*, 1977 ARIZ. ST. L.J. 327, 328, 344.

196. Graham, *supra* note 80, at 196.

197. See generally R. CARLSON, E. IMWINKELRIED & E. KIONKA, *supra* note 8, at 72. See also R. ALLEN & R. KUHN, *AN ANALYTICAL APPROACH TO EVIDENCE: TEXT, PROBLEMS, AND CASES* 124 (1989).

198. E. IMWINKELRIED, *UNCHARGED MISCONDUCT EVIDENCE* § 9:55 (1984).

to undo the damage caused by the reference to the inadmissible matter, the defense may move for a mistrial.<sup>199</sup> As a practical matter, the judge is more likely to grant a mistrial motion when she senses that the witness or attorney deliberately injected the inadmissible material into the record.<sup>200</sup> Both the prosecuting attorney and the expert witness are trained professionals. This professional status may make it difficult for the prosecutor or expert witness to convince the judge that a reference to the defense's pretrial consultation with the expert was inadvertent and innocent.

#### IV. CONCLUSION

Judges will not always find it easy to implement the solution recommended in this Article. Justice Holmes was correct when he stated that judges are always drawing lines, but some lines are harder to draw than others. Given a case in which the judge finds the prosecution has made the requisite showing of need to discover the work product material in a defense expert's report, the judge may find it difficult to redact the references to protected communications without rendering the rest of the report incomprehensible. If so, a good deal of time may be consumed by the defense preparation of a summary of the report and the judge's review of the summary. However, even with these concessions, the solution urged in this Article is still superior at several levels to the current majority view in the United States.

Distinguishing between the client's communications with the expert and other expert information is a preferable solution to the problem of expert discovery. The current majority view has converted a narrow privilege doctrine into a broad incompetency rule, slighting the opposing attorney's discovery needs. Even if one jettisons the majority view, the work product doctrine still will give the other expert information a substantial degree of protection. Many respected authorities complain that, at least in civil cases, the existing work product protection for expert information is excessive.<sup>201</sup> Numerous courts have held that when the attorney does not intend to call the expert as a witness, the opposition cannot discover even the expert's identity without a showing of excep-

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199. R. CARLSON & E. IMWINKELRIED, *DYNAMICS OF TRIAL PRACTICE: PROBLEMS AND MATERIALS* § 15.3 (1989).

200. *Id.*

201. *E.g.*, McLaughlin, *Discovery and Admissibility of Expert Testimony*, 63 NOTRE DAME L. REV. 760 (1988) (the author is a district judge for the Eastern District of New York).

tional need.<sup>202</sup> In practice, the opposition is rarely able to satisfy the burden of proving exceptional need.<sup>203</sup> The judge is likely to find the showing insufficient unless the party seeking discovery can show that the expert had unusual qualifications<sup>204</sup> or that the expert analyzed an object which has since been altered, precluding another expert from duplicating the earlier test.<sup>205</sup> The courts have so severely restricted discovery of work product material from experts not called as trial witnesses<sup>206</sup> that adding the protection of the attorney-client privilege is hardly necessary.

The majority view is undesirable at another level. The majority view not only represents an unsound solution to the privilege problem of expert discovery; it also tends to distort privilege law in general. One of the key concepts in privilege law is the definition of communication.<sup>207</sup> That concept helps define the scope of not only the attorney-client privilege, but also the physician-patient,<sup>208</sup> psychotherapist-patient,<sup>209</sup> and spousal<sup>210</sup> privileges. The majority view has distorted the concept by stretching it beyond any sensible limit.<sup>211</sup> That distortion may create additional mischief by spilling over into the law governing the other privileges employing the same concept.

Most important, the majority view impedes progress toward the development of criminal discovery as a two-way street. Many commentators advocate more liberal discovery for the criminal defendant.<sup>212</sup> Justice Brennan's 1963 Article in this journal is one of the most eloquent pleas in favor of expanded discovery for the defense,<sup>213</sup> and his 1989 Tyrrell Wil-

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202. Mack v. Moore, 91 N.C. App. 478, 372 S.E.2d 314 (1988); 2 J. HOGAN, *supra* note 10, § 13.12, at 255; Comment, *supra* note 39, at 351; Note, *supra* note 110, at 517.

203. 8 C. WRIGHT & A. MILLER, *supra* note 16, § 2032, at 256; 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2032, at 122-23 (Supp. 1988).

204. 2 J. HOGAN, *supra* note 10, § 13.12, at 253; Friedenthal, *supra* note 17, at 484.

205. Friedenthal, *supra* note 17, at 484; 2 J. HOGAN, *supra* note 10, § 13.12, at 252; 8 C. WRIGHT & A. MILLER, *supra* note 16, § 2032, at 256 n.87; 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2032, at 123 (Supp. 1988).

206. Graham, *supra* note 80.

207. R. CARLSON, E. IMWINKELRIED & E. KIONKA, *supra* note 8, at 610-11.

208. *Id.* at 660-61.

209. *Id.* at 665-68.

210. *Id.* at 620-23.

211. 2 J. HOGAN, *supra* note 10, § 13.10, at 238.

212. Everett, *Discovery in Criminal Cases—In Search of a Standard*, 1964 DUKE L.J. 477; Krantz, *Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice*, 42 NEB. L. REV. 127 (1963); Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56 (1961).

213. Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279.



liams Lecture reiterates that plea with renewed urgency.<sup>214</sup> Justice Brennan joined Justice Powell's *Nobles* opinion in repudiating the view that criminal discovery should be a one-way street.<sup>215</sup> The majority view of the application of the attorney-client privilege to expert information has become a serious obstacle to the transformation of criminal discovery into a two-way street. That obstacle must be removed.

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214. Brennan, *supra* note 2.

215. *United States v. Nobles*, 422 U.S. 225, 233 (1975).