A-C PRIVILEGE → PROJECT FOR B.K. 7/96

**Memorandum** **Office of the Independent Counsel**

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To : Brett Kavanaugh Date 7/3/96

From : Matt Kirsner

Subject: Attorney-Client Privilege

I have reviewed the states' evidence rules on attorney-client privilege. Most indicate that a "client" may include a "public entity," though government bodies are not specifically mentioned. I was unable to locate any "privilege" provisions for DC, IL, MA, MO, PA, & VA in the treatises or on WL/Lexis. Copies of all other states' attorney-client privilege statutes are attached.

At least four states (AR, ME, ND, and OK) deny privilege to communications between a public agency and its lawyers "unless the communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public agency to process the claim or conduct a pending investigation, litigation, or proceeding in the public interest." I was unable to locate any case law interpreting this public agency provision (usually cited as Rule 502(d)(6)).

At least ten states (AR, DE, ID, ME, ND, NE, OK, OR, SD, and VT) have some sort of "governmental privilege" (usually cited as Rule 508). Copies of these provisions are attached.

Please let me know if you need any more assistance with this project.

Brett- 9/6

I'm distributing my files based on project supervisor. Feel free to keep or discard this info. It was great working with you. Best of luck. Matt

**From:** Brett Kavanaugh
**To:** MKIRSNER, TREPCZYN, JMCCARR
**Date:** 7/1/96 10:54am
**Subject:** 50-state survey

I need one of the three of you to spend a fair amount of time the next few days doing a 50-state (and DC) survey on a particular aspect of the attorney-client privilege. You must examine the evidence rules of each state and copy those portions which deal with the A-C privilege. (Perhaps there is a compendium of state evidence rules in the Library of Congress, DOJ library, or Lexis or Westlaw, which would make the task quicker.) I am especially interested in the definition of the "client" for purposes of the privilege. In particular, does the client include a government entity and, if so, does the rule give any guidance about the proceedings in which that privilege may be asserted (probably not). I also would like a case or two from each state interpreting this aspect of the rule, if there are any. That perhaps can be done by looking at annotated state codes.

Finally, I would like the states' evidence rules also examined for any separate "governmental" privileges, which may be defined, for example, as "official information" privileges or "state secret privileges or the like. (I do not believe many if any states have such a privilege, but check anyway.)

If you spend 15 minutes on each State, that will take 12.5 hours of real work time. I envision that you can move quicker as you get into it. And it may be quite a bit quicker if there is a collection of rules somewhere in a library or on Lexis or Westlaw.

Which of the three of you can get this done before Thursday?

**CC:** aazar, scolloto

• Rules of professional conduct?
e.g., D.C. 1.6 cmt. 36 (1996).

DATE: JULY 1, 1996

CLIENT: MK
LIBRARY: CODES
FILE: ALLRUL

YOUR SEARCH REQUEST IS:
HEADING (EVIDENCE) & ATTORNEY OR LAWYER W/1 CLIENT W/1 PRIVILEGE

NUMBER OF DOCUMENTS FOUND WITH YOUR REQUEST THROUGH:
LEVEL 1... 60

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# 1152067 - KIRSNER,MATTHEW

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| Number of Requests in Group: | 1 | |
| Approximate Number of Lines: | 7720 | |
| Date and Time Printing Started: | 07/01/96 | 02:36:00 pm (Central) |



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Client Identifier: **MK**
Date of Request: 07/01/96
The Current Database is RULES-ALL
Your Terms and Connectors Query:

PR, CA (EVIDENCE) & ATTORNEY LAWYER/S CLIENT/S PRIVILEGE

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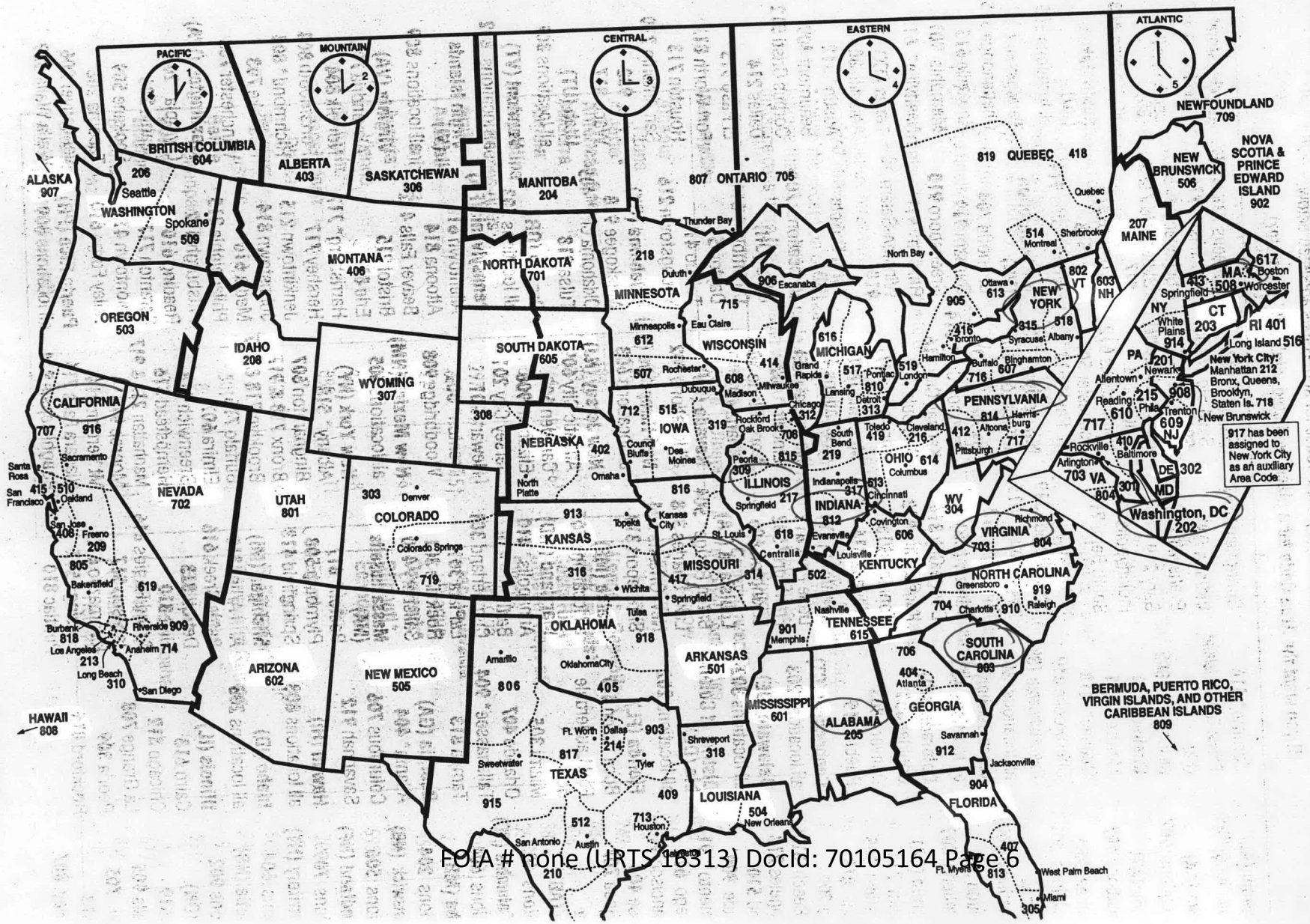

AZ 501 "General Rule"

COLO 501 "PrNs recognized as provided"

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IOWA 501 "General Rule"

MINN. 501 "General Rule"

MONT. 501 "PrNs. recognized only as provided"

MICH. 501 "General Rule"

NV 49.035 + — .115

NH 502 — —

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OH 501 "General Rule"

OK 2502 "AC Rev."

RI 501

SD 19-13-2

WA 501

WV 501

WY 501

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Need 10 more states

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NEED

(#) CALIFORNIA ?
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(#) ND. TR

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(X) MASS ?

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# 1152067 - KIRSNER,MATTHEW

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| Number of Requests in Group: | 6 | |
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Client Identifier: **MK**
Date of Request: 07/03/96
The Current Database is RULES-ALL
Your Terms and Connectors Query:

CA,PR (EVIDENCE) & "GOVERNMENTAL PRIVILEGE!"

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DATE: JULY 3, 1996

CLIENT: MK
LIBRARY: STATES
FILE: ALLCDE

YOUR SEARCH REQUEST IS:
HEADING (EVIDENCE) & "LAWYER-CLIENT PRIVILEGE"

NUMBER OF DOCUMENTS FOUND WITH YOUR REQUEST THROUGH:
LEVEL 1... 87

CA — Cal. Evid. Code Art 3, V.
SS 950-962 (West 1966)

MO ? 491.060

ILL ?

NY — St. 1962, Apr. 4, c. 308 [4503(a)]

PA ? title 19 §686 ; title 5 § 321

VA ?

MASS ?

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NY (74)

V.I (85)

62 BUL Rev. 1003 (1982)

# THE APPLICABILITY AND SCOPE OF THE ATTORNEY-CLIENT PRIVILEGE IN THE EXECUTIVE BRANCH OF THE FEDERAL GOVERNMENT

## I. INTRODUCTION

The attorney-client privilege protects communications between an attorney and a client from judicially compelled disclosure.[1] The privilege enables a client to disclose freely all facts to a lawyer,[2] who is then better able to represent the client.[3] Although the privilege traditionally applied only to communications between an attorney and an individual client,[4] more recently it has been applied to communications between attorneys and corporations,[5] state governments,[6] and the federal government.[7]

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[1] *See* 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (McNaughton rev. ed. 1961). The privilege is recognized by the federal courts. *See* FED. R. EVID. 501 (noting that application of evidentiary privileges should "be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience"); *see also* FED. R. EVID. 503 (not enacted), 56 F.R.D. 235-37 (1972) (attempting to codify the common law privilege).

The attorney-client privilege should not be confused with an attorney's obligation to protect a client's confidences and secrets. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-4 (1981) ("The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge.").

[2] The terms "attorney" and "lawyer" are not interchangeable. The term attorney should only be applied to one acting for a client. "Thus, a lawyer *is* not an attorney, but only *acts* as attorney." Safire, *On Language*, N.Y. Times, Jan. 31, 1982, § 6 (Magazine), at 13-14 (emphasis in original).

[3] *See* 8 J. WIGMORE, *supra* note 1, § 2290, at 545.

[4] C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 88, at 181 (E. Cleary 2d ed. 1972).

[5] *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383 (1981); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1978) (en banc) (*aff'g in part and rev'g in part prior panel decision*); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), *aff'd mem. by an equally divided court*, 400 U.S. 348 (1971); *In re* Ampicillin Antitrust Litig., 81 F.R.D. 377 (D.D.C. 1978); *see also infra* notes 110-35 and accompanying text (discussing application of privilege in corporate context).

[6] *See* People v. Glen Arms Estate, Inc., 230 Cal. App. 2d 841, 41 Cal. Rptr. 303 (1964); Riddle Spring Realty Co. v. State, 107 N.H. 271, 220 A.2d 751 (1966); Rowley v. Ferguson, 48 N.E.2d 243 (Ohio Ct. App. 1942); Port of Seattle v. Rio, 16 Wash. App. 718, 559 P.2d 18 (1977); *infra* note 11. In Georgia "the attorney/client privilege and relationship practically extends between the Attorney General and members of his staff on the one hand and every officer and employee of the executive branch of

Application of the attorney-client privilege to attorneys employed by executive branch departments and agencies[8] of the federal government[9]

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State Government on the other." Letter from Robert S. Stubbs II, Executive Assistant Attorney General of Georgia, to the author (Sept. 15, 1981) (on file at the Boston University Law Review).

Several states have restricted the application of the attorney-client privilege for state agencies to communications made in contemplation of some type of legal proceeding. *See* People *ex rel.* Hopf v. Barger, 30 Ill. App. 3d 525, 332 N.E.2d 649 (1975); State *ex rel.* Cartwright v. Oklahoma Indus. Auth., 629 P.2d 1244 (Okla. 1981). Because of this restrictive application, the privilege closely resembles the work product privilege. *See infra* note 71. *But cf.* Times Publishing Co. v. Williams, 222 So. 2d 470 (Fla. Dist. Ct. App. 1969) (ruling that although the attorney-client privilege was abolished for the county agency client by the state's "Government in the Sunshine Law," FLA. STAT. ANN. § 286.011 (West Supp. 1982), the privilege still had vitality for attorneys since the state constitution, FLA. CONST. art. V, § 6(3), gave the state supreme court power to define lawyers' ethical obligations).

[7] *See, e.g.*, Brinton v. Department of State, 636 F.2d 600 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854 (D.C. Cir. 1980); Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d 242 (D.C. Cir. 1977); SEC v. World-Wide Coin Invs., Ltd., 92 F.R.D. 65 (N.D. Ga. 1981); Jupiter Painting Contracting Co. v. United States, 87 F.R.D. 593 (E.D. Pa. 1980); Sterling Drug, Inc. v. Harris, 488 F. Supp. 1019 (S.D.N.Y. 1980); United States v. AT&T Co., 86 F.R.D. 603 (D.D.C. 1979); United States v. Anderson, 34 F.R.D. 518 (D. Colo. 1963); *see also infra* notes 82-108 and accompanying text.

[8] This Note adopts the definition of "agency" used in The Freedom of Information Act, 5 U.S.C. § 552(e) (1976), which includes "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." For a general discussion of the definition, see 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1:2 (2d ed. 1978); Note, *The Definition of "Agency Records" Under the Freedom of Information Act*, 31 STAN. L. REV. 1093, 1101-06 (1979).

[9] Defining the applicability of the attorney-client privilege for all federal government lawyers is beyond the scope of this Note. "The government attorney himself is a mythical being. The federal district judge, his law clerk, the Federal Trade Commission hearing officer, the General Counsel of the Army . . . may all be characterized as 'government attorneys,' in that they belong to the bar and work for the government." *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1417 (1981) [hereinafter cited as *Developments*]. For purposes of this Note, a federal government lawyer is one who is employed by an agency except if "designated to represent another in government service against whom procedures are brought of a disciplinary, administrative, or personnel character." Poirier, *The Federal Government Lawyer and Professional Ethics*, 60 A.B.A. J. 1541, 1542 (1974). In this latter situation it is clear that the "individual represented is the client and the usual attorney-client relationship exists." Lawry, *Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 FED. B.J., Fall, 1978, at 61, 63.

presents unique difficulties. Because the attorney is representing an amorphous entity, neither the parties who may assert the privilege nor the communications for which the privilege may be claimed are clearly identifiable.[10] As a result, courts have had difficulty defining and applying the attorney-client privilege in the context of the federal government.[11] No test for applying the privilege to the executive branch of the federal government has been succinctly articulated or widely adopted; consequently, federal attorneys, agencies that employ them, and courts reviewing agencies' actions are often unsure of the scope of the privilege. The uncertainty engendered by the absence of a definitive test may lead to a reluctance by agencies to seek essential legal advice.

This Note considers the applicability of the attorney-client privilege to executive branch agencies of the federal government. After discussing the

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[10] *Compare* Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 253 & n.24 (D.C. Cir. 1977) (finding attorney-client communication privileged whenever it is based on information supplied with the expectation of secrecy and not known by third parties) *with* Niemeier v. Watergate Special Prosecution Force, 565 F.2d 967, 974 (7th Cir. 1977) (finding communication between a government lawyer and his employer agency privileged only "where litigation is contemplated and the document represents attorney work product").

[11] *See infra* notes 82-108 and accompanying text.

Many of the difficulties encountered in applying the privilege to the federal government also exist when a state government asserts the privilege. There has been relatively little litigation involving the scope of the privilege when it has been asserted by a state. *But see supra* note 6 (citing state cases discussing application of privilege). Courts that have applied the privilege to state governments generally have done so merely by stating that the privilege applies to a particular situation, rather than by setting out general criteria for its applicability. *Id.* At least one state court has set forth a test for applying the privilege to a state agency by borrowing a test that had been formulated to deal with all types of confidential relationships:

> (1) The communication must originate in a confidence that it will not be disclosed; (2) the element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained.

Port of Seattle v. Rio, 16 Wash. App. 718, 725, 559 P.2d 18, 23 (1977) (citations omitted). The court in *Rio* further stated that "[w]hen a communication is confidential and concerns contemplated or pending litigation or settlement offers, the necessity for the attorney-client privilege exists as between a public agency and its lawyers to as great an extent as it exists between other clients and their counsel." *Id.* (citation omitted). A likely reason for the relatively small number of cases on the state level is that the Freedom of Information Act, 5 U.S.C. § 552 (1976), which has engendered much litigation in the federal courts, *see infra* notes 59-81 and accompanying text, does not apply to the states, although some states have passed their own versions of the Act, *see, e.g.*, CONN. GEN. STAT. ANN. § 1-19 (West Supp. 1982); N.Y. PUB. OFF. LAW §§ 84-90 (McKinney Supp. 1982).

background of the privilege, the Note describes problems unique to federal agency assertion of the privilege. The Note next examines recent cases dealing with the attorney-client privilege in the federal government context and analogizes to cases applying the privilege to corporations. It then proposes a test for determining the propriety of assertion of the attorney-client privilege by federal agencies. The Note concludes that use of the proposed test will guide lawyers, agencies, and courts as they attempt to balance the need for free dissemination of information with the sometimes competing need for privacy in agency decisionmaking.

## II. The Attorney-Client Privilege

### A. *General Principles*

The attorney-client privilege is derived from balancing the objectives of effective legal representation and judicial truth-seeking. The dimensions of the privilege reflect this balance of often conflicting goals.

#### 1. Definition and Purpose of the Privilege

The attorney-client privilege is the oldest evidentiary privilege for confidential communications.[12] Although there is no universally accepted definition,[13] Wigmore's definition of the attorney-client privilege is concise and inclusive:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except [if] the protection be waived.[14]

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[12] 8 J. Wigmore, *supra* note 1, § 2290, at 542. The privilege originated in the reign of Elizabeth I (1558-1603). *Id.*

[13] *But cf.* Unif. R. Evid. 502 (1974) (defining the attorney-client privilege). The general rule of privilege stated is:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him or his representative, or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

*Id.* 502(b).

[14] 8 J. Wigmore, *supra* note 1, § 2292, at 544. This definition is frequently cited. *See, e.g., In re* Fischel, 557 F.2d 209, 211 (9th Cir. 1977); *In re* Ampicillin Antitrust Litig., 81 F.R.D. 377, 383-84 (D.D.C. 1978).

The original rationale for the attorney-client privilege was to protect the honor of the attorney rather than to guard the client's interests.[15] The present justification for the privilege—encouragement of full disclosure of all material facts by a client to his attorney—emerged with the development of the modern adversarial system.[16] The privilege thus fosters better legal representation because a well-informed attorney can more effectively represent a client's interests.[17]

Existence of the privilege has created a tension within the adversarial system.[18] The truth-seeking apparatus of the adversarial process is impaired by granting litigants this privilege.[19] Yet because the privilege serves to improve the quality of legal representation, there is a greater chance that a court will reach a just decision.[20]

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Another often cited definition was formulated by Judge Wyzanski in United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950):

> 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 the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, 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.

*See, e.g.*, Jupiter Painting Contracting Co. v. United States, 87 F.R.D. 593, 598 (E.D. Pa. 1980) (citing *United Shoe* definition); Coastal Corp. v. Duncan, 86 F.R.D. 514, 520 (D. Del. 1980) (same); *In re* Ampicillin Antitrust Litig., 81 F.R.D. 377, 383 (D.D.C. 1978) (same); *see also* FED. R. EVID. 503 (not enacted), 56 F.R.D. 235-37 (1972) (defining the privilege).

[15] 8 J. WIGMORE, *supra* note 1, § 2290, at 543; *see also* Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487, 487-89 (1928) (tracing history of privilege from Roman law).

[16] 8 J. WIGMORE, *supra* note 1, § 2290; *see also* Comment, *The Attorney-Client Privilege as Applied to Corporate Clients*, 15 AKRON L. REV. 119, 120-21 (1981) (citing WIGMORE); Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach*, 69 MICH. L. REV. 360, 364 (1970) (same).

With the growing acceptance of the modern rationale, the privilege was gradually expanded from protecting only communications made after the commencement of litigation to protecting all consultations for legal advice. 8 J. WIGMORE, *supra*.

[17] 8 J. WIGMORE, *supra* note 1, § 2291.

[18] *See* Rosenfeld, *The Transformation of the Attorney-Client Privilege: In Search of an Ideological Reconciliation of Individualism, the Adversary System, and the Corporate Client's SEC Disclosure Obligations*, 33 HASTINGS L.J. 495, 499-513 (1982).

[19] 8 J. WIGMORE, *supra* note 1, § 2291, at 549-51; *see* Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 466-73 (1977); *see also* Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953, 954 n.6 (1956) (discussing reasons for opposing the privilege).

[20] *See* MODEL CODE OF EVIDENCE Rule 210, Comment a (1942); C. MCCORMICK,

2. Elements of Significance to the Federal Government

Certain elements of Wigmore's definition of the attorney-client privilege are particularly pertinent to its application to the federal government. Not all communications between an attorney and a client are privileged.[21] The privilege applies only when a client consults a lawyer, or a person believed to be a lawyer, for the purpose of securing legal advice.[22] The privilege does not apply if the client, in making the communication, intends to further the commission of a crime or fraud,[23] or if the client is consulting the attorney in a nonlegal capacity.[24]

Another prerequisite for invoking the privilege is that the communication be made in confidence.[25] The term "made in confidence" does not mean that the information itself must be confidential—known only to the client—but that the communication be made with the intention that the information remain confidential.[26] A communication is made in confidence when it is intended to be disclosed only to those persons needed for the performance of legal services for the client.[27]

Federal courts have extended the privilege beyond the words of Wigmore's definition to include communications from attorney to client that are based on confidential information given by the client.[28] This extension of the privilege prevents use of an attorney's statements to a client to show admis-

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*supra* note 4, § 87, at 175; *cf.* Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424, 425 (1970) (attorney best serves client, and indirectly society, if better informed).

[21] *See, e.g.*, UNIF. R. EVID. 502(d) (1974).

[22] United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950); *see* C. MCCORMICK, *supra* note 4, § 88, at 179.

[23] C. MCCORMICK, *supra* note 4, § 95; *see* United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950).

[24] Olender v. United States, 210 F.2d 795, 806 (9th Cir. 1954) (privilege does not exist when attorney hired to prepare tax returns as an accountant); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950) (defining privilege); *see* C. MCCORMICK, *supra* note 4, § 88, at 179-80.

[25] *See* UNIF. R. EVID. 502 (1974); C. MCCORMICK, *supra* note 4, § 91.

[26] *See In re* Ampicillin Antitrust Litig., 81 F.R.D. 377, 388 (D.D.C. 1978); *see also* Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 33 (D. Md. 1974) (interpreting *United Shoe* definition to mean "that the communication must have been intended as confidential, i.e., not intended to be related to others").

[27] *See* UNIF. R. EVID. 502(a)(5) (1974); FED. R. EVID. 503(a)(4) (not enacted), 56 F.R.D. 236 (1972).

[28] Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 254 & n.25 (D.C. Cir. 1977); *see* United States v. Osborn, 409 F. Supp. 406, 409 (D. Or. 1975), *aff'd in part, rev'd in part, vacated and remanded in part*, 561 F.2d 1334 (9th Cir. 1977); *accord* United States v. Amerada Hess Corp., 619 F.2d 980, 985-86 (3rd Cir. 1980).

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sions by the client,[29] but does not render all of an attorney's communications to a client privileged.[30] Regardless of which party makes the communication, the privilege can be asserted only by the client, or by an attorney on behalf of the client.[31]

### B. *Problems in Applying the Privilege to the Federal Government*

Special considerations arise in judicial application of the attorney-client privilege to the federal government. Courts must identify a specific client within the larger body of the federal government.[32] In addition, they must consider the unique legal context in which most assertions of the privilege by the federal government arise.

#### 1. Identifying the Client

In considering the applicability of the attorney-client privilege in a specific case, courts must explicitly[33] or implicitly[34] identify the client. This determination is critical[35] because only the client may claim or waive the privi-

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[29] 8 J. WIGMORE, *supra* note 1, § 2320, at 628-29.

[30] *See* SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 522 (D. Conn.), *appeal dismissed*, 534 F.2d 1031 (2d Cir. 1976); Bird v. Penn Cent. Co., 61 F.R.D. 43, 45-46 (E.D. Pa. 1973); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950); C. MCCORMICK, *supra* note 4, § 89, at 182-84. *But see* United States v. Amerada Hess Corp., 619 F.2d 980, 986 (3d Cir. 1980) ("[L]egal advice given to the client should remain confidential.") (citation omitted).

[31] C. MCCORMICK, *supra* note 4, § 92; 8 J. WIGMORE, *supra* note 1, § 2321. Similarly, only the client may waive the privilege. C. MCCORMICK, *supra* § 93.

[32] *See infra* notes 33-57 and accompanying text.

[33] *See* Sterling Drug, Inc. v. Harris, 488 F. Supp. 1019, 1025 (S.D.N.Y. 1980) (finding that FDA officials with decision-making responsibilities are clients of FDA attorneys for purposes of the attorney-client privilege); United States v. AT&T Co., 86 F.R.D. 603, 616-18 (D.D.C. 1979) (defining federal attorney's client as the agency employing the attorney or another agency in matters "in which the agencies have a substantial *identity of legal* interest") (emphasis in original) (footnote omitted); *cf.* Hearn v. Rhay, 68 F.R.D. 574, 579-80 (E.D. Wash. 1975) (holding that Superintendent of the Washington State Penitentiary was, in his *individual* capacity, client of the Washington State Attorney General, because Superintendent had been stripped of his official immunity).

[34] *See, e.g.*, Brinton v. Department of State, 636 F.2d 600 (D.C. Cir. 1980) (implying that Secretary of State is client of Department of State's Office of Legal Advisor), *cert. denied*, 452 U.S. 905 (1981); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854 (D.C. Cir. 1980) (implying that auditors in Department of Energy field offices are clients of Department of Energy regional counsel).

[35] "The starting point of analysis is identification of the client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 note (Proposed Final Draft 1981) (Kutak Commission Report). *But cf.* Lawry, *supra* note 9. Lawry maintains that the question "who is the client?" is "less than useless as a pathway leading to any clarification of the unique nature of a government lawyer's professional responsibilities." *Id.* at 62.

lege,[36] and only communications made in confidence between the client and his attorney may be privileged.[37] Although arguably the President,[38] the Congress,[39] the government as a whole,[40] or the public might be considered the client,[41] courts have considered the client to be the agency that employs

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He argues that client identification does not automatically solve ethical questions, such as what kind of confidences an attorney must respect. *Id.* Lawry, however, addresses the general question of the professional responsibility of the federal government lawyer, rather than the specific issue of the attorney-client privilege.

[36] C. MCCORMICK, *supra* note 4, §§ 92-93; 8 J. WIGMORE, *supra* note 1, § 2321.

[37] *See supra* notes 25-27 and accompanying text.

[38] At least one prominent jurist, Justice Rehnquist, when serving as an agency attorney, considered the President to be his client. *Hearings before the Committee on the Judiciary, U.S. Senate, on Nominations of William H. Rehnquist and Lewis F. Powell, Jr.*, 92nd Cong., 1st Sess. 48 (1971) (statement of William H. Rehnquist) ("My client, in my position as the Assistant Attorney General for the Office of Legal Counsel, is the Attorney General, and the President . . . ."). Most federal lawyers, however, have a more attenuated relationship with the President. Even the United States Attorney General, the highest ranking legal figure in the executive branch, may not have an attorney-client relationship with the President. *See* Bell, *Office of Attorney General's Client Relationship*, 36 BUS. LAW. 791 (1981).

Although the President is vested with authority over the executive branch, U.S. CONST. art. II, § 1, the President has little real authority over independent agencies that employ many lawyers, *see, e.g.*, 12 U.S.C. § 241 (1976) (mandating fourteen-year terms for the Board of Governors of the Federal Reserve System, thereby limiting the Presidential power of appointment); 15 U.S.C. § 41 (1976) (providing a system of appointment to the FTC that severely restricts Presidential control over the Commission). Furthermore, if the President is considered the client, legal communications in which the President does not participate would not be privileged, thereby inhibiting agencies from seeking legal advice.

[39] Congress' use of its legislative authority to grant an agency and its employees—including its lawyers—a mandate to effect some purpose should not imply that Congress is the client of the agency's lawyers. Although Congress, in practice, employs broad supervisory powers over federal agencies, its constitutional function is that of a repository of "[a]ll legislative [p]owers herein granted," U.S. CONST. art. I, § 1, and not a supervisor of agencies and their employees. *See* Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975).

[40] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 comment (Proposed Final Draft 1981) (Kutak Commission Report) (noting that in some circumstances the client "may be a specific agency but in others it may be the government as a whole"). *But cf.* United States v. AT&T Co., 86 F.R.D. 603, 617 (D.D.C. 1979) (noting that in some instances "the Government is not a single client").

[41] No plausible argument can be made for designating the entire American populace as the client of federal government lawyers. However, protection of the public interest is a fundamental aspect of a valid invocation of the attorney-client privilege by a federal agency. *See infra* note 47. In some situations a government attorney "represents the people as well as government." Weinstein, *Some Ethical*

the attorney,[42] or, in some circumstances, the agency to which the attorney has been assigned to do legal work.[43]

Designation of the agency as client is supported by the Supplemental Federal Ethical Considerations issued by the Federal Bar Association (FBA).[44] The FBA ethical considerations state that "[t]he immediate professional responsibility of the federal lawyer is to the department or agency in which he is employed, to be performed in light of the particular public interest function of the department or agency."[45] The term "immediate professional responsibility" implies that the federal attorney's relationship to an employer agency is similar to that of a private attorney to a client.[46]

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*and Political Problems of a Government Attorney*, 18 MAINE L. REV. 155, 169 (1966). Professor Weinstein, now Chief Judge of the United States District Court for the Eastern District of New York, stated that the government attorney must sometimes represent the interests of the government with less than full vigor to protect individual members of the public. For example, in condemnation cases the government attorney may have an obligation to ensure that condemnees not represented by counsel obtain a fair price for their property. *Id.* This situation, however, does not represent a conflict of interest between the public and the government, but rather a conflict between the interest of individual members of the public and those of the government.

[42] *See, e.g.*, United States v. AT&T Co., 86 F.R.D. 603, 616-18 (D.D.C. 1979) (defining federal agency's client in most circumstances as the agency employing the attorney). Courts often find that agency personnel, acting in their official capacities, are the clients of agency officials. *See, e.g.*, Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854 (D.C. Cir. 1980) (implying that auditors in Department of Energy field offices are clients of Department of Energy regional counsel); Sterling Drug, Inc. v. Harris, 488 F. Supp. 1019, 1025 (S.D.N.Y. 1980) (finding that FDA officials with decision-making responsibilities are clients of FDA attorneys); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(a) (Proposed Final Draft 1981) (Kutak Commission Report) ("A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents.").

[43] *See infra* notes 48-57 and accompanying text.

[44] FEDERAL ETHICAL CONSIDERATIONS (FBA 1973), *reprinted in* Poirier, *supra* note 9, at 1542. These guidelines supplement the *Model Code of Professional Responsibility* for federal government lawyers. They have been adopted by at least one executive agency, the Department of Defense. Memorandum for Members of the Office of General Counsel and the Defense Legal Services Agency from William H. Taft IV, General Counsel of the Department of Defense (November 30, 1981) (on file at the Boston University Law Review).

[45] FEDERAL ETHICAL CONSIDERATION 5-1 (FBA 1973), *reprinted in* Poirier, *supra* note 9, at 1543.

[46] The federal attorney's "immediate professional responsibility" to an agency is analogous to the attorney's duty "to represent his client zealously within the bounds of the law . . . ." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1981) (footnotes omitted).

This responsibility is tempered in the public sector by a concomitant duty to act in the public interest.[47]

In addition to the attorney's duties to an employing agency and to the public interest, the structure of the federal government often requires attorneys to represent other government agencies.[48] A federal lawyer thus may act simultaneously as the attorney for both the employing agency[49] and another agency.[50] For an agency other than the one that employs the attorney also to be a client, the two agencies must "have a substantial identity of legal interest in a particular matter."[51] If such an identity of interests exists, the attorneys jointly represent both agencies;[52] if the interests conflict,

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[47] Defining the "public interest" of a government agency is not an easy task since "[o]ne of the principal purposes of government is to provide a set of institutions that analyze and define the public interest. No individual attorney can hope to perform this task on his own." *Developments*, *supra* note 9, at 1414. The government's public interest obligation is found not in the opinions of its officials, but rather in applicable statutes and constitutional provisions. *See* Schnapper, *Legal Ethics and the Government Lawyer*, 32 REC. A.B. CITY N.Y. 649, 654 (1977). For a federal agency's actions to be in the public interest, they must at least meet standards defined by the Constitution and laws of the United States, particularly the enabling act of the agency, *see, e.g.*, The Federal Communication Act of 1934, 47 U.S.C. § 151 (1976) (purpose of FCC is to create a worldwide wire and radio system for the people of the United States). These minimal public interest standards limit the lawyer's responsibility for determining the public interest to enforcing the laws formulated by elected officials. *See* FEDERAL BAR ASS'N PROFESSIONAL ETHICS COMM., OPINIONS, No. 73-1 (1973) ("The Government Client and Confidentiality"), *reprinted in* 32 FED. B.J., Winter, 1973, at 71, 72 (government attorney must protect "the public interest sought to be served by the governmental organization of which he is a part"). Nevertheless, government lawyers are often in policy-making positions. While occupying such positions, they have a responsibility to formulate and execute public policies in accordance with the desires of elected officials. *See* Weinstein, *supra* note 41, at 158.

[48] *See, e.g.*, Thill Sec. Corp. v. New York Stock Exch., 57 F.R.D. 133, 138-39 (E.D. Wis. 1972) (finding that an attorney-client relationship existed between the Antitrust Division of the Justice Department and the SEC); United States v. Anderson, 34 F.R.D. 518, 522-23 (D. Colo. 1963) (recognizing an attorney-client relationship between the United States Attorney's office and the Small Business Administration).

[49] *See* United States v. AT&T Co., 86 F.R.D. 603, 617 (D.D.C. 1979) (finding that although the identity of a government lawyer's client is uncertain, it "clearly includes the attorney's own agency").

[50] *Id.; see* Bell, *supra* note 38, at 793. Former Attorney General Bell stated: "I impressed on [the Justice Department lawyers] that they were lawyers for clients and that the agency they represented was their client and . . . ought to be treated as such." *Id.* Most federal litigation is conducted by the Justice Department. *See* 5 U.S.C. § 3106 (1976).

[51] United States v. AT&T Co., 86 F.R.D. 603, 617 (D.D.C. 1979).

[52] *Id.*

communications between the agencies' attorneys are not privileged.[53] According to this test, "the [g]overnment is a cluster of 'clients' for purposes of the attorney-client privilege."[54] Thus, the federal lawyer has two potential clients: the first is the agency that employs the attorney,[55] so long as it acts within the public interest;[56] and the second is an agency that does not employ the attorney, but for whom the attorney has been assigned to do legal work, provided that there is an identity of interest between the two agencies.[57]

2. Impact of the Freedom of Information Act on Assertion of the Privilege

The federal government has asserted the attorney-client privilege in limited legal contexts.[58] In most reported cases, the privilege is claimed in litigation arising under the Freedom of Information Act (FOIA),[59] although it also is asserted during discovery proceedings against the government.[60]

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[53] *Id.*

[54] *Id.*

[55] *See supra* note 42 and accompanying text.

[56] *See supra* note 47 and accompanying text.

[57] *See supra* notes 48-54 and accompanying text.

[58] *See infra* notes 59-60 and accompanying text.

In cases involving nongovernmental clients, the privilege is often asserted during criminal investigations, *see, e.g.*, United States v. Goldfarb, 328 F.2d 280 (6th Cir.) (civil contempt case arising from claim of privilege before grand jury), *cert. denied*, 377 U.S. 976 (1964), and during civil discovery, *see, e.g.*, Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 606 (8th Cir. 1978) (en banc) (*aff'g in part and rev'g in part prior panel decision*) (corporate defendant seeking to protect its attorney's reports and memoranda from discovery); Barr Marine Prods., Co. v. Borg-Warner Corp., 84 F.R.D. 631 (E.D. Pa. 1979) (similar fact situation).

[59] 5 U.S.C. § 552 (1976). Illustrative of FOIA cases in which courts have considered federal government claims of attorney-client privilege are Brinton v. Department of State, 636 F.2d 600, 603-04 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862-64 (D.C. Cir. 1980); Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 252-55 (D.C. Cir. 1977); Canadian Javelin, Ltd. v. SEC, 501 F. Supp. 898, 902 (D.D.C. 1980); Sterling Drug, Inc. v. Harris, 488 F. Supp. 1019, 1025 (S.D.N.Y. 1980); Falcone v. IRS, 479 F. Supp. 985, 989-90 (E.D. Mich. 1979); Kanter v. IRS, 478 F. Supp. 552, 557 (N.D. Ill. 1979); Gregory v. FDIC, 470 F. Supp. 1329, 1335 (D.D.C. 1979), *rev'd in part*, 631 F.2d 898 (D.C. Cir. 1980); Firestone Tire & Rubber Co. v. Coleman, 432 F. Supp. 1359, 1365, 1367-68 (N.D. Ohio 1976).

[60] *See* SEC v. World-Wide Coin Invs., Ltd., 92 F.R.D. 65 (N.D. Ga. 1981) (motion for discovery of communications between SEC attorneys and staff investigating securities fraud); Jupiter Painting Contracting Co. v. United States, 87 F.R.D. 593 (E.D. Pa. 1980) (motion for discovery against government in a taxpayer's refund suit); Coastal Corp. v. Duncan, 86 F.R.D. 514 (D. Del. 1980) (motion for discovery in suit seeking judicial review of Department of Energy regulations); United States v. AT&T Co., 86 F.R.D. 603 (D.D.C. 1979) (setting rules for discovery

The FOIA determines when a request for government documents should be granted.[61] Under the FOIA, an applicant's need for a document is irrelevant, as the Act dictates disclosure to "any person."[62] Because of the FOIA's concern with promoting public access to government documents,[63] courts have been uncertain as to the effect the FOIA should have on assertions of the privilege.[64]

Under Exemption 5 of the FOIA,[65] an agency is not required to turn over "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency."[66] This exemption is intended to insulate the agency decision-making process from the inhibiting effects that a disclosure requirement would have on the flow of information to agency decision makers.[67] Given that a primary objective of the attorney-client privilege is to promote frank communications between attorney and client,[68] and that legal advice is part of agency decisionmaking,[69] Exemption 5 has been held to encompass the

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proceedings in an antitrust action); Thill Sec. Corp. v. New York Stock Exch., 57 F.R.D. 133 (E.D. Wis. 1972) (motion for discovery against Department of Justice and SEC in which both agencies intervened in antitrust action based on claim against stock exchange anti-rebate rule); *see also* Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975) (state government claims privilege); Connecticut Mut. Life Ins. Co. v. Shields, 18 F.R.D. 448 (S.D.N.Y. 1955) (same).

[61] K. DAVIS, ADMINISTRATIVE LAW TEXT § 3A.4 (3d ed. 1972).

[62] 5 U.S.C. § 552(a)(3) (1976); *see* K. DAVIS, *supra* note 61, § 3A.4; H.R. REP. No. 1497, 89th Cong., 2d Sess. 8, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2418, 2426.

[63] *See* H.R. REP. No. 1497, *supra* note 62, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2419-23.

[64] *See infra* notes 73-81 and accompanying text.

[65] 5 U.S.C. § 552(b)(5) (1976).

[66] *Id.* Exemption 5 has generally protected statements containing opinions while forcing disclosure of essentially factual materials. *See* EPA v. Mink, 410 U.S. 73, 85-92 (1973) (applying Exemption 5 to memoranda conveying recommendations to the President); Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 HARV. L. REV. 1047, 1049-63 (1973). Although at least one court has implied that this distinction also applies in attorney-client privilege cases under the FOIA, *see* Kanter v. IRS, 478 F. Supp. 552, 557 (N.D. Ill. 1979), it should be irrelevant to attorney-client privilege cases because the privilege is meant to encourage clients to disclose *facts* to attorneys, *see* Upjohn Co. v. United States, 449 U.S. 383, 389-91 (1981); *supra* notes 16-17 and accompanying text.

[67] Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977). *See* Comment, *Governmental Commercial and Precontractual Information Under Exemption 5 of the FOIA:* Merril v. FOMC, 60 B.U.L. REV. 765, 782-85 (1980).

[68] *See supra* notes 16-17 and accompanying text.

[69] Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977).

attorney-client privilege.[70] In addition, Exemption 5 incorporates two other privileges recognized in civil discovery proceedings, the work product privilege[71] and the executive privilege.[72]

[70] *Id.*; *see* S. REP. No. 813, 89th Cong., 1st Sess. 2 (1965) (stating that Exemption 5 "would include . . . documents which would come within the attorney-client privilege if applied to private parties"); *see also* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 154 (1975) (quoting legislative history supporting inclusion of attorney-client privilege under Exemption 5). *See generally* cases cited *supra* note 59 (applying attorney-client privilege under FOIA's Exemption 5).

[71] The work product privilege may be asserted by an attorney to protect "trial preparations, in varying degrees," from compelled disclosure. C. MCCORMICK, *supra* note 4, § 96, at 204; *see* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 154 (1975); Hickman v. Taylor, 329 U.S. 495 (1947); FED. R. CIV. P. 26(b)(3).

The work product privilege is narrower than the attorney-client privilege. *See* Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 864 (D.C. Cir. 1980) ("[R]ather than protecting confidential communications from the client, [the work product privilege] provides a working attorney with a 'zone of privacy' within which to think, plan, weigh facts and evidence, candidly evaluate a client's case, and prepare legal theories."). Moreover, materials covered by the work product privilege are discoverable if there is a substantial showing of "necessity or justification." *Hickman*, 329 U.S. at 510. This distinction is irrelevant in FOIA cases, however, since an applicant is not required to show need under the Act. *See supra* notes 62-63 and accompanying text. The work product privilege is further distinguishable from the client-oriented attorney-client privilege in its focus on protection of the attorney and the trial process. The client is unable to assert this privilege, but may indirectly benefit from his attorney's ability to protect his work product. The work product privilege thus provides an alternate rationale for withholding documents, and the government frequently asserts both privileges in the same cases. *See, e.g.*, Falcone v. IRS, 479 F. Supp. 985 (E.D. Mich. 1979); Thill Sec. Corp. v. New York Stock Exch., 57 F.R.D. 133 (E.D. Wis. 1972); Detroit Screwmatic Co. v. United States, 49 F.R.D. 77 (S.D.N.Y. 1970).

[72] Executive privilege—often called the governmental or deliberative process privilege—protects materials that reveal the government's policy-making processes. Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977); *see* C. MCCORMICK, *supra* note 4, §§ 106-113. The policy underlying executive privilege is encouragement of the free flow of ideas among government administrators and prevention of premature release of government decisions. *Mead Data*, 566 F.2d at 257. Exemption 5 of the FOIA has been held to include materials covered by executive privilege. *E.g.*, NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975); EPA v. Mink, 410 U.S. 73, 89-91 (1973); *Mead Data*, 566 F.2d at 256. The attorney-client and executive privileges overlap, and are often asserted in the same cases. *E.g.*, *Mead Data*, 566 F.2d at 254 n.28; Jupiter Painting Contracting Co. v. United States, 87 F.R.D. 593, 597-98 (E.D. Pa. 1980).

An important distinction between the two privileges is that the attorney-client privilege bars disclosure of attorney opinions in order to protect the confidentiality of underlying facts, whereas executive privilege does not bar disclosure of facts unless it would reveal part of the agency decision-making process. *Mead Data*, 566 F.2d at 254 n.28. *But see Jupiter Painting*, 87 F.R.D. at 598 (distinguishing applicability of

The FOIA and discovery rules share the common function of establishing procedures for the disclosure of documents; nevertheless, the United States Supreme Court has stated that discovery rules should be applied in FOIA cases only "by way of rough analogies."[73] Courts have recognized two distinctions between discovery and FOIA requests. First, the decision to compel disclosure in a discovery case often rests on the applicant's need, whereas in a FOIA suit the plaintiff's need is irrelevant.[74] Second, unlike the FOIA, different discovery rules apply to the government depending on whether it acts as prosecutor, plaintiff, or civil defendant.[75]

In addition to these two generally recognized distinctions between the FOIA and discovery proceedings, the United States Court of Appeals for the District of Columbia Circuit, in *Mead Data Central, Inc. v. United States Department of the Air Force*,[76] further distinguished the two proceedings as they concern the attorney-client privilege. The court implied that it might have found a broader attorney-client privilege had it been deciding a discovery case rather than a FOIA case.[77] Unfortunately, the *Mead Data* court

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the two privileges to a government lawyer by stating that executive privilege applies to opinions rendered by lawyer to agency, whereas attorney-client privilege principally protects factual statements from client to lawyer).

There is a significant difference in the effective protection of communications under the two privileges. *Mead Data*, 566 F.2d at 255 n.28. Even if documents are insulated from disclosure because of executive privilege, the agency can be required by the court to describe the factual content of the documents. There is no similar requirement under the attorney-client privilege. *Id. But cf.* United States v. Exxon Corp., 87 F.R.D. 624, 637 (D.D.C. 1980) (requiring Department of Energy to provide certain information about the communication to "ensure the proper invocation of the attorney-client privilege").

[73] EPA v. Mink, 410 U.S. 73, 86 (1973). *See generally* Comment, *supra* note 67, at 779-82 (discussing relationship of discovery rules and Exemption 5).

[74] Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 252 n.14 (D.C. Cir. 1977). This distinction is irrelevant in attorney-client privilege cases because even a party demonstrating need in a discovery proceeding cannot breach the privilege.

[75] EPA v. Mink, 410 U.S. 73, 86 & n.13 (1973).

[76] 566 F.2d 242 (D.C. Cir. 1977). For a concise discussion of *Mead Data*, see 1 K. DAVIS, *supra* note 8, § 5:37, at 420-21. *See also* Note, *Developments Under the Freedom of Information Act—1977*, 1978 DUKE L.J. 189, 219-23 (also discussing *Mead Data*); Comment, Mead Data Central, Inc. v. United States Department of the Air Force: *Extending the FOIA's Fifth Exemption*, 19 WM. & MARY L. REV. 343 (1977) (arguing that the *Mead Data* court had found too broad an attorney-client privilege under Exemption 5).

[77] *See Mead Data*, 566 F.2d at 255 n.28. This implication derives from the majority's criticism of Judge McGowan's dissenting opinion in *Mead Data* regarding the attorney-client privilege, which the majority thought "unfortunately disregard[s] the basic fact that this case arises under the Freedom of Information Act." *Id. See also* Falcone v. IRS, 479 F. Supp. 985, 989 (E.D. Mich. 1979) (finding that under the FOIA "the privilege must be limited to communications essential to the purpose of the privilege in the agency context").

did not articulate its reasons for implying that a different balancing should occur when an attorney-client privilege problem arises under the FOIA rather than under discovery proceedings. The court stated merely that "FOIA's exemptions are to be narrowly construed."[78]

Judicial attempts to limit the privilege in light of FOIA are largely unwarranted. There is no justification for permitting plaintiffs to circumvent discovery proceedings through the FOIA[79] since the scope of Exemption 5 parallels that of the attorney-client privilege as it would be applied in discovery proceedings.[80] The tension under the FOIA between the need for confidentiality in certain relationships and the desire for openness in government is analogous to the conflict, inherent in the attorney-client privilege, between the improvement of legal representation and the free flow of information in the courtroom.[81] Consequently, the scope of the privilege should be the same under discovery and the FOIA.

## III. Sources for Deriving a Standard for Federal Agency Assertion of the Privilege

### A. *Judicial Attempts to Create a Standard for Assertion of the Privilege*

Despite repeated consideration of the issue, courts have failed to articulate a consistent test to determine the propriety of an assertion of the attorney-client privilege by agencies of the federal government. This lack of judicial consensus has resulted in inconsistent application of the attorney-client privilege to federal agencies.

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[78] 566 F.2d at 255 n.28.

[79] Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) ("Congress intended that agencies should not lose the protection traditionally afforded through the evidentiary privileges simply because of the passage of the FOIA."); *see* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975) ("The [FOI] Act is fundamentally designed to inform the public about agency action and not to benefit private litigants."); Verrazzano Trading Corp. v. United States, 349 F. Supp. 1401 (Cust. Ct. 1972) (finding that FOIA does not affect scope of discovery). *But cf.* Grolier, Inc. v. FTC, 671 F.2d 553, 556 (D.C. Cir. 1982) (holding that "in the context of an FOIA request, attorney work-product from terminated litigation remains exempt from disclosure *only when* litigation related to the terminated action exists or potentially exists") (emphasis in original).

[80] Jupiter Painting Contracting Co. v. United States, 87 F.R.D. 593, 596-97 (E.D. Pa. 1980). The *Jupiter* court stated that "[o]nly for an absolute privilege, such as attorney-client, where all claimants stand on equal footing, does FOIA consistently track the scope of discovery available against the Government." *Id.* at 597; *see* J. Moore & J. Lucas, 4 Moore's Federal Practice ¶ 26.61[4.-3], at 26,278 n.28 (2d ed. 1982) ("[T]he statute [FOIA] and the [federal] rules [of civil procedure pertaining to discovery] are near equivalents . . . .").

[81] 8 J. Wigmore, *supra* note 1, § 2291; *see supra* notes 16-20 and accompanying text.

1. Narrow Interpretation of the Privilege

In *Niemeier v. Watergate Special Prosecution Force*,[82] the plaintiff sought, pursuant to the FOIA, a copy of a memorandum written by the Counsel to the Special Prosecutor concerning the rationale behind the decision not to indict former President Nixon.[83] The United States District Court for the Northern District of Illinois held that the memorandum was exempt from disclosure under Exemption 5 of the FOIA and dismissed the complaint.[84] On appeal, however, the United States Court of Appeals for the Seventh Circuit reversed, holding that Exemption 5 was inapplicable because the memorandum was the basis of a final opinion in the adjudication of a case.[85]

The *Niemeier* court stated that the attorney-client privilege applies to communications between a government lawyer and an employer agency only "where litigation is contemplated and the document represents attorney work product."[86] This interpretation, practically limiting the attorney-client privilege to the work product privilege,[87] is highly restrictive in two ways. First, it does not extend the privilege to confidences made by agency officials to their attorneys. Second, it does not protect documents produced by attorneys while answering agency inquiries that are not made in contemplation of litigation. Furthermore, this interpretation undermines the privilege's objective of enhancing the quality of legal advice by encouraging clients to confide fully in their attorneys.[88]

2. Intermediate Interpretation of the Privilege

A somewhat more expansive interpretation of the attorney-client privilege is found in *Coastal Corp. v. Duncan*.[89] In *Coastal Corp.*, the plaintiffs sought judicial review of the validity of Department of Energy (DOE) regulations that established a procedure enabling oil refiners to pass on

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[82] 565 F.2d 967 (7th Cir. 1977), *rev'g* 420 F. Supp. 794 (N.D. Ill. 1976).

[83] *Id.* at 969.

[84] 420 F. Supp. at 795.

[85] 565 F.2d at 971-73. *See generally* Swift, *Interpretive Rules and the Legal Opinions of Government Attorneys*, 33 AD. L. REV. 425 (1981) (finding the privilege inapplicable to legal interpretations adopted by agencies).

[86] 565 F.2d at 974. Despite the language used, the court specifically noted that it was dealing with the attorney-client privilege and not the work product privilege. *Id.* at 974 n.23.

[87] *See supra* note 71 (explaining work product privilege).

[88] *See* 8 J. WIGMORE, *supra* note 1, § 2291; *supra* notes 16-20 and accompanying text.

[89] 86 F.R.D. 514 (D. Del. 1980).

*Coastal Corp.* may be said to take a broader view of the attorney-client privilege than *Niemeier* because it does not attempt to limit the attorney-client privilege to the work product privilege.

increased costs in determining the maximum legal selling price of refined petroleum.[90] During the course of discovery, the DOE claimed the attorney-client privilege for certain unidentified documents.[91] The United States District Court for the District of Delaware stated that the agency "must establish that the documents withheld under the privilege were intended to be confidential at the time they were written and were maintained as confidential since."[92]

The court's emphasis on the necessity for confidentiality imposes a heavy burden of proof on the party asserting the privilege.[93] Other courts similarly have applied a requirement that communications between the government attorney and agency officials must have been made in confidence, kept confidential, and based on confidential facts.[94] This requirement reflects the theory that confidentiality will encourage attorney-client communications.[95] Proving confidentiality, however, is a heavy burden for an agency to carry. Each agency produces a vast number of documents, and proving that any particular communication has been kept confidential both within and without the agency would be extremely difficult. Enforcement of such a sweeping burden would hamper agency operations and might deter an agency from seeking legal advice.

3. Broad Interpretation of the Privilege

In *Mead Data Central, Inc. v. United States Department of the Air Force*,[96] an action was brought to compel disclosure of documents relating to negotiations for a licensing agreement between the Air Force and West Publishing Company to use the copyrighted West key number system in a computerized legal research system.[97] The United States District Court for the District of Columbia held that the materials could not be disclosed under

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[90] *Id.* at 515.

[91] *Id.*

[92] *Id.* at 521.

[93] *See id.*

[94] *See* Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980) (noting that if facts were made known to persons who did not need to know them, there was no basis for confidentiality); Canadian Javelin, Ltd. v. SEC, 501 F. Supp. 898, 902 (D.D.C. 1980) (stating that SEC must show limited access to communication within agency for privilege to apply); Jupiter Painting Contracting Co. v. United States, 87 F.R.D. 593, 598 (E.D. Pa. 1980) (maintaining that confidentiality does not extend to information coming from outside organizational client); Community Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 68 F.R.D. 378, 382 (E.D. Wis. 1975) (finding communications based on public information not confidential).

[95] *See* 8 J. WIGMORE, *supra* note 1, §§ 2290-2291; *supra* notes 16-17 and accompanying text.

[96] 566 F.2d 242 (D.C. Cir. 1977), *rev'g* 402 F. Supp. 460 (D.D.C. 1975).

[97] *Id.* at 248.

Exemption 5 of the FOIA.[98] The United States Court of Appeals for the District of Columbia Circuit reversed, and found that the district court had improperly broadened the Exemption 5 standard.[99]

Although the court of appeals did narrow the district court's application of the attorney-client privilege, it granted a privilege significantly broader than those enunciated in *Niemeier*[100] and *Coastal Corp.*[101] The court held that if the Air Force showed that "the information on which [the documents] are based was supplied by the Air Force with the expectation of secrecy and was not known by or disclosed to any third party," the communication was privileged.[102] This standard permits freer circulation of the communication within the agency[103] than a standard based on continuing confidentiality.[104]

The *Mead Data* court's relatively broad interpretation of the privilege is still inadequate. The dissent correctly recognized that the privilege defined by the majority was unduly narrow because it did not include attorney opinions based on a client's version of negotiations with third parties.[105] This criticism is valid, as a client generally tells his attorney facts which are necessarily known to both parties to the relevant transaction.[106] The majority's standard places an unnecessarily heavy burden on an agency to prove that underlying facts are not known by a third party.[107] The dissent considered the relevant question in the case to be "not whether West is familiar with the course of negotiations between the parties, but whether the Air Force's communication with its legal counsel was confidential, *i.e.*, whether the Air Force legitimately expected that its summary of past events to its counsel would remain undisclosed."[108] This subjective test of confi-

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[98] 402 F. Supp. at 463-64.

[99] 566 F.2d at 254.

[100] 565 F.2d at 974; *see supra* notes 82-88 and accompanying text.

[101] 86 F.R.D. at 521; *see supra* notes 89-95 and accompanying text.

[102] 566 F.2d at 254. The court of appeals remanded the case to the district court for a determination of whether the information upon which the documents were based was supplied by the Air Force with the expectation of secrecy and not disclosed to a third party. *Id.*

[103] *See id.* at 253 n.24.

[104] *See supra* notes 93-95 and accompanying text.

[105] 566 F.2d at 264 (McGowan, J., dissenting).

[106] *Id.* For example, in *Mead Data* the facts underlying the communication between Air Force officials and attorneys necessarily were known by West Publishing Company, the other party to the negotiations. *Id.*

[107] *See id.*

Bast v. IRS, 78-1 U.S. Tax Cas. ¶ 9418 (D.D.C. 1978) provides an illustration of a situation in which it would be impossible for an agency to prove the absence of third party knowledge. In *Bast*, the plaintiff sought release of all IRS documents about him. The United States District Court for the District of Columbia, applying the *Mead Data* court's standard, found the attorney-client privilege inapplicable because the plaintiff, a third party to the communications between IRS officials and attorneys, knew of the information that formed the basis of the legal opinion. *Id.* at 84,103.

[108] 566 F.2d at 264 (McGowan, J., dissenting).

dentiality is more manageable than the majority's test because it does not impose the near impossible burden of proving that other parties are ignorant of the facts underlying the communication.

### B. *Analogy to the Corporate Attorney-Client Privilege*

Although the attorney-client privilege is frequently asserted by agencies of the federal government, courts have yet to articulate a test that effectively determines the scope of the privilege.[109] In contrast, courts have developed several useful tests to delineate the dimensions of the attorney-client privilege in the corporate context.[110] Because of the structural similarities between corporate and government entities, an examination of these judicially-crafted tests is valuable.[111] In the corporate context courts have most frequently applied the control group test[112] and the subject matter test.[113]

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[109] *See supra* notes 82-108 and accompanying text. *But cf. Mead Data*, 566 F.2d at 252-54 (attempting to define the scope of the privilege); United States v. AT&T Co., 86 F.R.D. 603, 612-36 (D.D.C. 1979) (setting standards for application of the privilege to both the federal government and a corporation in discovery proceedings in major antitrust case).

[110] *See infra* notes 112-35 and accompanying text. An additional test has been devised for use in shareholders' derivative actions. *See* Garner v. Wolfinbarger, 430 F.2d 1093, 1103-04 (5th Cir. 1970) (holding "availability of the [attorney-client] privilege . . . subject to the right of the stockholders to show cause why it should not be invoked"), *cert. denied*, 401 U.S. 974 (1971). For a general discussion of the corporate attorney-client privilege, see 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 503(b)[04] (1981); Block & Barton, *Internal Corporate Investigations: Maintaining the Confidentiality of a Corporate Client's Communications with Investigative Counsel*, 35 BUS. LAW. 5 (1979); Simon, *supra* note 19; Note, *supra* note 20; Comment, *The Corporate Attorney-Client Privilege: Alternatives to the Control Group Test*, 12 TEX. TECH. L. REV. 459 (1981).

[111] There are many similarities between governments and corporations. *See* Latham, *The Body Politic of the Corporation*, in THE CORPORATION IN MODERN SOCIETY 218 (E. Mason ed. 1960). Both are large, hierarchical organizations that often have many different branches. For the lawyer employed by a corporation, as well as for the federal government lawyer, identifying the client is often difficult. *See* Forrow, *The Corporate Law Department Lawyer: Counsel to the Entity*, 34 BUS. LAW. 1797, 1799 (1979). Most important for purposes of this Note, however, both governments and corporations frequently need legal advice requiring communication with lawyers. To obtain necessary legal advice, both governments and large corporations maintain legal counsel. These attorneys must be assured a certain degree of confidentiality to render effective legal advice and conduct investigations. *See* Upjohn Co. v. United States, 449 U.S. 383, 390-97 (1981).

[112] *See infra* notes 114-25 and accompanying text.

[113] *See infra* notes 126-35 and accompanying text.

1. The Demise of the Control Group Test: *Upjohn Co. v. United States*

Until the recent unanimous United States Supreme Court decision in *Upjohn Co. v. United States*[114] invalidated the control group test, it was the most common test used by federal courts to determine the applicability of the attorney-client privilege in the corporate context.[115] Under this standard, a communication was privileged "if the employee making the communication . . . [was] in a position to control or even to take a substantial part in a decision about any action which the corporation [might] take upon the advice of the attorney."[116]

In *Upjohn*, independent accountants informed the petitioner, Upjohn Company, that a foreign subsidiary had made payments to foreign government officials to secure business.[117] As a result, Upjohn requested that its attorneys conduct an internal investigation of the matter.[118] Reports of the investigation were submitted voluntarily to the SEC and the IRS.[119] The IRS subsequently issued a summons demanding production of the answers to questionnaires that Upjohn's attorneys sent to its foreign offices.[120] When Upjohn refused to submit the questionnaires, claiming protection of the attorney-client privilege, the IRS sought enforcement of the summons in federal court and won in both the district court[121] and the court of appeals.[122] The United States Court of Appeals for the Sixth Circuit ordered disclosure, finding that the communications were made by Upjohn employ-

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[114] 449 U.S. 383 (1981). For general commentary on *Upjohn*, see Nath, Upjohn: *A New Prescription for the Attorney-Client Privilege and Work Product Defenses in Administrative Investigations*, 30 BUFFALO L. REV. 11 (1981); Stern, *Attorney-Client Privilege: Supreme Court Repudiates the Control Group Test*, 67 A.B.A. J. 1142 (1981); Comment, Upjohn Co. v. United States: *A Functional Expansion of the Attorney-Client Privilege*, 67 IOWA L. REV. 161 (1981); Note, *The Implications of* Upjohn, 56 NOTRE DAME LAW. 887 (1981).

[115] The test may have continued significance for the narrow purpose of examining the privilege's applicability to government agencies because cases discussing the scope of the attorney-client privilege to be applied to government entities have drawn analogies to the control group test used in the corporate context. *See* Sterling Drug, Inc. v. Harris, 488 F. Supp. 1019, 1025 (S.D.N.Y. 1980); Hearn v. Rhay, 68 F.R.D. 574, 579 (E.D. Wash. 1975).

[116] City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa.), *mandamus denied sub nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963).

[117] 449 U.S. at 386.

[118] *Id.* at 386-87.

[119] *Id.* at 387.

[120] *Id.* at 387-88.

[121] 78-1 U.S. Tax Cas. ¶ 9437 (W.D. Mich. 1978) (adopting Magistrate's Report and Recommendation, 78-1 U.S. Tax Cas. ¶ 9277 (W.D. Mich. 1978)), *aff'd in part and rev'd in part*, 600 F.2d 1223 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981).

[122] 600 F.2d 1223 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981).

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*Upjohn Co. v. United States*

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ees who were not responsible for directing the corporation's response to legal advice.[123]

The Supreme Court reversed, finding that the control group test "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation."[124] Although it invalidated the control group test, the Court failed to adopt an alternate test.[125] The Court's decision left the subject matter test intact.

2. The Subject Matter Test

Since *Upjohn*, the subject matter test is the only viable test for delineating the corporate attorney-client privilege under Federal Rule of Evidence 501. This test provides that an employee's communication to a corporate attorney concerning the performance of the employee's duties is privileged if made at the direction of a corporate superior.[126] Under the subject matter test, disclosures made by lower-ranking employees to corporate attorneys are not automatically beyond the protection of the attorney-client privilege.[127] The subject matter test thus provides a more realistic approach than the control group test to the problems encountered by corporate counsel investigating a legal matter involving a lower-ranking employee.

The subject matter test, however, is not without its own opposition. Critics contend that through its liberal protection of corporate employees, the

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[123] *Id.* at 1225.

[124] 449 U.S. at 392.

[125] *Id.* at 386. Ironically, the Court stated that the control group test was not precise enough for attorneys and clients to know with certainty whether a communication was privileged. *Id.* at 393. Chief Justice Burger's concurring opinion stated that he would have preferred to have explicitly adopted the subject matter test, making it law that "a communication is privileged at least when . . . an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment." *Id.* at 403 (Burger, C.J., concurring). One commentator contends that the Court in *Upjohn* implicitly adopted the test laid down in Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1978) (en banc) (*aff'g in part and rev'g in part prior panel decision*). Note, *supra* note 114, at 892-94. *See generally infra* notes 130-32 and accompanying text (discussing *Diversified*).

[126] Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970), *aff'd mem. by an equally divided court*, 400 U.S. 348 (1971).

[127] For example, if the control group test was applied to statements by a corporation truck driver to a lawyer employed by the corporation concerning an accident the driver had been in, the statements would be discoverable because the driver would not take part in a decision the corporation might make based on the attorney's advice. Under the subject matter test, however, this would probably not result because the subject of the communication would be within the driver's scope of employment and the driver would be speaking to the lawyer at his employer's request.

subject matter test may create a barrier to discoverable information.[128] This potential zone of silence could be realized if a corporation directed its employees to funnel communications through corporate attorneys so that the communications would become privileged.[129] To prevent this potential abuse of the attorney-client privilege, courts have devised two variations of the subject matter test.

In the first variation, the United States Court of Appeals for the Eighth Circuit, in *Diversified Industries, Inc. v. Meredith*,[130] modified the subject matter test to include the requirements that a superior direct an employee to communicate with corporate attorneys only for the purpose of securing legal advice for the corporation and that the communication be kept confidential within the group of persons in the corporate structure who "need to know its contents."[131] By making the applicability of the privilege dependent upon the purpose of the communication—securing legal advice—the *Diversified* court merely affirmed a precept that has been clearly recognized as central to the privilege.[132]

A second variation of the subject matter test more effectively states the purpose that a communication must have to be privileged. In *In re Ampicillin Antitrust Litigation*,[133] the United States District Court for the District of Columbia held that a privileged communication did not have to be made at the direction of corporate superiors, but rather must be "*reasonably believed to be necessary to the decision-making process* concerning a problem on which legal advice was sought."[134] The *Ampicillin* test improves the basic subject matter test because it prevents corporations from inappropriately protecting information by ordering employees to direct all business reports to corporate attorneys.[135]

## IV. A Proposed Test for Federal Agency Assertion of the Attorney-Client Privilege

The federal government must seek legal advice more often than corporations or individuals, for the government must not only obey the law, it must formulate and enforce it. It is therefore important that courts avoid applying

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[128] Comment, *supra* note 110, at 466.

[129] *See* Note, *The Attorney-Client Privilege—Identifying the Corporate Client*, 48 FORDHAM L. REV. 1281, 1288 (1980).

[130] 572 F.2d 596, 609 (8th Cir. 1978) (en banc) (*aff'g in part and rev'g in part prior panel decision*).

[131] *Id.*

[132] *See* 8 J. WIGMORE, *supra* note 1, §§ 2294-2299; Nath, *supra* note 114, at 29 n.66 & 49 n.130.

[133] 81 F.R.D. 377 (D.D.C. 1978).

[134] *Id.* at 385 (emphasis in original).

[135] *See* Note, *Privileged Communications—Inroads on the "Control Group" Test in the Corporate Area*, 22 SYRACUSE L. REV. 759, 766 (1971); *supra* notes 128-29 and accompanying text.

an overly constricted attorney-client privilege to the government because such a privilege might deter agencies from seeking essential legal advice. It is equally important that courts consistently enforce an effective test for determining the scope of the attorney-client privilege to government entities. If courts give agency officials clear guidance regarding the types of communications protected by the attorney-client privilege, agency officials will more frequently and candidly consult their attorneys. Ultimately, the agency will receive both a more accurate interpretation of its legislative mandate and a better formulation of regulations with which to carry out statutory requirements.

Moreover, enforcement of a very broad privilege, or imprecise application of a sufficiently narrow one, would contravene the policies underlying the FOIA and discovery proceedings. Both the FOIA and discovery rules are based on the belief that indiscriminate secrecy in certain circumstances is contrary to public policy. In enacting the FOIA, Congress expressly limited agencies' abilities to withhold all their materials from inspection by the public.[136] The FOIA reflects Congress' perception that government operations will benefit from close public scrutiny.[137] Federal Rules of Civil Procedure 26 through 37, pertaining to discovery, reflect a similar idea. They were adopted to "make a trial less a game of blindman's buff [sic] and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[138] If the attorney-client privilege is construed too broadly in the government context these aims will be frustrated, for agencies will be able to shield information by simply routing it through their attorneys.[139]

This Note proposes a test for ascertaining the validity of an assertion of the attorney-client privilege by a government agency. The test is formulated to encompass the unique circumstances in which the federal government attorney works.[140] A corollary is also necessary because attorneys may have more than one agency as their client.[141] In defining the scope of the privilege, the basic test and its corollary attempt to accommodate competing policy considerations[142] by permitting agency officials to consult with attorneys about matters within the scope of the official's duties without fear of disclosure, while simultaneously preventing agencies from using their attorneys to shield materials.

The basic test, applicable to attorneys employed by a single agency, may be stated as follows:

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[136] *See* 5 U.S.C. § 552(c) (1976) ("This section does not authorize withholding of information or limit the availability of records to the public, except as specifically [exempted].").

[137] *See* 1 K. DAVIS, *supra* note 8, § 5:45.

[138] United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958).

[139] *See supra* notes 128-29 and accompanying text.

[140] *See supra* notes 32-57 and accompanying text.

[141] *See supra* notes 48-57 and accompanying text.

[142] *See supra* notes 19-20 and accompanying text.

(1) When an attorney licensed to practice in any state or the District of Columbia (2) is employed by an agency of the federal government as a legal adviser, (3) any communication made between the attorney and any employee (4) concerning a legal problem that the initiator of the communication reasonably believes to be necessary to the decision-making process[143] (5) employed to fulfill that agency's public interest function,[144] and (6) that is related to the performance by the nonlegal employee of the duties of his employment,[145] (7) shall be protected from judicially ordered disclosure, (8) provided that the communication shall have been made in confidence,[146] and (9) kept confidential within the agency.[147]

When an attorney is employed by a cluster of clients within the federal government, it is necessary to apply a corollary to the basic test:

(1) When in fulfilling the duties of his employment, (2) a government lawyer is instructed by superiors, (3) acting under the laws of the United States,[148] (4) to serve as an attorney for another agency,[149] and (5) there is a substantial identity of legal interest between the agencies in the particular matter,[150] (6) any communication between the attorney and the other agency shall be protected from judicially ordered disclosure, (7) provided that the basic test is satisfied.

The proposed test solves the problem of client identification by finding that the client of a federally employed attorney is the agency for which the attorney works, so long as any attorney-client communications are addressed to fulfilling the agency's public interest function.[151] The test also provides that a federal attorney may have more than one client when he is lawfully assigned to provide legal services to another agency and there is an identity of legal interest between the two agencies.[152]

Borrowing from the corporate context, the proposed test uses the *Ampicillin*[153] standard to render a communication privileged only when the agency employee reasonably believes the communication relates to the decision-making process concerning the problem for which legal advice was sought. This element of the test should prevent agencies from misusing the privilege to prevent disclosure of information by channeling it through their

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[143] *See Ampicillin*, 81 F.R.D. at 385.

[144] *See supra* note 47.

[145] *See supra* notes 126-35 and accompanying text.

[146] *See supra* notes 25-27 and accompanying text.

[147] *See Diversified*, 572 F.2d at 609; Canadian Javelin, Ltd. v. SEC, 501 F. Supp. 898, 902 (D.D.C. 1980).

[148] The Justice Department, for example, handles litigation for other agencies. 5 U.S.C. § 3106 (1976).

[149] *See id.*; United States v. AT&T Co., 86 F.R.D. 603, 616 (D.D.C. 1979).

[150] United States v. AT&T Co., 86 F.R.D. 603, 617 (D.D.C. 1979).

[151] *See supra* notes 32-57 and accompanying text.

[152] *See supra* notes 48-57 and accompanying text.

[153] *See* 81 F.R.D. at 385.

attorneys.[154] At the same time, the reasonable belief criterion permits agency officials to consult with agency attorneys without fear of disclosure of information concerning legal questions arising in the course of their work. Such a standard balances competing considerations by providing the agency with a partial screen to ensure that its employees will fully discuss legal problems with its attorneys, while preventing the agency from shielding otherwise unprivileged material by filtering it through its attorneys.[155]

The test requires that attorney-client communications be made in confidence—with the intention and reasonable expectation that the information will not be disclosed by either party. This does not mean that the information must be confidential in the sense that it is known only to the individual making the disclosure.[156] The test does require, however, that the information remain confidential within the agency. For a communication to be considered confidential in this context, the information must have been exchanged by persons who learned of it in the course of their employment.[157] This aspect of the test imposes a reasonable burden of proof on the agency invoking the privilege; the agency must make a reasonable showing of confidentiality to justify the privilege, but it is not required to prove that no outside party knows of the information.

## V. Conclusion

With the increasing amount of litigation directed against the federal government, much of it involving the FOIA, it is incumbent upon the courts to adopt a workable test for applying the attorney-client privilege to the federal government. Absent such a test, courts will continue to render conflicting and murky decisions. Furthermore, fearing compelled disclosure, agencies may fail to seek essential legal advice.

This Note has proposed a test which, if applied consistently, will aid both agencies and courts. The proposed test addresses issues that confront courts in both discovery and FOIA cases. The test guides courts on the troublesome issues of client identity, confidentiality, and privileged subject matter in the government context. Through consistent application of the test, agencies will be able to plan their actions, and courts will be better able to balance the public's desire for information with the sometimes competing government desire to keep that information confidential.

Ronald I. Keller

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[154] *See supra* notes 128-29 & 133-35 and accompanying text.
[155] *See supra* notes 133-35 and accompanying text.
[156] *See supra* notes 25-27 and accompanying text.
[157] *See supra* notes 145-47 and accompanying text.

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# 1152067 - KIRSNER,MATTHEW

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| Number of Requests in Group: | 2 | |
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| Date and Time Printing Started: | 07/23/96 | 03:14:21 pm (Central) |



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Client Identifier: **MK**
Date of Request: 07/23/96
The Current Database is CTA8
Your Terms and Connectors Query:

"COMMON INTEREST" "JOINT DEFENSE AGREEMENT" & "ATTORNEY-CLIENT PRIVILEGE" & DA(AFT 1/1/1980)

Your Locate Request:

"JOINT DEFENSE"

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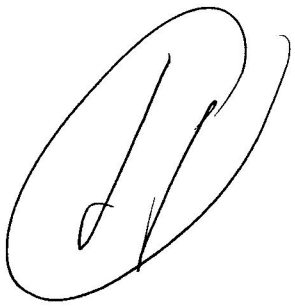
**From:** Matt Kirsner
**To:** BKAVAN
**Date:** 7/15/96 5:49pm
**Subject:** The evidence codes of many States . . . -Reply

I ran a search (using the terms supplied) and found one 4th Cir. case involving GJ subpoenas and joint defense privilege (common interest rule). I'll bring you the copy. No state cases were immediately found.

**From:** Brett Kavanaugh
**To:** MKIRSNER
**Date:** 7/15/96 3:12pm
**Subject:** The evidence codes of many States . . .

provide that the common interest rule applies to communications to lawyers "representing another party in a pending action" and having a common intererst. Does the pending action include gradn jury proceedings? Perhaps you can type in the quoted language along withe, maybe, "evidence" and "common interest" and "grand jury" in the ALLSTATES library and tell me what you find. Thanks.



SOURCE OF CASES ON G.J. + "COMMON INTEREST"



**Curburna HICKS**
**v.**
**COMMONWEALTH of Virginia.**

**Record No. 1546-92-2.**

Court of Appeals of Virginia.

Jan. 11, 1994.

Defendant was convicted in the Circuit Court, City of Richmond, James M. Lumpkin, J., of possession of heroin. Defendant appealed. The Court of Appeals, Barrow, J., held that attorney-client privilege protected defendant's communication to accomplice's attorney.

Reversed and remanded.

**[1] ATTORNEY AND CLIENT⚿ 32(13)**
45⚿32(13)
Attorney may not divulge professional confidence made by client.

**[2] WITNESSES⚿ 198(1)**
410⚿198(1)
Attorney-client privilege extends to communications among codefendants and their attorneys when engaged in consultation about defense.

**[3] WITNESSES⚿ 198(1)**
410⚿198(1)
Attorney-client privilege applies to statement by defendant who is present without attorney at conference with others charged with same crimes.

**[4] WITNESSES⚿ 199(1)**
410⚿199(1)
Attorney-client privilege shielded defendant's communications to accomplice's attorney, even though defendant and accomplice were not charged with conspiracy and were not jointly indicted.

**[5] WITNESSES⚿ 219(3)**
410⚿219(3)
Presence of unrepresented third party at defendant's meeting with accomplice's attorney and accomplice did not waive attorney-client privilege as to defendant's statement to accomplice's attorney; although third party was not charged, she was with defendant and accomplice in apartment with drugs during search and was potential codefendant.

**[6] CRIMINAL LAW⚿ 1043(3)**
110⚿1043(3)
Issue concerning application of attorney-client privilege to defendant's statement to accomplice's attorney was preserved by objection based on policy under Miranda rulings and ethical canons addressing the issue, even though defendant did not expressly state that objection was based on attorney-client privilege.

****415 *536** Esther J. Windmueller, Asst. Public Defender (David J. Johnson, Richmond Public Defender, on brief), for appellant.

Kathleen B. Martin, Asst. Atty. Gen. (Stephen D. Rosenthal, Atty. Gen., on brief), for appellee.

Present: BARROW, BENTON and COLEMAN, JJ.

BARROW, Judge.

In this criminal appeal, the defendant contends that an incriminating statement he made to an accomplice's attorney was inadmissible because it was a privileged communication with the attorney. We hold that the defendant's communication to the attorney was privileged and was not admissible into evidence without the defendant's waiver of the privilege.

During a search of the accomplice's apartment, the police found the defendant, the accomplice and a third person in the kitchen. When found, the accomplice was trying to stuff a paper bag behind a washing machine. The bag contained money and heroin. The defendant, who was standing five feet from the accomplice, was searched and found to have heroin in his coat pocket. The police charged the defendant with possession of heroin with the intent to distribute. The police also charged the accomplice, who later pleaded guilty to possession of heroin.

After a public defender was appointed to represent the defendant, the accomplice's attorney requested that the defendant meet with him and the accomplice. The defendant went, without his appointed attorney, to the office of the accomplice's attorney. [FN1] The defendant testified that he went to the meeting voluntarily and with the expectation that the accomplice's attorney and his own attorney

would be working on the case together. At trial, the attorney testified that during the meeting the defendant admitted that the heroin in the bag belonged to him.

> FN1. A lawyer is prohibited from communicating "with a party he knows to be represented by a lawyer ... unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so." DR 7-103. We are unable to determine in this case if the accomplice's attorney violated this disciplinary rule, nor are we required to do so. However, our failure to so conclude should not be construed as approval of the attorney's action.

***537** [1][2][3] An attorney may not divulge a professional confidence made to him by his client. Commonwealth v. Edwards, 235 Va. 499, 508-09, 370 S.E.2d 296, 301 (1988). This privilege extends to communications among co- defendants and their attorneys when engaged in consultation about their defense. Chahoon v. Commonwealth, 62 Va. (21 ****416** Gratt.) 822, 836- 42 (1871). It is "natural and reasonable, if not necessary, that ... parties, ... charged with the same crimes, should meet together in consultation with their counsel, communicate to the latter all that might be deemed proper for them to know, and to make all necessary arrangements for the defence." Id. at 839. "[I]t follows as a necessary consequence, that all the information, derived by any of the counsel from such consultation, is privileged, and the privilege belongs to each and all of the clients, and cannot be released without the consent of all of them." Id. at 842. This rule applies even to a defendant present at such a conference without his attorney. See id. at 839.

This privilege has not been overruled or discarded; on the contrary, it has been reaffirmed. In a recent case arising in Virginia, the Fourth Circuit recognized the continued vitality of the "common interest rule." In re Grand Jury Subpoenas, 89-3 and 89-4, John Doe 89-129, 902 F.2d 244, 249 (4th Cir.1990). Whether an action is civil or criminal, potential or actual, whether the commonly interested parties are plaintiffs or defendants, "persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims." Id.; see also In the Matter of Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 126 (3d Cir.1986); United States v. Bay State Ambulance and Hosp. Rental Service, Inc., 874 F.2d 20, 28 (1st Cir.1989); United States v. McPartlin, 595 F.2d 1321, 1336 (7th Cir.), cert. denied, 444 U.S. 833, 100 S.Ct. 65, 62 L.Ed.2d 43 (1979).

Although the defendants in Chahoon were charged with a conspiracy and had been indicted jointly, the principle recognized in Chahoon is not limited to prosecutions for conspiracies or to persons charged in a joint indictment. The court did not rest its decision on either of these circumstances. Chahoon, 62 Va. (21 Gratt.) at 841 (defendant appealed convictions for forging and uttering for which the defendants were severally indicted). Instead, the court spoke of the need for such a privilege among persons charged with the same crime and grounded its decision on the need of such persons to consult together about their defense and the futility of such consultation without the protection offered ***538** by the privilege. Id. at 842. See also In re Grand Jury Subpoenas, 902 F.2d at 249.

[4] The police charged the defendant and the accomplice with the same crime and each was represented by counsel. The defendant, having not been advised otherwise, reasonably may have thought that he, the accomplice and their attorneys were mutually engaged in the defense of both him and his accomplice. Therefore, the defendant's communications to his accomplice's attorney were shielded by the attorney-client privilege, even though they were not charged with a conspiracy and were not jointly indicted.

[5] The presence of another, unrepresented third party at the meeting does not waive the defendant's privilege in this case. Here, the third party, though ultimately not charged, was with the defendant and the accomplice in the apartment with the drugs when the police searched. Thus, she was a potential co-defendant and shared an interest in a common defense effort.

[6] The defendant's objection to the admissibility of the attorney's testimony, although failing to refer the trial judge to any specific authority or to expressly articulate the problem as one of attorney-client privilege, was sufficient to permit our review of the issue on appeal. An objection "is sufficient ... if 'at the time the ruling or order of the court is made or sought, [a party] makes known to the court the

action which he desires the court to take or his objections to the actions of the court and his grounds therefor.' " Campbell v. Commonwealth, 12 Va.App. 476, 480, 405 S.E.2d 1, 2 (1991) (en banc ).

The Attorney General attacks only the adequacy of the defendant's description of his grounds for the objection. The defendant objected before the attorney testified, asking that he not be permitted to testify concerning what the defendant said to him at the meeting. Thus, the objection was made timely, and the action the defendant sought ****417** and the basic grounds for the action were clear.

The defendant's attorney based the objection on "the policy under the Miranda rulings and under the ethical canons that address this kind of issue." While she did not expressly state that the objection was based on the attorney-client privilege, the objection concerned the professional role of the accomplice's attorney and the defendant's need to consult with his attorney, concerns that also underlie the application of the attorney-client privilege. The application of the privilege ***539** infrequently occurs in this context, as is demonstrated by the absence of any reported appellate decision in Virginia concerning this issue in over one hundred years. The trial judge understood what was being asked of him and knowingly ruled on the issue. We hold that the objection of the defendant's attorney sufficiently preserved the issue for consideration on appeal.

Finally, this error was not harmless. Prejudice is evident from the trial judge's explicit statement that he disbelieved the defendant's testimony insofar as it conflicted with the attorney's testimony.

For these reasons, we conclude that the trial court erred in admitting the evidence of the defendant's statement to his accomplice's attorney. The judgment of conviction is, therefore, reversed, and the proceeding is remanded for a new trial.

Reversed and remanded.

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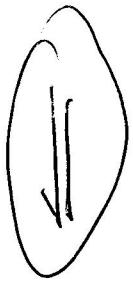

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Note, The A-C Privilege . . .., 8 Columbia Journal of Law & Social Problems 179 (1972) (X)
Comment, Fed Rules of Evidence . . ., 15 wayne L. Rev. 1287 (1969) (X)
Note, Waiver of . . ., 63 Yale LJ 1030 (1954) (X)

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