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Extending the Attorney-Client Privilege: A Constitutional Mandate

> *No man can conduct any of his affairs which relate to matters of law, without employing and consulting with an attorney . . . . [I]f he does not fully and candidly disclose every thing that is in his mind, which he apprehends may be in the least relative to the affair he consults his attorney upon, it will be impossible for the attorney properly to serve him . . . .*
>
> —*Annesley v. Anglesea*, 17 How. St. Trials 1139, 1237 (1743).

The attorney-client privilege,[1] the oldest of the communication privileges, can be traced back to the beginnings of the common law.[2] Judges and legal commentators have addressed its scope and philosophical foundation at length.[3] Despite this scrutiny, elemental issues remain unresolved as to when and how the privilege should be applied. This comment will consider the scope of information that should be protected by the privilege in a criminal case, with specific reference to physical evidence *and* to information not *directly* communicated by a defendant but nevertheless derived from a confidential communication between the defendant and his or her attorney.

Presently, the primary categorical limitation upon the scope of the privilege is the judicially-established *physical evidence* exception. This exception provides that physical evidence relevant to a criminal prosecution, once in the possession of the defendant's attorney, must be delivered by the attorney to the prosecution.[4] The fact that the defendant delivered the evidence to the attorney does not bring the evidence within the scope of the privilege.[5] Reflecting a balance between the

1. For purposes of this discussion, the relevant definition of the attorney-client privilege is that provided by statute: "[T]he client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer." CAL. EVID. CODE §954. Further, a "confidential communication between client and lawyer" is defined as "information transmitted between a client and his lawyer in the course of that relationship and in confidence . . . ." *Id.* §952. The scope of the "information" so protected comprises the major focus of modern legal discussion of the privilege.

2. *See generally* 8 J. WIGMORE, EVIDENCE §2290, at 542 (rev. ed. J. McNaughton 1961) [hereinafter cited as WIGMORE]; Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1069-85 (1978).

3. *See, e.g.*, Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464 (1977) [hereinafter cited as *Constitutional Entitlement*]; Comment, *Attorney-Client Privilege in California*, 10 STAN. L. REV. 297 (1958) [hereinafter cited as *Privilege in California*].

4. See note 41 *infra*.

5. See note 41 *infra*.

need for confidentiality in the attorney-client relationship and the fact-finding objective of the criminal justice system, the physical evidence exception precludes a criminal defendant from concealing physical evidence (that might otherwise be subject to discovery and seizure in the course of an investigation) by delivery to his or her attorney.[6]

The physical evidence exception addresses only one of the areas of conflict raised by the attorney-client privilege. Certain other key issues remain: May an attorney who discovers physical evidence take possession of the evidence? If the attorney takes possession of the evidence, does there arise an obligation to testify as to the location of the evidence? Or, may this information be denied to the prosecution, despite the possibility that the evidence in its original location might have been discovered in the course of the criminal investigation? Does the privilege protect information *derived* by an attorney from a confidential communication, when the information is not specifically contained in the communication?[7] Does the work product doctrine provide an acceptable alternative to protect a criminal defendant's constitutional rights, in cases in which the attorney-client privilege does not now apply?

These issues have not been resolved by statute or by judicial decision; thus, the application of the attorney-client privilege remains subject to piecemeal interpretation. For example, in a recent California decision involving the physical evidence exception,[8] an appellate court refused to apply the privilege to an observation by an attorney that resulted from a confidential communication by a criminal defendant. Employing an unprecedented standard, the court reasoned that the attorney's testimony was not protected by the privilege because the fact in question was objectively observable.[9] This use of "objective observability" as a criterion for application of the attorney-client privilege would require such close distinctions to be made by the criminal defendant in the course of consultation with his or her attorney as to inhibit unconstitutionally the defendant's exercise of the right to counsel.[10]

Generally, the need to establish uniform standards for future application of the attorney-client privilege is indicated by the following three factors: (1) the absence of specific statutory language addressing the unresolved issues; (2) the absence of sufficiently specific judicial

6. See note 42 *infra*.
7. This consideration will be referred to *infra* as the derivative evidence issue.
8. People v. Meredith, 98 Cal. App. 3d 925 (1979), *aff'd*, 29 Cal. 3d 682, __ P.2d __, __ Cal. Rptr. __ (1981) (cited here with particular reference to the appellate court opinion).
9. 98 Cal. App. 3d at 936-37.
10. See notes 61-80 and accompanying text *infra*.

guidelines to prevent piecemeal interpretation of the privilege; and (3) the legal inadequacy of the work product doctrine as an alternative source of protection of the criminal defendant's constitutional rights inherent in the attorney-client relationship.[11] Through analysis of the historical use of the privilege in terms of its constitutional and public policy purposes, this comment will identify appropriate standards for applying the attorney-client privilege to the situations earlier described.

Two specific standards will be suggested. First, elaborating on the physical evidence exception, upon removal of physical evidence from its original location by defense counsel or counsel's agent, testimony as to its location should be required under most circumstances. Second, information not contained within a confidential communication should nevertheless be protected by the attorney-client privilege when the information is *primarily derived* from a confidential communication between a criminal defendant and his or her attorney.

As a general prerequisite to the use of the attorney-client privilege, there must be a communication in the course of the attorney-client relationship, a communication intended by the client to be confidential.[12] This comment will focus on the scope of information that may be included within the confidentiality of the attorney-client communication. Initially, however, the constitutional and public policy purposes of the attorney-client privilege will be discussed, in order to identify the rationale under which the privilege should be applied.

LEGAL SCOPE OF THE ATTORNEY-CLIENT PRIVILEGE

This section will briefly assess the legal authority for the attorney-client privilege, including a description of the physical evidence exception. Identifying the legal purposes of the attorney-client privilege, with emphasis on its relationship to the consitutional rights of a criminal defendant, will aid in its subsequent application to the specific issues referred to in the introduction.

A. Legal Basis of the Privilege

In order to determine the appropriate application of the attorney-client privilege, it is helpful to consider first its present scope as a product of common law, statute, and constitutional law. At its narrowest, the privilege applies to communications by an accused criminal to his or her counsel, in contemplation of defending a pending or imminent

11. See notes 117-130 and accompanying text *infra*.

12. *See* Sullivan v. Superior Court, 29 Cal. App. 3d 64, 69, 105 Cal. Rptr. 241, 244 (1972); B. WITKIN, CALIFORNIA EVIDENCE *Witnesses* §§799, 802, 804 (2d ed. 1966) [hereinafter cited as WITKIN]; *Privilege in California*, *supra* note 3, at 300.

prosecution, concerning a completed crime.[13] Beyond this limited application, the privilege is perhaps best viewed in each case not as a mechanical result, but as an accommodation of competing societal and constitutional interests.

To begin with, the attorney-client privilege arose under the common law as one of a number of evidentiary privileges.[14] In order to limit the exclusion of otherwise admissible evidence, the weight of authority generally requires that evidentiary privileges be narrowly construed.[15] Many cases accordingly have held that the attorney-client privilege should be narrowly applied so as to minimize the potential for withholding relevant information from the fact-finding process.[16] Case law also, however, supports the proposition that the latitude accorded the scope of an evidentiary privilege should be determined on a case-by-case basis.[17] Specifically, it appears that in view of the extensive statutory protection of the attorney-client privilege in California,[18] and the constitutional considerations that underlie the privilege,[19] the attorney-client privilege should be categorically granted a more liberal construction than are other evidentiary privileges.[20]

California protects the attorney-client relationship through a combination of statutory provisions. In addition to the articulation of the privilege in the Evidence Code, protecting "confidential communication between client and lawyer,"[21] the Business and Professions Code requires the attorney to "maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client."[22] Moreover, the Penal Code proscribes the eavesdropping or recording of a conversation between "a person who is in the physical custody of a law enforcement officer . . . and such person's attorney . . . ."[23] These

13. Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1062 (1978).

14. *See generally* WITKIN, *supra* note 12, §§794-937.

15. *See* Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 396, 364 P.2d 266, 288, 15 Cal. Rptr. 90, 112 (1961); 29 Cal. App. 3d at 72, 105 Cal. Rptr. at 246.

16. *See, e.g.*, Fisher v. United States, 425 U.S. 391, 403 (1976); People v. Donovan, 57 Cal. 2d 346, 354, 369 P.2d 1, 5, 19 Cal. Rptr. 473, 477 (1962); Brunner v. Superior Court, 51 Cal. 2d 616, 618, 335 P.2d 484, 486 (1959); People v. Meredith, 98 Cal. App. 3d 925, 937-38 (1979); Gonzales v. Municipal Court, 67 Cal. App. 3d 111, 118, 136 Cal. Rptr. 475, 479 (1977).

17. *See* Sullivan v. Superior Court, 29 Cal. App. 3d 64, 105 Cal. Rptr. 241 (1972).

18. See notes 21-23 and accompanying text *infra*.

19. See notes 24-34 and accompanying text *infra*.

20. *See, e.g.*, Holm v. Superior Court, 42 Cal. 2d 500, 509, 267 P.2d 1025, 1030 (1954), *disapproved on other grounds*, 58 Cal. 2d 166, 373 P.2d 432, 23 Cal. Rptr. 368 (1962); People v. Atkinson, 40 Cal. 284, 285-86 (1870); People v. Flores, 71 Cal. App. 3d 559, 563, 139 Cal. Rptr. 546, 548 (1977); American Mut. Liab. Ins. Co. v. Superior Court, 38 Cal. App. 3d 579, 593, 113 Cal. Rptr. 561, 572 (1974); People v. Kor, 129 Cal. App. 2d 436, 447, 277 P.2d 94, 100-01 (1954) (Shinn, J., concurring). *See generally* WITKIN, *supra* note 12, §795.

21. CAL. EVID. CODE §954.

22. CAL. BUS. & PROF. CODE §6068(e).

23. CAL. PENAL CODE §636.

provisions reflect clear legislative intent that a criminal defendant be assured of the right to consult with legal counsel without fear that the information thereby disclosed will be used to his or her detriment.

More fundamental to the scope of the attorney-client privilege than its legislative support are the constitutional rights the privilege is held to protect. Although the attorney-client privilege lacks *express* constitutional authorization, its protection of the criminal defendant's expectations of confidentiality is "essentially interrelated with the specific constitutional guaranties of the individual's right to counsel and immunity from self-incrimination. . . ."[24] The privilege has been elsewhere characterized as "a basic civil right, indispensable to the fulfillment of the constitutional security against self-incrimination and the right to make defense with the aid of counsel skilled in the law."[25] Proper application of the attorney-client privilege, therefore, hinges not only upon specific statutory language, but also upon the parameters of the fifth and sixth amendments of the United States Constitution.

The leading case on the relation of the attorney-client privilege to the self-incrimination clause of the fifth amendment is *Fisher v. United States*.[26] The United States Supreme Court held in *Fisher* that if a defendant is privileged from producing given information, his or her attorney may not be compelled to produce it either.[27] For example, in a New York case decided in 1975,[28] an attorney was held blameless who, upon being advised by his client of the whereabouts of a murder victim, failed to disclose the information, in apparent violation of public health law.[29] Finding the attorney-client privilege to be an implementation of the fifth amendment protection against self-incrimination, the court held that the privilege superseded the statutory disclosure requirement on a balance of "the importance of the general privilege of confidentiality" with the "fair administration of criminal justice."[30]

As to the *sixth* amendment, federal case law has held that the right to counsel is effectively and meaningfully exercised only if the defendant's consultation with his or her attorney is private and secure from intru-

24. *See* State v. Kociolek, 23 N.J. 400, 415, 129 A.2d 417, 425 (1957). *See also Constitutional Entitlement*, *supra* note 3, at 480, 485-87, arguing the privilege to be implicitly guaranteed by the fifth and sixth amendments to the United States Constitution.

25. 23 N.J. at 414, 129 A.2d at 424 (1957). *See also* Caplon v. United States, 191 F.2d 749, 757 (D.C. Cir. 1951).

26. 425 U.S. 391 (1976).

27. *See id.* at 404. *See also* Malloy v. Hogan, 378 U.S. 1 (1963) (applying the fifth amendment privilege against self-incrimination to the states under the due process clause of the fourteenth amendment); Prudhomme v. Superior Court, 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970); WIGMORE, *supra* note 2, §2307, at 592.

28. People v. Belge, 83 Misc. 2d 186, 372 N.Y.S.2d 798 (1975), *aff'd*, 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976).

29. *See id.* 372 N.Y.S.2d at 799.

30. *See id.* 372 N.Y.S.2d at 802.

sion by the government.[31] California's constitutional counterpart to the sixth amendment, providing that "the defendant in a criminal cause has the right . . . to have the assistance of counsel . . . ,"[32] has been interpreted similarly by the California Supreme Court to assure a criminal defendant the right to communicate with his or her attorney in absolute privacy.[33]

The constitutional policy underlying the existence of the privilege is self-evident: to afford a client the freedom from fear of compulsory disclosure of information divulged in consultation with counsel[34] so that the client will feel free to impart all relevant information essential to effective legal counselling.[35] Any requirement that an attorney disclose information provided by a client would result in the client's refusal to inform the attorney in order to keep incriminating facts from the court.[36] Any limitations upon the attorney-client privilege, therefore, should be consistent with the reasonable expectations of the client as to the confidentiality of the consultation; otherwise, these limitations would unduly inhibit the defendant's communications with counsel, chilling the exercise of the defendant's constitutional rights.

The attorney-client privilege is thus integral to the constitutional rights provided a criminal defendant under the fifth and sixth amendments and should be applied accordingly. The scope of the privilege, however, must be balanced with the fact-finding objectives of the criminal justice system, resulting in limitations upon the privilege. One such limitation is the physical evidence exception.

B. The Physical Evidence Exception

The physical evidence exception is the primary categorical example of a balance of the prosecutorial and constitutional implications of applying the attorney-client privilege in a given set of circumstances. The exception was judicially created to limit the scope of the attorney-client privilege to the constitutional and public policy concerns it was

31. *See* Weatherford v. Bursey, 429 U.S. 545, 554 n.4 (1977); Fisher v. United States, 425 U.S. 391, 404 (1976); Caplon v. United States, 191 F.2d 749 (D.C. Cir. 1951). *See also* Caldwell v. United States, 205 F.2d 879, 881 (D.C. Cir. 1953).

32. CAL. CONST. art. I, §15.

33. Barber v. Municipal Court, 24 Cal. 3d 742, 751, 598 P.2d 818, 822, 157 Cal. Rptr. 658, 662 (1979); *In re* Jordan, 7 Cal. 3d 930, 941, 500 P.2d 873, 879, 103 Cal. Rptr. 849, 855 (1972). *See also In re* Rider, 50 Cal. App. 797, 799-800, 195 P. 965, 965-66 (1920).

34. *See* Holm v. Superior Court, 42 Cal. 2d 500, 506-07, 267 P.2d 1025, 1028 (1954), *disapproved on other grounds*, 58 Cal. 2d 166, 373 P.2d 432, 23 Cal. Rptr. 368 (1962); State v. Olwell, 64 Wash. 2d 828, 832, 394 P.2d 681, 684 (1964). *See also* People v. Canfield, 12 Cal. 3d 699, 704-05, 527 P.2d 633, 637, 117 Cal. Rptr. 81, 85 (1974).

35. *See* Fisher v. United States, 425 U.S. 391, 403 (1976); WIGMORE, *supra* note 2, §2291, at 545. *See also* Nowell v. Superior Court, 223 Cal. App. 2d 652, 657, 36 Cal. Rptr. 21, 25 (1963).

36. *See Privilege in California*, *supra* note 3, at 298.

designed to further. Under this limitation, information divulged by the client to the attorney in the course of confidential communication may indirectly result in providing the prosecution with additional physical evidence to prove the guilt of the criminal defendant.[37] This may occur when the attorney, either directly or through an investigating agent, takes possession of physical evidence in the course of factual investigation performed in preparing the defense. In the leading California case on this limitation, *People v. Lee*,[38] the court held that the importance of an attorney's obligations under the privilege of attorney-client confidentiality[39] was outweighed on a balance of policy considerations, in that standards of professional responsibility did not allow an attorney "knowingly to take possession of and secrete the instrumentalities of a crime."[40] Accordingly, the court required that the attorney turn over to the prosecution any physical evidence in his or her possession relevant to the criminal case,[41] on the basis that an attorney may not serve as a depository for evidence of a crime and may not act to suppress such evidence.[42]

This exception has been carefully defined by the courts. In *Lee*, the court held that an attorney is entitled to withhold the evidence for a reasonable period of time, for the purposes of collecting information and preparing a defense.[43] Additionally, although the physical object itself is not protected by the privilege, the fact that the defendant delivered the evidence to the attorney must be treated as privileged information.[44]

Furthermore, physical evidence protected by the defendant's fifth amendment right because of its testimonial nature falls outside of this exception to the attorney-client privilege when delivered by the defendant to the attorney.[45] For example, an early case on the interpretation

37. See notes 41, 42 and accompanying text *infra*.
38. 3 Cal. App. 3d 514, 83 Cal. Rptr. 715 (1970).
39. *In re* Ryder, 381 F.2d 713, 714 (4th Cir. 1967).
40. 3 Cal. App. 3d 514, 526, 83 Cal. Rptr. 715, 722 (1970).
41. *See* 3 Cal. App. 3d at 526, 83 Cal. Rptr. at 722. *See generally In re* January 1976 Grand Jury, 534 F.2d 719, 720 (7th Cir. 1976); Morrell v. State, 575 P.2d 1200, 1210 (Alas. 1978); State v. Olwell, 64 Wash. 2d 828, 833-34, 394 P.2d 681, 684-85 (1964); Graffeo, *Ethics, Law, and Loyalty: The Attorney's Duty to Turn Over Incriminating Physical Evidence*, 32 STAN. L. REV. 977 (1980); Sevilla, *Between Scylla and Charybdis: The Ethical Perils of the Criminal Defense Lawyer*, 2 NAT'L J. OF CRIM. DEF. 237, 263-65 (1976) [hereinafter cited as *Scylla & Charybdis*].
42. *See* State v. Dillon, 93 Idaho 698, 710, 471 P.2d 553, 565 (1970), *cert. denied*, 401 U.S. 942 (1971).
43. *See* 3 Cal. App. 3d at 526, 83 Cal. Rptr. at 722. *See also* 64 Wash. 2d at 833-34, 394 P.2d at 684-85.
44. *See* People v. Lee, 3 Cal. App. 3d 514, 526, 83 Cal. Rptr. 715, 722 (1970); Anderson v. State, 297 So. 2d 871, 875 (Fla. App. 1974); State v. Olwell, 64 Wash. 2d 828, 834, 394 P.2d 681, 684 (1964); WIGMORE, *supra* note 2, §2264, at 379. *See generally* Comment, *The Right of a Criminal Defense Attorney to Withhold Physical Evidence Received from His Client*, 38 U. CHI. L. REV. 211 (1970). *Cf.* State v. Vindhurst, 63 Wash. 2d 607, 614-16, 388 P.2d 552, 556-57 (1964).
45. *See* Fisher v. United States, 425 U.S. 391, 413-14 (1976); *In re* January 1976 Grand Jury,

of the attorney-client privilege held that an attorney may not be compelled to disclose the existence or location of physical evidence if the attorney observed the evidence as the direct result of a communication from his or her client.[46] Information of this sort constitutes testimonial evidence that the prosecution could not compel the defendant to disclose under the fifth amendment; thus, the defendant's attorney should be precluded from testifying about this information.[47] Any other result would present the criminal defendant with the dilemma of exercising either the right to counsel or the right against self-incrimination, but not both. Application of the attorney-client privilege is, therefore, necessary to avoid unduly inhibiting the criminal defendant in the exercise of his or her constitutional rights.

The attorney-client privilege and the physical evidence exception demonstrate legislative and judicial concern with a balance of the public policy factors affected by the privilege, centering upon a tension between the consideration by the court of all relevant evidence[48] and the protection of a criminal defendant in the exercise of constitutional rights.[49] Fundamentally, the attorney-client privilege exists to allow the defendant to provide information to an attorney[50] pursuant to preparation of an effective legal defense,[51] without fear that the exercise of the right to counsel will provide the attorney with information with which the defendant will be incriminated at trial.[52] This interpretation has been supported without apparent exception in judicial decisions and legal commentaries addressing the relationship between the fifth and sixth amendments and the attorney-client privilege.[53]

The physical evidence exception, for example, serves to limit the scope of the privilege to its constitutional purposes by requiring the attorney to provide physical evidence that: (1) would not, in the defendant's possession, be protected by the fifth amendment right against

534 F.2d 719, 724 n.5 (7th Cir. 1976); Comment, *The Problem of an Attorney in Possession of Evidence Incriminating His Client: The Need For a Predictable Standard*, 47 U. CIN. L. REV. 431, 439 (1978). *See generally* WITKIN, *supra* note 12, §811 (Supp. 1977). For example, a written statement prepared by the client in the course of consultation with an attorney would be protected by the fifth amendment and by the attorney-client privilege; documents preexisting the criminal prosecution, however, would not be testimonial in nature, and would not therefore be protected by the privilege when delivered to the attorney.

46. *See* State v. Douglas, 20 W. Va. 770, 780 (1882); Comment, *The Problem of an Attorney in Possession of Evidence Incriminating His Client: The Need For a Predictable Standard*, 47 U. CIN. L. REV. 431, 438 (1978); *Scylla & Charybdis*, *supra* note 41 at 264.

47. *See* People v. Belge, 83 Misc. 2d 186, 190, 372 N.Y.S.2d 798, 802 (1975).

48. See note 14 *supra*.

49. See notes 34, 35 *supra*.

50. See note 35 *supra*.

51. See note 25 *supra*.

52. See note 34 *supra*.

53. See notes 24-34 *supra*.

self-incrimination,[54] and (2) has come into the actual possession of the attorney.[55] The fifth amendment privilege against self-incrimination is not infringed upon by the physical evidence exception, which concerns only evidence not protected by the fifth amendment.[56] Furthermore, the sixth amendment right to counsel, and its counterpart in the California Constitution,[57] are not disturbed, as there is no authority for the proposition that the constitutional right to legal counsel includes the right of defense counsel to take possession of physical evidence without restriction.[58] Balanced against the interests of society in permitting a criminal investigation to produce evidence not protected by the fifth amendment privilege,[59] the purposes of defense preparation served by defense counsel's actual removal and possession of physical evidence cannot reasonably be entitled to unqualified constitutional protection. Thus, no serious questions of constitutionality appear to be raised by a judicial doctrine requiring physical evidence of a non-testimonial nature that has come into the possession of defense counsel to be transferred to the prosecution.

To summarize, the attorney-client privilege, as generally codified, interpreted, and applied, is consistent with constitutional law and public policy concerns. The argument for an articulated standard of application of the privilege is founded on the danger that, as demonstrated by recent California case law,[60] the failure to consider adequately the policy factors underlying the privilege may lead to applications inconsistent with its rationale.

THE PROBLEM—APPLICATION OF THE PRIVILEGE

One example of the potential for misapplication of the attorney-client privilege arose in the appellate court decision in *People v. Meredith*,[61] involving an application of the physical evidence exception. The case centered upon physical evidence procured by an attorney's

54. See note 46 *supra*.
55. *See Scylla & Charybdis*, *supra* note 41, at 263-64.
56. See note 46 *supra*.
57. *See* CAL. CONST. art. I, §15. The constitutional right to counsel of a criminal defendant includes a right to legal representation that can be fairly characterized as competent, *see* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970), and a right to pretrial preparation of a defense on the basis of an independent examination by counsel of facts, circumstances, pleadings, and applicable law. *See* Von Moltke v. Gillies, 332 U.S. 708, 721 (1948); People v. Pope, 23 Cal. 3d 412, 423, 590 P.2d 859, 866, 152 Cal. Rptr. 732, 739 (1979); *In re* Saunders, 2 Cal. 3d 1033, 1041-42, 472 P.2d 921, 926, 88 Cal. Rptr. 633, 638 (1970); *In re* Williams, 1 Cal. 3d 168, 175, 460 P.2d 984, 988-89, 81 Cal. Rptr. 784, 788-89 (1969). *See generally* Zeitlan, *The Constitutional Mandate of Effective Assistance of Counsel: The Duty to Investigate*, 6 HOFSTRA L. REV. 245 (1977).
58. See note 41 *supra*.
59. See note 16 *supra*.
60. *See* People v. Meredith, 98 Cal. App. 3d 925 (1979).
61. 98 Cal. App. 3d 925 (1979).

investigator[62] pursuant to information conveyed by a criminal defendant in a confidential communication with the attorney.[63] The trial court compelled the agent to testify as to the location of the evidence.[64] On appeal, the Third District Court of Appeal affirmed, holding that: (1) the courts have refused to apply the attorney-client privilege to information coming to an attorney from an *independent* source;[65] and (2) because observations of fact made by experts are deemed an independent source, and therefore admissible,[66] the *observation* of physical evidence in its original location is admissible as well.[67] The court reasoned,

> Scott (the defendant) now contends that since [the attorney's agent] observed the location as a result of the communication from Scott to [his attorney], the location as well as the communication may not be disclosed. This contention is unacceptable. The location of the [physical evidence] did not become privileged merely because Scott told it to [his attorney].[68]

Mistakenly perceiving the expert testimony cases to hinge on the objective observability of the information sought to be admitted,[69] the appellate court in *Meredith* reasoned that *any* objective observation was independent, and therefore outside the scope of the attorney-client privilege. The court thereby created a standard for interpretation of the privilege that bears no relation to its legal rationale.[70] The expert testimony limitation relied on by the court, accurately interpreted, is based on the fact that the attorney-client privilege is correctly applied only to protect communications between client and attorney,[71] not knowledge coming to the attorney from an independent source, such as an expert's specialized knowledge.[72] For example, the California

62. References in this comment to the attorney taking possession of physical evidence should be deemed to cover also the situation in which the attorney's agent takes possession, since the two situations are indistinguishable as to the application of the attorney-client privilege. *See* Gonzales v. Municipal Court, 67 Cal. App. 3d 111, 118, 136 Cal. Rptr. 475, 480 (1977); CAL. EVID. CODE §952.

63. *See* 98 Cal. App. 3d at 935.

64. *See id.* at 934-38.

65. *See id.* at 936 (illustrating the independent source limitation by reference to cases involving expert testimony).

66. See notes 72-75 and accompanying text *infra*.

67. *See* 98 Cal. App. 3d at 936-37.

68. *Id.* at 937.

69. See note 72 *infra*.

70. See notes 82-84 and accompanying text *infra*.

71. *See* Hunter v. Watson, 12 Cal. 363, 377 (1859). *See generally* Morrell v. State, 575 P.2d 1200 (Alas. 1978); State v. Dillon, 93 Idaho 698, 471 P.2d 553 (1970), *cert. denied*, 401 U.S. 942 (1971); *Privilege in California*, *supra* note 3, at 305.

72. *See Privilege in California*, *supra* note 3, at 316-17. The admissibility of expert testimony is predicated on the subject matter of the testimony being sufficiently removed from common experience that the trier of fact will benefit from the assistance of a specialist. *See* G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 391 (1978); 2 J. WIGMORE, EVIDENCE §§559-560, at 640 (rev. ed. J. McNaughton 1961).

Supreme Court in *Oceanside Union School District v. Superior Court*[73] held that factual data and opinions gathered by an expert were not privileged. The court reasoned that the information "did not emanate from the client,"[74] but rather had been derived from the specialized knowledge and analysis of the expert.[75] Under the facts of *Meredith*, the observations of the investigator employed by Scott's attorney involved no *independent* knowledge on the investigator's part. His testimony served only to confirm information directly provided by defendant Scott, and to this extent should have been excluded under the attorney-client privilege.[76] *Meredith* is distinguishable from the expert witness cases, in that the witness in *Meredith* was called to testify about information he received from the confidential communication between client and attorney, not about information arising from his independent expertise.[77]

Beyond the error in reasoning committed by the appellate court in *Meredith*, the apparently categorical exclusion by the court of observed facts from the attorney-client privilege raises a serious constitutional issue. The constitutional right to counsel[78] entitles a criminal defendant to rely upon counsel to conduct an independent investigation.[79] A standard that could compel counsel to testify to the observation of facts drawn from client communications infringes upon the assurance of confidentiality and privacy of communication with counsel guaranteed to a criminal defendant under the constitutional right to counsel.[80] By penalizing the criminal defendant for exercising the right to counsel, the *Meredith* standard permits the defendant to employ either the right to counsel or the fifth amendment privilege against self-incrimination, but precludes the use of both.

A legitimate ground to support the introduction of the investigator's testimony in *Meredith* was cited only incidentally by the appellate court when it pointed out that, once the agent removed the physical evidence from its original location, the agent's testimony became the only potential source available to the prosecution of evidence concern-

73. 58 Cal. 2d 180, 373 P.2d 439, 23 Cal. Rptr. 375 (1962).

74. *Id.* at 191, 373 P.2d at 446, 23 Cal. Rptr. at 382. *See also* San Diego Professional Ass'n v. Superior Court, 58 Cal. 2d 194, 201, 373 P.2d 448, 452, 23 Cal. Rptr. 384, 388 (1962).

75. *See Privilege in California*, *supra* note 3, at 316-17.

76. *See People v. Lines*, 13 Cal. 3d 500, 509-10, 531 P.2d 793, 799, 119 Cal. Rptr. 225, 231 (1975), holding that "confidentiality is not destroyed by disclosure of confidential communications to third persons 'to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the lawyer is consulted.' " *See also Privilege in California*, *supra* note 3, at 304.

77. *Compare Scylla & Charybdis*, *supra* note 41, at 264, *with* Coy v. Superior Court, 58 Cal. 2d 210, 219-20, 373 P.2d 457, 461-62, 23 Cal. Rptr. 393, 397-98 (1962).

78. *See* U.S. CONST. amend. VI; CAL. CONST. art. I, §15.

79. See note 16 *supra*.

80. See notes 31, 33 *supra*. *See also* Petition for Hearing at 12-26, People v. Meredith, 98 Cal. App. 3d 925 (1979) (copy on file at the *Pacific Law Journal*).

ing that location.[81] The interference of defense counsel with the potential course of a fact-finding investigation was, in fact, the basis upon which the *Meredith* result was subsequently affirmed by the California Supreme Court.[82] This policy concern, which subsequently will be discussed in greater depth, offers a more feasible basis for limitation of the attorney-client privilege than does the standard articulated by the appellate court in *Meredith*. The implication of the court that the client must discern, in communications with his or her attorney, between "objectively observable" facts and other information in order to rely upon the confidentiality of the attorney-client relationship is contrary to the client's reasonable expectations of confidentiality, thus rendering meaningless the constitutional right to counsel.[83]

IDENTIFICATION OF A STANDARD OF APPLICATION

The constitutional interests protected by the attorney-client privilege dictate that more definitive standards be established. Specifically, guidelines must be created for the consistent treatment of physical evidence *and* of information derived from, but not explicitly contained in, confidential communications between attorney and client.

A. The Treatment of Physical Evidence

The physical evidence exception reflects a balance of the public policy and constitutional factors underlying the attorney-client privilege[84] and, therefore, appears to stand on firm judicial footing.[85] The *Meredith* fact situation, however, raises issues beyond the scope of the physical evidence exception, in that once defense counsel takes possession of physical evidence related to a criminal offense, the prosecution is precluded from subsequent discovery of the evidence in its original location. This potential interference with the judicial fact-finding process must be weighed against the likelihood that the exercise of constitutional liberties will be impaired. Specifically, this balancing process must address: (1) the importance of the actual removal of physical evidence by a defense attorney, or an agent of the attorney, to the defendant's exercise of the right to counsel, as it furthers a duty of investigation on the attorney's part;[86] and (2) the possibility that the prosecution might discover the evidence were it left in its original loca-

81. People v. Meredith, 98 Cal. App. 3d 925, 938 (1979).
82. *See* People v. Meredith, 29 Cal. 3d 682, __ P.2d __, __ Cal. Rptr. __ (1981).
83. *See* Petition for Hearing at 26, People v. Meredith, 98 Cal. App. 3d 925 (1979) (copy on file at the *Pacific Law Journal*).
84. See notes 24, 31 *supra*.
85. See note 41 *supra*.
86. See note 57 *supra*.

tion, thereby obtaining information as to its location as well.[87]

Strictly on a public policy balance, strong arguments may be offered both for and against compelling defense counsel to testify about where the physical evidence was found. On the one hand, the unrestrained removal and possession of physical evidence allows for a more comprehensive analysis of the evidence and, thereby, better representation of the defendant. The concern that this could result in frustrating the judicial fact-finding process is substantially mitigated by the fact that the *defendant* is not legally constrained from personally delivering physical evidence to an attorney. Should the defendant do so, the information as to the original location of the evidence is lost to the prosecution because the attorney has observed no fact upon which he or she could be compelled to testify, and the defendant's fifth amendment privilege would preclude the prosecution from compelling testimony as to the defendant's observations.

On the other hand, the Attorney General has argued that the location of physical evidence is ordinarily at least as important to the ascertainment of truth as the physical evidence itself because its exculpatory potential is "inseparably attached to the evidence."[88] Additionally, it should be noted that, while the fifth amendment may bar the defendant's testimony pursuant to his or her removal of physical evidence, the defendant's attorney is not in a similar position. As an officer of the court, defense counsel should not be permitted to interfere indiscriminately with a criminal investigation.

Basic to the resolution of these conflicting arguments is an assessment of the constitutional principles involved, beginning with the proposition that an evidentiary privilege should not be subject to limitation on public policy grounds to the extent that its application is necessary to protect the exercise of a constitutional right.[89] The attorney-client privilege should not, therefore, be limited, to the extent that its application is necessary to protect fifth and sixth amendment rights. Accordingly, the *physical evidence* exception to the attorney-client privilege should not be applied when it would infringe upon the constitutional right to counsel. The physical evidence exception is thus dependent upon the judicial determination that the right to counsel does not protect the attorney's unqualified possession of physical evidence.

Case law interpreting the right to counsel supports this view. As a

87. *See* Brief of Amicus Curiae at 15, People v. Meredith, 98 Cal. App. 3d 925 (1979) (filed by California Attorneys for Criminal Justice) (copy on file at the *Pacific Law Journal*); see notes 46, 47 and accompanying text *supra*.

88. *See* Response to Petition for Hearing at 13, People v. Meredith, 98 Cal. App. 3d 925 (1979) (copy on file at the *Pacific Law Journal*).

89. *See Constitutional Entitlement*, *supra* note 3, at 480, 485-87.

constitutional privilege, the right to counsel requires that counsel be competent[90] and that counsel, in preparing a legal defense for the accused, conduct an independent investigation of the facts, circumstances, pleadings, and applicable law.[91] Thus, judicial decisions applying the physical evidence exception have held that defense counsel may retain possession of the physical evidence temporarily for the purposes of collecting information and preparing a defense.[92] These decisions support the conclusion that the physical evidence exception is constitutional *to the extent* that it avoids infringing upon the constitutional right to counsel.

The right of temporary custody for analysis of physical evidence may be inferred, therefore, to arise from the constitutional right to counsel. Accordingly, the accused is constitutionally entitled to the possession of relevant physical evidence by his or her attorney to the extent that such possession is essential to the attorney's fact-finding investigation, pursuant to the preparation of a legal defense.[93] After a reasonable period of time, the attorney must relinquish the physical evidence to the prosecution;[94] this limitation is constitutionally acceptable because permanent possession cannot reasonably be said to be necessary for the preparation of an adequate legal defense. Once analysis is complete, the constitutional interest of the criminal defendant ceases to apply, and policy interests in the judicial fact-finding process dictate that the evidence be relinquished.[95]

When the preparation of an adequate legal defense *requires* that evidence be taken into possession by the attorney, a requirement that the attorney testify as to the location of the evidence is unconstitutional under the fifth and sixth amendments. This compulsion to testify, applicable only when physical evidence is taken into possession by the attorney,[96] thereby penalizes the accused. When temporary possession of the evidence by the attorney comprises an exercise of the defendant's right to counsel,[97] the requirement that the attorney testify about the location of the evidence is an infringement of that constitutional right, rendering moot the public policy considerations in support of the compulsion.[98] Therefore, when the defendant's constitutional right to counsel requires that the attorney take possession of physical evidence,

90. See note 57 *supra*.
91. See note 57 *supra*.
92. See notes 43-44 and accomanying text *supra*.
93. See notes 43-44, 57 and accompanying text *supra*; text accompanying note 92 *supra*.
94. See notes 43-44 and accompanying text *supra*.
95. See note 41 *supra*.
96. *See Scylla & Charybdis*, *supra* note 41, at 263-64. See note 45 *supra*.
97. See notes 43-44, 57 and accompanying text *supra*; text accompaying note 92 *supra*.
98. See notes 43-44 and accompanying text *supra*.

the attorney may not constitutionally be compelled to testify as to the location where the evidence was found.

When the attorney's possession of physical evidence is *not* necessary to the defendant's exercise of the constitutional right to counsel,[99] whether defense counsel should be compelled to testify about the location of evidence removed by the attorney should be resolved by a balance of relevant public policy factors.[100] Paramount among these factors is that the defendant should not be permitted to employ legal counsel as a means of hiding incriminating physical evidence that might otherwise be subject to discovery by the prosecution.[101] Furthermore, defense counsel should not be permitted to take possession of physical evidence indiscriminately, thereby depriving the prosecution of information concerning its location.[102] Therefore, if defense counsel is able to demonstrate to the court that the physical evidence in question would not have come to the attention of the prosecution in the course of an unhindered investigation, no grounds would remain for the requirement that the attorney testify about the location where the evidence was found. Any use of incriminating evidence resulting from the confidential communication of information between attorney and client comprises a limitation upon the free exercise of the right to counsel. Even when an evidentiary use of the information is not integral to that constitutional protection, any restriction upon the client's reasonable expectations of confidentiality should be subject to a requirement of justification on the basis of a greater public policy purpose.[103] Thus, when defense counsel can show that taking possession of certain physical evidence did not interfere with a law enforcement investigation, by showing that the evidence would not have been discovered in the course of the investigation, no justification remains for using testimony as to the location of the physical evidence against the defendant.

The objective in establishing specific standards for application of the attorney-client privilege is to protect legitimate expectations of confidentiality in the criminal defendant's exercise of the constitutional right to counsel without creating an incentive for defense counsel to interfere actively with the ability of the prosecution to discover relevant facts

99. That is, when meaningful analysis of the evidence may be accomplished without taking possession of the physical evidence. *Cf. Scylla & Charybdis*, *supra* note 41, at 263-64. Compare notes 43-45, 57 and accompanying text *supra*.

100. *See Constitutional Entitlement*, *supra* note 3, at 480, 485-87.

101. *See* State v. Dillon, 93 Idaho 698, 710, 471 P.2d 553, 565 (1970), *cert. denied*, 401 U.S. 942 (1971).

102. *See* Reply to Brief of Amicus Curiae at 18-20, People v. Meredith, 98 Cal. App. 3d 925 (1979) (filed by California Attorneys for Criminal Justice) (copy on file at the *Pacific Law Journal*).

103. See notes 34-36 and accompanying text *supra*.

through its investigatory function. This objective would seemingly best be accomplished by the requirement that, upon removal of physical evidence by defense counsel or counsel's agent, testimony as to its location would be compelled absent a showing by the defense counsel that either: (1) removal of the evidence for analysis was integral to counsel's ascertainment of facts for preparation of a legal defense, and thereby protected by the constitutional right to counsel;[104] or (2) regardless of the actions of defense counsel, the evidence would not have come to the attention of the authorities in the course of their investigation. The first exception is necessary to protect the basic constitutional right of the defendant to have legal representation by counsel sufficiently informed to prepare and present a competent defense.[105] As to the second exception, if the prosecution would not have discovered the information on its own, no legitimate judicial purpose is served by compelling the defendant's attorney to augment actively the case against his or her client.[106] Placing the burden of establishing one of these two factors upon the defense is necessary to prevent defense counsel from indiscriminately interfering with the fact-finding process. The alternative of requiring the prosecution to show both that the removal of evidence was not necessary to the protection of defendant's constitutional rights *and* that the evidence would probably have been found in its original location seems, on balance, to place an undue burden on the prosecution of crimes.[107]

B. Derivative Evidence and the Work Product Doctrine

An additional issue that hinges upon the policy foundation of the attorney-client privilege is the application of the privilege to information that, while not directly contained in communications between client and attorney, is made available to the attorney in the course of investigation based on confidential communications from the client. This indirect evidence, while partially protected by the attorney's work product privilege,[108] must also be considered under the attorney-client privilege held by the criminal defendant, thus incorporating the protection of the defendant's fifth and sixth amendment rights.

Although derivative information is not expressly protected by the statutory codification of the privilege that refers to "confidential com-

104. See note 57 *supra*.
105. *See Constitutional Entitlement*, *supra* note 3, at 480, 485-87. See notes 43-44, 57 and accompanying text *supra*; text accompanying notes 90-93 *supra*.
106. *See Constitutional Entitlement*, *supra* note 3, at 480, 485-87. See notes 34-36, 101-102 and accompanying text *supra*.
107. *See* People v. Meredith, 29 Cal. 3d 682, __ P.2d __, __ Cal. Rptr. __ (1981).
108. See text accompanying notes 117-130 *infra*.

munications" between attorney and client,[109] this information falls within the scope of the constitutional right to counsel as the right has been interpreted to provide the criminal defendant with the assurance of consultation with a legal representative without fear of self-incrimination.[110] A client would not expect that information given to his or her attorney, pursuant to the attorney's preparation of a legal defense, would serve as a basis for the discovery of incriminating evidence to which counsel could be compelled to testify. Accordingly, information *primarily derived* from a confidential communication should be protected by the attorney-client privilege.

As the expert testimony cases illustrate, the attorney-client privilege does not protect information held by the attorney that did not emanate from the client.[111] Since the primary source of expert testimony is the specialized knowledge and analysis of the expert, rather than raw factual data provided by client communications, courts frequently have held the conclusions of the expert to be outside the scope of the privilege.[112] The exclusion of an expert report from the privilege occurs, however, only when "the information on which it is predicated cannot be shown to have emanated from that attorney's client."[113] Alternatively, "if the facts and circumstances surrounding the creation of the agency indicate that the agent was retained to evaluate and pass on to the attorney matters which emanate in confidence from the client, both his opinions and his report are clothed with the privilege."[114]

In determining whether given testimony is protected by the attorney-client privilege, the *Oceanside* criterion is that the "distinction is based on the source of the expert's information. . . ."[115] The weight of case law supports the proposition that factual determinations and opinions drawn by an expert retained by counsel are covered by the attorney-client privilege *to the extent* that they are drawn from the confidential communications of client and attorney.[116] This standard serves to deny

109. *See* CAL. EVID. CODE §952.

110. See note 46 and accompanying text *supra*.

111. See notes 71, 74 *supra*.

112. *See* People *ex rel.* Dep't of Public Works v. Donovan, 57 Cal. 2d 346, 354-55, 369 P.2d 1, 5, 19 Cal. Rptr. 473, 477 (1962).

113. Oceanside Union School Dist. v. Superior Court, 58 Cal. 2d 180, 188, 373 P.2d 439, 444, 23 Cal. Rptr. 375, 380 (1962).

114. San Diego Professional Ass'n v. Superior Court, 58 Cal. 2d 194, 202, 373 P.2d 448, 452, 23 Cal. Rptr. 384, 388 (1962). For example, an expert's opinion is protected by the attorney-client privilege when it constitutes a scientific or technical evaluation of information emanating from the client. *See id.* at 188, 373 P.2d at 444, 23 Cal. Rptr. at 380.

115. *Id.* at 189, 373 P.2d at 445, 23 Cal. Rptr. at 381.

116. *See* Petition for Hearing at 26, People v. Meredith, 98 Cal. App. 3d 925 (1979) (copy on file at the *Pacific Law Journal*). *See, e.g.*, San Diego Professional Ass'n v. Superior Court, 58 Cal. 2d 194, 373 P.2d 448, 23 Cal. Rptr. 384 (1962) (holding unprivileged an engineer's report on physical and structural qualities of a building, as well as a real estate appraiser's report); City and County of San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951) (holding privileged

application of the privilege, then, only to evidence drawn from sources other than the client. As a result, the reasonable expectations of confidentiality held by the client are protected, permitting the free exercise of the constitutional right to counsel without the fear of self-incrimination.

In recognizing this distinction, it should be noted that the application of the attorney-client privilege to derivative evidence does not merely duplicate the scope of the work product doctrine. While the work product doctrine protects certain information also protected by the attorney-client privilege, it encompasses applications and purposes distinct from those of the attorney-client privilege[117] and is thus inadequate to protect the constitutional interests represented by the privilege. This distinction is most evident in a comparison of the policy purposes and standards of application pertaining to the two forms of evidentiary privilege.

The public policy furthered by the work product doctrine is cited in the Code of Civil Procedure as follows: "It is the policy of this state (i) to preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (ii) to prevent an attorney from taking undue advantage of his adversary's industry or efforts."[118] The work product doctrine is thus oriented toward maintaining the practical protections inherent to the smooth functioning of the adversary system of fact-finding.[119] As important as this purpose may be, it invokes a lesser degree of legal protection than do the constitutional rights inherent to the attorney-client privilege.[120]

The work product doctrine is deemed an absolute privilege when applied to "any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories. . . ."[121] Any other evidence obtained through the efforts of the attorney is protected from

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a physician's examination of a client at the request of the latter's attorney). The latter case additionally held that a communication "by *any form of agency* employed or set in motion by the client is within the privilege." *Id.* at 237, 231 P.2d at 31 (emphasis in original).

117. *See, e.g.*, American Mut. Liab. Ins. Co. v. Superior Court, 38 Cal. App. 3d 579, 593-94, 113 Cal.Rptr. 561, 572-73 (1974). *See generally* Bergman, *Status of the Work Product Doctrine in California*, 6 SW. L. REV. 677 (1974) [hereinafter cited as *Work Product Doctrine*].

118. CAL. CIV. PROC. CODE §2016(g).

119. *See, e.g.*, 38 Cal. App. 3d at 594, 113 Cal. Rptr. at 573 (holding that the work product doctrine is primarily designed to satisfy the privacy requirement of the attorney, rather than the client); Southern Pac. v. Superior Court, 3 Cal. App. 3d 195, 198, 83 Cal. Rptr. 231, 233 (1969); Brown v. Superior Court, 218 Cal. App. 2d 430, 437, 32 Cal. Rptr. 527, 531 (1963). *See generally* WITKIN, *supra* note 12, §§817-820 (Supp. 1977); *Work Product Doctrine*, *supra* note 117, at 683-85.

120. *See generally Constitutional Entitlement*, *supra* note 3, at 480.

121. CAL. CIV. PROC. CODE §2016(b). *See also* People v. Moore, 50 Cal. App. 3d 989, 994, 123 Cal. Rptr. 837, 840 (1975).

discovery only to the extent that denial of discovery does not, in the judgment of the court, "unfairly prejudice the party seeking discovery in preparing his claim or defense or . . . result in an injustice. . . ."[122] The claim of "work product" has been elsewhere interpreted to comprise not "an absolute bar to discovery," but only "a circumstance to be considered by the trial court in exercising its discretion."[123]

The 1962 decision of the California Supreme Court in *Suezaki v. Superior Court*[124] is illustrative of the contrast between the attorney-client privilege and the work product doctrine. Addressing the right of discovery concerning certain photographic evidence obtained by an investigator employed by one of the attorneys,[125] the court found, upon a consideration of equity and justice, that the films might be protected under the work product doctrine.[126] In refusing to apply the attorney-client privilege, however, the court held that the evidence in question did not emanate from the client, on the basis that the films were not "a graphic representation of the defendants, their activities, their mental impressions, anything within their knowledge, or of anything owned by them."[127] The case demonstrates that the work product doctrine, primarily oriented toward the privacy interests of the *attorney*,[128] and the attorney-client privilege, designed to protect the interests of the *client*, are not equivalent in scope. In light of the policy interests represented by the work product doctrine[129] and its lack of constitutional protection, the purposes of the attorney-client privilege can be adequately safeguarded only by an application of the privilege that is grounded in the nature of those purposes.[130] The constitutional interests of the right to counsel and the privilege against self-incrimination, as they are implicated in the capacity of a criminal defendant to consult freely with his or her attorney, require the protection of an absolute evidentiary privilege; the attorney-client privilege must be applied so as to provide that protection.

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122. CAL. CIV. PROC. CODE §2016(b). *See also* Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 401, 364 P.2d 266, 291, 15 Cal. Rptr. 90, 115 (1961); Mack v. Superior Court, 259 Cal. App. 2d 7, 11, 66 Cal. Rptr. 280, 283 (1968); *Work Product Doctrine*, *supra* note 117, at 692-95.

123. Oceanside Union School Dist. v. Superior Court, 58 Cal. 2d 180, 192, 373 P.2d 439, 446, 23 Cal. Rptr. 375, 382 (1962); *see* Hickman v. Taylor, 329 U.S. 495, 510-12 (1947); San Diego Professional Ass'n v. Superior Court, 58 Cal. 2d 194, 204, 373 P.2d 448, 454, 23 Cal. Rptr. 384, 390 (1962); Suezaki v. Superior Court, 58 Cal. 2d 166, 178, 373 P.2d 432, 438-39, 23 Cal. Rptr. 368, 374-75 (1962).

124. 58 Cal. 2d 166, 373 P.2d 432, 23 Cal. Rptr. 368 (1962).

125. *Id.* at 176-77, 373 P.2d at 437-38, 23 Cal. Rptr. at 373-74.

126. *See id.* at 177-78, 373 P.2d at 438-39, 23 Cal. Rptr. at 374-75.

127. *Id.* at 177, 373 P.2d at 438, 23 Cal. Rptr. at 374.

128. See note 119 *supra*.

129. See notes 118, 119 *supra*.

130. See notes 121-123 *supra*.

CONCLUSION

To apply the attorney-client privilege with consistency to a wide variety of fact patterns, it is essential in each case to balance the judicial objective of the ascertainment of truth with the policy purposes of the privilege, with emphasis on the role of the attorney-client privilege in protecting the constitutional right to counsel and the privilege against self-incrimination. For these constitutional guarantees to be adequately protected, the evidentiary privilege of attorney-client confidentiality must be applied to assure a criminal defendant that self-incrimination will not result from the free discussion with his or her attorney of facts necessary to prepare a legal defense.[131]

Accordingly, the client's reasonable expectations of confidentiality in consultation with counsel must be appropriately safeguarded. This protection must be more clearly established in two particular areas. First, as to the removal of physical evidence, the ability of the government to conduct a criminal investigation without active interference by defense counsel must be limited by the constitutional right of the criminal defendant to counsel,[132] including consultation without fear of self-incrimination[133] and the preparation by counsel of a defense based upon an independent investigation of the facts.[134] This is accomplished to some degree by the current physical evidence exception, requiring defense counsel to transfer to the prosecution physical evidence in his or her possession.[135] Additionally, however, the attorney or agent should be compelled to *testify* as to the location where the evidence was found, absent a showing of one of two exceptional cases: (1) that removal of the evidence for analysis was integral to counsel's ascertainment of facts for preparation of a legal defense, and therefore protected by the sixth amendment right of the defendant to counsel; or (2) regardless of the actions of defense counsel, the evidence would not have come to the attention of the prosecution in the course of its investigation. This testimony, of course, would have to be presented in such a manner as to preclude the inference that the defendant was the source of the information.[136] Second, evidence that is *primarily* derived from confidential communications between client and attorney, rather than from an independent source, must be deemed within the scope of the attorney-client privilege.[137] Although this principle has been articu-

131. See notes 26, 27 *supra*.
132. See notes 30-32 and accompanying text *supra*.
133. See notes 33-35 and accompanying text *supra*.
134. See note 57 *supra*.
135. See note 40 *supra*.
136. See note 43 *supra*.
137. *See, e.g.*, Oceanside Union School Dist. v. Superior Court, 58 Cal. 2d 180, 188, 373 P.2d

lated in California case law since at least 1859,[138] the reference of the statutory statement of the privilege simply to "communications"[139] between client and attorney is not sufficiently definitive on this point.

While the courts have been the source of most of the doctrine relevant to the attorney-client privilege, the lack of specific standards for its application permits considerable inconsistency in the interpretation of the privilege. In view of the significance of the constitutional purposes served by the attorney-client privilege, the legislative implementation of standards similar to those suggested above would better protect the privilege and the constitutional interests it serves. While the courts would retain substantial responsibilty for interpretation, the greater judicial consistency achieved through the use of legislative guidelines would offer an improved degree of protection to the constitutional rights inherent in the application of the privilege.

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439, 444, 23 Cal. Rptr. 375, 380 (1962); City and County of San Francisco v. Superior Court, 37 Cal. 2d 227, 236-37, 231 P.2d 26, 30-31 (1951).

138. *See* Hunter v. Watson, 12 Cal. 363 (1859).

139. *See* CAL. EVID. CODE §954.