

PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT

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The doctrine of privileged communications between attorney and client is the oldest of the privileges in Anglo-American law.¹ The purport of this article is to discuss the doctrine mostly from an evidence viewpoint. However, to discuss fully the privilege, it is only proper that some phases of the doctrine be approached from the ethical side. Therefore, a minor portion of the discussion revolves around the ethical problem involved.

In *United States v. United Shoe Machinery Corp.*,² an elucidation of the privilege is stated:

“The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceed-

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¹ WIGMORE, EVIDENCE, § 2290 (3d ed. 1940). The doctrine finds its origin during the reign of Elizabeth in the 1500s. “But the theory . . . in those days, was very different from that of modern times. It was an objective, not a subjective, one,—a consideration for *the oath and the honor* of an attorney, rather than for the apprehensions of his client. . . . ‘The first duty of an attorney,’ it has been said, ‘is to keep the secrets of his clients.’”

“That doctrine, however, finally lost ground, and by the last quarter of the 1700s . . . was entirely repudiated. The judicial search for truth could not endure to be obstructed by a voluntary pledge of secrecy; nor was there any moral delinquency nor public odium in breaking one’s pledge under force of law.

“[The] new theory looked to the necessity of *providing subjectively for the client’s freedom of apprehension* in consulting with his legal adviser.” (emphasis as shown in the text)

§ 2294. “As the 1700s drew to a close, it came first to be conceded that ‘the privilege was that of the client.’”

² 89 F.Supp. 357 (D.Mass. 1950).

ing, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.”

This is a succinct statement of the rule, but does it give an answer to its many ramifications? What elements are necessary to create the relation of attorney and client? When is one seeking legal advice? When and how does the relation terminate? To answer these questions, we must look to the decisions of the courts. And, at the same time, it should be remembered that, since the rule tends to give rise to a concealment of the truth, it should be applied strictly, if at all.³

I. Holder of the Privilege Must be or is Seeking to Become a Client

It seems quite clear that if an attorney has refused outright to become employed by a party, the privilege will not obtain.⁴ At just what point the relation of attorney-client will come into existence, however, is often hard to determine. The case of *Keir v. State*⁵ holds that where a communication is made to an attorney with a view of hiring him as counsel for professional purposes, even though the attorney is not subsequently employed, it will be privileged. The relation is generally a matter of contract, either express or implied, but it is a *sui generis* relation not to be determined by pure contract law, as the unique feature of the relation must be given considerable weight because of

³ *Ibid.*, and cases cited note 42 *infra*.

⁴ *Setzar v. Wilson*, 26 N.C. 501 (1844). This was a case where an attorney told a party “he always believed there was so much rascality on one side and ignorance on the other that he did not care to have anything to do with the case; and after that, the defendant George made the declarations which the plaintiff proposed to prove.” See, also, *McGrede v. Rembert Nat. Bank*, 147 S.W.2d 580 (Tex.Civ.App. 1941) where the attorney promptly informed the client he could not represent her.

⁵ 11 So.2d 886 (Fla. 1943). This was a case in which the client wrote letters to the attorney in regard to hiring the attorney in a divorce action. The letters were held to be privileged communications.

the policy of the rule.⁶ That policy seems to be that communications made by a client to his attorney should not be divulged without the client's permission, because only in this manner can there be a proper administration of justice. Thus, it was held in *Alexander v. United States*:⁷

"If he [defendant] consulted him [attorney] in the capacity of an attorney, and the communication was made in the course of his employment, and may be supposed to have been drawn out in consequence of the relations of the parties to each other, neither the payment of a fee nor the pendency of litigation was necessary to entitle him to the privilege."

This statement suggests the conclusion that "a communication to an attorney, under the impression that he had consented to act as attorney of the party is privileged, even though the attorney himself may not have so understood it."⁸ Also, where an attorney has repeatedly acted in real estate transactions (or any other sort of transactions) for a client, and even though the client did not specifically employ the attorney for a particular transaction in which the attorney acted, it has been held that the relation existed.⁹

II. The Person to Whom the Communication Was Made

(a) **Must be a Member of the Bar of a Court, or his Subordinate and (b) in Connection with this Communication is Acting as a Lawyer**

(a) *Must be a member of the bar of a court, or his subordinate.* "The doctrine of privilege communication is confined to cases of counsel, solicitor, and attorney."¹⁰ In the application of this doctrine it has been held that a law stu-

⁶ WIGMORE, *op. cit. supra* note 1, § 2291. "The policy of the privilege has been plainly grounded, since the latter 1700s, on subjective considerations. In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal adviser must be removed; and hence the law must prohibit such disclosure except on the client's consent. Such is the modern theory."

⁷ 138 U.S. 353 (1891).

⁸ 66 Am.St.Rep. 216. See, also, cases cited therein.

⁹ *Guy v. Avery County Bank*, 206 N.C. 322, 173 S.E. 600 (1934).

¹⁰ *Brungger v. Smith*, 49 Fed. 124 (C.C.D.Mass. 1892).

dent who has an office open to the public is not qualified as a member of a bar;¹¹ that an attorney who has a license to practice only before a justice of the peace is sufficient to create the privilege;¹² that where communications are made to a person who is an "attorney in fact" but not an attorney at law, the communication will not be privileged.¹³

There is no absolute rule that the communications will not be privileged where made to one other than an attorney or counsel. But where such communications are made to someone other than an attorney, to obtain benefit of the rule, it must be proved that the receiving party was an agent or clerk of the attorney who was to act for the client.¹⁴ It would seem to be an undus burden on an attorney to settle each little detail (such as typing letters, documents, or other records) of his client's case, and in such event the attorney's subordinates should be restricted from revealing what they might peruse or gather in the attorney's office insofar as it concerns a client's confidences. This is apparently the rationale for holding that communications made in the presence of a stenographer,¹⁵ those made to necessary

¹¹ *Holman v. Kimball*, 22 Vt. 555 (1850). This was a case in which it was stated that to extend the privilege to apply to law students would be "embarrassing to courts and liable to grossest abuses." See, also, *Barnes v. Harris*, 7 Cush. 576 (Mass. 1851).

¹² *English v. Ricks*, 117 Tenn. 73, 95 S.W. 189 (1906). The attorney's license would not permit him to proceed with the case (divorce) since justices of the peace are without jurisdiction in such matters. Yet, everything communicated to the attorney was privileged. The court held "it would not be proper to permit one having such limited license to obtain confidential communications on the faith of his office as an attorney and then divulge them on the ground that the particular kind of case was beyond his legal power."

¹³ *State v. Smith*, 138 N.C. 700, 50 S.E. 859 (1905), a case in which a prisoner made certain declarations, a type of confession, to one not an attorney, and later the prisoner asked the latter to "do what he could for the prisoner," whereby he did endeavor to aid the prisoner on the day of the preliminary hearings. The court ruled that the "attorney in fact" should be allowed to testify to the communications as made by the prisoner.

¹⁴ See notes 15, 16 and 17 *infra*.

¹⁵ *State v. Krich*, 123 N.J.L. 519, 9 A.2d 803 (1939). The attorney had a secretary present to take down statements of the client.

agents,¹⁶ and those made by an agent of the client to the attorney are privileged.¹⁷

Perhaps it should be the rule that a client, once he enters an attorney's office, should inquire as to the position of the party with whom he is conversing before he relates any data concerning his business for coming to the office. One interesting case along that line is that of *Barnes v. Harris*.¹⁸ This case, even though a very old one, is apparently still good law in Massachusetts. In this case, a law student worked in the office of an attorney. He was so working when a client came into the office of the attorney to obtain some legal advice. The client made certain communications to the student relative to the former's claims against another party. The lower court ruled "that it was not competent for the witness [the student] to testify to any statements then made to him by the plaintiff, for the purpose of obtaining professional advice." The case was taken to an appellate court on exception to the exclusion of this testimony and it was there ruled:

" . . . as the rule operates on the exclusion of evidence, the courts have always felt inclined to construe it strictly and narrow its effect. We believe the rule is . . . that it 'is confined strictly to communications to members of the legal profession, as barristers and counselors, attorneys and solicitors, and those whose intervention is necessary to secure and facilitate the communication between attorney and client; as interpreters, agents, and attorney's clerks.'

"The witness, in this case, was not of the legal profession; and though he was a student in an attorney's office, yet it does not appear that he was either the attorney's agent or clerk for any purpose."

Does such a case not place an undue risk on the client? From a general knowledge of agency law one would be in-

¹⁶ *State v. Loponio*, 85 N.J.L. 357, 88 Atl. 1045 (1913), a case in which a fellow prisoner, acting as scrivener for another prisoner who could not write English, wrote a letter to be sent to a lawyer. Dictation of the letter was held privileged.

¹⁷ *In re Helle*, 65 Ohio App. 45, 29 N.E.2d 175 (1939).

¹⁸ See note 11, *supra*.

clined to say this student was at least the agent of the attorney. Or, if not an agent of the attorney, why should not the court have said that if the client reasonably believed the student to be a proper person to talk to, the communications should have been privileged? The student had testified at the trial that "he did not know but the plaintiff [client] supposed him to be Mr. Whitney [attorney]; and that the conversation was relative to the plaintiff's claims against the defendant, as to which the plaintiff consulted the witness." It seems only proper that a communication made by a client under such circumstances should be privileged, and that the law of privileged communications should not be so fossilized.

(b) *Must be acting as a lawyer.* In the *United Shoe* case, *supra*, a mere soliciting of business advice or the giving of such advice was held not sufficient to create a privilege. And where an attorney is acting as a mere agent for a party, he may be examined as a witness without any privilege being invoked.¹⁹ Therefore, when is a person acting as a lawyer? Do the above cases mean that communications which are made to an attorney-director of a corporation are not the type of communications which give rise to the privilege, or that an attorney-director of a corporation is not in the proper position for the privilege to be invoked? It is submitted that there are many situations in which, even though acting in a dual capacity, a lawyer-director would be under a moral compulsion to retain the secrets he received by virtue of his employment. On the other hand, the bare existence of an attorney-client relation should not always be sufficient to give rise to the privilege. An exam-

¹⁹ *United States v. Vehicular Parking, Ltd.*, 52 F.Supp. 751 (D.Del. 1943). Suit under Anti-Trust law. The court said in part: "As active business manager of defendant Vehicular, he did not, I suspect, wear his lawyer suit when he taxied over to the Department of Justice building and voluntarily turned over to the government the exhibits in controversy as well as the many writings concerning the Vehicular Group of defendants of which Joynt [attorney as well as promoter and director of Vehicular] was neither the sender nor the receiver. In short, I conclude, when he made his delivery of the documents to the Anti-Trust Division, he did so as the agent of the corporation involved; patently not as their adviser."

ple of such a case would be, as shown above, where the attorney-director merely gave some sought after business advice.²⁰

One interesting hypothetical situation along such lines is this: suppose that A, a director of a corporation, is also an attorney. If the board of directors is in session and some point under discussion which requires the knowledge of an experienced legal counsel comes up, and A is asked to give his professional opinion on the subject, and he does give that opinion in the presence of all the remaining directors, would such communications be considered privileged? Further, would it make any difference whether the board was at a regularly called meeting, an informal meeting, or that the directors owned all the stock of the corporation?²¹

Under these circumstances it could be argued that the relation of attorney and client did exist between this attorney and the board of directors, because the board was seeking professional advice presumably in a confidential manner. However, would the presence of all the directors preclude a privilege on the theory that the communication was made in the presence of strangers, which, according to authorities shown later, would destroy any privilege which might otherwise have existed? Or, would the better view be that, since the board was acting for the corporation, the former became a client, in which case the privilege would be appropriate? Authority on this point is negligible, but it is submitted that all the reasons for the privilege are here present, and the exigencies of the manner in which a board often has to carry on its policy-making should bring this situation within the purview of the doctrine. By this

²⁰ *Id.* at 753. In *In re Fisher*, 51 F.2d 424 (S.D.N.Y. 1931) information was given to an accountant for the purpose of having financial statements made therefrom, and the communication was held not privileged even though the accountant, acting as an attorney, also rendered legal advice on the basis thereof. See, also, *Turner v. Turner*, 123 Ga. 5, 50 S.E. 969, 107 Am.St.Rep. 76 (1905); *Gronewald v. Gronewald*, 304 Ill. 11, 136 N.E. 489 (1922); *Estate of Huffman*, 132 Mo.App. 44, 111 S.W. 848 (1908); *Howe v. Stuart*, 68 Misc. 352, 123 N.Y.Supp. 971 (Sup.Ct. 1910); *Lifschitz v. O'Brien*, 143 App.Div. 180, 127 N.Y.Supp. 1091 (2d Dep't. 1911).

²¹ As to the legal effect of different forms of board meetings, see *BALLENTEINE, CORPORATIONS*, §§ 42-48 (1946).

argument it is not meant that a corporation as such cannot become a client, because it is elementary that a corporation may be a client. But the above situation is somewhat different from the flat proposition of a corporation being a client in some form of litigation.

Finally, the privilege should not extend to any and every statement made, or to general conversation, or to the relating of information to an attorney as a personal friend.²² For the privilege to exist, the attorney must be acting in his professional capacity when the communication is made,²³ and whether he is so acting will be determined by the court from all the facts appearing in a particular situation.²⁴

III. The Communication must Relate to a Fact of which the Attorney was Informed (a) by his Client (b) Without the Presence of Strangers (c) for the Purpose of Securing Primarily Either (i) an Opinion of Law or (ii) Legal Services or (iii) Assistance in some Legal Proceeding, and not (d) for the Purpose of Committing a Crime or Tort.

²² *Modern Woodmen of America v. Watkins*, 132 F.2d 352 (5th Cir. 1942). A case in which the insurer defended an action on life policies on the ground the insured committed suicide. The insured's statements to an attorney that the former was "going west" or that "they'll find him in the river" were held not privileged.

²³ See note 19 *supra* at 753. See, also, *Potter v. Barringer*, 236 Ill. 224, 86 N.E. 233 (1908); 64 A.L.R. 180, 192.

²⁴ *Bacon v. Frisbie*, 80 N.Y. 394, 36 Am.Rep. 627 (1830). A case in which an attorney, who also kept a liquor store, testified that one of the defendants came to his store and in the presence of others (though it was not proved the others heard the conversation) put a hypothetical case to the attorney who had acted as counsel for said defendant in other cases and the attorney gave an opinion as to what its outcome would be. After the attorney gave the defendant his opinion, the defendant informed the former what the real transaction was, just as the defendant was going away. The attorney did not consider that he was advising the defendant; he had no general retainer and received no fee for his professional opinion. There was no suit pending, but this suit was afterwards brought on the transaction spoken of. The court said "he who seeks aid or advice from a lawyer ought to be altogether free from the dread that his secrets will be uncovered; to the end that he may speak freely and fully all that is in his mind." The court further stated "Though he [attorney] disclaimed on the trial that he acted in a professional capacity, that was a matter for the court to determine from the facts appearing."

(a) *Informed by his client.* It is elementary that the information must come from the client or his agent. Thus, where information was obtained by an attorney from a witness other than his client, it was not privileged.²⁵ Little else need be said of this requirement.

(b) *Without the presence of strangers.* There will be numerous instances in which necessary strangers are required to be present in preparing defenses of clients or preparing some claim for them. Such instances are shown under II (a) above. That type of stranger is excluded under the present prerequisite. The strangers here involved may be described as unnecessary or those who have no interest in the matter at hand.

Where two or more persons consult with an attorney at the same time about the same matter, it is generally held that the communications then made are privileged if there should arise in the future some form of litigation between the two, but the privilege will subsist if that litigation is between one of the original parties and a third person.²⁶ Also, where a communication is made in the presence of an unnecessary third person, whether with or without the client's knowledge, the privilege is not available,²⁷ and information obtained by an attorney from a third person,

²⁵ *Hickman v. Taylor*, 329 U.S. 495, 508 (1947). "[T]he protective cloak of this privilege does not extend to the information which an attorney secures from a witness while acting for his client in anticipation of litigation." See, also, *Schwartz v. Public Service Coordinated Transport*, 64 A.2d 477 (N.J. 1948), which cites the *Hickman* case. *Of. People v. Singh*, 123 Cal.App. 365, 11 P.2d 73 (1932).

²⁶ *Allen v. Ross*, 199 Wis. 162, 225 N.W. 831 (1929). In this case a mother and her daughter went to an attorney to have mutual wills executed. Later, in a case in which the question of privileged communications was brought out, the court held "Each heard what the other said, so that the disclosures were not, as between them, confidential, and there can be no reason for treating such disclosures as privileged." Citing *Hurlburt v. Hurlburt*, 128 N.Y. 420, 28 N.E. 651 (1891) which dealt with the same type factual situation.

²⁷ *Mitchell v. Towne*, 31 Cal.App.2d 259, 87 P.2d 908 (1939); *Ver Bryck v. Luby*, 67 Cal.App. 842, 155 P.2d 706 (1945). But, see *Bacon v. Frisbie*, note 24 *supra*, in which the court intimated even if the communication was made in the presence of third persons, it would have to be clearly shown that said third person or persons heard or knew the substance of the communication before it would be held as not privileged. See, also, *Wigmore, op. cit. supra* note 1, § 2326.

even though those facts were then known to his client, is not privileged.²⁸

The reasoning for the privilege doctrine is that the client should be allowed and encouraged to relate information to his counsel concerning his controversy in a confidential manner. It would follow that, where the information is given in the presence of a third person, the client himself is expressly or impliedly leaving an impression that he does not desire confidentiality. Confidentiality, incidentally, is not to be presumed from the mere relation of attorney and client. Thus, where an attorney has received information which was intended to be relayed to another party, such is not privileged.²⁹ And where a client does not seek confidentiality, there is no rationale for the privilege to remain.

(c) *For the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding.*

This stipulation is intermingled and overlapping of that in II (b) above. Certainly a prime requisite of the privilege is that an opinion of law should be given, rather than an entirely non-legal opinion as to how someone should carry out a business venture. It would be unwise, and decidedly not in keeping with the policy of the doctrine, to allow a party to seal the lips of an attorney in respect to any and every communication made to the latter. The cases seem generally to hold that unless the client approaches the attorney with a view of gaining some point of law concern-

²⁸ *Hawley v. Hawley*, 114 F.2d 745 (D.C.Cir. 1940). In *Tutson v. Holland*, 50 F.2d 338 (D.C.Cir. 1931) it was held "The limits of the rule, however, are well defined, and as its tendency is to stifle a full disclosure of the truth, courts have been careful to confine it within its legitimate scope, and so it has been held that the rule does not apply to the discovery of facts within the knowledge of an attorney which were not communicated by a client though he became acquainted with such facts while engaged as attorney for the client." *Cf. People v. Singh*, note 25 *supra*.

²⁹ *Hiltbold v. Stern*, 82 A.2d 123 (D.C.Mnn.App. 1951). In this case an attorney testified as to certain offers and counter-offers which he communicated between the parties. It was held that the "mere relation of attorney and client does not raise the presumption of confidentiality and communications made to an attorney for the purpose of being conveyed by him to others are stripped of their confidentiality and therefore are not privileged."

ing a controversy or right which the client wishes to assert against another there is no reason to allow the privilege to exist. As noted earlier, the court will not hold the giving of mere business advice as privileged.³⁰

Another situation is that in which a client goes to counsel with the prime purpose of gaining legal advice or assistance in instituting a legal proceeding, but during that consultation conversation is made by the client in regard to the person against whom he wishes to bring the proceeding, but yet collateral to the main purpose of his visit with the attorney. The court in such a case might rightfully hold that the communication, concerning the collateral conversation, would be admissible as evidence in later proceedings inasmuch as it was not communicated for the object of obtaining legal advice or opinion and it should be considered a "mere *gratis dictum*."³¹

There are cases in which the pertinent communications cannot be separated from the impertinent. In that event the only way to give effect to the rule is to allow all that is communicated to be privileged.³² But if there can be found a situation in which the relevant material is separable from the irrelevant, then that which is relevant will be privileged and the remainder will not.³³

(d) *Not for the purpose of committing a crime or tort.*

It must be readily admitted that there are limits beyond which the privilege should not extend. One such limit is the following:³⁴

"The confidences of such persons [clients] may legitimately be protected, wrongdoers though they have been, because . . . the element of wrongdo-

³⁰ Cases cited note 20, *supra*.

³¹ *People v. Marcofsky*, 219 Ill.App. 230 (1920). Here, wife went to an attorney seeking advice on instituting divorce proceedings against her husband, and, while or during the period of consultation with the attorney, she related to the attorney that unless her husband returned her diamond earrings she was going to sue the husband for pandering. The court held such statements admissible as evidence and not privileged.

³² *Maas v. Bloch*, 7 Ind. 202 (1855).

³³ *McDonald v. McDonald*, 142 Ind. 55, 41 N.E. 336, 344 (1895).

³⁴ *WIGMORE, op. cit. supra* note 1, § 2298.

ing is not always found separated from an element of right; because when it is, a legal adviser may properly be employed to obtain the best available or lawful terms of making redress; and because the legal adviser must not habitually be placed in the position of an informer. But these reasons all cease to operate at a certain point, namely, where the desired advice refers not to a *prior wrongdoing*, but to a *future wrongdoing*." (emphasis added).

The privilege should not be extended to seal the lips of an attorney in a situation in which he is approached for information as to some contemplated future wrongdoing; nor should it be allowed as a weapon of offense to enable persons to carry out crimes against society. Thus, where a client hired an attorney to represent her in a claim which she was prosecuting and told the attorney she had been injured while riding on a train, though actually she had not been, and, upon learning of the true facts, the attorney withdrew from the case, at which time the client employed a second attorney to carry on the case, the first attorney was permitted to testify in the final litigation when called as a witness, the court holding the communications as made to the first attorney were not privileged.³⁵ Neither can the privilege be invoked to cloak a fraudulent scheme;³⁶ nor that concerning a client's contemplated criminal act.³⁷ But where the communication is made as relating to an executed fraudulent transaction, the privilege will exist.³⁸

One very interesting case dealing with contemplated fu-

³⁵ Gebhardt v. United Rys. Co. of St. Louis, 220 S.W. 677 (Mo. 1920).

³⁶ United States v. Bob, 106 F.2d 37 (2d Cir. 1939); Securities and Ex. Comm. v. Harrison, 80 F.Supp. 226 (D.C. 1948); A. B. Dick Co. v. Marr, 95 F.Supp. 83 (S.D.N.Y. 1950); and see WIGMORE, *op. cit. supra* note 1, § 2298.

³⁷ Abbott v. Superior Court, 78 Cal.App. 19, 177 P.2d 317 (1947), a case in which an attorney was alleged to be active as a member of a conspiracy to violate a law prohibiting abortions and he was allegedly counsel for a fellow member in an attempt to further the illegal purpose of the conspiracy. Held, the communications to the attorney were not privileged. See 125 A.L.R. 519 for cases holding that "as a foundation for such evidence there must be a prima facie showing of the criminal activities of the client."

³⁸ Hartness v. Brown, 21 Wash. 655, 59 Pac. 491, 495 (1899).

ture crimes which deserves special mention is that of *People v. Singh*.³⁹ In that case, an attorney was approached by a party, other than either of the three defendants involved, to represent defendant X. This attorney made a visit to the jail where the defendants were being held, and had an interview with defendant Y. During this interview Y told the attorney that he and the defendants X and Z were guilty as charged (assault with attempt to kill), but that they were not worried about the outcome as preparations were being made to bribe the jury and witnesses. Later, the counsel appeared at the arraignment for all three defendants, argued for a reduction in bail, entered a plea of not guilty and requested a date for a hearing. The attorney was not paid his retainer fee of \$1000 as promised and he immediately withdrew. At the trial the attorney appeared as a witness for the prosecution. Over objection he was allowed to testify to the conversation with the defendant Y and that he never considered himself attorney for either of the defendants. The defendants were found guilty, but on appeal the case was reversed and it was held that the testimony given by the attorney was inadmissible as it was privileged.

It is submitted that the whole policy behind the privilege was breached in the *Singh* case. From the background of the law, and especially in light of the cases cited immediately above, why should not the attorney have been free to testify to the contemplated bribery? It was a future contemplated crime, and even though it was not carried out (which does not appear from the case report), the testimony should readily be admitted in order that society be protected from the connivings of those guilty of a crime who endeavor to be found innocent through perjury, trickery and schemes. It may be said that the court would have held differently if the attorney had withdrawn immediately upon learning of the proposed bribery instead of waiting until he had appeared at the arraignment at which time he did not get the promised retainer. But is there reason for placing society in jeopardy of a miscarriage of justice be-

³⁹ See note 25 *supra*.

cause of the mercenary attitude of an attorney? Perhaps, as has been suggested by others, the answer should be left to the state legislature.⁴⁰

The American Bar Association has felt so strongly about the limits of the privilege, as regards future crimes, that an ethical Canon has been adopted dealing with the topic. It reads in part:⁴¹

“The duty to preserve his client’s confidence outlasts the lawyer’s employment. . . .

“If a lawyer is falsely accused by his client, he is not precluded from disclosing the truth in respect to the false accusation. The announced intention of a client to commit a crime is not included within the confidence which he is bound to respect. He may properly make such disclosures as to prevent the act or protect those against whom it is threatened.”

Was it not at least the ethical duty of the attorney in the *Singh* case to disclose the proposed bribery? Usually, in order to avoid extending the bounds of privilege, the courts will strictly construe the privilege in accordance with its object.⁴²

⁴⁰ 21 CALIF. L. REV. 67 (1932) in which there is a comment on the *Singh* case.

⁴¹ Canon 37, CANONS OF PROFESSIONAL ETHICS, (Proceedings of the American Bar Association, 1936).

⁴² See note 2 *supra*, at page 358. That case quotes the following from Comment to Rule 210 of the A.L.I. Model Code of Evidence: “In a society as complicated in structure as ours governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential. To the furnishing of such advice the fullest freedom and honesty of communication of pertinent facts is a prerequisite to induce clients to make such communications, the privilege to prevent their later disclosure is said by courts and commentators to be necessary. The social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of evidence in specific cases.” Then the court adds “But the privilege should be strictly construed in accord with its object.” See, also, *Prichard v. United States*, 181 F.2d 326, 328 (6th Cir. 1950); *People’s Bank of Buffalo v. Brown*, 112 Fed. 652, 654 (3rd Cir. 1902).

IV. The Privilege has been Claimed and not Waived

Whenever the privilege exists it attaches to the client and not to the attorney,⁴³ and the client may waive it either expressly or impliedly.⁴⁴ Where a witness (client) voluntarily testifies to a communication as made to his counsel, it will not be privileged as the client is deemed to have waived his privilege,⁴⁵ but by merely becoming a witness the client has not waived the privilege,⁴⁶ and the rule applies when the client is a witness as well as where the attorney is asked to testify.⁴⁷ Waiver does, however, take place when the communication is made in the presence of unnecessary third persons,⁴⁸ or when the client accuses his

⁴³ *Abbott v. Superior Court*, *supra*, note 37. "The privilege, where it exists, is the client's, not the attorney's and if it results in the protection of the attorney it does so only accidentally as a result of the assertion of the client's right."

⁴⁴ *Jones v. Nantahala Marble & Talc Co.*, 137 N.C. 237, 49 S.E. 94 (1904). Here, the attorney sued the client to recover fees. The client introduced as witness an attorney who was associated with the plaintiffs in the litigation in which the claims for the fees arose, for the purpose of showing that the plaintiffs' charges were excessive. Held, the defendant thereby waives the privilege of secrecy attaching to a confidential communication between the witness-attorney and the defendant, and hence such communication is admissible to show the witness had a different opinion at the time the communication was made. See, also, *State v. Artis*, 227 N.C. 371, 42 S.E.2d 409 (1947).

⁴⁵ *Tripp v. Chubb*, 69 Ariz. 31, 208 P.2d 312 (1949). The attorney was called by the court to testify and admit his file concerning the formation of a partnership. Held, "under our statutes and the decisions of this court a client who offers himself as a witness and voluntarily testifies to such communications is deemed to have waived the privilege and in effect consented to the examination of such an attorney."

⁴⁶ *State v. Pusch*, 46 N.W.2d 508, 524 (N.D. 1950). This was a case in which the defendant was on trial for murder. Defendant was "asked if in that conversation [between defendant and his attorney] the defendant did not say to his attorney 'If I confess, will I get some of my money back.' " Held, "communications between an attorney and his client are privileged and the privilege extends to the testimony of the client and he cannot be compelled to testify as to what he communicated to his attorney in confidence or as to what was communicated to him by his attorney. . . . An accused does not by becoming a witness waive the protection of the rule that a communication to him by his attorney is privileged."

⁴⁷ See, *Shelly v. Landry*, 79 A.2d 626 (N.H. 1951); *Ex parte Martin*, 141 Ohio St. 87, 47 N.E.2d 388, 395 (1943).

⁴⁸ See cases cited in note 27, *supra*.

is some justifiable reason to permit the attorney to divulge them. Litigation between those claiming an interest in a decedent's estate by will, intestate succession, or equitable claim creates such a reason. But an interest would not exist in a suit by a third person who does not come within some like category.⁵³

Disbarment for Disclosure of Privileged Communications and Statutes

It is only proper that some space be devoted to the penalties imposed for disclosure of a privileged communication. In *United States v. Costen*,⁵⁴ a disbarment proceeding, an attorney was employed by a client, and, after acting as such for a period, he ceased to be so employed. He then wrote letters to the opposing counsel saying:

"I have acquired knowledge during my employment of facts of great importance. I am no longer employed by the complainant. I want to be employed by you, and I will put you in possession of these facts, though I do not want to be known as under your employment."

The court ruled:

"Now it is the glory of our profession that its fidelity to its client can be depended on; that a man may safely go to a lawyer and converse with him upon his rights or supposed rights in any litigation with the absolute assurance that that lawyer's tongue is tied from ever disclosing it; and any lawyer who proves false to such an obligation and betrays or seeks to betray any information or any facts that he has attained while employed on the one side, is guilty of the grossest breach of trust. . . . The motion for disbarment will be allowed."

⁵³ See cases cited note 51, *supra*.

⁵⁴ 38 Fed. 24 (C.C.D.Col. 1889). See, also, *In re Boone*, 83 Fed. 944 (C.C.N.D.Calif. 1897); *In re Marron*, 22 N.M. 252, 160 Pac. 391, 395 (1916); *In re Proujan*, 257 App.Div. 297, 13 N.Y.S.2d 241 (1st Dep't. 1939).

It is submitted that this privilege doctrine would be of no importance if the communications as made by a client to his attorney could be divulged without any redress whatever.

In conclusion it must be stated that the majority of the states have statutes in one form or another pertaining to privileged communications between a client and his attorney. Therefore, in the preparation of any legal research concerning this age-old principle, the respective statutes should be consulted. But as a general rule, the statutes follow fairly closely the rule as outlined in the *United Shoe* case, *supra*.⁵⁵

⁵⁵ See, WIGMORE, *op. cit. supra* note 1, § 2292.