pose.... "). On disaffirming opinion letters and the like, see id., Comment ¶ [15] (" ... Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like"). See also N.Y. Code Prof. Resp., DR 4-101(C)(5) (1990) (lawyer may disclose confidential client information "to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information"); ABA Formal Opinion 92-366 (1992), cited in Reporter's Note to Comment *b*; N.Y. Cty. Ethics Opin. 686 (1991); § 98, Comment *d*, and Reporter's Note thereto.

Comment k. Effects of a lawyer taking or not taking discretionary remedial action. See generally § 66, Comment *g*, and Reporter's Note thereto. See also Fahnestock & Co. v. Castelazo, 741 F.Supp. 72, 76 (S.D.N.Y.1990) (under New York law, in absence of special relationship between plaintiff and defendant law firm, latter had no duty to warn plaintiff securities dealer of fraud of client guardian, which caused dealer to incur liability to beneficiaries); cf., e.g., L & H Airco, Inc. v. Rapistan Corp., 446 N.W.2d 372 (Minn.1989) (lawyer who knew of close relationship between arbitrator and client not liable to opposing party in arbitration for not disclosing relationship to that party).

TOPIC 2. THE ATTORNEY-CLIENT PRIVILEGE

TITLE A. THE SCOPE OF THE PRIVILEGE

Introductory Note

Section

68. Attorney-Client Privilege
69. ___ "Communication"
70. ___ "Privileged Persons"
71. ___ "In Confidence"
72. ___ Legal Assistance as the Object of a Privileged Communication

TITLE B. THE ATTORNEY-CLIENT PRIVILEGE FOR ORGANIZATIONAL AND MULTIPLE CLIENTS

73. The Privilege for an Organizational Client
74. The Privilege for a Governmental Client
75. The Privilege of Co-Clients
76. The Privilege in Common-Interest Arrangements

TITLE C. DURATION OF THE ATTORNEY-CLIENT PRIVILEGE; WAIVERS AND EXCEPTIONS

Introductory Note

TITLE A. THE SCOPE OF THE PRIVILEGE

Introductory Note: This Topic examines the attorney-client testimonial privilege. This Title generally defines the privilege and supplies important elaboration and limitations.

Every American jurisdiction provides—either by statute, evidence code, or common law—that generally neither a client nor the client's lawyer may be required to testify or otherwise to provide evidence that reveals the content of confidential communications between client and lawyer in the course of seeking or rendering legal advice or other legal assistance. The privilege stands in the law of evidence alongside other occupational privileges, particularly the doctor-patient privilege and the priest-penitent privilege. Decisional law has interpolated limitations on the privilege, making it one of the most technical of evidentiary doctrines.

The nuances of the rules reflect the tension between the policy of protecting confidential client communications and the policy of requiring every person to give relevant testimony and other evidence when called upon to do so in an official proceeding (see § 68, Comment *c*).

Modern privilege rules also reflect the profound alterations of litigation brought about by the introduction of broad pretrial discovery and felt need for greater accountability and openness in private and public institutions, demands that are hostile to broad claims of secrecy.

§ 68. Attorney–Client Privilege

Except as otherwise provided in this Restatement, the attorney-client privilege may be invoked as provided in § 86 with respect to:

(1) a communication

(2) made between privileged persons

(3) in confidence

(4) for the purpose of obtaining or providing legal assistance for the client.

Comment:

a. Scope and cross-references. This Section states the general formulation of the attorney-client testimonial privilege. It must be read in the context of succeeding Sections that elaborate its four elements: § 69, defining types of communications protected by the privilege; § 70, delineating the privileged persons who may be the source of or receive privileged communications; § 71, defining the requirements of "in confidence"; and § 72, specifying that legal assistance be the purpose of the communication. Applications of the rule with respect to organizational and multiple clients are set out in Title B. The privilege is subject to a number of important waivers, exceptions, and extensions set out in Title C. On invoking the protection of the privilege, see § 86. The legal duty of a lawyer to keep client information confidential is examined in Topic 1.

b. Relationship to other confidentiality principles. The attorney-client privilege and its underlying policies have influenced such related rules as the work-product immunity (see Topic 3), the lawyer's duties respecting confidential client information (see Topic 1), and the immunities of lawyers and clients for injurious statements made in the course of a judicial proceeding (see § 57(1)).

c. Rationale supporting the privilege. The modern attorney-client privilege evolved from an earlier reluctance of English courts to require lawyers to breach the code of a gentleman by being compelled to reveal in court what they had been told by clients. The privilege, such as it was then, belonged to the lawyer. It was a rule congenial with the law, which prevailed in England until the mid–19th century, that made parties to litigation themselves incompetent to testify,

whether called as witnesses in their own behalf or by their adversaries. The modern conception of the privilege, reflected in this Restatement, protects clients, not lawyers, and clients have primary authority to determine whether to assert the privilege (see § 86) or waive it (see §§ 78–80).

The rationale for the privilege is that confidentiality enhances the value of client-lawyer communications and hence the efficacy of legal services. The rationale is founded on three related assumptions. First, vindicating rights and complying with obligations under the law and under modern legal processes are matters often too complex and uncertain for a person untrained in the law, so that clients need to consult lawyers. The second assumption is that a client who consults a lawyer needs to disclose all of the facts to the lawyer and must be able to receive in return communications from the lawyer reflecting those facts. It is assumed that, in the absence of such frank and full discussion between client and lawyer, adequate legal assistance cannot be realized. Many legal rules are complex and most are fact-specific in their application. Lawyers are much better situated than nonlawyers to appreciate the effect of legal rules and to identify facts that determine whether a legal rule is applicable. Full disclosure by clients facilitates efficient presentation at trials and other proceedings and in a lawyer's advising functions.

The third assumption supporting the privilege is controversial—that clients would be unwilling to disclose personal, embarrassing, or unpleasant facts unless they could be assured that neither they nor their lawyers could be called later to testify to the communication. Relatedly, it is assumed that lawyers would not feel free in probing client's stories and giving advice unless assured that they would not thereby expose the client to adverse evidentiary risk. Those assumptions cannot be tested but are widely believed by lawyers to be sound. The privilege implies an impairment of the search for truth in some instances. Recognition of the privilege reflects a judgment that this impairment is outweighed by the social and moral values of confidential consultations. The privilege provides a zone of privacy within which a client may more effectively exercise the full autonomy that the law and legal institutions allow.

The evidentiary consequences of the privilege are indeterminate. If the behavioral assumptions supporting the privilege are well-founded, perhaps the evidence excluded by the privilege would not have come into existence save for the privilege. In any event, testimony concerning out-of-court communications often would be excluded as hearsay, although some of it could come in under exceptions such as that for statements against interest. The privilege also precludes an abusive litigation practice of calling an opposing lawyer as a witness.

Some judicial fact findings undoubtedly have been erroneous because the privilege excluded relevant evidence. The privilege creates tension with the right to confront and cross-examine opposing witnesses. It excuses lawyers from giving relevant testimony and precludes full examination of clients. The privilege no doubt protects wrongdoing in some instances. To that extent the privilege may facilitate serious social harms. The crime-fraud exception to the privilege (see § 82) results in forced disclosure of some such confidential conversations, but certainly not all.

Suggestions have been made that the privilege be conditional, not absolute, and thus inapplicable in cases where extreme need can be shown for admitting evidence of attorney-client communications. The privilege, however, is not subject to ad hoc exceptions. The predictability of a definite rule encourages forthright discussions between client and lawyer. The law accepts the risks of factual error and injustice in individual cases in deference to the values that the privilege vindicates.

d. Source of the law concerning the privilege. In most of the states, the privilege is defined by statute or rule, typically in an evidence code; in a few states, the privilege is common law. In the federal system, the definition of the privilege is left to the common-law process with respect to issues on which federal law applies. Federal Rule of Evidence 501 provides generally that questions of privilege "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." On elements of a claim or defense as to which state law supplies the rule of decision, however, Rule 501 provides that the federal courts are to apply the attorney-client privilege of the relevant state.

REPORTER'S NOTE

The general definition of the attorney-client privilege set out in this Section differs only slightly from other general formulations put forward in recent decades. E.g., Unif. R. Evid. 502(b) (1974) ("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"); Proposed Supreme Court Rule 503 (1972). See also, e.g., Fla. Stats. § 90.502 (1981); N.Y. Civ. Pract. L. & R. 4503 (McKinney 1963).

This Section and succeeding Sections differ in some respects from the earlier formulation adopted by the Institute in its Model Code of Evidence §§ 209–213 (1942) as revised in the Uniform Rules of Evidence (1953). Those differences relate to specific applications and exceptions, which are noted in following Sections.

The history of the attorney-client privilege is traced in, e.g., 8 J. Wig-

more, Evidence § 2290 (J. McNaughton rev.1961); 1 C. McCormick, Evidence § 87 (J. Strong 4th ed.1992); Morgan, Foreword, Model Code of Evidence 24–25 (1942); P. Rice, Attorney–Client Privilege in the United States ch. 1 (1993); Hazard, An Historical Perspective on the Attorney–Client Privilege, 66 Calif. L. Rev. 1061 (1978). For the current state of the law in England and other cognate jurisdictions, see, e.g., J. Buzzard, R. May & M. Howard, Phipson on Evidence 294–312 (13th ed.1982); R. Cross & C. Tapper, Evidence 388–402 (6th Ed.1985); Partlett, Attorney–Client Privilege, Professions, and the Common Law Tradition, 10 J. Leg. Prof. 9 (1985).

Comment c. Rationale supporting the privilege. See generally C. Mueller & L. Kirkpatrick, Modern Evidence § 5.8 (1995); P. Rice, Attorney–Client Privilege in the United States § 2.3 (1993); 8 J. Wigmore, Evidence § 2291 (J. McNaughton rev.1961); 1 C. McCormick, Evidence § 87 (J. Strong 4th ed.1992); C. Wolfram, Modern Legal Ethics § 6.1 (1986). Courts frequently have asserted the argument that the privilege furthers societal interests in law compliance and the vindication of legal rights by encouraging full disclosure by clients te their lawyers that would not occur in the absence of the privilege. E.g., Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981); Trammel v. United States, 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980) (dicta); Fisher v. United States, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976); In re Vanderbilt (Rosner–Hickey), 439 N.E.2d 378, 383–84 (N.Y.1982).

The rationale based on the social desirability of encouraging communication by the lawyer to the client is a minor theme in the decisions, probably because it is typically relevant only in cases dealing with the narrow question of the application of the privilege to a lawyer's communications to a client. E.g., In re LTV Securities Litigation, 89 F.R.D. 595, 602–03 (N.D.Tex.1981); State ex rel. Great American Ins. Co. v. Smith, 574 S.W.2d 379, 384–85 (Mo.1978).

The rationale for the attorney-client privilege was subjected to searching critical analysis in Professor Edmund M. Morgan's Foreword to the Institute's Model Code of Evidence 25–28 (1942). Other scholars, both before and after Professor Morgan's work for the Institute, have questioned the assumptions underlying the privilege and the reach of its doctrine. E.g., 7 Jeremy Bentham's Works 473–75 (J. Bowring ed. 1843); Radin, the Privilege of Confidential Communication between Lawyer and Client, 16 Calif. L. Rev. 487, 491–93 (1928); Gardner, A Reevaluation of the Attorney–Client Privilege, 8 Vill. L. Rev. 279 (1963); Krattenmaker, Testimonial Privileges in Federal Courts, 62 Geo. L.J. 61, 85 (1973) (asserting that most evidence experts would agree that "testimonial privileges are mere bothersome exclusionary rules, born of competing professional jealousies, that impede the accuracy of fact finding and serve no other important societal goals"); M. Frankel, Partisan Justice 64–66 (1980); Frankel, The Search for Truth Continued: More Disclosure, Less Privilege, 54 U. Colorado L. Rev. 51, 60–63 (1982). See also Hazard, An Historical Perspective on the Attorney–Client Privilege, 66 Calif. L. Rev. 1061 (1978).

The only known empirical study of the privilege concludes that lawyers

are more likely than nonlawyers to believe that the privilege encourages client disclosures and that most nonlawyers are unaware of the privilege or erroneously assume that it extends to communications with a large number of other professionals as well. Note, Functional Overlap between the Lawyers and Other Professionals: Its Implications for the Privileged Communication Doctrine, 71 Yale L.J. 1226, 1232 (1962).

Confidentiality may also have constitutional dimensions, primarily in the context of criminal defense. See generally C. Wolfram, Modern Legal Ethics § 6.2 (1986). For example, police intrusions into confidential client-lawyer relationships and conversations can raise issues concerning the Sixth Amendment right to the effective assistance of counsel. See, e.g., Bishop v. Rose, 701 F.2d 1150, 1157 (6th Cir.1983) (violation of Sixth Amendment right to counsel when, during otherwise lawful cell search, jailers seized prisoner-client's confidential draft of letter to lawyer). Arguments sometimes have been made that client confidentiality is protected by the self-incrimination clause of the Fifth Amendment. It has also been argued on a nonconstitutional basis that the privilege furthers a societal interest in protecting privacy by assuring that there are some areas into which official prying cannot reach. See Hearings on Proposed Rules of Evidence before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong., 1st Sess., Ser. 2, at 241 (1973) (Professor Charles L. Black). The Supreme Court consistently has held that the privilege against self-incrimination is not violated in the absence of a governmental compulsion to reveal. E.g., United States v. Doe, 465 U.S. 605, 610, 104 S.Ct. 1237, 1240, 79 L.Ed.2d 552 (1984); Fisher v. United States, 425 U.S. 391, 410–13, 96 S.Ct. 1569, 1580–1582, 48 L.Ed.2d 39 (1976). Because the state does not compel clients to communicate to their lawyers, the Fifth Amendment independently does not preclude the states from compelling lawyers to testify concerning client communications. State constitutional law may, of course, preclude such compulsion despite the inapplicability of the federal Constitution.

On the whole, the law of the privilege does not provide for a case-by-case balancing in which applying the privilege would depend upon the advantages and disadvantages of upholding the privilege in a particular case. But cf. § 85, Comment *a* (exception for privilege in shareholder litigation); § 77 (setting aside privilege of deceased client in will-contest and similar cases). Professor McCormick suggested that a balancing approach could be employed in applying most privileges. McCormick, The Scope of Privilege in the Law of Evidence, 16 Tex. L. Rev. 447, 469–70 (1938); 1 C. McCormick, Evidence § 87, at 317 (J. Strong 4th ed.1992). See also Note, The Attorney–Client Privilege: Fixed Rules, Balancing and Constitutional Entitlement, 91 Harv. L. Rev. 464 (1977); Pritchard–Keang Nam Corp. v. Jaworski, 751 F.2d 277, 284 (8th Cir.1984), cert. dism'd, 472 U.S. 1022, 105 S.Ct. 3491, 87 L.Ed.2d 625 (1985) (dicta); Amoss v. University of Washington, 700 P.2d 350, 363 (Wash.Ct.App.1985) (apparently approving trial court's balancing approach to applying privilege). On the other hand, a case-by-case balancing approach would exact a high price of uncertainty, possibly frustrating the purpose of the privilege of inducing

frank communication. See In re Sealed Case, 676 F.2d 793, 806–07 (D.C.Cir.1982). The overwhelming weight of authority states or assumes that the privilege is absolute.

On the rule limiting the extent to which an opposing lawyer can be called as a witness, thus invoking the advocate-witness rule, see § 108.

For authority stressing the social costs of privileges generally and of the attorney-client privilege in particular, see, e.g., Trammel v. United States, 445 U.S. 40, 50–51, 100 S.Ct. 906, 911–912, 63 L.Ed.2d 186 (1980) (all privileges should be construed strictly because they contravene the fundamental principle that the public has a right to every man's evidence); Fisher v. United States, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976); In re Selser, 105 A.2d 395, 401 (N.J.1954) (privilege results in suppression of relevant and otherwise admissible evidence and, to that extent, is at war with truth). See also Fla. Stats. § 90.501 (1983) ("Except as otherwise provided by this chapter [which includes an attorney-client privilege provision], any other statute, or the Constitution of the United States or of the State of Florida, no person in a legal proceeding has a privilege to: (1) Refuse to be a witness. (2) Refuse to disclose any matter. (3) Refuse to produce any object or writing. (4) Prevent another from being a witness, from disclosing any matter, or from producing any object or writing").

Because of the social harm that may be caused by applying the privilege, courts have often repeated the dictum that the attorney-client privilege should be construed strictly. E.g., United States v. (Under Seal), 748 F.2d 871, 875 (4th Cir.1984); Hoyas v. State, 456 So.2d 1225, 1228 (Fla.Dist.Ct.App.1984). The usually quoted source of the dictum is 8 J. Wigmore, Evidence § 2291, at 554 (J. McNaughton rev.1961). The Supreme Court has said that, in view of its costs, the privilege applies only where necessary to achieve its purpose. E.g., United States v. Zolin, 491 U.S. 554, 562, 109 S.Ct. 2619, 2625, 105 L.Ed.2d 469 (1989), quoting Fisher v. United States, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976).

Although the law is in conflict among the states, some jurisdictions permit adverse comment on an adversary's invocation of the privilege, as constituting an attempt to suppress relevant information. See Annot., 32 A.L.R.3d 906 (1970). In New York, for example, such use is apparently well-settled, at least in civil cases. See N.Y. State L. Revision Comm'n, Code of Evidence § 503(b)(2), cmt. (1991) (proposed code of evidence; citing authorities); cf., e.g., Marine Midland Bank v. John E. Russo Produce Co., 405 N.E.2d 205 (N.Y.1980) (permitting comment on opposing party's invocation of privilege against self-incrimination).

Comment d. Source of the law concerning the privilege. Most states whose law of the privilege is embodied in a statute or evidence code have not interpreted these narrowly or technically but have shown great flexibility of interpretation. E.g., State v. Montgomery, 499 So.2d 709, 711 (La. Ct.App.1986), writ denied, 502 So.2d 106 (La.1987) (in absence of language in privilege statute, court looks to statutes and decisions in other states and general treatises for guidance); In re Gartley, 491 A.2d 851, 858 (Pa.Super.Ct.1985). Some state decisions, however, have followed statutory formulations of the privilege more

closely, refusing to consider possible common-law bases for diverging from or adding to those formulations. E.g., State v. Jancsek, 730 P.2d 14 (Or. 1986).

Rule 501 of the Federal Rules of Evidence provides that the question of privilege is to 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." However, federal courts in civil actions are to follow state law on privileges with respect to an element of a claim or defense as to which state law supplies the rule of decision. That two-phase rule was inserted by Congress in place of a detailed redefinition of the attorney-client privilege (and other privileges) that the Supreme Court originally promulgated. Nonetheless, the Supreme Court's proposed rule has continued to be influential as a statement of the federal common law of the privilege. E.g., United States v. Spector, 793 F.2d 932, 938 (8th Cir.1986), cert. denied, 479 U.S. 1031, 107 S.Ct. 876, 93 L.Ed.2d 830 (1987); 2 J. Weinstein & M. Berger, Evidence ¶ 503[02], at 503–17 (1986). The proposed rule also was the model closely followed by the corresponding rule 502 of the Revised Uniform Rules of Evidence (1974).

§ 69. Attorney-Client Privilege—"Communication"

A communication within the meaning of § 68 is any expression through which a privileged person, as defined in § 70, undertakes to convey information to another privileged person and any document or other record revealing such an expression.

Comment:

a. Scope and cross-references. This Section defines the concept of "communication" stated in § 68(1). The elements of § 68(2)–(3) are considered in §§ 70–72. On invoking the privilege, see § 86. On the confidentiality responsibilities of lawyers, see §§ 59–67.

b. Communications qualifying for the privilege. A communication can be in any form. Most confidential client communications to a lawyer are written or spoken words, but the privilege applies to communication through technologically enhanced methods such as telephone and telegraph, audio or video tape recording, film, telecopier, and other electronic means. However, communications through a public mode may suggest the absence of a reasonable expectation of confidentiality (see § 71, Comment *e*).

c. Intercepted communications. The communication need not in fact succeed; for example, an intercepted communication is within this Section (see § 71, Comment *c* (eavesdroppers)).

Illustration:

1. Lawyer represents Client in a pending criminal investigation. Lawyer directs Client to make a tape recording detailing everything that Client knows about an unlawful enterprise for Lawyer's review. Client makes the tape recording in secret. A cell mate, after learning of the tape recording, informs the prosecutor who causes the tape to be seized under a subpoena. The attorney-client privilege covers the tape recording.

For the rule where a communication is disclosed to nonprivileged persons, see § 79.

d. Distinction between the content of a communication and knowledge of facts. The attorney-client privilege protects only the content of the communication between privileged persons, not the knowledge of privileged persons about the facts themselves. Although a client cannot be required to testify about communications with a lawyer about a subject, the client may be required to testify about what the client knows concerning the same subject. The client thus may invoke the privilege with respect to the question "Did you tell your lawyer the light was red?" but not with respect to the question "Did you see that the light was red?" Similarly, the privilege does not apply to preexisting documents or other tangible evidence (see Comment *j*), even if they concern the same subject as a privileged communication.

Illustration:

2. Client, a defendant in a breach-of-contract suit, confidentially informs Lawyer about Client's recollection of a course of dealings between Client and a subcontractor, Plaintiff in the pending contract suit. The attorney-client privilege does not prevent Plaintiff from requiring Client to testify at a deposition or trial concerning Client's present recollection of the course of dealings between Client and Plaintiff. Plaintiff may not, however, require Lawyer or Client to testify concerning what Client told Lawyer about those same facts.

e. Communicative client acts. The privilege extends to nonverbal communicative acts intended to convey information. For example, a client may communicate with a lawyer through facial expressions or other communicative bodily motions or gestures (nodding or shaking the head or holding up a certain number of fingers to indicate number)

or acting out a recalled incident. On the other hand, the privilege does not extend to a client act simply because the client performed the act in the lawyer's presence. The privilege applies when the purpose in performing the act is to convey information to the lawyer.

Illustrations:

3. Client, charged with a crime, retains Lawyer as defense counsel. Lawyer obtains a police report stating that the perpetrator of the crime had a tattooed right forearm. Lawyer asks Client whether Client's right arm is tattooed. In answer, Client rolls up his right sleeve revealing his forearm. The information that the lawyer thereby acquires derives from a protected communication.

4. The same facts as in Illustration 3, except that, shortly after the crime, Client appears at Lawyer's office wearing a short-sleeved shirt. The observation by Lawyer that Client had a tattoo on his arm is not a communication protected by the privilege.

5. Lawyer represents Client in a divorce and child-custody proceeding. While accompanying Client in a visit to the residence of Client's child, Lawyer observes Client physically break into the premises. Lawyer's knowledge is not protected as a communication from Client.

f. A lawyer's testimony on a client's mental state. A lawyer may have knowledge about a client's mental state based on the client's communications with the lawyer. That knowledge may be relevant, for example, in the context of determining whether an accused is competent to stand trial. The lawyer in such cases is uniquely competent to testify concerning the client's ability to assist in presenting a defense. Testimony may be elicited that concerns the client's mode of thought but not if it would disclose particulars that would tend to incriminate the client. On representing a client with diminished capacity, see § 24.

g. Client identity, the fact of consultation, fee payment, and similar matters. Courts have sometimes asserted that the attorney-client privilege categorically does not apply to such matters as the following: the identity of a client; the fact that the client consulted the lawyer and the general subject matter of the consultation; the identity of a nonclient who retained or paid the lawyer to represent the client; the details of any retainer agreement; the amount of the agreed-upon fee; and the client's whereabouts. Testimony about such matters normally does not reveal the content of communications from the client. However, admissibility of such testimony should be based on the extent to which it reveals the content of a privileged communica-

tion. The privilege applies if the testimony directly or by reasonable inference would reveal the content of a confidential communication. But the privilege does not protect clients or lawyers against revealing a lawyer's knowledge about a client solely on the ground that doing so would incriminate the client or otherwise prejudice the client's interests.

Illustration:

6. Client consults Lawyer about Client's taxes. In the consultation, Client communicates to Lawyer Client's name and information indicating that Client owes substantial amounts in back taxes. The fact that Client owes back taxes is not known to the taxing authorities. Lawyer sends a letter to the taxing authorities and encloses a bank draft to cover the back taxes of Client. Lawyer does so to gain an advantage for Client under the tax laws by providing a basis for arguing against the accrual of penalties for continued nonpayment of taxes. Neither Lawyer's letter nor the bank draft reveals the identity of Client. (For the purpose of the Illustration, it is assumed that the client-lawyer communication occurred for the purpose of obtaining legal assistance (see § 72)). In a grand-jury proceeding investigating Client's past failure to pay taxes, Lawyer cannot be required to testify concerning the identity of Client because, on the facts of the Illustration, that testimony would by reasonable inference reveal a confidential communication from Client, Client's communication concerning Client's nonpayment of taxes.

A client also enjoys the constitutional protection against self-incrimination. But this right does not provide a basis on which the client's lawyer can refuse to reveal incriminating information about the client that is not protected by the attorney-client privilege. The precise interaction of the attorney-client and self-incrimination privileges is beyond the scope of this Restatement. Protection may also be provided by the constitutional guarantee of the right to counsel. On the application of the attorney-client privilege to a lawyer's testimony about how the lawyer came into the possession of instrumentalities of crime or the fruits of crime, see § 119.

h. A record of a privileged communication. The privilege applies both to communications when made and to confidential records of such communications, such as a lawyer's note of the conversation. The privilege applies to a record when a communication embodied in the record can be traced to a privileged person as its expressive source

(see § 70) and the record was created (see § 71) and preserved (see § 79) in a confidential state.

i. Lawyer communications to a client. Confidential communications by a lawyer to a client are also protected, including a record of a privileged communication such as a memorandum to a confidential file or to another lawyer or other person privileged to receive such a communication under § 71. Some decisions have protected a lawyer communication only if it contains or expressly refers to a client communication. That limitation is rejected here in favor of a broader rule more likely to assure full and frank communication (see § 68, Comment *c*). Moreover, the broader rule avoids difficult questions in determining whether a lawyer's communication itself discloses a client communication. A lawyer communication may also be protected by the work-product immunity (see Topic 3).

Illustration:

7. Lawyer writes a confidential letter to Client offering legal advice on a tax matter on which Client had sought Lawyer's professional assistance. Lawyer's letter is based in part on information that Client supplied to Lawyer, in part on information gathered by Lawyer from third persons, and in part on Lawyer's legal research. Even if each such portion of the letter could be separated from the others, the letter is a communication under this Section, and neither Lawyer nor Client can be made to disclose or testify about any of its contents.

A lawyer may serve as the conduit for information to be conveyed from third persons to the lawyer's client. For most purposes, notice to a lawyer constitutes notice to the lawyer's client (see § 28(1)). In any event, both lawyer and client can be required to testify to the message for which the lawyer served as conduit. Lawyers in such situations serve, not as confidants, but as a communicative link between their clients and opposing parties, courts, and other legal institutions. Were such communications privileged, an opposing party would be required to communicate directly with the client, in derogation of the rule that communications with represented parties must be conducted through their lawyers (see § 99).

j. Preexisting documents and records. A client may communicate information to a lawyer by sending writings or other kinds of documentary or electronic recordings that came into existence prior to the time that the client communicates with the lawyer. The privilege protects the information that the client so communicated but not the

preexisting document or record itself. A client-authored document that is not a privileged document when originally composed does not become privileged simply because the client has placed it in the lawyer's hands. However, if a document was a privileged preexisting document and was delivered to the lawyer under circumstances that otherwise would make its communication privileged, it remains privileged in the hands of the lawyer.

Illustrations:

8. Client confidentially delivers Client's business records to Lawyer, who specializes in tax matters, in order to obtain Lawyer's legal advice about taxes. As business records, the documents were not themselves prepared for the purpose of obtaining legal advice and are not protected by another testimonial privilege. They gain no privileged status by the fact that Client delivers them to Lawyer in seeking legal advice.

9. Client possesses a memorandum prepared by Client to communicate with Lawyer A during an earlier representation by Lawyer A. Client takes the memorandum to Lawyer B in confidence to obtain legal services on a different matter. The memorandum qualified as a privileged communication in the earlier matter. While in the hands of Lawyer B, the memorandum remains protected by the attorney-client privilege due to its originally privileged nature.

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Comment b. Communications qualifying for the privilege. On the coverage of client writings and other nonoral communications, see generally 1 C. McCormick, Evidence § 89 (J. Strong 4th ed.1992); C. Mueller & L. Kirkpatrick, Modern Evidence § 5.12 (1995); 8 J. Wigmore, Evidence § 2307 (J. McNaughton rev.1961); 24 C. Wright & K. Graham, Federal Practice & Procedure § 5484, at 321–29 (1986). On tape recordings: United States v. Spector, 793 F.2d 932 (8th Cir.1986), cert. denied, 479 U.S. 1031, 107 S.Ct. 876, 93 L.Ed.2d 830 (1987).

Comment c. Intercepted communications. Illustration 1 is based on the facts in Bishop v. Rose, 701 F.2d 1150 (6th Cir.1983) (violation of Sixth Amendment right to counsel for jailers to seize from prisoner's cell confidential draft of letter from prisoner to lawyer). Illustration 2 is based on United States v. Spector, 793 F.2d 932 (8th Cir.1986), cert. denied, 479 U.S. 1031, 107 S.Ct. 876, 93 L.Ed.2d 830 (1987) (tape recording undertaken at direction of lawyer protected from subpoena by privilege). See also, e.g., People v. Gardner, 165 Cal.Rptr. 415 (Cal.Ct.App.1980) (client-prison-

er's letter to lawyer seeking legal assistance intercepted by prison officials before prisoner could dispatch it protected by privilege).

Comment d. Distinction between the content of a communication and knowledge of facts. The distinction in the Comment is commonly recognized. See generally Upjohn Co. v. United States, 449 U.S. 383, 395–96, 101 S.Ct. 677, 685–686, 66 L.Ed.2d 584 (1981) ("[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing.... "); Commonwealth of Massachusetts v. First Nat'l Supermarkets, Inc., 112 F.R.D. 149, 152 (D.Mass.1986); C. Wolfram, Modern Legal Ethics § 6.3.5, at 257–58 (1986); 24 C. Wright & K. Graham, Federal Practice & Procedure § 5484, at 320–21 (1986).

Comment e. Communicative client acts. See generally 1 C. McCormick, Evidence § 89, at 327–28 (J. Strong 4th ed.1992). On nonverbal methods of communication, see 24 C. Wright & K. Graham, Federal Practice & Procedure § 5484, at 329–30 (1986). On Illustrations 3 and 4, see United States v. Kendrick, 331 F.2d 110, 113–14 (4th Cir.1964) ("excluded from the privilege ... are physical characteristics of the client, such as his complexion, his demeanor, his bearing, his sobriety and his dress. Such things are observable by anyone"). See also State v. Regier, 621 P.2d 431 (Kan.1980) (lawyer could testify that client had hairy chest). Illustration 5 is drawn from the facts in Jones v. Jones, 620 P.2d 850 (Mont.1980). See also, e.g., Granviel v. State, 723 S.W.2d 141, 156 (Tex.Crim.App.), cert. denied, 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 250 (1977) (testimony of bailiffs in punishment phase of case that client in holding cell slapped lawyer and grabbed lawyer by coat and tie). But cf., e.g., Ramada Inns, Inc. v. Dow Jones & Co., 523 A.2d 968, 971–72 (Del.Super.Ct.1986) (act of lawyer in handing deposition to client privileged, apparently without regard to informational content of lawyer's act). On difficulties presented when an act of producing documents also may serve as an admission of their genuineness or other testimonial element, see United States v. Doe, 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984) (Fifth Amendment privilege against self-incrimination precludes government subpoena seeking to require target of investigation to produce generally described documents).

Comment f. A lawyer's testimony on a client's mental state. Courts dealing with issues of the competency of a client to stand trial in a criminal prosecution commonly hold that the lawyer's knowledge of a client's mental condition is not privileged even if based in part on the client's confidential communications to the lawyer. E.g., United States v. Kendrick, 331 F.2d 110, 114 (4th Cir.1964); Bishop v. Superior Court, 724 P.2d 23, 28–29 (Ariz.1986) (waiver required because of special character of incompetency hearing, need for lawyer's testimony and duty of lawyer as officer of court to assist court in reaching correct decision); People v. Kinder, 512 N.Y.S.2d 597 (N.Y.App.Div.1987). Courts occasionally apply the concept in other areas. E.g., Southern Ry. v. Lawson, 353 S.E.2d 491, 494–95 (Ga. 1987) (issue of validity of release signed by client).

In view of the client-lawyer relationship, a preferable approach is to refuse to permit the prosecutor to

call defense counsel as a witness on such an issue. E.g., Goza v. Goza, 470 So.2d 1262, 1266 (Ala.Civ.App.1985) (lawyer should not have been forced to testify to client's mental capacity to enter into separation agreement, but error here not cause for reversal). Some decisions can be understood to reason, in effect, that a client accused of crime waives the attorney-client privilege if the client or the client's lawyer takes the position that the client is incompetent to stand trial. Cf., e.g., United States ex rel. Foster v. DeRobertis, 741 F.2d 1007, 1012 (7th Cir.1984), cert. denied, 469 U.S. 1193, 105 S.Ct. 972, 83 L.Ed.2d 975 (1985) (defendant cannot attempt to avoid trial by claiming incompetence and at same time invoke privilege as basis for refusing to permit lawyer to testify to basis for claim); People v. Kinder, supra, 512 N.Y.S.2d at 599–600 (defendant has no legitimate interest in precluding lawyer from testifying to competency, because only in that way can constitutional right to communicate with counsel be protected). Such a rationale both would impair the ability of a criminal accused to consult freely with a lawyer and would be a dubious use of the concept of waiver because it is applied in the context of a person who is arguably incompetent. Compare § 78 (waiver of privilege by consent).

Comment g. Client identity, the fact of consultation, fee payment, and similar matters. See generally P. Rice, Attorney-Client Privilege in the United States §§ 6.13–6.21 (1993); 8 J. Wigmore, Evidence § 2313 (J. McNaughton rev. ed.1961); 2 J. Weinstein & M. Berger, Evidence ¶ 503(a)(4)[02] (1986); C. Wolfram, Modern Legal Ethics § 6.3.5, at 259–60 (1986); 24 C. Wright & K. Graham, Federal Practice & Procedure § 5484, at 360–75 (1986); Annot., 16 A.L.R.3d 1047 (1967); Annot., 84 A.L.R. Fed. 852 (1987). Courts generally state that the fact that the client consulted a lawyer and the general nature of the consultation are not within the privilege. E.g., Colton v. United States, 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951, 83 S.Ct. 505, 9 L.Ed.2d 499 (1963); People v. Adam, 280 N.E.2d 205, 207–08 (Ill.), cert. denied, 409 U.S. 948, 93 S.Ct. 289, 34 L.Ed.2d 218 (1972) (facts that client called and spoke with lawyer, arranged to meet, and retained lawyer); State v. Wilshire, 509 A.2d 444, 453 (R.I.1986), cert. denied, 479 U.S. 1037, 107 S.Ct. 891, 93 L.Ed.2d 843 (1987) (in prosecution of client-wife for murder of husband, fact that shortly before murder client consulted lawyer about domestic-relations matter). Courts also generally agree that information about fees is not privileged. E.g., In re Shargel, 742 F.2d 61, 62 (2d Cir.1984); In re Slaughter, 694 F.2d 1258, 1260 (11th Cir.1982); United States v. Sherman, 627 F.2d 189, 190–92 (9th Cir.1980); U.S. Fire Ins. Co. v. Citizens Ins. Co., 402 N.W.2d 11, 13 (Mich.Ct.App.1986) (nature and extent of referral fee). See also, e.g., In re Grand Jury Subpoenas (Hirsch), 803 F.2d 493 (9th Cir.1986), corrected, 817 F.2d 64 (9th Cir.1987) (identity of nonclient fee payer not privileged); Priest v. Hennessy, 409 N.E.2d 983, 986 (N.Y.1980) (identity of third persons who paid lawyers to represent clients accused of prostitution). Courts commonly hold that a lawyer's communication to a client of the date and time of a hearing is not privileged in the subsequent prosecution of the client for bail-jumping or a similar offense. E.g., United States v. Freeman, 519 F.2d 67, 68 (9th Cir.1975). See also, e.g., Commonwealth v. Maguigan, 511

A.2d 1327, 1333–37 (Pa.1986) (whereabouts of client who was fugitive from justice not privileged). Even under those decisions, inquiry must be phrased carefully to avoid intrusion on privileged communications. Cf. In re Grand Jury Subpoena (Bierman), 788 F.2d 1511 (11th Cir.1986) (question asking what lawyer told client about notice to surrender sought privileged information); United States v. Liebman, 742 F.2d 807 (3d Cir. 1984) (privilege precludes summons demanding from lawyer list of names of clients whom lawyer had advised that they could deduct legal fees on income for certain years).

The problem of "circumstantial proof" of the contents of a communication is discussed in 24 C. Wright & K. Graham, Federal Practice & Procedure § 5489, at 424–25 (1986). On the impermissible use of evidence or argument by a prosecutor that the fact that a person accused of crime consulted a lawyer implies consciousness of guilt, see, e.g., United States v. McDonald, 620 F.2d 559 (5th Cir. 1980); Zemina v. Solem, 573 F.2d 1027 (8th Cir.1978); United States v. Liddy, 509 F.2d 428, 443–45 (D.C.Cir. 1974), cert. denied, 420 U.S. 911, 95 S.Ct. 833, 42 L.Ed.2d 842 (1975). Cf. also Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) (fact that accused exercised right to remain silent until he consulted lawyer unconstitutionally employed as impeachment at trial as evidence of silence in the face of accusation). If evidence has some tendency to prove circumstantially the content of a communication or to suggest an impermissible inference of guilt from the fact of consulting a lawyer, a judge has discretion to exclude the evidence if its probative value is outweighed by the risk that it will prejudice the accused. See, e.g., Federal Rules of Evidence, Rule 403.

Illustration 6 and the accompanying commentary in effect follow the result but not some of the reasoning of the leading case of Baird v. Koerner, 279 F.2d 623 (9th Cir.1960). *Baird* held that the attorney-client privilege bars an attempt to require a lawyer to disclose the identity of a client when disclosure could supply the "last link" of evidence necessary to prosecute the client on the very matter for which the client had sought the lawyer's advice. *Baird* is supportable on the ground that forcing the lawyer to disclose the client's identity would require the lawyer to disclose a confidential client communication. But *Baird* is not supportable on the different argument that disclosing such facts would incriminate the client. The attorney-client privilege affords no protection against incriminating disclosures; it guards, importantly but only, against disclosures of client communications. E.g., In re Grand Jury Proceedings, 791 F.2d 663, 665 (8th Cir.1986) (" ... Nonprivileged information is not suddenly transformed into confidential communications ... whenever it becomes relevant to a criminal investigation or prosecution of a client.... "); In re Shargel, 742 F.2d 61, 62–63 (2d Cir.1984) (criticizing "incrimination rationale" for privilege). For criticisms of some "last link" applications of the *Baird* decision, see 1 C. McCormick, Evidence § 90, at 331–33 (J. Strong 4th ed.1992); 2 J. Weinstein & M. Berger, Evidence ¶ 503(a)(4)[02], at 503–34 to 503–35 (1986); C. Wolfram, Modern Legal Ethics § 6.3.5, at 260–61 (1986). *Baird* has been extensively distinguished and limited. E.g., In re Slaughter, 694 F.2d 1258, 1260 (11th

Cir.1982) (*Baird* involved limited and rarely available exception); In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026, 1028 (5th Cir.1982) (en banc) ("limited and narrow exception"), even in the Ninth Circuit, e.g., In re Grand Jury Subpoenas Duces Tecum (Marger), 695 F.2d 363, 365 (9th Cir.1982) (*Baird* is "narrowly applied").

One common criticism of *Baird* is beside the mark. Some courts have noted that protecting information such as the identity of a client may offer "considerable temptations to use lawyers as conduits of information or of commodities necessary to criminal schemes or as launderers of money." In re Shargel, 742 F.2d 61, 64 (2d Cir.1984). See also, e.g., In re Grand Jury Subpoenas (Hirsch), 803 F.2d 493, 499 (9th Cir.1986); In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026, 1027 (5th Cir.1982) (en banc). The concern of several of those decisions—a concern that perhaps should also have actuated the court in *Baird* itself—that lawyers not become mere conduits by which clients effect anonymous payments of money is better pursued as an objection that the lawyer is not providing legal assistance for the client in such circumstances. See § 72. Cf. Saltzburg, Communications Falling Within the Attorney-Client Privilege, 66 Iowa L. Rev. 811, 823–24 (1981) (privilege should not apply when lawyer merely performs act for client, such as payment of money, that would not be privileged if another agent performed it). If the lawyer, whether or not aware of the client's purpose, is consulted by the client for the purpose of aiding a crime, fraud, or other wrongful act, the privilege also does not apply. See § 82.

Decisions in jurisdictions other than the Ninth Circuit have indicated willingness to accept *Baird* or its rationale. E.g., In re Grand Jury Proceedings (Jones), 517 F.2d 666, 671 (5th Cir.1975); NLRB v. Harvey, 349 F.2d 900, 905 (4th Cir.1965), on remand, 264 F.Supp. 770 (W.D.Va. 1966); In re Kozlov, 398 A.2d 882, 886–87 (N.J.1979) (identity of client whose lawyer supplied information concerning public corruption). Some decisions reaching results consistent with *Baird* reflect judicial impatience with a party who seeks to gain information through having a lawyer testify instead of first exhausting available and less intrusive alternatives. E.g., In re Witness–Attorney Before Grand Jury No. 83–1, 613 F.Supp. 394, 398 (S.D.Fla.1984). See C. Wolfram, Modern Legal Ethics § 6.3.5, at 261 n.31 (1986); see also § 108, Comment *l*, and Reporter's Note thereto (judicial policy against calling opposing lawyer except in compelling circumstances).

On legislation requiring a lawyer to disclose such matters as the client's identity and the size of a fee payment, see, e.g., United States v. Sindel, 53 F.3d 874 (8th Cir.1995) (upholding IRS "Form 8300" requiring report of all cash payments to criminal-defense lawyer in excess of $10,000 under federal money-laundering legislation); United States v. Ritchie, 15 F.3d 592 (6th Cir.), cert. denied, 513 U.S. 868, 115 S.Ct. 188, 130 L.Ed.2d 121 (1994) (upholding Internal Revenue Service summons).

Comment h. A record of a privileged communication. E.g., Natta v. Zletz, 418 F.2d 633, 638 (7th Cir.1969) (lawyer's memorandum summarizing meeting between lawyer and client); Green v. IRS, 556 F.Supp. 79, 85 (N.D.Ind.1982) (lawyer's notes of con-

versation with client), aff'd, 734 F.2d 18 (7th Cir.1984).

Comment i. Lawyer communications to a client. See, e.g., Proposed Supreme Court Rule 503(b) (1972) (privilege applies to "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between [the client] or his representative and his lawyer or his lawyer's representative"); Unif. R. Evid. 502(b) (1974) (same). See also, e.g., Cal. Evid. Code § 952 (West 1974) ("As used in this article, 'confidential communication between lawyer and client' ... includes a legal opinion formed and the advice given by the lawyer."). The extension of the privilege to lawyer communications to a client has been rarely litigated and seems to have been assumed rather than definitively established in decisions. See, e.g., P. Rice, Attorney-Client Privilege in the United States § 5.4 et seq. (1993); 8 J. Wigmore, Evidence § 2320 (J. McNaughton rev.1961) ("That the *attorney's communications to* the client are also within the privilege was always assumed in the earlier cases and has seldom been brought into question.... ") (emphasis in original; notes omitted.); E. Morgan, Basic Problems of Evidence 111 (1942). The question was largely irrelevant in an earlier legal culture that did not provide for pretrial discovery and in which calling a lawyer to the witness stand was very rare.

Either of two differing approaches could be taken to the question of applying the privilege to lawyer communications. See 2 J. Weinstein & M. Berger, Evidence ¶ 503(b)[03], at 503–39 n.5 (1986) (noting differing approaches, without favoring either); United States v. Amerada Hess Corp., 619 F.2d 980, 986 (3d Cir.1980) (noting both approaches, but adopting neither explicitly). A broad approach protects all such lawyer communications, regardless of the content of the communication. E.g., Proposed Supreme Court Rule 503(b)(1), supra; Uniform R. Evid. 502(b)(1), supra; Cal. Evid. Code § 952, supra; Ind. Code Ann. § 34-1-14-5 (1986); In re LTV Securities Litigation, 89 F.R.D. 595, 602–03 (N.D.Tex.1981); State ex rel. Great American Ins. Co. v. Smith, 574 S.W.2d 379, 384–85 (Mo.1978); Amoss v. University of Washington, 700 P.2d 350, 363 (Wash.Ct.App.1985) (advice letter based solely on matters of public record). A narrower approach extends the privilege only to those lawyer communications to a client that embody or reflect client communications that themselves are covered by the privilege. E.g., Brinton v. Dept. of State, 636 F.2d 600, 603 (D.C.Cir.1980), cert. denied, 452 U.S. 905, 101 S.Ct. 3030, 69 L.Ed.2d 405 (1981); United States v. Ramirez, 608 F.2d 1261, 1268 n.12 (9th Cir. 1979); United States v. United Shoe Mach. Corp., 89 F.Supp. 357, 359 (D.Mass.1950); 8 J. Wigmore, Evidence § 2320 (J. McNaughton rev. 1961); C. Wolfram, Modern Legal Ethics § 6.3.5, at 258–59 (1986).

Comment *i* takes the position that the broader approach, which is favored by the recent evidence codes, is preferable because it provides assurance to lawyers to be forthcoming in giving candid advice. In the nature of things, most lawyer communications to a client will be privileged under both approaches; the broader approach thus will result in suppressing little relevant evidence. When the lawyer's communication is offered to prove a client statement, it would sometimes not be admissible in evi-

dence because it is hearsay. In addition, the work-product immunity would independently prevent routine discovery of many lawyer communications of either the inclusive or the noninclusive type. See § 87.

A lawyer communication to a nonprivileged third person is not protected by the privilege, regardless of its content. E.g., Johnston v. Johnston, 499 A.2d 1074, 1077 (Pa.Super.Ct.1985). Compare also § 79 (waiver by subsequent disclosure).

On Illustration 7, compare 8 J. Wigmore, Evidence § 2317, at 619 (J. McNaughton rev.1961). On the lawyer's serving as a conduit of information to the client, see, e.g., United States v. Innella, 821 F.2d 1566, 1567 (11th Cir.1987) (neither privilege nor "last-link" extension to it precludes former lawyer's testimony that he had informed defendant of required surrender date); C. Wolfram, Modern Legal Ethics § 6.3.5, at 259 n.18 (1986), and authorities cited.

Comment j. Preexisting documents and records. See generally 1 C. McCormick, Evidence § 89, at 329–30 (J. Strong 4th ed.1992); P. Rice, Attorney-Client Privilege in the United States § 5.19 (1993); 8 J. Wigmore, Evidence § 2307 (J. McNaughton rev.1961); C. Wolfram, Modern Legal Ethics § 6.3.5, at 262 (1986). E.g., Fisher v. United States, 425 U.S. 391, 403–04, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976); In re Gartley, 491 A.2d 851, 858 (Pa.Super.Ct.1985); Baker v. Campbell, [1983] Austral. L.R. 749, 778. The concept of nonprivileged preexisting documents should include any repository of memorialized material, including computer-stored data. But cf. 24 C. Wright & K. Graham, Federal Practice & Procedure § 5484, at 322 n.30 (1986) (possibility of applying privilege to data stored in client's computer if accessed by lawyer).

Illustration 8 is based on Fisher v. United States, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976), in which the Court noted that, unless the attorney-client privilege continued to protect the communicated and hitherto privileged documents the client would be reluctant to undertake the risk of losing the self-incrimination privilege that attached independently to the documents by showing them to the lawyer. In effect, the Court indicated a willingness to continue one testimonial privilege (self-incrimination) through the legal mechanism of another (attorney-client privilege). Although the *Fisher* doctrine arguably departs from the normal rule that refuses to accord a privileged status to preexisting documents, it does so only in the narrow context of documents that have independently gained a privileged legal status. Compare also United States v. Doe, 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984) (Fifth Amendment privilege against self-incrimination precludes government subpoena seeking to require target of investigation to produce generally described documents because act of production may have testimonial element by providing authentication of documents), with, e.g., United States v. Rue, 819 F.2d 1488, 1492 (8th Cir.1987) (*Doe* doctrine does not protect against government subpoena issued to target of investigation seeking specifically identified document).

§ 70. Attorney-Client Privilege—"Privileged Persons"

Privileged persons within the meaning of § 68 are the client (including a prospective client), the client's lawyer, agents of either who facilitate communications between them, and agents of the lawyer who facilitate the representation.

Comment:

a. Scope and cross-references. This Section addresses the requirement of § 68(2) that a confidential communication be "made between privileged persons." On determining which persons in a corporate or other organization qualify as agents for communication, see § 73, Comment *d*. On invoking the privilege, see § 86. See also § 75 (co-client communication) and § 76 (communication in common-interest arrangement).

b. A privileged person as the expressive source. To qualify as privileged, a communication must originate from a person who may make privileged communications and be addressed to persons who may receive them. Those persons are referred to in this Restatement as privileged persons. Client and lawyer are, of course, included. Other privileged persons are those who serve to facilitate communication between client and lawyer and persons who aid the lawyer in representing the client.

The privilege does not extend to communications from nonprivileged persons, even if the client transmits such a person's communication to the lawyer, for example by carrying to the lawyer a document written by a nonprivileged person. Such information may, however, be given a qualified immunity from discovery under the work-product immunity (see § 87). Moreover, if the communication from a nonprivileged person is incorporated in a protected communication from which it cannot be separated, the entire communication is privileged. For example, a lawyer may not be required to testify to what a client had communicated concerning the client's memory of a conversation with a nonprivileged third person.

c. An initial consultation. The privilege protects prospective clients—persons who communicate with a lawyer in an initial consultation but whom the lawyer does not thereafter represent—as well as persons with whom a client-lawyer relationship is established (see § 72(1) & Comment *d* thereof; see also § 15).

d. Third-party payment of a fee. A person who pays a lawyer's fee is not necessarily a client. The relevant question is whether the

lawyer undertook to give legal advice or provide other legal assistance to that person (see § 14; see also § 134).

e. Privileged agents for a client or lawyer: in general. The privilege normally applies to communications involving persons who on their own behalf seek legal assistance from a lawyer (see § 72). However, a client need not personally seek legal assistance, but may appoint a third person to do so as the client's agent (e.g., § 134, Comment *f*). Whether a third person is an agent of the client or lawyer or a nonprivileged "stranger" is critical in determining application of the attorney-client privilege. If the third person is an agent for the purpose of the privilege, communications through or in the presence of that person are privileged; if the third person is not an agent, then the communications are not in confidence (see § 71) and are not privileged. Accordingly, a lawyer should allow a nonclient to participate only upon clarifying that person's role and when it reasonably appears that the benefit of that person's presence offsets the risk of a later claim that the presence of a third person forfeited the privilege.

f. A client's agent for communication. A person is a confidential agent for communication if the person's participation is reasonably necessary to facilitate the client's communication with a lawyer or another privileged person and if the client reasonably believes that the person will hold the communication in confidence. Factors that may be relevant in determining whether a third person is an agent for communication include the customary relationship between the client and the asserted agent, the nature of the communication, and the client's need for the third person's presence to communicate effectively with the lawyer or to understand and act upon the lawyer's advice.

Illustrations:

1. The police arrest Client and do not permit Client to communicate directly with Client's regular legal counsel, Lawyer. Client asks Friend, a person whom Client trusts to keep information confidential, to convey to Lawyer the message that Lawyer should not permit the police to search Client's home. Friend is an agent for communication.

2. Client and Lawyer do not speak a language known by the other. Client uses Translator to communicate an otherwise privileged message to Lawyer. Translator is an acquaintance of Client. Translator is an agent for communication.

3. Client regularly employs Secretary to record and transcribe Client's important business letters, including confidential

correspondence. Client uses the services of Secretary to prepare a letter to Lawyer. Secretary is an agent for communication.

An agent for communication need not take a direct part in client-lawyer communications, but may be present because of the Client's psychological or other need. A business person may be accompanied by a business associate or expert consultant who can assist the client in interpreting the legal situation.

Illustrations:

4. Client, 16 years old, is represented by Lawyer. Client's parents accompany Client at a meeting with Lawyer concerning a property interest of Client. Client's parents are appropriate agents for communication.

5. Client is advised by Accountant to consult a lawyer about a legal problem involving complex questions of tax accounting. Client, who does not fully understand the nature of the accounting questions, asks Accountant to accompany Client to a consultation with Lawyer so that Accountant can explain the nature of Client's legal matter to Lawyer. Accountant is Client's agent for communication. That would also be true if Accountant were to explain Lawyer's legal advice in business or accounting terms more understandable to Client.

The privilege applies to communications to and from the client disclosed to persons who hire the lawyer as an incident of the lawyer's engagement. Thus, the privilege covers communications by a client-insured to an insurance-company investigator who is to convey the facts to the client's lawyer designated by the insurer, as well as communications from the lawyer for the insured to the insurer in providing a progress report or discussing litigation strategy or settlement (see § 134, Comment *f*). Such situations must be distinguished from communications by an insured to an insurance investigator who will report to the company, to which the privilege does not apply.

g. A lawyer's agent. A lawyer may disclose privileged communications to other office lawyers and with appropriate nonlawyer staff—secretaries, file clerks, computer operators, investigators, office managers, paralegal assistants, telecommunications personnel, and similar law-office assistants. On the duty of a lawyer to protect client information being handled by nonlawyer personnel, see § 60(1)(b). The privilege also extends to communications to and from the client that are

disclosed to independent contractors retained by a lawyer, such as an accountant or physician retained by the lawyer to assist in providing legal services to the client and not for the purpose of testifying.

h. An incompetent person as a client. When a client is mentally or physically incapacitated from effectively consulting with a lawyer, a representative may communicate with the incompetent person's lawyer under the protection of the privilege. The privilege also extends to any communications between the incompetent person and the representative relating to the communication with the lawyer.

Illustration:

6. Client is mentally incapacitated, and a court has appointed Guardian as the guardian of the person and property of Client. A question has arisen concerning a right of Client in certain property, and Lawyer is retained to represent the interests of Client in the property. Guardian serves as the agent for communication of Client in discussing the matter with Lawyer.

REPORTER'S NOTE

Comment b. A privileged person as the expressive source. See generally C. Mueller & L. Kirkpatrick, Modern Evidence §§ 5.8–5.10 (1995); C. Wolfram, Modern Legal Ethics § 6.3.6., at 262–64 (1986). Statements made by third persons who are not clients or agents of the client or lawyer are not covered by the attorney-client privilege. E.g., In re Sealed Case, 737 F.2d 94, 99 (D.C.Cir.1984); New Orleans Saints v. Griesedieck, 612 F.Supp. 59, 63 (E.D.La.1985), aff'd, 790 F.2d 1249 (5th Cir.1986); State v. Rabin, 495 So.2d 257 (Fla.Dist.Ct. App.1986) (witness (client's former wife) interviewed by lawyer); Marshall v. Marshall, 320 S.E.2d 44, 47 (S.C.Ct.App.1984). But see, e.g., People v. Barr, 206 Cal.Rptr. 331, 351 (Cal.Ct.App.1984) (depublished; not citable as authority) (possibly confusing attorney-client privilege and work-product immunity, dictum that privilege precludes prosecutor from obtaining statements that nonclients made to client's lawyer).

On the limitation of the privilege to communications with a "client," see, e.g., Model Code of Evidence, Rule 210(b) (1942) (privilege applies "if the client or lawyer reasonably believed the communication to be relevant to an offer or acceptance or rejection of a retainer of the lawyer by the client or to the seeking or rendering of the lawyer's legal service in his professional capacity ... "); Cal. Evid. Code § 951 (West 1974) ("As used in this article, 'client' means a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer

or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent."). See, e.g., In re Grand Jury, 106 F.R.D. 255, 257–58 (D.N.H. 1985); State v. Rabin, 495 So.2d 257, 260 (Fla.Dist.Ct.App.1986). A lawyer seeking personal legal advice may, of course, qualify as a client for the purposes of the privilege. E.g., Mead Data Central, Inc. v. Dep't of Air Force, 566 F.2d 242, 253 n.21 (D.C.Cir.1977). On the proposition that members of a class in a class action who are not named representatives do not communicate with the class lawyer under the protection of the privilege, see Penk v. Oregon St. Bd. of Higher Educ., 99 F.R.D. 511, 517 (D.Or.1983).

Comment c. An initial consultation. See § 72, Comment *d*, and Reporter's Note thereto.

Comment d. Third-party payment of a fee. Payment of a fee is not a prerequisite to applying the privilege. E.g., In re Advisory Opinion No. 544, 511 A.2d 609, 611 (N.J.1986) (indigent clients of lawyers working for legal-aid agency); People v. O'Connor, 447 N.Y.S.2d 553, 556 (N.Y.App.Div. 1982). Correspondingly, a fee payer is not the client protected by the privilege if the fee payer is not the person seeking legal advice or other assistance. E.g., Priest v. Hennessy, 409 N.E.2d 983 (N.Y.1980).

Comment f. A client's agent for communication. Courts generally hold that presence of a translator or other person who facilitates a client's communication to a lawyer is consistent with confidentiality of the communication. E.g., Wolfle v. United States, 291 U.S. 7, 15, 54 S.Ct. 279, 280, 78 L.Ed. 617 (1934) (dictum) (stenographer); United States v. Kovel, 296 F.2d 918, 921–22 (2d Cir.1961) (accountant acting for client in translating financial data for benefit of client's lawyer privileged equally with translator of foreign language). See generally Cal. Evid. Code § 952 (West Supp.1986) (communication privileged despite the presence of third persons "present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted"); 8 J. Wigmore, Evidence § 2317 (J. McNaughton rev.1961); C. Wolfram, Modern Legal Ethics § 6.3.6, at 263–64 (1986). A more restrictive approach than that adopted in this Section is to limit the rule concerning agents for communication to situations in which the client is a corporate or other artificial entity—in effect, when the client is incapable of communicating with a lawyer except through persons other than the entity itself. See State v. Jancsek, 730 P.2d 14 (Or.1986) (state evidence code narrowly construed so that contents of letter in which client asked trusted friend to hire lawyer not protected by privilege). Although a corporate or other organizational client will be a typical beneficiary of the rule extending the privilege to communications through an agent for communication (§ 73), there is no reason to limit benefited clients to corporations. Natural persons may, with equal need and reason, employ intermediaries such as interpreters, stenographers, or messengers.

On the extension of the privilege to client-lawyer communications in the presence of a client's parent, spouse, or business associate, see Supreme Court Advisory Committee on Rules of Evidence, 56 F.R.D. 183, 238 (1972) (spouse, parent, or business

associate); In re Estate of Weinberg, 509 N.Y.S.2d 240, 242 (N.Y.Surr. Ct.1986) (daughter of client who functioned as alter ego of father-client in business matter being discussed with lawyer). The existence of a close familial or other personal relationship is not sufficient to assure confidentiality if the third person's presence at the client-lawyer meeting serves no useful purpose, e.g., State v. Gordon, 504 A.2d 1020, 1025–26 (Conn.1985) (presence of wife of client accused of crime at meetings with lawyer concerning trial strategy); In re Guardianship of Walling, 727 P.2d 586, 592 (Okla.1986) (client's grandmother whose presence was not reasonably necessary for the transmission of communication), and particularly if the client knows that the interests of the client and the relative are adverse, e.g., Lewis v. State, 709 S.W.2d 734, 736 (Tex.Ct.App.1986) (in circumstances, sexual-abuse complainant and sister considered to have adverse interests). On occasion, the concept described in the Comment is carried beyond close personal or business relationships. E.g., Miller v. Haulmark Transp. Systems, 104 F.R.D. 442, 445 (E.D.Pa.1984) (presence of third-person insurance agent at meeting of clients and lawyer not inconsistont with confidentiality when agent could provide information useful to purpose of meeting).

On the extension of the concept to communications by an insured to a representative of a liability insurer, compare, e.g., People v. Ryan, 197 N.E.2d 15, 17 (Ill.1964) (communications between insured and insurer privileged where insurer is under duty to defend); State ex rel. L.Y. v. Davis, 723 S.W.2d 74 (Mo.Ct.App. 1986) (insured-insurer communications privileged whether insurer accepts or denies coverage on claim), with, e.g., State v. Pavin, 494 A.2d 834, 837–38 (N.J.Super.Ct.1985) (privilege applies only if insurer's agent interviewing insured is acting under instructions from employer's lawyer or if insurer has retained lawyer to review investigator's file); see also § 134, Comment *f*, and Reporter's Note thereto.

Comment g. A lawyer's agent. See generally Revised Uniform Rules of Evidence, Rule 502(a)(4) (1974) ("A 'representative of the lawyer' is one employed by the lawyer to assist the lawyer in the rendition of professional legal services"); id. Rule 502(a)(5) ("A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."); id. Rule 502(b) (confidential client communications are privileged if "(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, ... or (5) among lawyers and their representatives representing the same client"); P. Rice, Attorney-Client Privilege in the United States § 5.5 et seq. (1993); 8 J. Wigmore, Evidence § 2301, at 583 (J. McNaughton rev 1961) ("It has never been questioned that the privilege protects communications to the *attorney's clerks* and his other agents (including stenographers) for rendering his services.... ") (empha-

sis in original); United States v. Kovel, supra, 296 F.2d at 921 ("secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts"); Cedrone v. Unity Sav. Ass'n, 103 F.R.D. 423, 429 (E.D.Pa.1984) (memorandum between lawyers in same office); People v. Tippett, 733 P.2d 1183, 1192 (Colo.1987) (en banc) (quoting Colo. Rev. Stat. § 13-90-107(1)(b) (1986 Supp.)) ("attorney's secretary, paralegal, legal assistant, stenographer, or clerk" may not be examined without "employer's (sic)" consent about any fact, knowledge of which was acquired in such capacity); Pouncy v. State, 353 So.2d 640 (Fla. Dist.Ct.App.1977) (subsequently codified in West's Fla. Stat. Ann. Rules Crim. Proc., Rule 3.216(a) (1980)) (privilege covers report to lawyer by court-appointed mental-health expert appointed to report only to defense counsel on defendant's sanity and not to testify); State v. Schneider, 402 N.W.2d 779, 787 (Minn.1987) (approach similar to that of Florida); State v. Rickabaugh, 361 N.W.2d 623, 625 (S.D.1985) (independent polygraph tester).

The person asserting the privilege has the burden of demonstrating that involving the client's or lawyer's agent was for the purpose of obtaining or providing legal services (see § 72). See von Bulow v. von Bulow, 811 F.2d 136, 146-47 (2d Cir.), cert. denied, 481 U.S. 1015, 107 S.Ct. 1891, 95 L.Ed.2d 498 (1987). The privilege extends only to communications of privileged persons. Information is not privileged simply because it was collected by such a privileged agent as when, for example, the agent collected it from a nonprivileged source. E.g., Syracuse Supply Co. v. U.S. Lumber Co., 485 A.2d 1377, 1379 (Conn.Super.Ct.1984) (facts gathered from public agency's files by agent of lawyer).

Comment h. An incompetent person as a client. E.g., Uniform Rules of Evidence, Rule 26(3)(a) (1953) ("client" includes "an incompetent whose guardian so consults the lawyer or the lawyer's representative in behalf of the incompetent"); Model Code of Evidence, Rule 209(a) (1942) (same); Cal. Evid. Code § 951 (West 1974), quoted supra in Reporter's Note to Comment *b*.

§ 71. Attorney-Client Privilege—"In Confidence"

A communication is in confidence within the meaning of § 68 if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one will learn the contents of the communication except a privileged person as defined in § 70 or another person with whom communications are protected under a similar privilege.

Comment:

a. Scope and cross-references. This Section considers the requirement of § 68(3) that a communication must be "in confidence." The elements of § 68(1)-(2) and § 68(4) are explained in §§ 69-70 and § 72. Even if the initial communication is in confidence and otherwise

qualifies for protection as a privileged communication, its privileged status may be lost by subsequent revelation of the communication (see § 79). On the agency power of a lawyer to waive a privilege by disclosure to a nonprivileged person, see § 79. On the legal responsibilities of lawyers with respect to confidential client information, see generally §§ 60–67. With respect to communications between co-clients, see § 75, and with respect to a communication in a common-interest arrangement, see § 76.

b. Rationale. Given the objectives of the attorney-client privilege (see § 68, Comment *c*), a communication must be made in circumstances reasonably indicating that it will be learned only by the lawyer, client, or another privileged person (see § 70). The matter communicated need not itself be secret. For example, a privileged person receiving the communication may have known the same information from another source. The intent of the communicating person to communicate in confidence is relevant but not determinative. Thus, communication in a nonconfidential setting evidences that secrecy was not a consideration even if it is later protested that confidentiality was intended. Extending the privilege to a nonconfidential communication would not further the policy of the privilege and would result in excluding otherwise admissible and relevant evidence (see § 68, Comment *d*). If the communicating person did not intend that the communication be confidential, it is not privileged regardless of the circumstances otherwise attending its transmission.

The presence of a stranger to the lawyer-client relationship does not destroy confidentiality if another privilege protects the communications in the same way as the attorney-client privilege. Thus, in a jurisdiction that recognizes an absolute husband-wife privilege, the presence of a wife at an otherwise confidential meeting between the husband and the husband's lawyer does not destroy the confidentiality required for the attorney-client privilege.

c. Confidential and nonconfidential communications. The circumstances must indicate that the communicating persons reasonably believed that the communication would be confidential. Thus, a conversation between lawyer and client in the lawyer's offices is privileged. The same will not necessarily apply to a communication in offices of the client, inasmuch as not all agents of the client are privileged persons within the meaning of § 70 (compare Illustration 1 hereto & Comment *d*). For the delineation of privileged persons in the case of a client that is an organization, see § 73.

The circumstances may indicate that the communicating person knows that a nonprivileged person will learn of it, thus impairing its confidentiality. For example, a client may talk with a lawyer in a loud

voice in a public place where nonprivileged persons could readily overhear. Communication over a medium from which it is impossible to exclude other listeners, such as radio, strongly suggests that secrecy is not reasonably expected. Whether the client or other communicating person knew that nonprivileged persons would learn of the communication depends on the specific circumstances. The relevant circumstances are those reasonably evident to the communicating person, not the auditor. Thus, the presence of a surreptitious eavesdropper does not destroy confidentiality.

Illustrations:

1. Client and Lawyer confer in Client's office about a legal matter. Client realizes that occupants of nearby offices can normally hear the sound of voices coming from Client's office but reasonably supposes they cannot intelligibly detect individual words. An occupant of an adjoining office secretly records the conference between Client and Lawyer and is able to make out the contents of their communications. Even if it violates no law in the jurisdiction, the secret recording ordinarily would not be anticipated by persons wishing to confer in confidence. Accordingly, the fact that the eavesdropper overheard the Client–Lawyer communications does not impair their confidential status.

2. During a recess in a trial, Client and Lawyer walk into a courthouse corridor crowded with other persons attending the trial and discuss Client's intended testimony in tones loud enough to be readily overheard by bystanders. As Lawyer knows, the courthouse premises include several areas more appropriate for a confidential conversation than the corridor. The corridor conversation is not in confidence for the purposes of the privilege, and the privilege does not bar examining either Client or Lawyer concerning it.

Confidentiality is a practical requirement. Exigent circumstances may require communications under conditions where ordinary precautions for confidentiality are impossible. The privilege applies if the communicating person has taken reasonable precautions in the circumstances.

Illustration:

3. A jailer requires Client, an incarcerated person, and Lawyer to confer only in a conference area that, as Client and

Lawyer know, is sometimes secretly subjected to recorded video surveillance by the jailer. If Client and Lawyer take reasonable precautions to avoid being overheard, the fact that the jailer secretly records their conversation does not deprive it of its confidential character.

d. A communication intended for a nonprivileged person. A client may disclose information to a lawyer intending that it be conveyed to a nonprivileged third person and not intending that the lawyer determine the suitability of thus publishing it. Such a communication is not confidential for purposes of the privilege. Willingness to disclose a communication to nonprivileged persons (compare § 70) without prior review by the lawyer indicates that assurance of confidentiality did not importantly motivate communication.

The critical element is whether the privileged person's evident purpose is that the contents of the communication be made available to a nonprivileged person. Clients do not typically have such a purpose. Rather, a client ordinarily expects the lawyer to release information to nonprivileged persons only after exercising judgment about whether to do so and about the form in which it should be released. In ascertaining purpose, the nature of the legal assistance that the lawyer is providing and the nature of the communication asserted to be confidential are relevant.

A common instance of nonconfidential client-lawyer communications is where a lawyer functions as an attesting witness on a document signed by the lawyer's client. Those circumstances plainly warrant the inference that the lawyer may testify to facts relevant to the attestation, including communications from the client relating to that function.

e. Random dissemination of a communication. Communicating randomly to many auditors indicates that the communicating person was oblivious to secrecy.

Illustration:

4. Client makes an audiotape recording in which Client confesses to committing a crime, remorse for which, Client says on the tape, has led Client to attempt suicide. Client addresses the audio tape to business associates of Client. On the tape, Client mentions that the business associates might wish to provide the tape to Client's Lawyer. Client fails in the suicide attempt and is charged with the crime confessed on the tape. The business associates to whom the tape is addressed give the tape to Lawyer.

Client did not intend the message as a confidential communication. It is immaterial whether or not nonprivileged persons in fact listened to the tape and thus actually learned of the communication.

In many circumstances, including the foregoing Illustration, when a communication is addressed to an audience that includes nonprivileged persons, an additional reason the privilege does not apply is that the client did not communicate to obtain legal assistance (see § 72(2)).

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Comment b. Rationale. For formulations of the principle underlying the rule stated in this Section, see, e.g., Proposed Federal Rules of Evidence, Rule 503(a)(4) ("A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."); Revised Uniform Rules of Evidence, Rule 502(a)(5) (1974) (substantially similar); Cal. Evid. Code § 952 (West 1974) ("As used in this article, 'confidential communication between lawyer and client' means information transmitted between a client and his lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses that information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted").

The approach of modern evidence codes varies. Some are consistent with a subjective ("intent") concept; others seem to refer to circumstances reasonably apparent. See also, e.g., Esposito v. United States, 436 F.2d 603, 606 (9th Cir.1970) ("reasonable person"); United States v. Tellier, 255 F.2d 441, 447 (2d Cir.), cert. denied, 358 U.S. 821, 79 S.Ct. 33, 3 L.Ed.2d 62 (1958) ("understood"). In their actual decisions, courts almost invariably inquire into whether a reasonable person would have expected the communication to reach only other privileged persons in the circumstances and not into the actual, subjective state of mind of the communicating person. That approach is stated in the Section.

Comment c. Confidential and nonconfidential communications. See generally 1 C. McCormick, Evidence § 91 (J. Strong 4th ed.1992); C. Mueller & L. Kirkpatrick, Modern Evidence § 5.13 (1995); Annot., 14 A.L.R. 4th 594 (1982). E.g., United States v. Lopez, 777 F.2d 543, 553 (10th Cir.1985) (presence of companion whose interests were potentially adverse to those of client); United States v. Lechoco, 542 F.2d 84, 85 (D.C.Cir.1976) (presence of client's kidnaping victim, whose presence was coerced by client at time of interview with lawyer); People v. Harris, 442 N.E.2d 1205, 1208 (N.Y.1982), cert. denied, 460 U.S. 1047, 103 S.Ct. 1448, 75 L.Ed.2d 803 (1983) (statement of

client blurted out to lawyer over telephone before police officer, who overheard statement while walking out of room, could completely retreat from room). For the purpose of this rule, the third person must be not only present but in a position to learn the content of the communication. E.g., Divincenti v. Redondo, 486 So.2d 959, 962 (La.Ct.App.1986) (confidentiality of lessor's statements not impaired when lessee was present in office of lessor's lawyer but apparently heard only lawyer's side of telephone conversation between lessor and lawyer). If the third person is present and in a position to overhear the communication, the communication is not confidential even if the third person in fact did not overhear it. Cf. State v. Cascone, 487 A.2d 186, 191 (Conn.1985).

On the presence of a nonprivileged third person when the need for client-lawyer communication reasonably precludes more private arrangements, see, e.g., Hofmann v. Conder, 712 P.2d 216 (Utah 1985) (presence of nurse in client's intensive-care room).

Older authority held that an eavesdropper could testify to privileged conversations even if client and lawyer took reasonable precautions to achieve privacy. E.g., 8 J. Wigmore, Evidence § 2326 (J. McNaughton rev.1961). That is the traditional English view. See Heyden, Legal Professional Privilege and Third Parties, 37 Mod. L. Rev. 601 (1974). Some modern British Commonwealth courts have, however, refused to follow that rule. Rex v. Uljee, N.Z.L.R. 561 (C.A.) (1982). The eavesdropper rule (or "third party exception," as it is known in the United Kingdom) is inconsistent with a dominant theme of the doctrine on confidentiality—the client's reasonable expectations. It also ignores the difficulty of guaranteeing absolute privacy in the face of modern advances in miniaturized and electronic eavesdropping devices. Finally, it motivates adversaries to employ invasive means to breach the confidences of clients and lawyers to secure evidence. The Institute adopted the rigid rule on eavesdroppers in the Model Code of Evidence, Rule 210, Comment *b* (1942), but rejected it in the Uniform Rules of Evidence, Rule 26, Comment (1953) ("This rule ... goes further than the Model Code by preventing disclosure of communications overheard by eavesdroppers"). Modern American authority generally does not insist that the client be able to exclude all possibility that eavesdroppers will overhear the communication. See generally C. Wolfram, Modern Legal Ethics § 6.3.7, at 264–65 (1986).

Illustration 2 is based on Schwartz v. Wenger, 124 N.W.2d 489 (Minn. 1963) (testimony of nonsurreptitious eavesdropper who overheard client-lawyer conversation in crowded courthouse hallway admissible because no effort made by client or lawyer to ensure secrecy).

Comment d. A communication intended for a nonprivileged person. See generally Supreme Court Advisory Committee on Rules of Evidence, 56 F.R.D. 183, 238 (1972) (" ... A communication ... meant to be relayed to outsiders ... can scarcely be considered confidential.... "); 1 C. McCormick, Evidence § 91, at 333 (J. Strong 4th ed.1992). E.g., United States v. Aronson, 781 F.2d 1580 (11th Cir.1986); Colton v. United States, 306 F.2d 633, 638 (2d Cir. 1962). Whether a client intends a communication to be conveyed to nonprivileged third persons is, of course, a question of fact to be determined in view of the circumstances. A

client may intend disclosure to a third person only under limited conditions, consistent with confidentiality. For example, although a client who has signed a will must know that it probably will be made public at some point, clients also retain the power to revoke or change a will. Thus, courts customarily hold that during the client's lifetime the will and communications underlying it remain confidential. E.g., 8 J. Wigmore, Evidence § 2314 (J. McNaughton rev.1961); Will of Johnson, 488 N.Y.S.2d 355, 357 (N.Y.Surr.Ct.1985); In re Guardianship of York, 723 P.2d 448, 452–53 (Wash.Ct.App.1986). Compare § 81 (privilege inapplicable in contest over will of decedent and similar questions of succession). Careful examination of the circumstances also is required to determine whether the client intended the lawyer to convey the client's communication to a third person or, instead, to review the communication first and advise the client on the legal implications of the communication. See United States v. (Under Seal), 748 F.2d 871, 875–76 (4th Cir.1984). Thus, in the typical situation of a lawyer and client exchanging drafts of a communication ultimately made to a nonprivileged person, the otherwise confidential drafts of the published document remain privileged. E.g., Kobluk v. University of Minnesota, 574 N.W.2d 436 (Minn.1998).

On the inapplicability of the privilege to testimony by a lawyer who is an attesting witness, see Revised Uniform Rules of Evidence, Rule 502(d)(4) (1974) ("There is no privilege under this rule ... (4) Document attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness.... "); Model Code of Evidence, Rule 213(2)(c) (1942).

Comment e. Random dissemination of a communication. E.g., Supreme Court Advisory Committee on Rules of Evidence, 56 F.R.D. 183, 238 (1972). Illustration 4 is based on the facts in, but reaches a result opposed to, In re Vanderbilt (Rosner–Hickey), 439 N.E.2d 378 (N.Y.1982) (fact that client intended tape to be heard by nonprivileged persons and that it was left in a place where it was likely to be discovered by nonprivileged persons, and was so discovered, does not deprive communication of privileged status). Other decisions are in accord with the position in this Section. E.g., State v. Jancsek, 730 P.2d 14 (Or. 1986) (no privilege for client letter to friend in another state threatening violence against client's wife and asking friend's help in securing a lawyer if client committed crime against wife).

§ 72. Attorney-Client Privilege—Legal Assistance as the Object of a Privileged Communication

A communication is made for the purpose of obtaining or providing legal assistance within the meaning of § 68 if it is made to or to assist a person:

(1) who is a lawyer or who the client or prospective client reasonably believes to be a lawyer; and

(2) whom the client or prospective client consults for the purpose of obtaining legal assistance.

Comment:

a. Scope and cross-references. This Section addresses the requirement of § 68(4) that the communication be made "for the purpose of obtaining or providing legal assistance for the client." The requirements of § 68(1)-(3) are addressed in §§ 69–71. On invoking the privilege, see § 86. On the confidentiality responsibilities of lawyers, see generally §§ 60–67.

A privileged communication may be made between privileged persons as stated in § 70. This Section does not require that the lawyer involved in a representation be a party to all communications between privileged persons in order for the privilege to attach. Thus, a client's otherwise privileged communications with an investigator for a lawyer are privileged, as well as statements the client makes directly to the lawyer.

b. The scope of legal assistance. The claimant of privilege must have consulted the lawyer to obtain legal counseling or advice, document preparation, litigation services, or any other assistance customarily performed by lawyers in their professional capacity. A lawyer's assistance is legal in nature if the lawyer's professional skill and training would have value in the matter. Some early authority suggested that the attorney-client privilege extended only to legal assistance in litigation. That limitation has not been followed by modern American authority or in the Section.

Client-lawyer communications retrospectively reflecting on past legal services, such as remarks after a trial or signing of a contract, are included within the privilege. Also included are communications that refer only speculatively to future legal services.

c. A client's purpose. A client must consult the lawyer for the purpose of obtaining legal assistance and not predominantly for another purpose. That limitation follows from the objective of the privilege, which is to encourage client communications to enable lawyers to render legal assistance to the client and to encourage lawyers to convey advice and other information to their clients (see § 68, Comment *c*). Whether another privilege (for example, doctor-patient privilege, interspousal communication privilege, or trade-secret privilege) might protect a specific communication is beyond the scope of this Restatement.

A consultation with one admitted to the bar but not in that other person's role as lawyer is not protected. Thus, a communication with a friend is not protected simply because the friend is a lawyer. Also not privileged are communications with a person who is a lawyer but who performs a predominantly business function within an organization, for example as a director or nonlegal officer of a corporation. When a

person in such a role performs legal services for the client organization, the privilege applies. Whether a purpose is significantly that of obtaining legal assistance or is for a nonlegal purpose depends upon the circumstances, including the extent to which the person performs legal and nonlegal work, the nature of the communication in question, and whether or not the person had previously provided legal assistance relating to the same matter. Inside legal counsel to a corporation or similar organization (see § 73, Comment *i*) is fully empowered to engage in privileged communications.

Illustration:

1. Client and Lawyer have had a longstanding relationship. Client sends a letter to Lawyer offering Lawyer an opportunity to participate as an investor in a real-estate project. Lawyer has occasionally given Client legal advice and performed other legal services, and the two have engaged in real-estate transactions on other occasions. In the letter, Client discusses negotiations with the prospective seller, indicating the seller's willingness to sell and the likely price. The letter does not request or refer to any legal assistance. Unless other circumstances compel a contrary inference, a finding is warranted that Client consulted Lawyer for a business purpose.

If a lawyer's services are of a kind performed commonly by both lawyers and nonlawyers or that otherwise include both legal and nonlegal elements, difficult questions of fact may be presented. So long as the client consults to gain advantage from the lawyer's legal skills and training, the communication is within this Section, even if the client may expect to gain other benefits as well, such as business advice or the comfort of friendship. The primary consideration is the reasonable expectations of the person in the position of putative client. Some situations are sufficiently familiar in practice to warrant treating them as presumptively legal services. Thus, preparing a will or preparing to conduct litigation should always be regarded as legal assistance.

Illustrations:

2. As Lawyer has done in past years, Lawyer prepares Client's federal tax returns, using records, receipts, and other information supplied by Client and without discussing any issues with Client. Client's tax returns are not complex, nor do they require a knowledge of tax law beyond that possessed by nonlawyer preparers of tax returns. Client knows that Lawyer is admit-

ted to practice law but has never discussed with Lawyer any legal question concerning taxes or return preparation, nor has Lawyer offered such advice. Client pays Lawyer on a per-form basis and in an amount comparable to what nonlawyer tax preparers charge. The trier of fact may, but need not, infer that Client's purpose was not that of obtaining legal assistance.

3. Client frequently has consulted Lawyer about legal matters relating to Client's growing business. Lawyer drafts documents and provides other legal assistance relating to a complicated transaction having important tax implications that Client and Lawyer identify and discuss. Client later asks Lawyer to prepare Client's federal income-tax return for the tax year in which the transaction occurs. The circumstances indicate that Lawyer is providing legal services in preparing the tax return.

Some tasks commonly performed by lawyers require no distinctly legal skill. Some courts in an earlier era determined that the lawyer was then a mere "scrivener" and that communications relating to such tasks were not privileged. The older decisions reflected a culture in which many clients were illiterate and lawyers were employed because they could read and write rather than because of their legal skills or knowledge. However, in contemporary practice it will be unusual for a lawyer to prepare a document without communication with the client to determine, at a minimum, the client's objectives. Except in unusual circumstances clearly indicating otherwise, no distinction under this Section should be drawn between situations where the lawyer performs perfunctory services and those involving greater complexity or moment.

d. Privilege for a communication in an initial consultation. The privilege applies to communications in an initial consultation (see § 68 & § 70, Comment *c*; see also § 15).

e. "Lawyer." As provided in Subsection (1), the privilege applies to communications to a person whom the client reasonably believes to be a lawyer. Thus, a lawyer admitted to practice in another jurisdiction or a lawyer admitted to practice in a foreign nation is a lawyer for the purposes of the privilege. On communications involving inside legal counsel of an organization, see Comment *c* hereto. Communications to a person who falsely poses as a lawyer are privileged, so long as the confiding client reasonably believes that the impostor is a lawyer. Although local practice by a lawyer admitted elsewhere or by an impostor may constitute unauthorized practice of law, depriving the client of the privilege is an inappropriate sanction. Clients should be

protected in dealing with legal advisers in good faith and not be exposed to the uncertainties of choice-of-law questions.

f. A lawyer acting in the interest of the communicating person. A communication must involve a lawyer functioning on behalf of the client who claims the protection of the privilege. Thus, a client's confidential communication to the lawyer for an opposing party in litigation or in a transaction is not privileged.

Illustration:

4. X is arrested and brought to the office of Y, who is apparently the district attorney who will prosecute X for the charged offense. X is informed of the charges against her and advised of her right to remain silent and to the assistance of counsel. X asks that the arresting officer leave the room and confides to Y that X has committed the crime charged. Neither Y nor any other governmental officer has done anything to deceive X about Y's role. The communication is not privileged because X could not reasonably have believed that Y would function as her lawyer.

On the privilege when two or more clients consult the same lawyer, see § 75. See also § 76 with respect to a common-interest arrangement.

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Comment b. The scope of legal assistance. The evidence codes commonly limit the privilege to client consultations for the purpose of obtaining legal assistance from a lawyer. E.g., Revised Uniform Rules of Evidence, Rule 502(a)(1) (1974); Proposed Federal Rules of Evidence, Rule 503(b) (1973); Uniform Rules of Evidence Rule 26(3)(a) (1953); Model Code of Evidence, Rule 210(b) (1942).

Courts no longer follow an early doctrine that limited the privilege to confidences given in aid of litigation and in the very litigation to which they pertained. See 8 J. Wigmore, Evidence § 2294 (J. McNaughton rev.1961). E.g., Alexander v. United States, 138 U.S. 353, 358, 11 S.Ct. 350, 352, 34 L.Ed. 954 (1891). The matter was not laid to rest in England until 1833 in Greenough v. Gaskell, 36 Rev. Rep. 258 (Ch. 1833). See R. Cross, Evidence 389 (6th ed.1985).

As with the question of expectation of confidentiality (see § 71, Comment *b*, and Reporter's Note thereto), some American decisions assert that the central inquiry concerning the purpose for which the lawyer and client consult involves the subjective belief of the person asserting the privilege. E.g., Alexander v. Superior Court, 685 P.2d 1309, 1314 (Ariz.1984); In re McGlothlen, 663 P.2d 1330, 1334 (Wash.1983). Here also, the generally

accepted foundation, in the majority of decisions and reflected in the Section, is that of objectively reasonable belief. See C. Mueller & L. Kirkpatrick, Modern Evidence § 5.10 (1995); P. Rice, Attorney–Client Privilege in the United States § 6.6 et seq. (1993); 8 J. Wigmore, Evidence § 2302 (J. McNaughton rev.1961); United States v. Boffa, 513 F.Supp. 517, 523–25 (D.Del.1981) (unreasonable for lawyer-defendant to believe that "jailhouse lawyer" was lawyer).

c. A client's purpose. See generally 1 C. McCormick, Evidence § 88, at 322–23 (J. Strong 4th ed.1992); C. Mueller & L. Kirkpatrick, Modern Evidence § 5.11 (1995); 2 J. Weinstein & M. Berger, Evidence ¶ 503(a)(1), at 503–21 (1986). E.g., Simon v. G. D. Searle & Co., 816 F.2d 397, 402–04 (8th Cir.), cert. denied, 484 U.S. 917, 108 S.Ct. 268, 98 L.Ed.2d 225 (1987) (no privilege for business documents that client supplied to keep lawyer apprised of business matters and not as implied request for legal advice based on those matters); United States v. Tedder, 801 F.2d 1437, 1442–43 (4th Cir.1986) (lawyer, although member of firm representing client, communicated with client in role of friend); United States v. Wilson, 798 F.2d 509, 513 (1st Cir.1986) (lawyer functioning as negotiator in business dealing); Mission Nat'l Ins. Co. v. Lilly, 112 F.R.D. 160, 163–65 (D.Minn.1986) (lawyer serving as claims adjuster); United States v. Rocco, 99 F.Supp. 746, 748 (E.D.Pa.1951), cert. denied, 343 U.S. 927, 72 S.Ct. 761, 96 L.Ed. 1338 (1952) (lawyer functioning as agent to sell stolen securities); Art Board, Inc. v. Worldwide Bus. Exch. Corp., 510 N.Y.S.2d 973, 974 (N.Y.Cty.Ct.1986) (lawyer serving as escrow agent); G & S Invs. v. Belman, 700 P.2d 1358, 1364–65 (Ariz.Ct.App.1984) (lawyer consulted as friend or business advisor); Minter v. Priest, [1930] A.C. 558 (H.L.) (solicitor approached as potential lender of money); Annesley v. Earl of Anglesea, 17 Howell's State Trials 1139, 1239 (1743) (lawyer consulted as friend).

In general, American decisions agree that the privilege applies if one of the significant purposes of a client in communicating with a lawyer is that of obtaining legal assistance. That position is reflected in the Section. For the English view, differently stating a "predominant purpose" test as a requirement for application of the privilege, but rejecting a "sole purpose" test, see Waugh v. British Rys. Bd., [1980] A.C. 521 (H.L.).

Inside legal counsel are professional legal advisers for purposes of the privilege, whether locally admitted or not (compare Comment *e* hereto). See, e.g., Bruce v. Christian, 113 F.R.D. 554, 560 (S.D.N.Y.1986); Research Inst. for Medicine & Chemistry, Inc. v. Wisconsin Alumni Research Found., 114 F.R.D. 672, 676 (W.D.Wis.1987); Valente v. Pepsico, Inc., 68 F.R.D. 361, 367 (D.Del.1975). For a contrary view, see, e.g., A M & S, Ltd. v. Commission of the European Communities, [1982] 2 E.C.R. 1575, 1612 (Ct. Just. of Eur. Comm.) (communications by client to lawyer who is "bound to his client by a relationship of employment" not covered by professional privilege, which is otherwise recognized in commission proceedings).

Illustrations 2 and 3 involve a somewhat confused area of the law. See generally Kenderdine, The Internal Revenue Service Summons to Produce Document, 64 Minn. L. Rev. 73, 100–101 (1979). The decisions disagree whether routine tax-return

preparation services constitute legal services covered by the privilege. See In re Grand Jury Subpoena Duces Tecum (Dorokee Co.), 697 F.2d 277, 280 (10th Cir.1983), and cases cited; see also, e.g., United States v. Frederick, 182 F.3d 496 (7th Cir.1999), cert. denied, ___ U.S. ___, 120 S.Ct. 1157, 145 L.Ed.2d 1070 (2000) (documents prepared by lawyer-accountant for either tax return or in preparing for client's tax audit not privileged from IRS summons).

For decisions holding that, in the circumstances of the case, a lawyer was functioning as a mere scrivener and thus could he required to testify to client communications, see, e.g., 1 C. McCormick, Evidence § 88, at 323 n.11 (J. Strong 4th ed.1992), and authorities cited (scrivener exception is "often used as a justification for denying the privilege"). On modern, and dubious, decisions, see, e.g., SEC v. Gulf & Western Indus., Inc., 518 F.Supp. 675, 683 (D.D.C.1981) (on facts not stated in opinion, large law firm was serving as scrivener in tender offer); Bolyea v. First Presbyterian Church, 196 N.W.2d 149, 154 (N.D.1972) (lawyer served as mere scrivener where lawyer advised preparing will but client overrode advice and directed lawyer to draft deed).

Comment d. Privilege for a communication in an initial consultation. See Revised Uniform Rules of Evidence, Rule 502(a)(1) (1974); Proposed Federal Rules of Evidence, Rule 503(a)(1) (1973) ("A 'client' is a person ... who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him"); Uniform Rules of Evidence, Rule 26(3)(a) (1953); Model Code of Evidence, Rule 210(b) (1942); 1 C. McCormick, Evidence § 88, at 322 (J. Strong 4th ed.1992). E.g., People v. Canfield, 527 P.2d 633, 636–37 (Cal.1974); Hoyas v. State, 456 So.2d 1225, 1228 (Fla.Dist.Ct.App.1984); Commonwealth v. O'Brien, 388 N.E.2d 658, 661 (Mass.1979); Taylor v. Sheldon, 173 N.E.2d 892, 895 (Ohio 1961). The fact that a client-lawyer relationship is ultimately formed does not necessarily protect all previous communications between client and lawyer. At the time of the communication, the relationship must have been established or be the subject of discussion. See Pipes v. Sevier, 694 S.W.2d 918, 925–26 (Mo.Ct.App.1985).

Comment e. "Lawyer." See Proposed Federal Rules of Evidence, Rule 503(a)(2) (1973) ("A 'lawyer' is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation."); Revised Uniform Rule 502(a)(3) (1974) (substantially similar). E.g., Hickman v. Taylor, 329 U.S. 495, 508, 67 S.Ct. 385, 392, 91 L.Ed. 451 (1947).

This Section follows the position of most evidence codes and decisions in defining "lawyer" broadly to include a person admitted to practice law anywhere. E.g., Mitts & Merrill, Inc. v. Shred Pax Corp., 112 F.R.D. 349, 352 (N.D.Ill.1986) (German patent agent). Among other justifications, that approach avoids choice-of-law problems that otherwise would arise concerning the scope of a lawyer's authority to function as a lawyer in a multistate practice context. See Supreme Court Advisory Committee Note on Evidence Rule 502(a)(2), 56 F.R.D. 183, 238 (1972). Rule 209(b) of the Model Code of Evidence (1942) suggested a somewhat more restrictive rule. It required that the lawyer be authorized "to practice law in any state or nation the law of which recognizes a privi-

lege against disclosure of confidential communications between client and lawyer." See also Uniform Rules of Evidence, Rule 26(3)(c) (1953). More recent codes and this Section do not require that the lawyer's home jurisdiction recognize the privilege. Because the privilege focuses on a lay client's reasonable belief, it would be incongruous to protect the client's intended confidences only if the law of another state or nation recognizes the privilege—a matter on which most clients would have no information or reason to inquire.

On lawyer-poseurs, the view that a communication is privileged when the client reasonably believes that the auditor is a lawyer is supported by, e.g., 1 C. McCormick, Evidence § 88, at 322 (J. Strong 4th ed.1992); P. Rice, Attorney-Client Privilege in the United States § 3.13 (1993); 8 J. Wigmore, Evidence § 2302 (J. McNaughton rev.1961). Compare State v. Spell, 399 So.2d 551, 556–57 (La.1981) (communication to "jailhouse lawyer" not privileged).

Comment f. A lawyer acting in the interest of the communicating person. E.g., Pritchard v. United States, 181 F.2d 326, 329–30 (6th Cir.), aff'd per curiam for lack of quorum, 339 U.S. 974, 70 S.Ct. 1029, 94 L.Ed. 1380 (1950) (no attorney-client privilege for disclosures to judge who had impaneled grand jury to investigate election fraud in which disclosing person was involved); Hopkinson v. State, 664 P.2d 43, 66–67 (Wyo.1983), cert. denied, 464 U.S. 908, 104 S.Ct. 262, 78 L.Ed.2d 246 (1983) (disclosures after lawyer had terminated relationship with client accused of crime and while lawyer was conducting duties as county prosecutor).

TITLE B. THE ATTORNEY-CLIENT PRIVILEGE FOR ORGANIZATIONAL AND MULTIPLE CLIENTS

Section

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§ 73. The Privilege for an Organizational Client

When a client is a corporation, unincorporated association, partnership, trust, estate, sole proprietorship, or other for-profit or not-for-profit organization, the attorney-client privilege extends to a communication that:

(1) otherwise qualifies as privileged under §§ 68–72;

(2) is between an agent of the organization and a privileged person as defined in § 70;

(3) concerns a legal matter of interest to the organization; and

(4) is disclosed only to:

(a) privileged persons as defined in § 70; and

(b) other agents of the organization who reasonably need to know of the communication in order to act for the organization.

Comment:

a. Scope and cross-references. This Section states the conditions under which an organization can claim the attorney-client privilege. The requirements of §§ 68–72 must be satisfied, except that this Section recognizes a special class of agents who communicate in behalf of the organizational client (see Comment *d*). The Section also requires that the communication relate to a matter of interest to the organization as such (see Subsection (3) & Comment *f* hereto) and that it be disclosed within the organization only to persons having a reasonable need to know of it (see Subsection (4)(b) & Comment *g* hereto).

Conflicts of interest between an organizational client and its officers and other agents are considered in § 131, Comment *e*. On the application of the privilege to governmental organizations and officers, see § 74.

b. Rationale. The attorney-client privilege encourages organizational clients to have their agents confide in lawyers in order to realize the organization's legal rights and to achieve compliance with law (Comment *d* hereto). Extending the privilege to corporations and other organizations was formerly a matter of doubt but is no longer questioned. However, two pivotal questions must be resolved.

The first is defining the group of persons who can make privileged communications on behalf of an organization. Balance is required. The privilege should cover a sufficiently broad number of organizational communications to realize the organization's policy objectives, but not insulate ordinary intraorganizational communications that may later have importance as evidence. Concern has been expressed, for example, that the privilege would afford organizations "zones of silence" that would be free of evidentiary scrutiny. A subsidiary problem is whether persons who would be nonprivileged occurrence witnesses with respect to communications to a lawyer representing a natural person can be conduits of privileged communications when the client is an organization. That problem has been addressed in terms of the "subject-matter" and "control-group" tests for the privilege (see Comment *d*).

Second is the problem of defining the types of organizations treated as clients for purposes of the privilege. It is now accepted that the privilege applies to corporations, but some decisions have questioned whether the privilege should apply to unincorporated associations, partnerships, or sole proprietorships. Neither logic nor principle supports limiting the organizational privilege to the corporate form (see Comment *c* hereto).

c. Application of the privilege to an organization. As stated in the Section, the privilege applies to all forms of organizations. A corporation with hundreds of employees could as well be a sole proprietorship if its assets were owned by a single person rather than its shares being owned by the same person. It would be anomalous to accord the privilege to a business in corporate form but not if it were organized as a sole proprietorship. In general, an organization under this Section is a group having a recognizable identity as such and some permanency. Thus, an organization under this Section ordinarily would include a law firm, however it may be structured (as a professional corporation, a partnership, a sole proprietorship, or otherwise). The organization need not necessarily be treated as a legal entity for any other legal purpose. The privilege extends as well to charitable, social, fraternal, and other nonprofit organizations such as labor unions and chambers of commerce.

d. An agent of an organizational client. As stated in Subsection (2), the communication must involve an agent of the organization, on one hand, and, on the other, a privileged person within the meaning of § 70, such as the lawyer for the organization. Persons described in Subsection (4)(b) may disclose the communication under a need-to-know limitation (see Comment *g* hereto). The existence of a relationship of principal and agent between the organizational client and the privileged agent is determined according to agency law (see generally Restatement Second, Agency §§ 1–139).

Some decisions apply a "control group" test for determining the scope of the privilege for an organization. That test limits the privilege to communications from persons in the organization who have authority to mold organizational policy or to take action in accordance with the lawyer's advice. The control-group circle excludes many persons within an organization who normally would cooperate with an organization's lawyer. Such a limitation overlooks that the division of functions within an organization often separates decisionmakers from those knowing relevant facts. Such a limitation is unnecessary to prevent abuse of the privilege (see Comment *g*) and significantly frustrates its purpose.

Other decisions apply a "subject matter" test. That test extends the privilege to communications with any lower-echelon employee or agent so long as the communication relates to the subject matter of the representation. In substance, those decisions comport with the need-to-know formulation in this Section (see Comment *g*).

It is not necessary that the agent receive specific direction from the organization to make or receive the communication (see Comment *h*).

Agents of the organization who may make privileged communications under this Section include the organization's officers and employees. For example, a communication by any employee of a corporation to the corporation's lawyer concerning the matter as to which the lawyer was retained to represent the corporation would be privileged, if other conditions of the privilege are satisfied. The concept of agent also includes independent contractors with whom the corporation has a principal-agent relationship and extends to agents of such persons when acting as subagents of the organizational client. For example, a foreign-based corporation may retain a general agency (perhaps a separate corporation) in an American city for the purpose of retaining counsel to represent the interests of the foreign-based corporation. Communications by the general agency would be by an agent for the purpose of this Section.

For purpose of the privilege, when a parent corporation owns controlling interest in a corporate subsidiary, the parent corporation's agents who are responsible for legal matters of the subsidiary are considered agents of the subsidiary. The subsidiary corporation's agents who are responsible for affairs of the parent are also considered agents of the parent for the purpose of the privilege. Directors of a corporation are not its agents for many legal purposes, because they are not subject to the control of the corporation (see Restatement Second, Agency § 14C). However, in communications with the organization's counsel, a director who communicates in the interests and for the benefit of the corporation is its agent for the purposes of this Section. Depending on the circumstances, a director acts in that capacity both when participating in a meeting of directors and when communicating individually with a lawyer for the corporation about the corporation's affairs. Communications to and from nonagent constituents of a corporation, such as shareholders and creditors, are not privileged.

In the case of a partnership, general partners and employees and other agents and subagents of the partnership may serve as agents of the organization for the purpose of making privileged communications (see generally Restatement Second, Agency § 14A). Limited partners

who have no other relationship (such as employee) with the limited partnership are analogous to shareholders of a corporation and are not such agents.

In the case of an unincorporated association, agents whose communications may be privileged under this Section include officers and employees and other contractual agents and subagents. Members of an unincorporated association, for example members of a labor union, are not, solely by reason of their status as members, agents of the association for the purposes of this Section. In some situations, for example, involving a small unincorporated association with very active members, the members might be considered agents for the purpose of this Section on the ground that the association functionally is a partnership whose members are like partners.

In the case of an enterprise operated as a sole proprietorship, agents who may make communications privileged under this Section with respect to the proprietorship include employees or contractual agents and subagents of the proprietor.

Communications of a nonagent constituent of the organization may be independently privileged under § 75 where the person is a co-client along with the organization. If the agent of the organization has a conflict of interest with the organization, the lawyer for the organization must not purport to represent both the organization and the agent without consent (see § 131, Comment *c*). The lawyer may not mislead the agent about the nature of the lawyer's loyalty to the organization (see § 103). If a lawyer fails to clarify the lawyer's role as representative solely of the organization and the organization's agent reasonably believes that the lawyer represents the agent, the agent may assert the privilege personally with respect to the agent's own communications (compare § 72(2), Comment *f*; see also § 131, Comment *e*).

The lawyer must also observe limitations on the extent to which a lawyer may communicate with a person of conflicting interests who is not represented by counsel (see § 103) and limitations on communications with persons who are so represented (see § 99 and following).

e. The temporal relationship of principal-agent. Under Subsection (2), a person making a privileged communication to a lawyer for an organization must then be acting as agent of the principal-organization. The objective of the organizational privilege is to encourage the organization to have its agents communicate with its lawyer (see Comment *d* hereto). Generally, that premise implies that persons be agents of the organization at the time of communicating. The privilege may also extend, however, to communications with a person with whom the organization has terminated, for most other purposes, an agency relationship. A former agent is a privileged person under

Subsection (2) if, at the time of communicating, the former agent has a continuing legal obligation to the principal-organization to furnish the information to the organization's lawyer. The scope of such a continuing obligation is determined by the law of agency and the terms of the employment contract (see Restatement Second, Agency § 275, Comment *e*, & § 381, Comment *f*). The privilege covers communications with a lawyer for an organization by a retired officer of the organization concerning a matter within the officer's prior responsibilities that is of legal importance to the organization.

Subsection (2) does not include a person with whom the organization established a principal-agent relationship predominantly for the purpose of providing the protection of the privilege to the person's communications, if the person was not an agent at the time of learning the information. For example, communications between the lawyer for an organization and an eyewitness to an event whose communications would not otherwise be privileged cannot be made privileged simply through the organization hiring the person to consult with the organization's lawyer. (As to experts and similar persons employed by a lawyer, see § 70, Comment *g*).

Ordinarily, an agent communicating with an organization's lawyer within this Section will have acquired the information in the course of the agent's work for the organization. However, it is not necessary that the communicated information be so acquired. Thus, a person may communicate under this Section with respect to information learned prior to the relationship or learned outside the person's functions as an agent, so long as the person bears an agency relationship to the principal-organization at the time of the communication and the communication concerns a matter of interest to the organization (see Comment *f*). For example, a chemist for an organization who communicates to the organization's lawyer information about a process that the chemist learned prior to being employed by the organization makes a privileged communication if the other conditions of this Section are satisfied.

f. Limitation to communications relating to the interests of the organization. Subsection (3) requires that the communication relate to a legal matter of interest to the organization. The lawyer must be representing the organization as opposed to the agent who communicates with the lawyer, such as its individual officer or employee. A lawyer representing such an officer or employee, of course, can have privileged communications with that client. But the privilege will not be that of the organization. When a lawyer represents as co-clients both the organization and one of its officers or employees, the privileged nature of communications is determined under § 75. On the

conflicts of interest involved in such representations, see § 131, Comment *e*.

g. The need-to-know limitation on disclosing privileged communications. Communications are privileged only if made for the purpose of obtaining legal services (see § 72), and they remain privileged only if neither the client nor an agent of the client subsequently discloses the communication to a nonprivileged person (see § 79; see also § 71, Comment *d*). Those limitations apply to organizational clients as provided in Subsection (4). Communications become, and remain, so protected by the privilege only if the organization does not permit their dissemination to persons other than to privileged persons. Agents of a client to whom confidential communications may be disclosed are generally defined in § 70, Comment *f*, and agents of a lawyer are defined in § 70, Comment *g*. Included among an organizational client's agents for communication are, for example, a secretary who prepares a letter to the organization's lawyer on behalf of a communicating employee.

The need-to-know limitation of Subsection (4)(b) permits disclosing privileged communications to other agents of the organization who reasonably need to know of the privileged communication in order to act for the organization in the matter. Those agents include persons who are responsible for accepting or rejecting a lawyer's advice on behalf of the organization or for acting on legal assistance, such as general legal advice, provided by the lawyer. Access of such persons to privileged communications is not limited to direct exchange with the lawyer. A lawyer may be required to take steps assuring that attorney-client communications will be disseminated only among privileged persons who have a need to know. Persons defined in Subsection (4)(b) may be apprised of privileged communications after they have been made, as by examining records of privileged communications previously made, in order to conduct the affairs of the organization in light of the legal services provided.

Illustration:

1. Lawyer for Organization makes a confidential report to President of Organization, describing Organization's contractual relationship with Supplier, and advising that Organization's contract with Supplier could be terminated without liability. President sends a confidential memorandum to Manager, Organization's purchasing manager, asking whether termination of the contract would nonetheless be inappropriate for business reasons. Because Manager's response would reasonably depend on several aspects of Lawyer's advice, Manager would have need to know the

justifying reason for Lawyer's advice that the contract could be terminated. Lawyer's report to President remains privileged notwithstanding that President shared it with Manager.

The need-to-know concept properly extends to all agents of the organization who would be personally held financially or criminally liable for conduct in the matter in question or who would personally benefit from it, such as general partners of a partnership with respect to a claim for or against the partnership. It extends to persons, such as members of a board of directors and senior officers of an organization, whose general management and supervisory responsibilities include wide areas of organizational activities and to lower-echelon agents of the organization whose area of activity is relevant to the legal advice or service rendered.

Dissemination of a communication to persons outside those described in Subsection (4)(b) implies that the protection of confidentiality was not significant (see § 71, Comment *b*). An organization may not immunize documents and other communications generated or circulated for a business or other nonlegal purpose (see § 72).

h. Directed and volunteered agent communications. It is not necessary that a superior organizational authority specifically direct an agent to communicate with the organization's lawyer. Unless instructed to the contrary, an agent has authority to volunteer information to a lawyer when reasonably related to the interests of the organization. An agent has similar authority to respond to a request for information from a lawyer for the organization. And the lawyer for the organization ordinarily may seek relevant information directly from employees and other agents without prior direction from superior authorities in the organization.

i. Inside legal counsel and outside legal counsel. The privilege under this Section applies without distinction to lawyers who are inside legal counsel or outside legal counsel for an organization (see § 72, Comment *c*). Communications predominantly for a purpose other than obtaining or providing legal services for the organization are not within the privilege (see § 72, Comment *c*). On the credentials of a lawyer for the purposes of the privilege, see § 72(1), Comment *e*.

j. Invoking and waiving the privilege of an organizational client. The privilege for organizational clients can be asserted and waived only by a responsible person acting for the organization for this purpose. On waiver, see §§ 78–80. Communications involving an organization's director, officer, or employee may qualify as privileged, but it is a separate question whether such a person has authority to invoke or waive the privilege on behalf of the organization. If the lawyer was

representing both the organization and the individual as co-clients, the question of invoking and waiving the privilege is determined under the rule for co-clients (see § 75, Comment *e*). Whether a lawyer has formed a client-lawyer relationship with a person affiliated with the organization, as well as with the organization, is determined under § 14. Communications of such a person who approaches a lawyer for the organization as a prospective client are privileged as provided in § 72. Unless the person's contrary intent is reasonably manifest to a lawyer for the organization, the lawyer acts properly in assuming that a communication from any such person is on behalf and in the interest of the organization and, as such, is privileged in the interest of the organization and not of the individual making the communication. When the person manifests an intention to make a communication privileged against the organization, the lawyer must resist entering into such a client-lawyer relationship and receiving such a communication if doing so would constitute an impermissible conflict of interest (see § 131, Comment *e*).

An agent or former agent may have need for a communication as to which the organization has authority to waive the privilege, for example, when the agent is sued personally. A tribunal may exercise discretion to order production of such a communication for benefit of the agent if the agent establishes three conditions. First, the agent must show that the agent properly came to know the contents of the communication. Second, the agent must show substantial need of the communication. Third, the agent must show that production would create no material risk of prejudice or embarrassment to the organization beyond such evidentiary use as the agent may make of the communication. Such a risk may be controlled by protective orders, redaction, or other measures.

Illustration:

2. Lawyer, representing only Corporation, interviews Employee by electronic mail in connection with reported unlawful activities in Corporation's purchasing department in circumstances providing Corporation with a privilege with respect to their communications. Corporation later dismisses Employee, who sues Corporation, alleging wrongful discharge. Employee files a discovery request seeking all copies of communications between Employee and Lawyer. The tribunal has discretion to order discovery under the conditions stated in the preceding paragraph. In view of the apparent relationship of Employee's statements to possible illegal activities, it is doubtful that Employee could persuade the tribunal that access by Employee would create no

material risk that third persons, such as a government agency, would thereby learn of the communication and thus gain a litigation or other advantage with respect to Corporation.

k. Succession in legal control of an organization. When ownership of a corporation or other organization as an entity passes to successors, the transaction carries with it authority concerning asserting or waiving the privilege. After legal control passes in such a transaction, communications from directors, officers, or employees of the acquired organization to lawyers who represent only the predecessor organization, if it maintains a separate existence from the acquiring organization, may no longer be covered by the privilege. When a corporation or other organization has ceased to have a legal existence such that no person can act in its behalf, ordinarily the attorney-client privilege terminates (see generally § 77, Comment *c*).

Illustration:

3. X, an officer of Ajax Corporation, communicates in confidence with Lawyer, who represents Ajax, concerning dealings between Ajax and one of its creditors, Vendor Corporation. Ajax later is declared bankrupt and a bankruptcy court appoints Trustee as the trustee in bankruptcy for Ajax. Thereafter, Lawyer is called to the witness stand in litigation between Vendor Corporation and Trustee. Trustee has authority to determine whether the attorney-client privilege should be asserted or waived on behalf of the bankrupt Ajax Corporation with respect to testimony by Lawyer about statements by X. X cannot assert a privilege because X was not a client of Lawyer in the representation. Former officers and directors of Ajax cannot assert the privilege because control of the corporation has passed to Trustee.

A lawyer for an organization is ordinarily authorized to waive the privilege in advancing the interests of the client (see § 61 & § 79, Comment *c*). Otherwise, when called to testify, a lawyer is required to invoke the privilege on behalf of the client (see § 86(1)(b)). On waiver, see §§ 78–80.

REPORTER'S NOTE

Comment b. Rationale. See generally J. Gergacz, Attorney–Corporate Client Privilege (1987); M. Graham, Federal Evidence § 503.3 (2d ed.1986); 1 C. McCormick, Evidence § 87.1 (J. Strong 4th ed.1992); C.

Mueller & L. Kirkpatrick, Modern Evidence § 5.16 (1995); P. Rice, Attorney–Client Privilege in the United States § 4.9 et seq. (1993); 2 J. Weinstein & M. Berger, Evidence ¶ 503(b)[04] (1986); C. Wolfram, Modern Legal Ethics § 6.5 (1986); 24 C. Wright & K. Graham, Federal Practice & Procedure § 5476 (1986); id. at 135 ("one of the most perplexing issues in the law of privilege").

The evidence codes commonly state that corporations, and perhaps other organizational clients, are covered by the privilege, but typically without any attempt to elaborate on the coverage of the privilege. E.g., Revised Uniform Rules of Evidence, Rule 502(a)(1) (1974) ("client" defined to include, in addition to persons, "a ... public officer, or corporation, association, or other organization or entity, either public or private"); Proposed Federal Rules of Evidence, Rule 503(a)(1) (1972) (same); Uniform Rules of Evidence, Rule 26(3)(a) (1953) ("client" defined to include a "corporation or other association that, directly or through an authorized representative" seeks legal services); Model Code of Evidence, Rule 209(a) (1942) (same). See also 2 J. Weinstein & M. Berger, supra at ¶ 503(b)[04], at 503–41 n.1 (citing 19 A.L.I. Proceedings 158–159 (1942)) (notes that neither Comments to Rule 209 nor floor discussion at ALI general meeting referred to problem of defining or limiting organizational privilege).

The Advisory Committee to the Supreme Court on the proposed Federal Rules of Evidence merely stated that the question of defining the scope of the corporate privilege "is better left to resolution by decision on a case-by-case basis." Supreme Court Advisory Committee Note (subd. (a)(1)), 56 F.R.D. 183, 237 (1972). No guidance for decision was provided in the proposed Rule 503 or in the commentary. That awkward resolution was inconsistent with the Committee's detailed approach on many other evidence problems and was undoubtedly necessary because a short time earlier the Supreme Court, to which the rule was presented for acceptance, had sharply divided over the appropriate test for the scope of the privilege for corporations. Decker v. Harper & Row Publishers, Inc., 400 U.S. 348, 91 S.Ct. 479, 27 L.Ed.2d 433 (1971), aff'g by equally divided court 423 F.2d 487 (7th Cir.1970).

The decisions uniformly recognize that the general concepts and requirements of the privilege dealt with in §§ 68–72 apply in the case of corporate clients. E.g., Simon v. G.D. Searle & Co., 816 F.2d 397, 403 (8th Cir.), cert. denied, 484 U.S. 917, 108 S.Ct. 268, 98 L.Ed.2d 225 (1987) (organization lawyer's receipt of organization reports or other documents prepared for business purposes not privileged); In re So. Indus. Banking Corp., 35 B.R. 643, 648 (Bankr. E.D.Tenn.1983) (because communication was not for purpose of obtaining legal services (see § 72), attorney-client privilege inapplicable, regardless of particular test that might otherwise determine its scope).

Although it has been argued that the attorney-client privilege should not extend to entities such as corporations, e.g., Radiant Burners, Inc. v. American Gas Ass'n, 207 F.Supp. 771 (N.D.Ill.1962), rev'd, 320 F.2d 314 (7th Cir.), cert. denied, 375 U.S. 929, 84 S.Ct. 330, 11 L.Ed.2d 262 (1963); D. Luban, Lawyers & Justice 217–34 (1988); Gardner, A Personal Privilege for Communications of Corporate Clients—Paradox or Public Policy, 40

U. Det. L.J. 299, 323–25, 376 (1963), by far the great majority of courts and commentators assert or assume that the privilege generally extends to corporate and other organizational clients. E.g., Upjohn Co. v. United Statos, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981); United States v. Louisville & N. R.R., 236 U.S. 318, 336, 35 S.Ct. 363, 369, 59 L.Ed. 598 (1915) (dictum); Cole v. Hughes Tool Co., 215 F.2d 924, 930–31 (10th Cir. 1954), cert. denied, 348 U.S. 927, 75 S.Ct. 339, 99 L.Ed. 726 (1955); Belanger v. Alton Box Board Co., 180 F.2d 87 (7th Cir.1950); United States v. United Shoe Mach. Corp., 89 F.Supp. 357, 359 (D.Mass.1950) (corporate attorney-client privilege covers any "information furnished by an officer or employee of the corporation in confidence and without the presence of third persons"); Western Union Tel. Co. v. Baltimore & Ohio Tel. Co., 26 F. 55 (C.C.S.D.N.Y.1885); Simon, The Attorney–Client Privilege as Applied to Corporations, 65 Yale L.J. 953, 990 (1956).

Courts and commentators have not agreed, however, on the question of tbe precise scope of the privilege for organizational clients. Compare, e.g., Upjohn Co. v. United States, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) (rejecting control-group test, but refusing to identify test that would be acceptable for federal courts), with, e.g., D. I. Chadbourne, Inc. v. Superior Court, 388 P.2d 700, 709–10 (Cal.1964) (11–point test propounded for detormining application of privilege to corporate client); State v. Ogle, 682 P.2d 267, 271 n.1 (Or. 1984) (concurring opinion) (noting commentary to recent state evidence code that expressly rejected *Upjohn* and adopted control-group test); Consolidation Coal Co. v. Bucyrus–Erie Co., 432 N.E.2d 250 (Ill.1982) (refusing to follow *Upjohn* and reaffirming control-group test as evidence standard for state's courts).

Comment c. Application of the privilege to an organization. See Revised Uniform Rules of Evidence, Rule 502(a)(1) (1974) ("association, or other organization or entity"); Proposed Federal Rules of Evidence, Rule 503(a)(1) (1972) (same); Uniform Rules of Evidence, Rule 26(3)(a) (1953) ("corporation or other association"); Model Code of Evidence, Rule 209(a) (1942) (same). Few decisions squarely address the applicability of the privilege to clients who are unincorporated associations, partnerships, sole proprietorships, or other noncorporate forms of organizations. Decisions generally assume that a privilege much like the familiar corporate attorney-client privilege applies to such organizations. See, e.g., Kneeland v. National Collegiate Athletic Ass'n, 650 F.Supp. 1076, 1087 (W.D.Tex.1986), rev'd on other grounds, 850 F.2d 224 (5th Cir.1988) (privilege assumed to apply to unincorporated association); Benge v. Superior Court, 182 Cal.Rptr. 275, 280 (Cal.Ct.App.1982) (privilege applies to "unincorporated organizations such as labor unions, social clubs, and fraternal societies") (dicta); State ex rel. Missouri Highways & Transp. Comm'n v. Legere, 706 S.W.2d 560, 566 (Mo.Ct.App.1986) (privilege applies to communication from employee to employer to be transmitted to employer's lawyer for advice or use in pending or threatened litigation); see generally P. Rice, Attorney–Client Privilege in the United States § 4.45 et seq. (1993) (unincorporated entities). Cf. Westinghouse Elec. Corp. v. Kerr–McGee Corp., 580 F.2d 1311 (7th Cir.), cert. denied, 439 U.S. 955,

99 S.Ct. 353, 58 L.Ed.2d 346 (1978) (without holding that members of unincorporated association were clients, when lawyer for association gathered information in confidence from members, fiduciary duty arose not to employ information against interests of members in subsequent adverse lawsuit representing new client). Contra, 24 C. Wright & K. Graham, Federal Practice & Procedure § 5477 (1986) (arguing against extending privilege to unincorporated associations).

On members of a class in a class action, compare, e.g., Penk v. Oregon St. Bd. of Higher Educ., 99 F.R.D. 511, 517 (D.Or.1983) (information gathered by lawyer for class representatives from nonrepresentative class members with assurance of confidentiality not protected by privilege), with, e.g., Connelly v. Dun & Bradstreet, Inc., 96 F.R.D. 339, 342 (D.Mass.1982) (privilege applies). On the analysis followed in the Comment, members of the class who serve as class representatives would be considered clients for the purpose of the attorney-client privilege, while represented class members generally would not. See § 70, Comment *c*.

Comment d. An agent of an organizational client. See generally authority cited in Reporter's Note to Comment *b*. On communications from a corporate employee with respect to information acquired prior to employment, see Baxter Travenol Labs., Inc. v. Lemay, 89 F.R.D. 410 (S.D.Ohio 1981) (privilege applies). Because the privilege concept of the Section turns on encouraging the employer to use its employment-related powers to encourage employees to speak to its counsel, the fact that an employee's information may have been learned before employment or, more generally, outside the scope and course of employment should be irrelevant. The Supreme Court in Upjohn Corp. v. United States, 449 U.S. 383, 394, 101 S.Ct. 677, 685, 66 L.Ed.2d 584 (1981), did note that the communications in question concerned matters within the employees' corporate duties. It is unclear whether that was simply an observation about the facts of a particular case or an intimation of a general limitation on the corporate privilege. At least one court has read the opinion in the latter, limiting sense. See Leer v. Chicago, Milwaukee, St. Paul & Pac. R.R., 308 N.W.2d 305 (Minn.1981), cert. denied, 455 U.S. 939, 102 S.Ct. 1430, 71 L.Ed.2d 650 (1982) (witnessing of accident not within employee's duties). For a contrary analysis, see J. Gargacz, Attorney–Corporate Client Privilege 3–84 to 3–86 (2d ed.1990).

Comment e. The temporal relationship of principal-agent. Few decisions deal with former employees. The issue was noted but specifically not decided in Upjohn Co. v. United States, 449 U.S. 383, 394, n.3, 101 S.Ct. 677, 685, n.3, 66 L.Ed.2d 584 (1981). The few decisions in point conflict. Compare, e.g., Connolly Data Systems, Inc. v. Victor Technologies, Inc., 114 F.R.D. 89, 93–95 (S.D.Cal. 1987) (applying California law, no privilege on facts of case, but communications protected as lawyer work product); Clark Equipment Co. v. Lift Parts Mfg. Co., 1985 WL 2917 (N.D.Ill.1985), with, e.g., Upjohn Co. v. United States, 449 U.S. 383, 402–03, 101 S.Ct. 677, 688–689, 66 L.Ed.2d 584 (1981) (Burger, C.J., concurring) (privilege should extend to all former employees); In re Petroleum Prods. Antitrust Litigation, 658 F.2d 1355, 1361 n.7 (9th Cir.1981), cert. denied, 455 U.S. 990, 102 S.Ct. 1615, 71 L.Ed.2d 850 (1982); Command

Transp., Inc. v. Y. S. Line (USA) Corp., 116 F.R.D. 94 (D.Mass.1987) (applying Massachusetts law). Many decisions discuss the former-employee question only in dictum, the issue before the court being the distinguishable issue whether a lawyer may contact ex parte a former employee of an opposing party (see § 100).

Decisions that favor extending the privilege to all communications from former employees rest on the general rationale that fact gathering of this sort enhances the quality of legal advice for the organizational client. The rationale conflates the lawyer work-product immunity and the attorney-client privilege. Douhtless legal advice is further enhanced by information gained from all nonclient sources, but the privilege clearly does not apply to communications from such sources (§ 70). E.g., P. Rice, Attorney–Client Privilege in the United States § 4.18 (1993) (criticizing general extension of privilege to former employees).

The position taken in the Comment that the agent must not have been retained solely for the purpose of supplying information to the lawyer was implicitly rejected in Baxter Travenol Lab., Inc. v. Lemay, 89 F.R.D. 410, 414 (S.D.Ohio 1981) (communications privileged when made to organization's lawyer by occurrence witness hired by organizational client as "litigation consultant").

The Restatement Second of Agency § 381 states an agent's general duty to convey information to a principal with respect to activities within the scope of the agent's duties:

> Unless otherwise agreed, an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have and which can be communicated without violating a superior duty to a third person.

Comment *f* to § 381 indicates that the duty may continue after the principal-agent relationship otherwise ends:

> *f. After termination.* An agent may be under a duty to give information to the principal after the termination of the agency, as where he does not account to the principal until such time. See § 382. Likewise, if the agency terminates without the fault of the principal, the agent is under a duty thereafter to give to the principal relevant information received by the agent when acting as such. See § 275, Comment *e*.

Section 275 of the same Restatement states a general proposition that a principal is bound by some forms of knowledge possessed by an agent, even if the agent does not convey the knowledge to the principal. It statos in Comment *e* that a principal is bound by information possessed by an agent who received the information during the agency but who has terminated the principal-agent relationship before the consequences of the agent's failure to disclose the information have occurred. It is unclear under those provisions what the extent may be of an agent's duty to convey information to a former principal, on the principal's request, if the information would not bind the principal.

Comment f. Limitation to communications relating to the interests of the organization. E.g., In re Bevill, Bresler & Schulman Asset Manage-

ment Corp., 805 F.2d 120, 125 (3d Cir.1986); In re Grand Jury Proceedings, Detroit, Michigan, 434 F.Supp. 648, 650 (E.D.Mich.1977), aff'd, 570 F.2d 562 (6th Cir.1978). There is no requirement, however, that the particular organizational agent be aware that legal advice is the purpose of the communication; that purpose of the communication is established from the point of view of the organization as a whole. See, e.g., P. Rice, Attorney–Client Privilege in the United States § 4.15 (1993).

The concept that entity interests are protected by the organizational privilege is also reflected in the doctrine that the organizational privilege passes, along with other organizational interests and assets, to new owners of the organization. See Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 349, 105 S.Ct. 1986, 1991, 85 L.Ed.2d 372 (1985). See also authorities cited, infra, Reporter's Note to Comment *j*.

Comment g. The need-to-know limitation on disclosing privileged communications. E.g., 2 J. Weinstein & M. Berger, Evidence ¶ 503(b)[04], at 503–49 to 503–50 (1986); Upjohn Co. v. United States, 449 U.S. 383, 395, 101 S.Ct. 677, 685, 66 L.Ed.2d 584 (1981); Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 863 (D.C.Cir.1980); Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir.1977), en banc rehearing, 572 F.2d 606, 609 (8th Cir.1978); Union Planters Nat'l Bank v. ABC Records, Inc., 82 F.R.D. 472, 475 (W.D.Tenn. 1979) (Tennessee law); Archer Daniels Midland Co. v. Koppers Co., 485 N.E.2d 1301, 1303 (Ill.App.Ct.1985) (need-to-know requirement under control-group test). The need-to-know limitation does not affect extensions of the privilege for co-clients (§ 75) or under a common-interest arrangement (§ 76). E.g., Roberts v. Carrier Corp., 107 F.R.D. 678, 686–88 (N.D.Ind.1985) (sharing information between sister corporations in defense of lawsuit).

Comment h. Directed and volunteered agent communications. But cf. Upjohn Co. v. United States, 449 U.S. 383, 394–95, 101 S.Ct. 677, 684–685, 66 L.Ed.2d 584 (1981) (stating as factor in decision that higher authority in corporation directed subordinate employees to communicate with counsel); Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir.1977); Indep. Petrochemical Corp. v. Aetna Casualty & Sur. Co., 654 F.Supp. 1334, 1364–65 (D.D.C.1986) (no privilege, under either *Upjohn* or *Diversified Industries*, for volunteered communication of district manager who was not member of control group and was not directed to communicate by corporate superiors); Marriott Corp. v. American Academy of Psychotherapists, Inc., 277 S.E.2d 785, 792 (Ga. Ct.App.1981) (communication undertaken between corporate employee and corporate lawyer, not at direction of corporate superior, denied privilege in absence of showing that employee independently had authority to request and act upon legal advice).

Some decisions that reject a claim of privilege under the control-group test involve facts such that the employee-volunteered communication in question would be privileged under this Section. E.g., Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455, 459 (N.D.Cal.1978) (complaints by employee to corporate lawyer about illegal bribes being made by others within corporation).

Comment i. Inside legal counsel and outside legal counsel. Courts generally accept or assume that the

privilege extends to communications with inside legal counsel as well as outside counsel. E.g., Upjohn Co. v. United States, 449 U.S. 383, 391, 101 S.Ct. 677, 683, 66 L.Ed.2d 584 (1981); United States v. Rowe, 96 F.3d 1294 (9th Cir.1996); Jonathan Corp. v. Prime Computer, Inc., 114 F.R.D. 693, 696 (E.D.Va.1987); United States v. United Shoe Mach. Corp., 89 F.Supp. 357, 360 (D.Mass.1950); Macey v. Rollins Env. Serv., 432 A.2d 960, 963–64 (N.J.Super.Ct.App.Div. 1981); Alfred Crompton Amusement Mach., Ltd. v. Customs & Excise Comm'rs, [1972] 2 Q.B. 102, 129 (C.A.). Occasional decisions, however, suggest that the protection of the privilege in the hands of inside legal counsel may be less than that when outside counsel represent the same corporation. E.g., In re Grand Jury Subpoena (Dated Dec. 18, 1981), 561 F.Supp. 1247, 1254 n.3 (E.D.N.Y. 1982) (because inside-legal-counsel status normally confers some management responsibility, such counsel will be assumed to have more authority to waive privilege than might be true of outside counsel); United Jersey Bank v. Wolosoff, 483 A.2d 821 (N.J.Super.Ct.App.Div. 1984). However, determination should depend on the relationship between the particular management and inside legal counsel in question and not on assumptions about assertedly typical organization-house counsel relationships or typical inside legal counsel roles in advising an organization.

As te recognition of the privilege for inside legal counsel of a law firm, see United States v. Rowe, 96 F.3d 1294 (9th Cir.1996); In re Sunrise Sav. & Loan, 130 F.R.D. 560, 595 (E.D.Pa.1989); Hertzog, Calmari & Gleason v. Prudential Ins. Co., 850 F.Supp. 255 (S.D.N.Y.1994); but cf. McCormick, Barstow, Shepard Wayte & Carruth v. Superior Court, 81 Cal. Rptr.2d 30 (Cal.Ct.App.1998) (privilege denied for internal law-firm documents generated after outside counsel was retained by firm).

Comment j. Invoking and waiving the privilege of an organizational client. E.g., Revised Uniform Rules of Evidence, Rule 502(c) (1974) ("The privilege may be claimed by ... the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence").

If an organization's director, officer, or employee communicates about an organizational legal matter with a lawyer who is functioning solely on behalf of the organization, the privilege may be invoked only on behalf of the organization and may not be invoked by the individual in his or her own behalf, nor may the individual prevent a responsible agent of the organization from waiving its privilege. E.g., J. Gergacz, Attorney–Corporate Privilege ¶ .02[2] (1987); Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348, 105 S.Ct. 1986, 1990, 85 L.Ed.2d 372 (1985); In re Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 124–25 (3d Cir.1986); In re Grand Jury Investigation (Sun Co.), 599 F.2d 1224, 1236 (3d Cir.1979); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 n.5 (8th Cir.1977) (en banc) (dicta); In re Diasonics Securities Litigation, 110 F.R.D. 570, 574 (D.Colo.1986); In re Grand Jury Subpoena Duces Tecum (No. 11–188), 391 F.Supp. 1029, 1033–34 (S.D.N.Y. 1975). Similarly, an officer or other employee cannot waive the organization's privilege for their personal purposes. E.g., State ex rel. Lause v.

Adolf, 710 S.W.2d 362, 364–65 (Mo.Ct. App.1986) (officers and directors of organization who were named as defendants in suit to which organization was not party did not have implied authority to waive organization's privilege by pleading reliance on advice of counsel).

On applicability of the privilege when a lawyer functions as counsel for both the corporation and an individual officer or employee as co-clients, see, e.g., Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 n.5 (8th Cir.1977) (en banc) (dicta); In re Grand Jury Subpoena (No. 11–188), 391 F.Supp. 1029, 1034 (S.D.N.Y.1975). See also § 75 (limited privilege for co-clients). The individual officer or employee bears the burden of establishing that communications to the common lawyer were made in the person's individual capacity and not in the person's capacity as officer or employee. See, e.g., Odmark v. Westside Bancorporation, Inc., 636 F.Supp. 552, 555 (W.D.Wash.1986) (mere subjective belief of communicating officer that lawyer also represented officer in individual capacity insufficient to support claim of privilege based on co-client doctrine); In re Grand Jury Investigation (No. 83–30557), 575 F.Supp. 777, 780 (N.D.Ga.1983); In re Grand Jury Proceedings (Jackier), 434 F.Supp. 648, 650 (E.D.Mich.1977); In re Grand Jury Subpoena Duces Tecum (No. 11–188), 391 F.Supp. 1029, 1034 (S.D.N.Y.1975).

The issues addressed in the latter part of the Comment and in Illustration 2 have been litigated infrequently and only recently. The decisions disagree. Some authority permits access by the former employee to all otherwise privileged communication on the subject, even those in which the employee did not participate and of which he or she was not otherwise aware. Such authority finds conclusive the fact that the former employee was already aware of the contents of the employee's own communications with counsel for the organization. See Gottlieb v. Wiles, 143 F.R.D. 241 (D.Colo.1992) (former CEO and chairman of corporation granted access to all documents generated during his tenure that he could have seen upon request at time they were generated). Other authority permits access only to the employee's own communications, but again without mentioning the interest of the organization in confidentiality with respect to third persons as to whom the communications remain privileged. See In re Braniff, Inc., 153 B.R. 941 (Bankr.M.D.Fla.1993) (former officers and directors entitled to discovery of privileged documents prepared by, addressed to, or copied to them). Still other authority treats the privilege as fully in effect and refuses access by the former employee. See Breckinridge v. Bristol-Myers Co., 624 F.Supp. 79, 82–83 (S.D.Ind.1985) (applicability of privilege for communications made te organization's lawyer who later sues organization). Neither the *Gottlieb* nor *Braniff* decision cites *Breckinridge*. The test proposed in the Comment seeks to accommodate the reduced interest in confidentiality of the organization (produced by the former employee's participation in the communication), but provides protection—including prohibiting access—when warranted. On the right of an organization's officer to possession of documents in which the organization's confidences are intermixed with personal matters of the officer, see Nelson v. Greenspoon, 103 F.R.D. 118

(S.D.N.Y.1984) (documents not privileged in circumstances).

k. Succession in legal control of an organization. The Comment recognizes, but does not attempt to deal exhaustively with, the complex problems of authority to assert the privilege after a transaction affecting ownership interest in an organization. Similarly complex problems can arise in the sale of assets of an organization. Few decisions are on point. In general, transfer of an organization's asset or other property that does not transfer management of the organization should not result in transfer of the right to assert or waive the privilege. E.g., Sobol v. E.P. Dutton, Inc., 112 F.R.D. 99, 102–03 (S.D.N.Y.1986) (sale of right to intellectual property); NL Indus., Inc. v. Koomey, Inc., 647 F.Supp. 936 (S.D.Tex.1984) (transfer of patent). But cf. Levingston v. Allis-Chalmers Corp., 109 F.R.D. 546, 551 (S.D.Miss.1985) (insurer-assignee stands in shoes of insured-assignor for purposes of asserting privilege).

On the power of a trustee in bankruptcy to assert or waive a bankrupt organization's privilege, see, e.g., Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985) (trustee, and not former directors, of bankrupt corporation may assert or waive privilege of corporation); Citibank v. Andros, 666 F.2d 1192, 1195–96 (8th Cir. 1981). See also, e.g., In re Diasonics Securities Litigation, 110 F.R.D. 570, 574–75 (D.Colo.1986) (communication between officer of acquired organization and lawyer for predecessor organization not privileged); Dickerson v. Superior Court, 185 Cal.Rptr. 97, 99 (Cal.Ct.App.1982) (right of acquiring organization to assert privilege of acquired corporation). Illustration 3 is based on *Commodity Futures Trading Comm'n v. Weintraub*, supra.

§ 74. The Privilege for a Governmental Client

Unless applicable law otherwise provides, the attorney-client privilege extends to a communication of a governmental organization as stated in § 73 and of an individual employee or other agent of a governmental organization as a client with respect to his or her personal interest as stated in §§ 68–72.

Comment:

a. Scope and cross-references. This Section provides that the attorney-client privilege ordinarily applies to governmental agencies as to other organizations as provided in § 73 and to individual governmental employees and other agents who are individually represented as it would for individuals under §§ 68–72.

b. Rationale. The objectives of the attorney-client privilege (see § 68, Comment *c*), including the special objectives relevant to organizational clients (see § 73, Comment *b*), apply in general to governmental clients. The privilege aids government entities and employees in obtaining legal advice founded on a complete and accurate factual

picture. Communications from such persons should be correspondingly privileged.

A narrower privilege for governmental clients may be warranted by particular statutory formulations. Open-meeting and open-files statutes reflect a public policy against secrecy in many areas of governmental activity. Moreover, unlike persons in private life, a public agency or employee has no autonomous right of confidentiality in communications relating to governmental business.

Nonetheless, the legal system has recognized the strategic concerns of a public agency or officer in establishing and asserting public legal rights. Even public legal rights are contingent at their boundaries and subject to argumentation and dispute as to their precise extent. Members of the public who assert legal interests against a public agency or officer act not in the general public interest but in their private interest or in what they assert is the public interest. The public acting through its public agencies is entitled to resist claims and contentions that the agency considers legally or factually unwarranted. To that end, a public agency or employee is entitled to engage in confidential communications with counsel to establish and maintain legal positions. Accordingly, courts generally have construed open-meeting, open-files, whistle-blower, and similar statutes as subject to the attorney-client privilege, recognizing that otherwise governments would be at unfair disadvantage in litigation, in handling claims and in negotiations.

A privilege that would cover only litigation, including claims or investigations, would be a plausible alternative. Rule 502(d)(6) of the Revised Uniform Rules of Evidence proposed a governmental-client privilege thus limited, but most states rejected that limitation. Another alternative would be a general but qualified privilege protecting confidential communications unless a tribunal found good cause to require disclosure. The privilege for the government could also be limited to a stated period of time (compare § 77, Reporter's Note to Comment *c*). More particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another. Such rules should take account of the complex considerations of governmental structure, tradition, and regulation that are involved.

This Section, however, states the generally prevailing rule that governmental agencies and employees enjoy the same privilege as nongovernmental counterparts. In any event, information covered by the privilege would, in some situations, be protected from disclosure by such rules as executive privilege or state secrets. Of course, a legislative determination of a need for less confidentiality, for example

in a statute that limits attorney-client confidentiality in areas outside of litigation, would prevail over the common-law rule stated in this Section.

c. Application of the general attorney-client-privilege rules to a governmental client. The general requirements of the attorney-client privilege apply with respect to assertedly privileged communications of a governmental client. For example, the privilege extends only to communication for the purpose of obtaining or giving legal assistance (see § 72).

The privilege does not apply to a document that has an independent legal effect as an operative statement of governmental policy. For example, a memorandum by a government lawyer that directs, rather than advises, a governmental officer to act in a certain way is not protected by the privilege. Such a document is a necessarily public statement of public policy and as such is meant to be publicly disseminated (see § 71, Comment *e*).

Communications between a lawyer representing one governmental agency and an employee of another governmental agency are privileged only if the lawyer represents both agencies (see § 75) or if the communication is pursuant to a common-interest arrangement (see § 76).

d. Individual government employees and agents. Employees and agents of a governmental agency may have both official and personal interests in a matter. A police officer sued for damages for the alleged use of excessive force, for example, may be both officially and personally interested in the lawsuit. The officer has the right to consult counsel of the officer's choice with respect to the officer's personal interests. If the officer consults a lawyer retained by the officer's agency or department, the principles of § 73, Comment *j*, determine whether the officer is a co-client with the agency or department (see § 75) or is not a client of the lawyer. Government lawyers may be prohibited from the private practice of law or accepting a matter adverse to the government. Thus, the fact that the common employer of both lawyer and officer is a government agency may affect the reasonableness of the officer's claim of expectation that the lawyer could function as personal counsel for the officer. On the conflict-of-interest limitations on such joint representations, see § 131, Comment *e*. If a lawyer is retained by the agency as separate counsel to represent the personal interests of the employee, for purposes of the privilege the employee is the sole client. As with agents of nongovernmental organizations, the status of a governmental employee or agent as co-client (see § 75), individual client, or nonrepresented communicating agent of the agency sometimes may be difficult to

determine. Inquiry in such cases should focus upon the employment relationship of the lawyer and the reasonable belief of the agent at the time of communicating.

e. Invoking and waiving the privilege of a governmental client. The privilege for governmental entities may be asserted or waived by the responsible public official or body. The identity of that responsible person or body is a question of local governmental law. In some states, for example, the state's attorney general decides matters of litigation policy for state agencies, including decisions about the privilege. In other states, such decisions are made by another executive officer or agency in suits in which the attorney general otherwise conducts the litigation. As a general proposition, the official or body that is empowered to assert or forego a claim or defense is entitled to assert or forego the privilege for communications relating to the claim or defense. Waiver of the privilege is determined according to the standards set forth in § 73, Comment *j*. See also Comment *d* hereto.

REPORTER'S NOTE

See generally 1 McCormick on Evidence § 88, at 324 (J. Strong 4th ed.1992) ("Traditionally, the relationship sought to be fostered by the privilege has been that between the lawyer and a private client, but more recently the privilege has been held to extend to communications to an attorney representing the state.... "); C. Mueller & L. Kirkpatrick, Modern Evidence § 5.18 (1995); P. Rice, Attorney-Client Privilege in the United States § 4.28 (1994); 2 J. Weinstein & M. Berger, Evidence ¶ 503[03] (1986 and Supp.); C. Wolfram, Modern Legal Ethics § 6.5.6. (1986); 24 C. Wright & K. Graham, Federal Practice & Procedure § 5475 (1986).

Comment b. Rationale. E.g., Revised Uniform Rules of Evidence, Rule 502(a)(1) (1974) ("A 'client' is a person, public officer, or corporation, association, or other organization or entity, either public or private ... "); Proposed Federal Rules of Evidence, Rule 503(a)(1) (1972) (same). A privilege for governments and government officers was not alluded to in the earlier Uniform Rules of Evidence (1953) and the Model Code of Evidence (1942).

The Revised Uniform Rules, unlike the proposed Federal Evidence Rules, restricted the privilege for governmental organizations to pending investigations or litigation. See Revised Uniform Rules of Evidence Rule 502(d)(6) (1974):

> (d) *Exceptions.* There is no privilege under this rule: ... (6) *Public Officer or Agency.* As to a communication between a public officer or 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 officer or agency to process the claim or conduct a pending investigation, litigation, or proceeding in the public interest.

Several states that have adopted Revised Uniform Rule 502 have omitted subdivision (d)(6).

On the general availability of the privilege to governmental agencies, see, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 154–55, 95 S.Ct. 1504, 1518, 44 L.Ed.2d 29 (1975) (attorney-client privilege and lawyer work-product immunity); Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 863 (D.C.Cir.1980) (dicta); Mead Data Central, Inc. v. Dep't of Air Force, 566 F.2d 242, 253 n.24 (D.C.Cir.1977) (control-group test determines scope of privilege for governmental agency); Falcone v. Internal Revenue Serv., 479 F.Supp. 985, 989 (E.D.Mich.1979) (same); District Attorney v. Board of Selectmen, 481 N.E.2d 1128, 1130 (Mass.1985) (under exception provided in open-meeting law, but refusing to recognize implicit exception for nonlitigation consultation); City of Orlando v. Desjardins, 493 So.2d 1027, 1029 (Fla.1986) (under state open-files statute); Doherty v. School Comm. of Boston, 436 N.E.2d 1223, 1226 (Mass.1982) (exemption in open-meeting statute for executive sessions covered school-committee meeting to discuss litigation strategy); Minneapolis Star & Tribune Co. v. Housing & Redevelopment Auth., 251 N.W.2d 620, 625–26 (Minn.1976) (state open-meeting law implicitly exempts meeting between agency and lawyer for purpose of discussing pending litigation). For earlier cases, see, e.g., Connecticut Mut. Life Ins. Co. v. Shields, 18 F.R.D. 448 (S.D.N.Y.1955); People ex rel. Dep't of Public Works v. Glen Arms Estate, Inc., 41 Cal.Rptr. 303, 310 (Cal.Ct. App.1964) (privilege for governmental agency determined in same way as privilege for private corporation); Rowley v. Ferguson, 48 N.E.2d 243 (Ohio Ct.App.1942).

For expressions of reservations about governmental privilege in the context of democratic government, see, e.g., Herbert v. Lando, 441 U.S. 153, 195, 99 S.Ct. 1635, 1658, 60 L.Ed.2d 115 (1979) (Brennan, J., dissenting); In re Franklin Nat'l Bank, 478 F.Supp. 577, 582 (E.D.N.Y.1979). Some decisions have suggested that a "contemplation of litigation" limitation (akin to the anticipation-of-litigation limitation of the work-product immunity (see § 87)) should be imposed on the governmental-client privilege. E.g., Falcone v. Internal Revenue Serv., 479 F.Supp. 985, 990 (E.D.Mich.1979) (dicta); Niemeier v. Watergate Special Prosecution Force, 565 F.2d 967, 974 & n.23 (7th Cir. 1977) (dicta). That suggestion is not followed in the Section or Comment.

On the operation of the privilege under open-access statutes, see generally EPA v. Mink, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973) (documents covered by attorney-client privilege exempt from production under federal Freedom of Information Act under statutory exemption (5 U.S.C. § 552(b)(5) (1976)) for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency ... "); Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 69 Cal.Rptr. 480, 490 (Cal.Ct.App.1968) (despite absence of exemption in open-meeting statute, implicit exemption recognized for reasonably necessary conferences between public body and lawyer advising that body); District Attorney v. Board of Selectmen, 481 N.E.2d 1128, 1130 (Mass.1985) (under state open-meeting law, only privileged consulta-

tions are those explicitly recognized in statute, relating to litigation or purchase of real property); Annot., 54 A.L.R. Fed. 280 (1981). Cf. City of Melbourne v. A.T.S. Melbourne, Inc., 475 So.2d 270, 271 (Fla.Dist.Ct.App. 1985) (noting supersession by statute of prior decisions holding no implied attorney-client-privilege exemption from state sunshine law). See also, e.g., FTC v. Grolier, Inc., 462 U.S. 19, 27, 103 S.Ct. 2209, 2214, 76 L.Ed.2d 387 (1983) (lawyer work product exempt from disclosure under federal Freedom of Information Act).

Comment c. Application of the general attorney-client-privilege rules to a governmental client. E.g., Brinton v. Department of State, 636 F.2d 600, 603–04 (D.C.Cir.1980), cert. denied, 452 U.S. 905, 101 S.Ct. 3030, 69 L.Ed.2d 405 (1981) (limiting privilege to lawyer communications to client based on confidential information provided by client); Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 863 (D.C.Cir.1980) (need-to-know limitation on circulation of communication within agency); Mead Data Central, Inc. v. Dep't of Air Force, 566 F.2d 242, 254 (D.C.Cir.1977) (requirement of confidentiality of communication); Gulf Oil Corp. v. Schlesinger, 465 F.Supp. 913, 916–17 (E.D.Pa.1979) (government, which has burden of demonstrating that privilege applies, cannot rely on blanket claim of privilege); Diamond v. City of Mobile, 86 F.R.D. 324, 328 (S.D.Ala.1978) (no privilege for communications to lawyer functioning not as legal adviser but merely as investigator concerning policy matter); Community Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 68 F.R.D. 378, 382 (E.D.Wis.1975) (under privilege extending to lawyer communication only if it restates or reflects privileged client communications (but see § 69, Comment *i*), no privilege for lawyer's confidential letter to client based entirely on public information); Smith v. FTC, 403 F.Supp. 1000, 1019 (D.Del.1975) (wide distribution of documents within agency negated criteria of confidentiality of communication).

Concerning a document that has an independent legal effect as an operative statement of governmental policy, compare, e.g., Falcone v. IRS, 479 F.Supp. 985, 989–90 (E.D.Mich.1979) (statements of policy and interpretation adopted by agency are in effect law and cannot be hidden from public view by claim of attorney-client privilege).

In addition to the attorney-client privilege and the lawyer work-product immunity, governmental agencies may have an executive privilege against disclosing internal deliberations of agency officials and advisory opinions and recommendations. E.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S.Ct. 1504, 1516, 44 L.Ed.2d 29 (1975) (under federal Freedom of Information Act); Kaiser Aluminum & Chem. Corp. v. United States, 157 F.Supp. 939, 944–46 (Ct. Cl.1958) (as evidentiary privilege).

Decision on a claim of attorney-client privilege in the context of intragovernmental assertions of privilege will typically turn on complex questions of ultimate authority with respect to claims and waivers of the privilege. See, e.g., In re Lindsey, 158 F.3d 1263 (D.C.Cir.), cert. denied, 525 U.S. 996, 119 S.Ct. 466, 142 L.Ed.2d 418 (1998) (deputy White House counsel not entitled to assert privilege claim against testifying to official-duty client-lawyer conversations when called to testify before grand jury by independent counsel); In re

Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir.), cert. denied, 521 U.S. 1105, 117 S.Ct. 2482, 138 L.Ed.2d 991 (1997) (similar).

Comment e. Invoking and waiving the privilege of a governmental client. Few decisions consider who may invoke the privilege. Cf., e.g., Clavir v. United States, 84 F.R.D. 612 (S.D.N.Y.1979) (employees of FBI could not raise work-product immunity as ground to suppress memorandum prepared by Department of Justice lawyer concerning their communications about illegal surveillance, when United States did not choose to assert immunity); see also supra, Comment *b* and Reporter's Note thereto. On waiving the privilege, see, e.g., Mead Data Central, Inc. v. Dep't of Air Force, 566 F.2d 242, 253 (D.C.Cir.1977) (subsequent disclosure); Zenith Radio Corp. v. United States, 588 F.Supp. 1443, 1446 (Ct. Int'l Trade 1984) (putting legal advice in issue); Brinton v. Dep't of State, 476 F.Supp. 535, 540 (D.D.C.1979) (dicta), aff'd, 636 F.2d 600 (D.C.Cir. 1980), cert. denied, 452 U.S. 905, 101 S.Ct. 3030, 69 L.Ed.2d 405 (1981) (subsequent disclosure); Haymes v. Smith, 73 F.R.D. 572, 576–77 (W.D.N.Y.1976) (subsequent disclosure and putting legal advice in issue); Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D.Wash.1975) (putting legal advice in issue).

§ 75. The Privilege of Co–Clients

(1) If two or more persons are jointly represented by the same lawyer in a matter, a communication of either co-client that otherwise qualifies as privileged under §§ 68–72 and relates to matters of common interest is privileged as against third persons, and any co-client may invoke the privilege, unless it has been waived by the client who made the communication.

(2) Unless the co-clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between the co-clients in a subsequent adverse proceeding between them.

Comment:

a. Scope and cross-references. This Section states the attorney-client-privilege rules that apply when co-clients have communications with the same lawyer. The privilege applies only if the other conditions of §§ 68–72 are met, except that Subsection (1) qualifies the requirement of § 71 that the communication be in confidence and Subsection (2) qualifies the rule of § 79 concerning waiver. On invoking the privilege, see § 86. Subsection (2) modifies the normally applicable rules of waiver (see §§ 78–80) in the case of a subsequent proceeding in which the co-clients are adverse. On the duration of the privilege, see § 77. On representation of multiple clients with conflicts of interest, see §§ 121–122 and §§ 128–131. On confidentiality obligations when representing co-clients, see § 60, Comment *l*.

A communication subject to the privilege for co-clients may be made through a client's agents for communication and a lawyer's agents for communication and other agents (see § 70).

b. The co-client privilege. Under Subsection (1), communications by co-clients with their common lawyer retain confidential characteristics as against third persons. The rule recognizes that it may be desirable to have multiple clients represented by the same lawyer.

c. Delimiting co-client situations. Whether a client-lawyer relationship exists between each client and the common lawyer is determined under § 14, specifically whether they have expressly or impliedly agreed to common representation in which confidential information will be shared. A co-client representation can begin with a joint approach to a lawyer or by agreement after separate representations had begun. However, clients of the same lawyer who share a common interest are not necessarily co-clients. Whether individuals have jointly consulted a lawyer or have merely entered concurrent but separate representations is determined by the understanding of the parties and the lawyer in light of the circumstances (see § 14).

Co-client representations must also be distinguished from situations in which a lawyer represents a single client, but another person with allied interests cooperates with the client and the client's lawyer (see § 76).

The scope of the co-client relationship is determined by the extent of the legal matter of common interest. For example, a lawyer might also represent one co-client on other matters separate from the common one. On whether, following the end of a co-client relationship, the lawyer may continue to represent one former co-client adversely to the interests of another, see § 121, Comment *e*. On the confidentiality of communications during a co-client representation, see Comment *d* hereto.

d. The subsequent-proceeding exception to the co-client privilege. As stated in Subsection (2), in a subsequent proceeding in which former co-clients are adverse, one of them may not invoke the attorney-client privilege against the other with respect to communications involving either of them during the co-client relationship. That rule applies whether or not the co-client's communication had been disclosed to the other during the co-client representation, unless they had otherwise agreed.

Rules governing the co-client privilege are premised on an assumption that co-clients usually understand that all information is to be disclosed to all of them. Courts sometimes refer to this as a presumed intent that there should be no confidentiality between co-clients. Fairness and candor between the co-clients and with the

lawyer generally precludes the lawyer from keeping information secret from any one of them, unless they have agreed otherwise (see § 60, Comment *l*).

Illustration:

1. Client X and Client Y jointly consult Lawyer about establishing a business, without coming to any agreement about the confidentiality of their communications to Lawyer. X sends a confidential memorandum to Lawyer in which X outlines the proposed business arrangement as X understands it. The joint representation then terminates, and Y knows that X sent the memorandum but not its contents. Subsequently, Y files suit against X to recover damages arising out of the business venture. Although X's memorandum would be privileged against a third person, in the litigation between X and Y the memorandum is not privileged. That result follows although Y never knew the contents of the letter during the joint representation.

Whether communications between the lawyer and a client that occurred before formation of a joint representation are subject to examination depends on the understanding at the time that the new person was joined as a co-client.

Co-clients may agree that the lawyer will not disclose certain confidential communications of one co-client to other co-clients. If the co-clients have so agreed and the co-clients are subsequently involved in adverse proceedings, the communicating client can invoke the privilege with respect to such communications not in fact disclosed to the former co-client seeking to introduce it. In the absence of such an agreement, the lawyer ordinarily is required to convey communications to all interested co-clients (see § 60, Comment *l*). A co-client may also retain additional, separate counsel on the matter of the common representation; communications with such counsel are not subject to this Section.

e. Standing to assert the co-client privilege; waiver. If a third person attempts to gain access to or to introduce a co-client communication, each co-client has standing to assert the privilege. The objecting client need not have been the source of the communication or previously have known about it.

The normal rules of waiver (see §§ 78–80) apply to a co-client's own communications to the common lawyer. Thus, in the absence of an agreement with co-clients to the contrary, each co-client may waive the privilege with respect to that co-client's own communications with the

lawyer, so long as the communication relates only to the communicating and waiving client.

One co-client does not have authority to waive the privilege with respect to another co-client's communications to their common lawyer. If a document or other recording embodies communications from two or more co-clients, all those co-clients must join in a waiver, unless a nonwaiving co-client's communication can be redacted from the document.

Disclosure of a co-client communication in the course of subsequent adverse proceeding between co-clients operates as waiver by subsequent disclosure under § 79 with respect to third persons.

REPORTER'S NOTE

See generally 1 C. McCormick, Evidence § 91, at 335–37 (7 Strong 4th ed. 1992); C. Mueller & L. Kirkpatrick, Modern Evidence § 5.14 (1995); P. Rice, Attorney–Client Privilege in the United States § 4.30 et seq. (1994); 2 J. Weinstein & M. Berger, Evidence ¶ 503(b)[6] (1986); 8 J. Wigmore, Evidence § 2312 (J. McNaughton rev.1961); C. Wolfram, Modern Legal Ethics § 6.4.8 (1986).

Comment b. The co-client privilege. The evidence codes generally take the approach of stating (only) the exception for subsequent adverse proceedings, which, however, implies recognition of the co-client privilege if that exception is inapplicable. E.g., Revised Uniform Rules of Evidence, Rule 502(d)(5) (1974) ("*(d). Exceptions.* There is no privilege under this rule: ... (5) *Joint Clients.*" As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients....); Proposed Federal Rules of Evidence, Rule 503(d)(5) (1973) (similar); Uniform Rules of Evidence, Rule 26(2)(e) (1953) (similar); Model Code of Evidence, Rule 211 (1942) ("When two or more persons acting together become clients of the same lawyer as to a matter of common interest, none of them has as against another of them any privilege under Rule 210 with respect to that matter"). Note that each formulation seems to assume the existence of the privilege with respect to strangers to the relationship, as stated in the Section and Comment *c*. E.g., People v. Abair, 228 P.2d 336, 340 (Cal.Ct.App. 1951); State v. Archuleta, 217 P. 619, 621 (N.M.1923). See generally Annot., 4 A.L.R. 4th 765 (1981).

Comment d. The subsequent-proceeding exception to the co-client privilege. E.g., Revised Uniform Rules of Evidence, Rule 502(d)(5) (1974), quoted in Reporter's Note to Comment *b*, supra; Proposed Federal Rules of Evidence, Rule 502(d)(5) (1972) (similar); Uniform Rules of Evidence, Rule 26(2)(e) (1953) (similar). The rule in Model Code of Evidence, Rule 211 (1942), quoted in Reporter's Note to Comment *b*, supra, was apparently broader, because the waiver rule was not limited to situations of

subsequent adverse proceedings between the former co-clients.

Among the decisions holding that co-client communications are not privileged among co-clients in subsequent proceedings between them, see, e.g., State v. Cascone, 487 A.2d 186, 189 (Conn.1985); Henke v. Iowa Home Mut. Casualty Co., 87 N.W.2d 920, 924 (Iowa 1958); authorities cited at C. Wolfram, Modern Legal Ethics § 6.4.8, at 274–75 nn.21–22 (1986). On the inapplicability of the exception when a former co-client merely turns state's witness, see, e.g., People v. Abair, 228 P.2d 336, 340 (Cal.Ct.App. 1951) (attempt by codefendant to impeach other defendant who was testifying for state); State v. Archuleta, 217 P. 619, 621 (N.M.1923) (same). The result in *Abair*, supra, has been codified in California in a form that is more limited than the Section. The statute limits the co-client exception to occasions when an otherwise privileged co-client communication is subsequently offered "in a civil proceeding." See Cal. Evid. Code § 962 (West 1966).

On the normal assumption, sometimes referred to as a presumption, that there is no expectation of confidentiality between co-clients, see, e.g., Alexander v. Superior Court, 685 P.2d 1309, 1314–15 (Ariz.1984) (lawyer who represented co-client A not barred by conflict of interest rules from simultaneously representing co-client B in nonantagonistic litigation in which confidential communications from co-client A would be relevant).

On the inapplicability of the exception to communications made to the common lawyer but prior to the time that the requesting client became a co-client, see, e.g., Miller, Morton, Caillat & Nevis v. Superior Court, 215 Cal.Rptr. 365, 371 (Cal.Ct.App. 1985) (depublished; not citable as authority) (no discovery of such communications on facts in case). On the inapplicability of the exception to communications that a co-client makes to a lawyer other than the common lawyer who represents other co-clients, see, e.g., Native Sun Inv. Group v. Ticor Title Ins. Co., 235 Cal.Rptr. 34, 40 n.2 (Cal.Ct.App.1987) (privileged communications between insurer and its separate lawyer, different from lawyer that insurer hired to represent insured, not subject to co-client exception).

No direct authority has been found for giving effect to agreements among co-clients that the privilege shall be preserved in subsequent adverse proceedings between them. The approach taken in Subsection (2) and Comment *e* is consistent with the theory of the co-client privilege and with the basis for removing the privilege in subsequent adverse proceedings, the presumed intent of the co-clients and fairness considerations. See Comment *e*. The result is similar to that which would obtain if the parties contracted on other matters. Perhaps most obviously, the result is the same that would be reached if, during litigation itself, adversary parties agreed to a confidentiality obligation as part of an effort to expedite pretrial discovery or for other reasons.

Comment e. Standing to assert the co-client privilege; waiver. On the rule that, in the absence of subsequent adverse proceedings between them, one co-client may not waive the privilege with respect to communications made by another, objecting co-client, see, e.g., American Mut. Liab. Ins. Co. v. Superior Court, 113 Cal. Rptr. 561, 573 (Cal.Ct.App.1974) (by express waiver and by testifying to communications between insured and

lawyer hired by insurer to defend insured, insured could not waive privilege with respect to communications between insurer and lawyer); State v. Maxwell, 691 P.2d 1316, 1320 (Kan. Ct.App.1984) (dicta) (no waiver even if majority of co-clients wish to waive). Contra, Tunick v. Day, Berry & Howard, 486 A.2d 1147, 1149 (Conn.Super.Ct.1984) (former co-client suing common lawyer for malpractice can waive privilege invoked by common lawyer on behalf of non-party co-clients who had neither waived privilege nor been involved in malpractice litigation). It might be thought there is an inconsistency between the rule requiring, in effect, collaborative waiver by co-clients and the well-recognized ability of lawyers and other agents to waive a client's privilege, even in instances in which that is not in the interest of the client. See § 78 and § 79, Comment *c*; cf. § 79, Comment *c* (manifestly wrongful disclosure by agent). However, the co-clients, by that fact alone, are not agents of each other. Their common lawyer, of course, is the agent of each and can waive for both or either.

Dean Wigmore's often-quoted but ambiguous statement of the waiver rule in co-client cases has caused confusion. See 8 J. Wigmore, Evidence § 2328, at 639 (J. McNaughton rev. 1961) ("Where the consultation was had by *several clients jointly*, the waiver should be joint for joint statements, and neither could waive for the disclosure of the other's statements; yet neither should be able to obstruct the other in the disclosure of the latter's own statements") (emphasis in original). Dean Wigmore plainly is asserting as a rule that each co-client can waive the privilege as to that co-client's own communications. The reference to "joint statements," however, might on hasty reading be thought to contradict it. What Dean Wigmore had in mind by such an ensemble recital by co-clients to a lawyer is not clear, but he probably did not mean individual communications. Perhaps he meant to refer to a lawyer's single letter to co-clients or a single co-client's letter to the common lawyer that mixes in communications from two or more of the co-clients. As indicated in the Comment, that problem can be dealt with in some instances by redacting from the document references to communications by others than the waiving client.

§ 76. The Privilege in Common-Interest Arrangements

(1) If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68–72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.

(2) Unless the clients have agreed otherwise, a communication described in Subsection (1) is not privileged as

between clients described in Subsection (1) in a subsequent adverse proceeding between them.

Comment:

a. Scope and cross-references. This Section states the common-interest attorney-client privilege. The rule differs from the co-client rule of § 75 in that the clients are represented by separate lawyers. Subsection (1) applies only if the other conditions of §§ 68–72 are satisfied, except it qualifies the requirement of § 71 that the communication be in confidence. Subsection (2) modifies the normal rules of waiver (see §§ 78–85) with respect to subsequent adverse proceedings between the clients.

b. Rationale. The rule in this Section permits persons who have common interests to coordinate their positions without destroying the privileged status of their communications with their lawyers. For example, where conflict of interest disqualifies a lawyer from representing two co-defendants in a criminal case (see § 129), the separate lawyers representing them may exchange confidential communications to prepare their defense without loss of the privilege. Clients thus can elect separate representation while maintaining the privilege in cooperating on common elements of interest.

c. Confidentiality and common-interest rules. The common-interest privilege somewhat relaxes the requirement of confidentiality (see § 71) by defining a widened circle of persons to whom clients may disclose privileged communications. As a corollary, the rule also limits what would otherwise be instances of waiver by disclosing a communication (compare § 79). Communications of several commonly interested clients remain confidential against the rest of the world, no matter how many clients are involved. However, the known presence of a stranger negates the privilege for communications made in the stranger's presence.

Exchanging communications may be predicated on an express agreement, but formality is not required. It may pertain to litigation or to other matters. Separately represented clients do not, by the mere fact of cooperation under this Section, impliedly undertake to exchange all information concerning the matter of common interest.

d. The permissible extent of common-interest disclosures. Under the privilege, any member of a client set—a client, the client's agent for communication, the client's lawyer, and the lawyer's agent (see § 70)—can exchange communications with members of a similar client set. However, a communication directly among the clients is not privileged unless made for the purpose of communicating with a privileged person as defined in § 70. A person who is not represented

by a lawyer and who is not himself or herself a lawyer cannot participate in a common-interest arrangement within this Section.

e. Extent of common interests. The communication must relate to the common interest, which may be either legal, factual, or strategic in character. The interests of the separately represented clients need not be entirely congruent.

Illustration:

1. Lawyer One separately represents Corporation A and Lawyer Two represents Corporation B in defending a products-liability action brought by a common adversary, Plaintiff X. The two lawyers agree to exchange otherwise privileged communications of their respective clients concerning settlement strategies. Plaintiff Y later sues Corporation A and Corporation B for damages for alleged defects involving the same products and attempts to obtain discovery of the communications between Lawyer One and Lawyer Two. The communications exchanged between the lawyers for Corporation A and Corporation B are privileged and cannot be discovered.

Unlike the relationship between co-clients, the common-interest relationship does not imply an undertaking to disclose all relevant information (compare § 75, Comment *d*). Confidential communications disclosed to only some members of the arrangement remain privileged against other members as well as against the rest of the world.

f. Subsequent adverse proceedings. Disclosing privileged communications to members of a common-interest arrangement waives the privilege as against other members in subsequent adverse proceedings between them, unless they have agreed otherwise. In that respect, the common-interest exception operates in the same way as the exception for subsequent adverse proceedings as between co-clients (see § 75, Comment *d*). Disclosing information does not waive the privilege with respect to other communications that might also be germane to the matter of common interest but that were not in fact disclosed.

There is no waiver between the members exchanging a communication if they have agreed that it will remain privileged as against each other in subsequent adverse proceedings.

g. Standing to assert the privilege; waiver. Any member of a common-interest arrangement may invoke the privilege against third persons, even if the communication in question was not originally made by or addressed to the objecting member.

In the absence of an agreement to the contrary, any member may waive the privilege with respect to that person's own communications. Correlatively, a member is not authorized to waive the privilege for another member's communication. If a document or other recording embodies communications from two or more members, a waiver is effective only if concurred in by all members whose communications are involved, unless an objecting member's communication can be redacted.

REPORTER'S NOTE

See generally C. Mueller & L. Kirkpatrick, Modern Evidence § 5.15 (1995); P. Rice, Attorney-Client Privilege in the United States §§ 4.35–4.38 (1994); 2 J. Weinstein & M. Berger, Evidence ¶ 503(b)(6) (1986); C. Wolfram, Modern Legal Ethics § 6.4.8 (1986). See, e.g., Revised Uniform Rules of Evidence, Rule 502(b)(3) (1974) (privilege applies to a communication by a client "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 ... "); Proposed Federal Rules of Evidence, Rule 503(b)(3) (1973) (privilege applies to communication by client "or his lawyer to a lawyer representing another in a matter of common interest"). For criticism of extensive application of the privilege to representatives of lawyers and clients, see 24 C. Wright & K. Graham, Federal Practice & Procedure §§ 5482–83 (1986).

The Proposed Federal Rule and the Revised Uniform Rule differ significantly; this Section departs somewhat from each. The Proposed Federal Rule apparently would not extend the common-interest rule to communications by a lawyer's or client's agent assisting in communication between the parties, but it was not limited to pending litigation. The Revised Uniform Rule apparently did contain the latter limitation but not the former. This Section contains neither limitation.

Comment b. Rationale. Terms such as "joint defense"—less frequently, "common defense"—are sometimes applied to the principle in the Section. Either term can be misleading, perhaps connoting that disclosure can occur only between co-defendants, and perhaps then only if they are actually involved in pending litigation. Although joint defense of a pending lawsuit is a common situation in which courts have applied the doctrine, its rationale and the Section apply equally to two or more separately represented persons whatever their denomination in pleadings and whether or not involved in litigation (Reporter's Noto to Comment *d*, infra). A preferable term is "common interest" because it includes, as do the decisions, both claiming as well as defending parties and nonlitigating as well as litigating persons. E.g., Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., 654 F.Supp. 1334, 1365 (D.D.C.1986). The term also distinguishes this Section from the somewhat different rules that apply to co-clients under § 75. On situations in which common-interest arrangements are commonly employed,

see ABA Formal Opin. 95–395 (1995) (citing Restatement).

Comment c. Confidentiality and common-interest rules. On the general principle that protects exchanged communications when third persons attempt to gain access or introduce them in evidence, see, e.g., United States v. Melvin, 650 F.2d 641, 645–46 (5th Cir.1981) (recognizing general rule, but finding it inapplicable because undercover government agent who was not member of common-interest arrangement was permitted to attend multi-defendant meeting with their lawyers); Hunydee v. United States, 355 F.2d 183, 185 (9th Cir. 1965) (lawyer for one prospective tax-evasion indictee informed lawyer for another that client was guilty; latter cannot testify to admission); Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir.1964) (privilege extends to summaries of parties' testimony before grand jury that were exchanged between lawyers for parties); In re Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F.Supp. 381, 388–89 (S.D.N.Y.1975) (memoranda exchanged between lawyers for several individuals implicated in fraud schemes involved in Securities Exchange Commission investigation and civil actions). The common-interest doctrine stands in contrast to the rule that, in the absence of an agreement based on such an interest, communications between a person and a lawyer for another person are not privileged. E.g., Government of the Virgin Islands v. Joseph, 685 F.2d 857, 862 (3d Cir.1982) (no privilege for admission of guilt by unrepresented person to lawyer for person accused of crime).

Comment d. The permissible extent of common-interest disclosures. On coverage of agents, compare, e.g., Revised Uniform Rules of Evidence, Rule 502(b)(3) (1974), with, e.g., Proposed Federal Rules of Evidence, Rule 503(b)(3) (1973), both quoted in Reporter's Note, supra. On applying the doctrine to co-plaintiffs, see, e.g., Sedlacek v. Morgan Whitney Trading Group, Inc., 795 F.Supp. 329, 331 (C.D.Cal.1992). On applying the doctrine to nonlitigation situations, see, e.g., Schachar v. American Academy of Ophthalmology, Inc., 106 F.R.D. 187, 191–92 (N.D.Ill.1985) (dicta), and authorities cited.

The exchanged communication must itself be privileged. The doctrine does not create new kinds of privileged communications aside from client-lawyer and similar types of communications that are privileged under §§ 68–72. E.g., In re Grand Jury Testimony of Attorney X, 621 F.Supp. 590, 592–93 (E.D.N.Y.1985) (common-interest privilege inapplicable when first lawyer communicates to lawyer for another member information that first lawyer obtained in nonprivileged way). On the applicability of the work-product immunity to disclosure of common-interest materials, see § 91, Comment *b*.

Comment e. Extent of common interests. On the general requirement of the presence of common interests, see, e.g., United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C.Cir.1980); Loustalet v. Refco, Inc., 154 F.R.D. 243, 247–48 (C.D.Cal. 1993). The fact that clients with common interests also have interests that conflict, perhaps sharply, does not mean that communications on matters of common interest are nonprivileged. E.g., Eisenberg v. Gagnon, 766 F.2d 770, 787–88 (3d Cir.), cert. denied, 474 U.S. 946, 106 S.Ct. 342, 88 L.Ed.2d 290 (1985), and authorities

cited (correspondence between lawyers for insurer of law firm, law firm, and member of firm in attempt to develop common position privileged despite conflicts). Illustration 1 is based on Lemelson v. Bendix Corp., 104 F.R.D. 13 (D.Del.1984) (manufacturers' exchange of privileged settlement information cannot be discovered by patent holder in latter's action against manufacturers for conspiracy to violate antitrust laws by unified opposition to holder's licensing claims). The fact that information is exchanged about parallel lawsuits, rather than about the same litigation, does not remove the privilege. E.g., United States v. A.T. & T. Co., 642 F.2d 1285 (D.C.Cir.1980). Interests may converge on nonlitigated issues as well. E.g., United States v. United Technologies Corp., 979 F.Supp. 108 (D.Conn.1997) (exchanges among 5 aerospace companies that formed consortium to break General Electric's dominance in the small-engine market).

Conversely, of course, the fact that clients have common interests does not provide a basis for forced disclosure of information in the absence of an agreement to do so. E.g., Vermont Gas Systems, Inc. v. United States Fidelity & Guar. Co., 151 F.R.D. 268, 277 (D.Vt.1993) (common interest of insured and insurer in defeating EPA superfund claims no basis for forced disclosure of privileged communications of insured with separately retained lawyer in suit by insured for declaratory judgment that claims are within policy coverage in light of uncertainty over coverage and adversity of interest on question).

Comment f. Subsequent adverse proceedings. E.g., Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 29, 32–33 (N.D.Ill.1980) (dicta) (waiver with respect to communications actually exchanged in later litigation between parties to common-interest arrangement); In re Grand Jury Subpoena Dated November 16, 1974, 406 F.Supp. 381, 393–94 (S.D.N.Y.1975). The court in Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., 654 F.Supp. 1334, 1365–66 (D.D.C.1986), erroneously held that a party who exchanges some privileged communications with another member waives the privilege with respect to all privileged communications relevant to the matter. The court, in effect, applied the co-client rule (§ 75(2)) to a common-interest situation. That is not the law under the privilege, but the court may have been correct that waiver of the privilege was an implied term of the insurer-insured relationship that existed between the parties, perhaps stemming from the cooperation clause of the policy. Several insurance cases have reached a result consistent with *Independent Petrochemical*, but based on the cooperation obligation of the insured. E.g., Truck Ins. Exchange v. St. Paul Fire & Mar. Ins. Co., 66 F.R.D. 129, 134–36 (E.D.Pa. 1975), and authorities cited.

As with the corresponding point under the co-client privilege, see § 75, Reporter's Note to Comment *d*, no authority has been found for dealing with the enforceability of agreements among members of a common-interest arrangement that the privilege shall be preserved, even in subsequent adverse proceedings between them. The approach taken in Subsection (2) and in Comment *f* is consistent with the theory of the privilege for such arrangements and with the basis for removing the privilege in subsequent litigation.

Comment g. Standing to assert the privilege; waiver. E.g., Interfaith Housing Delaware, Inc. v. Town of Georgetown, 841 F.Supp. 1393, 1400–02 (D.Del.1994) (reviewing decisions); Western Fuels Ass'n v. Burlington No. R.R., 102 F.R.D. 201, 203 (D.Wyo.1984), and authorities cited (waiver by the member who initiated privileged communication, even if other members neither waived nor concurred in client's waiver); Duplan Corp. v. Deering Milliken, Inc., 397 F.Supp. 1146, 1191 (D.S.C.1974) (no waiver by one member, without concurrence of other members, of privileged communications originally made by another member); Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 29 (N.D.Ill.1980) (no waiver by one member with respect to own communications if contained in document reflecting communications of other, nonwaiving members).

See generally § 75, Comment *e*, and Reporter's Note thereto.

TITLE C. DURATION OF THE ATTORNEY-CLIENT PRIVILEGE; WAIVERS AND EXCEPTIONS

Introductory Note: The attorney-client privilege must be asserted to maintain its protection. The privileged status of the communication can be waived in several ways (see §§ 78–80). Waivers are sometimes classified as "express" or "implied." Most instances result from inaction that the law treats as inconsistent with maintaining the privilege. The term "implied" waiver suggests advertent client purpose, but this is not required. Indeed, the client may waive the privilege even though entirely ignorant of its application. In this respect, the law's attitude toward the privilege is unsympathetic. Moreover, in certain limited instances the law recognizes exceptions to the privilege (see §§ 81–85).

Although the privilege for a client communication may be waived or lost, the information may remain confidential for other purposes. Application of waiver or exception to a communication does not relieve

a lawyer of the legal duty otherwise to protect the communication against further disclosure or use adverse to the client.

§ 77. Duration of the Privilege

Unless waived (see §§ 78–80) or subject to exception (see §§ 81–85), the attorney-client privilege may be invoked as provided in § 86 at any time during or after termination of the relationship between client or prospective client and lawyer.

Comment:

a. Scope and cross-references. For limitations on the privilege in subsequent adverse proceedings between co-clients, see § 75(2), and in common-interest arrangements, see § 76(2). The right of the personal representative of a deceased client to assert or waive the privilege is stated in § 86(1)(a).

b. Termination of the client-lawyer relationship. The attorney-client privilege continues indefinitely. Termination of the client-lawyer relationship, even for cause, does not terminate the privilege.

c. Death of a client or cessation of existence of an organization. The privilege survives the death of the client. A lawyer for a client who has died has a continuing obligation to assert the privilege (see § 63, Comment *b*). On standing to assert the privilege, see § 86, Comments *c* and *d*.

The privilege is subject to exception in a controversy concerning a deceased client's disposition of property (see § 81). When ownership or control of an organizational client is transferred or when the organization ceases to exist, the right to invoke the privilege in behalf of the organization may also shift to others or terminate (see § 73, Comment *k*).

d. Situations of need and hardship. The law recognizes no exception to the rule of this Section. Set out below are considerations that may support such an exception, although no court or legislature has adopted it.

It would be desirable that a tribunal be empowered to withhold the privilege of a person then deceased as to a communication that bears on a litigated issue of pivotal significance. The tribunal could balance the interest in confidentiality against any exceptional need for the communication. The tribunal also could consider limiting the proof or sealing the record to limit disclosure. Permitting such disclosure would do little to inhibit clients from confiding in their lawyers. The fortuity of death prevents waiver of the privilege by the client.

Appointing a personal representative to consider waiving the privilege simply transforms the issue into one before a probate court. It would be more direct to permit the judge in the proceeding in which the evidence is offered to make a determination based on the relevant factors.

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Comment b. Termination of the client-lawyer relationship. ABA Model Code of Professional Responsibility, EC 4-6 (1969); 8 J. Wigmore, Evidence § 2323 (J. McNaughton rev.1961); C. Wolfram, Modern Legal Ethics § 6.3.4, at 255 n.92 (1986). See, e.g., Bearden v. Boone, 693 S.W.2d 25, 27-28 (Tex.Ct.App.1985).

Comment c. Death of a client or cessation of existence of an organization. In general, modern evidence codes reflect the view that the privilege may be asserted by the personal representative of a deceased client (either an executor or administrator). A possible, unstated intimation is that the privilege perhaps lapses after the estate is wound up and the personal representative has no further power or responsibility to act in behalf of the estate. See Revised Uniform Rules of Evidence, Rule 502(c) (1974) ("(c) *Who may claim the privilege.* The privilege may be claimed by the client, ... the personal representative of a deceased client.... "); Proposed Federal Rules of Evidence, Rule 503(c) (1972) (same); Uniform Rules of Evidence, Rule 26(1) (1953) (" ... The privilege may be claimed by the client in person or by his lawyer, or if incompetent, by his guardian, or if deceased, by his personal representative.... "); Model Code of Evidence, Rule 209(c)(i) (1942) ("(c) 'holder of the privilege' (i) if the client is a person, means the client, while alive and not under guardianship or the guardian of an incompetent client, or the personal representative of a deceased client.... "). It is open to interpretation under some of the codes whether the deceased client's lawyer is required or permitted to assert the privilege following the winding-up of the client's estate. See generally 1 C. McCormick, Evidence § 94 (J. Strong 4th ed.1992); 2 J. Weinstein & M. Berger, Evidence ¶ 503(c)[01], at 503-66 (1986); 8 J. Wigmore, Evidence § 2323, at 630-31 (J. McNaughton rev.1961); 24 C. Wright & K. Graham, Federal Practice and Procedure § 5498 (1986). The question usually arises in litigation concerning property claims through a decedent. This is the subject of the exception, well-accepted in most jurisdictions and stated in § 81. Nonetheless, other cases are encountered, and they routinely hold that the privilege survives. E.g., Swidler & Berlin v. United States, 524 U.S. 399, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998) (under federal evidence rules, privilege survives death of client); State v. Macumber, 544 P.2d 1084 (Ariz.1976) (on prosecutor's objection, lawyer for deceased client could not testify to confession for crime for which another person now on trial); In re John Doe Grand Jury Investigation, 562 N.E.2d 69 (Mass.1990) (lawyer for apparent suicide suspected of killing wife); People v. Modzelewski, 611 N.Y.S.2d 22 (N.Y.App.Div.1994) (privilege precluded testimony of lawyer of deceased co-perpetrator). See generally

Hood, Note, The Attorney-Client Privilege and a Revised Rule 1.6: Permitting Limited Disclosure After the Death of the Client, 7 Geo. J. Legal Ethics 741 (1994).

Comment d. Situations of need and hardship. No extant case authority supports the proposed good-cause exception urged in the Comment. It is based upon tbe policy behind the privilege and fairness to litigants. See C. Wolfram, Modern Legal Ethics § 6.3.4, at 256 (1986). See also 1 C. McCormick, Evidence § 94, at 349–50 (J. Strong 4th ed.1992) (urging that privilege generally should be extinguisbed by client's death); 24 C. Wright & K. Graham, Federal Practice & Procedure § 5498 (1986) (urging that privilege should die with client and, as matter of interpretation of evidence codes, not survive winding-up of decedent's estate); cf., e.g., Note, The Attorney-Client Privilege and a Revised Rule 1.6; Permitting Limited Disclosure After the Death of the Client, 7 Geo. J. Leg. Ethics 741 (1994) (argument for etbical rule permitting lawyer to reveal client confidential information in order to exonerate innocent defendant, but only after deatb of client). In many (but not all) of the situations that are likely to arise, applying either the exception in § 81 or the standing rules of § 86 will allow the testimony, but without regard to any process of balancing the need for the testimony against the concept of confidentiality. On decisions apparently rejecting the approach recommended in the Comment, see, e.g., Swidler & Berlin v. United States, 524 U.S. 399, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998) (attorney-client privilege survives death of client, barring requirement that lawyer for decedent testify before grand jury as to client's pre-death disclosures in days before suicide); District Attorney v. Magraw, 628 N.E.2d 24 (Mass.1994); Rich v. Fuller, 666 A.2d 71 (Me.1995); see generally Frankel, The Attorney-Client Privilege After the Death of the Client, 6 Geo. J. Leg. Ethics 45 (1992).

§ 78. Agreement, Disclaimer, or Failure to Object

The attorney-client privilege is waived if the client, the client's lawyer, or another authorized agent of the client:

(1) agrees to waive the privilege;

(2) disclaims protection of the privilege and

(a) another person reasonably relies on the disclaimer to that person's detriment; or

(b) reasons of judicial administration require that the client not be permitted to revoke the disclaimer; or

(3) in a proceeding before a tribunal, fails to object properly to an attempt by another person to give or exact testimony or other evidence of a privileged communication.

Comment:

a. Scope and cross-references. This Section defines the circumstances under which a client loses the protection of the privilege by consent or through conduct inconsistent with maintaining the privilege. On assertion of the privilege, see § 86. On a lawyer's obligation to raise the objection, see § 63, Comment *b*. On the effect of partial disclosure on other communications, see § 79, Comment *c*. See also § 79, Comment *c* (waiver through disclosure by authorized agent). On the effect of waiver on a client's power to raise the privilege on another occasion, see § 79, Comment *i*. On waiver of the lawyer's work-product immunity, see §§ 91–92.

b. Rationale. The attorney-client privilege is personal to the client whose interests it protects. A client can relinquish its protection.

Waiver of the privilege must be contrasted with a lawyer's use or disclosure of confidential client information with client consent under § 62. Under that Section, client consent is effective only if the client is adequately informed (see § 62, Comment *c*). However, because of the interests of third persons and of judicial administration, under this Section the privilege can be lost even though the client is unaware of the privilege or the consequences of waiver (see particularly Comment *e* hereto).

c. Client agreement. Subsection (1) recognizes that the privilege can be waived by consent of a client, the client's lawyer, or another authorized agent. A lawyer generally has implied authority to waive a client's confidentiality rights in the course of representing the client (see § 61). That authority is especially important in litigation, where the lawyer is empowered to deal with evidentiary issues (see § 16(3) & § 26). A lawyer may be required in some circumstances to advise a client concerning waiver (see § 22). Whether a client can contract away the privilege by consent to a conflict of interest is considered in § 122.

Illustration:

1. A and B were partners in a business enterprise experiencing financial difficulties. Each retained a lawyer. A agreed to send B communications that he had received from his lawyer analyzing financial arrangements between them if B would forbear from filing suit against A. B delayed filing suit, but A refused to honor his agreement. In subsequent litigation, B seeks discovery of the information communicated to A by A's lawyer. A's agreement waives the protection of the attorney-client privilege.

The power of an agent, such as an employee of an organization, to waive the privilege is determined under the law of agency.

d. Client disclaimer. An announced intention to waive the privilege, not part of an enforceable promise, does not itself waive the privilege. The client ordinarily may rescind the intention, but, as stated in Subsection (2), not if another person reasonably and detrimentally relies on the announcement (see generally Restatement Second, Contracts § 90). So also, a tribunal has discretion to hold a litigant to an announced intention to waive the privilege, even without detrimental reliance.

e. Failure to object to evidence. Failure to object properly to another party's attempt to offer privileged evidence during a proceeding waives the privilege. Reasonable efforts must be exerted to maintain the secrecy of confidential communications, including making timely objection (see § 86) to their disclosure. Waiver by failing to make proper objection is an application of the general rule requiring parties to object contemporaneously to inadmissible evidence. E.g., Federal Rules of Evidence, Rule 103(a)(1).

In pretrial discovery, excessive concern with avoiding waiver can unduly delay and encumber the proceeding. Accordingly, procedural rules commonly permit parties to stipulate that privilege is not waived by failure to object during pretrial discovery (see Federal Rules of Civil Procedure, Rule 29).

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Comment b. Rationale. Revised Uniform Rules of Evidence, Rule 510 (1974); Proposed Federal Rules of Evidence, Rule 511 (1972); 1 C. McCormick, Evidence § 93 (J. Strong 4th ed.1992); 8 J. Wigmore, Evidence § 2327 (J. McNaughton rev.1961).

Comment c. Client agreement. E.g., Revised Uniform Rules of Evidence, Rule 510 (1974) (holder of privilege "waives the privilege" if holder "discloses or consents to disclosure of any significant part of the privileged matter"); Proposed Federal Rules of Evidence, Rule 511 (1972) (same). On agreements to waive, see, e.g., McCormick–Morgan, Inc. v. Teledyne Indus., Inc., 765 F.Supp. 611 (N.D.Cal.1991); Pipes v. Sevier, 694 S.W.2d 918, 924 (Mo.Ct.App.1985).

Comment d. Client disclaimer. Few decisions deal with disclaimer, the type of waiver considered in § 78(2). See C. Wright & K. Graham, Federal Practice & Procedure § 5507, at 583 (1986); United States v. Blackburn, 446 F.2d 1089, 1091 (5th Cir.1971), cert. denied, 404 U.S. 1017, 92 S.Ct. 679, 30 L.Ed.2d 665 (1972) (accused "waived" privilege in presence of trial counsel and government lawyers in meeting shortly before trial in trial counsel's office).

Comment e. Failure to object to evidence. The rule of waiver by failing to assert or defective assertion is universally followed. E.g., Model

Code of Evidence, Rule 210 (1942) (client has privilege to refuse to disclose and to prevent a witness from disclosing a privileged communication "if he claims the privilege"); 2 J. Weinstein & M. Berger, Evidence ¶ 503(c)[01], at 503–66 (1986); C. McCormick, Evidence § 93, at 243–44 (J. Strong 4th ed.1992); C. Wolfram, Modern Legal Ethics § 6.4.3 (1986); Hollins v. Powell, 773 F.2d 191, 197 (8th Cir.1985); Kelly v. State, 493 So.2d 356, 359–60 (Miss.1986). On stipulations preventing waiver at depositions, see, e.g., 4a J. Moore, J. Lucas & D. Epstein, Moore's Federal Practice ¶ 29.02 (2d ed.1987).

§ 79. Subsequent Disclosure

The attorney-client privilege is waived if the client, the client's lawyer, or another authorized agent of the client voluntarily discloses the communication in a nonprivileged communication.

Comment:

a. Scope and cross-references. This Section becomes relevant only if the requirements for the privilege (see §§ 68–72) have been satisfied. On waiver in the case of co-clients, see § 75, Comment *c*. Concerning separately represented clients who exchange confidential communications in a common-interest arrangement, see § 76, Comment *f*.

b. Subsequent disclosure. Voluntary disclosure of a privileged communication is inconsistent with a later claim that the communication is to be protected. When the disclosure has been made voluntarily, it is unnecessary that there have been detrimental reliance (compare § 78(2)).

c. Authorized disclosure by a lawyer or other agent. The privilege is waived if the client's lawyer or another authorized agent of the client discloses the communication acting under actual or apparent authority. A lawyer generally has implied authority to disclose confidential client communications in the course of representing a client (see § 27, Comment *c*; see also § 61). Ratification of the agent's authority has the same effect (see § 26, Comment *e*). Whether a subagent of the client or lawyer has authority to waive is governed by agency law. A file clerk in a law firm, for example, does not have implied authority.

Unauthorized disclosure by a lawyer not in pursuit of the client's interests does not constitute waiver under this Section. For example, disclosure of a client's confidential information to prevent a threat to the life or safety of another (§ 66) or to prevent a client crime or fraud (§ 67) does not constitute waiver within the meaning of this Section,

although another basis for finding the privilege inapplicable may apply.

Because of the lawyer's apparent authority to act for the client, a lawyer's failure to consult the client about disclosing privileged information generally will not affect the rights of third persons. A third person may not, however, reasonably rely on acts of an opposing lawyer or other agent constituting manifest disregard of responsibility for the client's interests (see also § 60, Comment *l*, & § 71, Comment *c* (eavesdroppers)). Upon discovery of an agent's wrongful disclosure, the client must promptly take reasonable steps to suppress or recover the wrongfully disclosed communication in order to preserve the privilege.

Illustration:

1. Lawyer sends a confidential memorandum containing privileged communications to Client for Client's review. Lawyer sends it by a reputable document-courier service. An employee of the document-courier service opens the sealed envelope, makes copies, and gives the copies to a government agency. As soon as the existence of the copies is discovered, Lawyer takes reasonable steps to recover them and demands that the document-courier service and the government agency return all communications taken or information gained from them. Even if the document-courier service is considered an agent of Lawyer for some purposes, its employee's actions do not waive Client's privilege in the communications.

d. A privileged subsequent disclosure. A subsequent disclosure that is itself privileged does not result in waiver. Thus, a client who discloses a communication protected by the attorney-client privilege to a second lawyer does not waive the privilege if the attorney-client privilege or work-product immunity protects the second communication. So also, showing a confidential letter from the client's lawyer to the client's spouse under circumstances covered by the marital privilege preserves the attorney-client privilege.

e. Extent of disclosure. Waiver results only when a nonprivileged person learns the substance of a privileged communication. Knowledge by the nonprivileged person that the client consulted a lawyer does not result in waiver, nor does disclosure of nonprivileged portions of a communication or its general subject matter. Public disclosure of facts that were discussed in confidence with a lawyer does not waive the privilege if the disclosure does not also reveal that

they were communicated to the lawyer. See § 69, Comment *d* (distinction between communications and facts).

Illustrations:

2. Client, a defendant in a personal-injury action, makes a privileged communication to Lawyer concerning the circumstances of the accident. In a later judicial proceeding, Client, under questioning by Lawyer, testifies about the occurrence but not about what Client told Lawyer about the same matter. On cross-examination, the lawyer for Plaintiff inquires whether the Client's testimony is consistent with the account Client gave to Lawyer in confidence. Client's testimony did not waive the privilege.

3. The same facts as in Illustration 2, except that Client states that "I've testified exactly as I told Lawyer just a week after the accident happened. I told Lawyer that the skid marks made by Plaintiff's car were 200 feet long. And I've said the same things here." Such testimony waives the privilege by subsequent disclosure. On the extent of waiver, see Comment *f* hereto.

In the circumstances of Illustration 3, if the client merely testifies that the subject of skid marks was discussed with the client's lawyer, the privilege is not waived.

f. Partial subsequent disclosure and "subject matter" waiver. An initial disclosure resulting in waiver under this Section may consist of disclosure of fewer than all communications between lawyer and client on the subject. The question then arises whether an inquiring party is entitled to access to other relevant communications beyond those actually disclosed. (Similar questions can arise with respect to waiver under § 78 (waiver by agreement, disclaimer, or failure to object) and § 80 (waiver by putting assistance or communication in issue).)

General waiver of all related communications is warranted when a party has selectively offered in evidence before a factfinder only part of a more extensive communication or one of several related communications, and the opposing party seeks to test whether the partial disclosure distorted the context or meaning of the part offered. All authorities agree that in such a situation waiver extends to all otherwise-privileged communications on the same subject matter that are reasonably necessary to make a complete and balanced presentation (compare Federal Rules of Evidence, Rule 106). That breadth of waiver is required by considerations of forensic fairness, to prevent a partial disclosure that would otherwise mislead the factfinder because

selectively incomplete. Similar considerations generally apply when the privilege holder makes a partial disclosure in pretrial proceedings, as in support of a motion for summary judgment or during a pretrial hearing on a request for provisional relief.

If partial disclosure occurs in a nontestimonial setting or in the context of pretrial discovery, a clear majority of decisions indicates that a similar broad waiver will be found, even though the disclosure is not intended to obtain advantage as a possibly misleading half-truth in testimony. Although arguably different considerations might apply (because of the absence of opportunity to mislead a factfinder by partial disclosure), courts insist in effect that a party who wishes to assert the privilege take effective steps to protect against even partial disclosure, regardless of the nontestimonial setting. In an appropriate factual setting, waiver may also be supportable on the ground that the partial disclosure was designed to mislead an opposing party in negotiations or was inconsistent with a candid exchange of information in pretrial discovery.

Parties may agree that disclosure of one privileged communication will not be regarded as waiver as to others, and a tribunal may so order, for example in a discovery protective order. Such an agreement or order governs questions of waiver both in the proceeding involved and, with respect to the parties to the agreement, in other proceedings.

g. Voluntary subsequent disclosure. To constitute waiver, a disclosure must be voluntary. The disclosing person need not be aware that the communication was privileged, nor specifically intend to waive the privilege. A disclosure in obedience to legal compulsion or as the product of deception does not constitute waiver.

Illustrations:

4. A burglar ransacks Client's confidential files and carries away copies of communications from Client to Lawyer protected by the attorney-client privilege. The police apprehend the burglar, recover the copies, and examine them in order to identify their owner. Client's right to invoke the privilege is not lost.

5. At a hearing before a tribunal, the presiding officer erroneously overrules Lawyer's objection to a question put to Client that calls for a communication protected by the attorney-client privilege. Client then testifies. By testifying, Client has not waived objection to efforts to elicit additional privileged communications in the litigation nor to claim on appeal that the hearing officer incorrectly overruled Lawyer's objection. Client also can

seek protection of the attorney-client privilege in subsequent litigation.

On resisting disclosure by legal compulsion, see § 86.

h. Inadvertent disclosure. A subsequent disclosure through a voluntary act constitutes a waiver even though not intended to have that effect. It is important to distinguish between inadvertent waiver and a change of heart after voluntary waiver. Waiver does not result if the client or other disclosing person took precautions reasonable in the circumstances to guard against such disclosure. What is reasonable depends on circumstances, including: the relative importance of the communication (the more sensitive the communication, the greater the necessary protective measures); the efficacy of precautions taken and of additional precautions that might have been taken; whether there were externally imposed pressures of time or in the volume of required disclosure; whether disclosure was by act of the client or lawyer or by a third person; and the degree of disclosure to nonprivileged persons.

Once the client knows or reasonably should know that the communication has been disclosed, the client must take prompt and reasonable steps to recover the communication, to reestablish its confidential nature, and to reassert the privilege. Otherwise, apparent acceptance of the disclosure may reflect indifference to confidentiality. Even if fully successful retrieval is impracticable, the client must nonetheless take feasible steps to prevent further distribution.

Illustration:

6. Plaintiff has threatened Client with suit unless Client is able to persuade Plaintiff's lawyers that Client is free from fault. Plaintiff imposes a stringent deadline for Client's showing. Client authorizes Lawyer to produce a large mass of documents. Although reviewed by Lawyer, the documents include a confidential memorandum by Client to Lawyer. The standard procedure of lawyers in the circumstances would not have included reexamining the copies prior to submission. Lawyer's inadvertent disclosure did not waive the privilege. After discovering the mistake, Client must promptly reassert the privilege and demand return of the document.

i. Consequences of client waiver of the privilege. Waiver ordinarily extends to the litigation in or in anticipation of which a

disclosure was made and future proceedings as well, whether or not related to the original proceeding. However, if no actual disclosure resulted from the waiver, a client might be in a position to reassert the privilege. For example, inadvertent disclosure of a privileged document in discovery should not preclude subsequent assertion of the privilege against a different opponent in different litigation if the disclosure does not result in the document becoming known to anyone other than the party who received it.

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Comment b. Subsequent disclosure. See generally Revised Uniform Rules of Evidence, Rule 510 (1974) ("A person upon whom these rules confer a privilege against disclosure waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged"); Proposed Federal Rules of Evidence, Rule 511 (1972) (substantially similar); cf. Uniform Rules of Evidence, Rule 37(b) (1953) (waiver if holder of privilege "without coercion and with knowledge of his privilege, made disclosure of any part of the matter or consented to such a disclosure made by any one").

Comment c. Authorized disclosure by a lawyer or other agent. E.g., Revised Uniform Rules of Evidence, Rule 510 (1974) (disclosure if client discloses "or consents to disclosure"); Proposed Federal Rules of Evidence, Rule 511 (1972). See generally Restatement Second, Agency § 7 (express or implied authority); id. § 8 (apparent authority); id. § 82 (ratification by client). See also § 26 hereto (actual authority) and § 27 (apparent authority).

E.g., United States v. Martin, 773 F.2d 579, 583–84 (4th Cir.1985) (client impliedly authorized lawyer to disclose privileged communications in order to compromise question of tax liability by authorizing lawyer to negotiate with tax agency); Drimmer v. Appleton, 628 F.Supp. 1249, 1251 (S.D.N.Y.1986) (although present in courtroom, client was silent when lawyer testified to content of privileged communication); Tucker v. State, 484 So.2d 1299, 1301 (Fla.Dist. Ct.App.1986) (lawyer's implied authority to waive privilege by disclosing communications to psychiatrist called to testify by opposing party). Compare, e.g., People v. Mudge, 492 N.E.2d 1050 (Ill.App.Ct.1986) (no waiver when lawyer gave privileged document to pathologist who, without authority, showed it to opposing party's pathologist); State ex rel. Lause v. Adolf, 710 S.W.2d 362, 364–65 (Mo. Ct.App.1986) (officers and directors of organization who were named as defendants in suit to which organization was not party did not have implied authority to waive organization's privilege by pleading reliance on advice of counsel).

On wrongful disclosure by a lawyer or another agent, see Uniform Rules of Evidence, Rule 26(1)(c)(iii) (1953) (client has privilege to prevent witness from disclosing communication that came to knowledge of witness "as a result of a breach of the lawyer-client relationship"); Model Code of

Evidence, Rule 210(c)(iii) (1942) (client can prevent witness from disclosing communication if witness "obtained knowledge or possession of the communication as a result of an intentional breach of the lawyer's duty of non-disclosure by the lawyer or his agent or servant"). The foregoing evidence codes refer to the agency-law-based concept of confidentiality stated in § 59. On the decisions, see, e.g., United States v. Sindona, 636 F.2d 792, 804–05 (2d Cir.1980) (evidence divulged by lawyer in breach of duties under attorney-client privilege properly excluded); State v. Maxwell, 691 P.2d 1316, 1320 (Kan.Ct.App. 1984) (when lawyer, without authorization from clients, disclosed damaging and otherwise privileged communications to opposing party's lawyer in clear breach of confidentiality obligation, privilege still applied). See generally § 60, Comment *m*, and Reporter's Note thereto.

On the rule that a lawyer's permissible disclosure to prevent a client crime does not waive the attorney-client privilege, see Purcell v. District Attorney, 676 N.E.2d 436 (Mass. 1997).

Comment d. A privileged subsequent disclosure. E.g., Revised Uniform Rules of Evidence, Rule 510 (1974) (rule of waiver by disclosure "does not apply if the disclosure is itself a privileged disclosure"); Proposed Federal Rules of Evidence, Rule 511 (1972) (same). Decisions under the attorney-client privilege are rare. E.g., Transmirra Prods. Corp. v. Monsanto Chem. Co., 26 F.R.D. 572, 576–77 (S.D.N.Y.1960) (no waiver when confidential information disclosed in confidence to person with common interest in litigation). A few decisions have extended the concept of a subsequent privileged disclosure beyond the realm of strictly evidentiary privileges. E.g., Lipton Realty, Inc. v. St. Louis Housing Auth., 705 S.W.2d 565, 570–71 (Mo.Ct.App.1986) (state public-housing agency confidentially disclosed letter from its lawyer to federal agency officials supplying financing for housing). Some decisions finding no waiver are apparently based in part on a concept similar to the rule that the privilege is preserved when a lawyer presents confidential information to an adversary in the course of settlement discussions (see generally § 61, Comment *d*, & Reporter's Note thereto). E.g., Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir.1977) (en banc); Byrnes v. IDS Realty Trust, 85 F.R.D. 679, 685, 688 (S.D.N.Y.1980) (disclosure at "non-public proceeding" of enforcement agency; waiver rejected to encourage voluntary disclosures to agencies). Contra, e.g., In re Penn Central Commercial Paper Litigation, 61 F.R.D. 453, 463–64 (S.D.N.Y.1973) (voluntary testimony before nonpublic SEC investigation waives privilege).

Comment e. Extent of disclosure. See generally 2 J. Weinstein & M. Berger, Evidence ¶ 511[02] (1986); Marcus, The Perils of Privilege: Waiver and the Litigator, 84 Mich. L. Rev. 1605 (1986); Davidson & Voth, Waiver of the Attorney–Client Privilege, 64 Or. L. Rev. 637 (1986); Developments in the Law—Privileged Communications, 98 Harv. L. Rev. 1450, 1629–65 (1985).

Courts generally have recognized the distinction between a fact and a communication concerning the same fact in determining whether a lawyer's or client's disclosure is inconsistent with the privilege. E.g., Diotima Shipping Corp. v. Chase, Leavitt &

Co., 102 F.R.D. 532, 536–37 (D.Me. 1984) (client's disclosure of lawyer's report of publicly available facts not waiver of client communications to lawyer about other facts); Mitchell v. Superior Court, 691 P.2d 642, 648 (Cal.1984) (client's disclosure that she discussed subject with lawyer is no waiver of contents of discussion); Brookings v. State, 495 So.2d 135, 139–40 (Fla.1986) (no waiver by testifying to same facts as were discussed with lawyer). Waiver does not occur if the client reveals only nonprivileged portions of what the client communicated to a lawyer. E.g., Southern Ry. v. Lawson, 353 S.E.2d 491, 494–95 (Ga.1987) (lawyer's testimony about mental state of client concerned no privileged matter, thus did not waive privilege for other, related information). Consistently, some decisions hold that the client's disclosure of even incriminating and embarrassing facts does not amount to waiver of the privilege with respect to client-lawyer communications about those same facts. Most of the decisions involve self-identified accomplices in crime who turn state's evidence, but then refuse te permit questioning concerning the version of facts that they had given to their lawyers. E.g., Commonwealth v. Goldman, 480 N.E.2d 1023, 1027–29 (Mass.), cert. denied, 474 U.S. 906, 106 S.Ct. 236, 88 L.Ed.2d 237 (1985). Contra, e.g., Jones v. State, 3 So. 379, 380 (Miss. 1887); see generally Annot., 51 A.L.R.2d 521 (1957). For an attempt to construct a loose "balancing" test, see State v. Cascone, 487 A.2d 186 (Conn.1985).

Courts have found waiver through subsequent disclosure in a wide variety of instances of client or lawyer disclosure to nonprivileged third persons. See, e.g., United States v. Jones, 696 F.2d 1069, 1072–73 (4th Cir.1982) (waiver by publishing lawyer's tax-law opinion in brochures); In re John Doe Corp., 675 F.2d 482, 488–89 (2d Cir.1982) (disclosing privileged material to independent accountant and to lawyer for third person); In re Horowitz, 482 F.2d 72 (2d Cir.), cert. denied, 414 U.S. 867, 94 S.Ct. 64, 38 L.Ed.2d 86 (1973) (sending privileged documents to accountant); Jonathan Corp. v. Prime Computer, Inc., 114 F.R.D. 693 (E.D.Va. 1987) (sending memorandum to third person in course of business negotiations); North Dakota ex rel. Olson v. Andrus, 581 F.2d 177, 180–81 (8th Cir.1978) (disclosure to single nonprivileged person); City of Los Angeles v. Superior Court, 216 Cal.Rptr. 311 (Cal.Ct.App.1985) (client's discussion with newspaper reporter); Agnew v. State, 446 A.2d 425 (Md.Ct. Spec.App.1982) (client's publication of book).

On the extent of revelation necessary to constitute waiver by subsequent disclosure, see, e.g., Mitchell v. Superior Court, 691 P.2d 642, 647–48 (Cal.1984) (client's disclosure that she had talked to her lawyer about toxic chemical no waiver of privilege with respect to contents of communications); Procacci v. Seitlin, 497 So.2d 969 (Fla.Dist.Ct.App.1986) (although client waived privilege with respect to communications with lawyer involving land sale as to which client sued lawyer for legal malpractice, thus waiving privilege for purposes of present suit involving other party to land sale, waiver did not reach other transactions on which lawyer advised client in course of lengthy client-lawyer relationship).

Comment f. Partial subsequent disclosure and "subject matter" waiver. The evidence codes are unclear on

the point addressed in the Comment. E.g., Revised Uniform Rules of Evidence, Rule 510 (1974) (waiver because of subsequent disclosure "of any significant part of the privileged matter"); Proposed Federal Rules of Evidence, Rule 511 (1972) (same); Uniform Rules of Evidence, Rule 37(b) (1953) (waiver by "disclosure of any part of the matter"); cf. Federal Rules of Evidence, Rule 106 ("When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it").

On so-called subject-matter waiver for forensic-fairness reasons, see, e.g., State v. Earnest, 703 P.2d 872, 877 (N.M.1985) (client's testifying to what client had *not* told lawyer waived privilege with respect to testimony of lawyer about conversation), vacated on other grounds, 477 U.S. 648, 106 S.Ct. 2734, 91 L.Ed.2d 539 (1986).

With respect to out-of-court partial disclosures, the substantial majority of decisions announces a broad and almost automatic subject-matter-waiver rule. E.g., In re Sealed Case, 877 F.2d 976 (D.C.Cir.1989) (waiver by subsequent disclosure of one document waives privilege as to all communications on same subject matter); In re Martin Marietta Corp., 856 F.2d 619 (4th Cir.1988), cert. denied, 490 U.S. 1011, 109 S.Ct. 1655, 104 L.Ed.2d 169 (1989) (implied subject-matter waiver as result of statements by corporation to government in negotiating settlement that "of those consulted within the Company all will testify" to certain facts and that "there is no evidence, testimonial or documentary" of other facts; waiver extends to all details underlying statements); AMCA Int'l Corp. v. Phipard, 107 F.R.D. 39 (D.Mass.1985) (disclosing to adversary in course of presuit negotiations letter from lawyer to client on interpretation of contracts waived privilege with respect to all communications between lawyer and client concerning lawyer's letter, but not all communications concerning interpretation of contract); Smith v. Alyeska Pipeline Serv. Co., 538 F.Supp. 977 (D.Del.1982), aff'd, 758 F.2d 668 (Fed.Cir.1984), cert. denied, 471 U.S. 1066, 105 S.Ct. 2142, 85 L.Ed.2d 499 (1985) (when patentee claiming infringement of patent sent alleged infringer copy of lawyer's opinion letter concerning infringement 6 years prior to suit, patentee thereby waived privilege with respect to letter; patentee also waived privilege with respect to prior and later communications between lawyer and client relating to "subject matter" of infringement of patent in patentee's subsequent infringement action).

On contrary decisions dealing with nonlitigation disclosure, see, e.g., In re von Bulow, 828 F.2d 94 (2d Cir. 1987) (lawyer and client's participation in writing book about crime waived privilege with respect to communications there revealed, but not for nonrevealed communications); Diotima Shipping Corp. v. Chase, Leavitt & Co., 102 F.R.D. 532, 537 (D.Me.1984) (dicta) (plaintiff did not waive privilege for communications with New York lawyers by disclosing communications from lawyers in Maine and France); see also, e.g., C. Mueller & L. Kirkpatrick, Modern Evidence § 5.28, at 572–74 (1995); Harmon, Note, Fairness and the Doctrine of Subject Matter Waiver of the Attorney–Client Privilege in Extrajudicial Disclosure Situations, 1988 U.

Ill. L. Rev. 999 (arguing that subject-matter waiver should be limited to situations in which significant risk exists that factfinder would otherwise be misled).

If subsequent disclosure occurs in the course of pretrial discovery, it has been held that *von Bulow* is inapplicable and subject-matter waiver applies, due to the controlled setting in which disclosure occurred as well as the policy of permitting opponents to prepare for trial. See Bowne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465 (S.D.N.Y.1993); cf. Stratagem Dev. Corp. v. Heron Int'l N.V., 153 F.R.D. 535, 544-45 (S.D.N.Y. 1994) (waiver of privilege by subsequent disclosure did not independently call for subject-matter waiver under *von Bulow* in absence of showing of prejudice to party seeking additional documents).

Comment g. Voluntary subsequent disclosure. The weight of authority is that a client waives the privilege by subsequent disclosure regardless of the client's subjective intent concerning the privilege. See, e.g., C. Mueller & L. Kirkpatrick, Modern Evidence § 5.28, at 564 (1995); 2 J. Weinstein & M. Berger, Evidence ¶ 511[02], at 511-6 to 511-7 (1986); 8 J. Wigmore, Evidence § 2327, at 636 (J. McNaughton rev. ed.1961); C. McCormick, Evidence § 93, at 341 n.4 (J. Strong 4th ed.1992); In re Grand Jury Investigation of Ocean Transportation, 604 F.2d 672 (D.C.Cir.), cert. denied, 444 U.S. 915, 100 S.Ct. 229, 62 L.Ed.2d 169 (1979) (intent not to waive privilege with respect to batch of documents marked "P" irrelevant, when lawyer, when asked by recipient agency whether mistake had been made, firmly insisted that documents were intended to be disclosed and no attempt to reclaim for almost year after mistake was discovered by lawyer); Miller v. Continental Ins. Co., 392 N.W.2d 500, 505 (Iowa 1986) (waiver found, rejecting party's contention that disclosures of privileged conversation in affidavit did not reflect intent to waive). Cf., e.g., Weil v. Inv. Indicators Research & Management, Inc., 647 F.2d 18, 24 (9th Cir.1981) (subjective intent is only one factor to be considered in determining whether waiver should be implied). But see Uniform Rules of Evidence, Rule 37(b) (1953) (language, not carried forward in subsequent evidence codes, that waiver by client's disclosing communication must be "with knowledge of his privilege").

A disclosure that is involuntary, because produced by either coercion or fraud, does not constitute waiver. E.g., State v. Schmidt, 474 So.2d 899, 902-03 (Fla.Dist.Ct.App.1985) (parties, who had interests adverse to client who was testifying at deposition in absence of his lawyer, deceived client into believing that his testimony would not waive privilege).

On Illustration 5, see Revised Uniform Rules of Evidence, Rule 511 (1974) ("A claim of privilege is not defeated by a disclosure which was (a) compelled erroneously or (b) made without opportunity to claim the privilege."); Uniform Rules of Evidence, Rule 38 (1953) ("Evidence of a statement or other disclosure is inadmissible against the holder of the privilege if the judge finds that he had and claimed a privilege to refuse to make the disclosure but was nevertheless required to make it."); Model Code of Evidence, Rule 232 (1942).

Comment h. Inadvertent disclosure. The modern law on inadvertent disclosure lies somewhere between two extreme positions. See generally

C. Mueller & L. Kirkpatrick, Modern Evidence § 5.29 (1995); C. Wolfram, Modern Legal Ethics § 6.4.4, at 270–71 (1986). It might be contended, at one extreme, that the attorney-client privilege should be deemed waived only when waiver is intentional. This would be something akin to the "intentional relinquishment or abandonment" doctrine employed, for example, for right-to-counsel issues in Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938); cf. Eisenberg v. Gagnon, 766 F.2d 770, 788 (3d Cir.), cert. denied, 474 U.S. 946, 106 S.Ct. 342, 88 L.Ed.2d 290 (1985) ("No matter what standard of waiver [of privilege] is applied, the waiver must be knowing"—quoting In re Grand Jury (Malfitano), 633 F.2d 276, 280 (3d Cir. 1980)); Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F.Supp. 936, 939 (S.D.Fla.1991); Mendenhall v. Barber-Greene Co., 531 F.Supp. 951, 955 (N.D.Ill.1982); Marcus, The Perils of Privilege: Waiver and the Litigator, 84 Mich. L. Rev. 1605, 1634–35 (1986) (inadvertent disclosure should result in waiver only in rare instances in which disclosure is made to ultimate factfinder and fairness requires production).

At the other extreme, Dean Wigmore argued for a virtually automatic waiver rule for any instance of inadvertent disclosure. See 8 J. Wigmore, Evidence § 2326 (J. McNaughton rev.1961). Dean Wigmore carried his position to the point of supporting a rule of waiver when a thief stole confidential client documents. Id. § 2325. In 1942, the Institute adopted the Wigmore position in the Model Code of Evidence rule 210, comment *b* (1942):

> [Rule 210(c)(iii)] protects the communication when it has been disclosed by the lawyer in breach of his duty owed to the client to keep it secret. If a stranger obtains knowledge of the communication in any other way, there is no privilege against disclosure by him. The cases dealing with this problem are cases of eavesdroppers, which reach the result stated in the Rule....

The Wigmore–Model Code approach at one time had a considerable following. See authorities cited in Davidson & Voth, Waiver of the Attorney-Client Privilege, 64 Or. L. Rev. 637, 640–41 (1986). The Institute abandoned the Wigmore position in the Uniform Rules of Evidence, Rule 26 (1953); see C. Wolfram, Modern Legal Ethics 265 (1986). Some few modern decisions continue the spirit of the former rule. E.g., Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254 (N.D.Ill.1981) (waiver when, after two years of burrowing secretly in dumpster searching wastebasket leavings of client, opposing party found handwritten draft of client's letter to lawyer).

The modern decisions cannot all be satisfactorily reconciled with any one approach, but most courts take the intermediate position outlined in the Section and Comments. They preserve the privilege unless, in effect, the client's own negligence produced the compromising disclosure. Negligence in this instance is a realistic concept. E.g., Transamerica Computer Co. v. International Business Mach. Corp., 573 F.2d 646, 652 (9th Cir.1978) (where trial judge's "demanding timetable" confronted responding party in discovery with "extraordinary logistical difficulties" in reviewing 17-million pages of documents within 3 months, statistically likely occurrence of inadvertent dis-

closure, despite extraordinary precautions, does not result in waiver). Courts have been willing to overlook some forms of what might be referred to as mild negligence. E.g., Eureka Fin. Corp. v. Hartford Accident & Indem. Co., 136 F.R.D. 179, 184 (E.D.Cal.1991) (factors relevant in determining excusable inadvertence).

In assessing whether inadvertent subsequent disclosure amounts to waiver, courts look to several factors. Those mentioned in the Comment are reflected in the decisions or seem sound in principle. On whether the disclosure occurred under pressure of time imposed by a court or another party, see, e.g., Transamerica Computer Co. v. International Business Mach. Corp., supra. On whether the client or lawyer who inadvertently disclosed the communication could reasonably have exercised closer scrutiny over the confidential communication, see, e.g., SEC v. Cassano, 189 F.R.D. 83 (S.D.N.Y.1999) (SEC lawyer specifically authorized release of document without examining it after defense lawyers made special request for it); United States v. Kelsey–Hayes Wheel Co., 15 F.R.D. 461, 465 (E.D.Mich.1954) (waiver by inadvertent disclosure where assertedly privileged documents were indiscriminately mingled with routine corporate documents with no special effort to preserve them in separate files). On whether the client had to contend with document production in discovery that required delivery of great masses of documents and only a small number of privileged documents were released, see, e.g., Kansas–Nebraska Nat. Gas Co. v. Marathon Oil Co., 109 F.R.D. 12, 21 (D.Neb.1983) (no waiver when one document among 75,000 produced "slipped through the cracks" of otherwise careful screening procedure). On disclosures that occur while privileged communications are permissibly in the hands of third persons, see, e.g., Eisenberg v. Gagnon, 766 F.2d 770, 788 (3d Cir.), cert. denied, 474 U.S. 946, 106 S.Ct. 342, 88 L.Ed.2d 290 (1985) (no waiver when opposing lawyer came into possession of documents submitted in camera under what judge had announced was a sealed transcript). On whether the client's or lawyer's post-release reaction indicates a reasonable attempt promptly to recapture the inadvertently released communication, see, e.g., Permian Corp. v. United States, 665 F.2d 1214, 1219–20 & n.11 (D.C.Cir.1981) (waiver when, although initial disclosure might have been inadvertent, client, although presented with ample opportunities, did not thereafter take steps to preserve privilege claim).

Illustration 6 is based on SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 519 (D.Conn.1976) (lawyer's failure to edit matters turned over in course of en masse copying does not constitute implied waiver when lawyer previously had excised privileged portions of documents but later failed to detect lack of deletion in substituted copies of documents because of production pressures).

See also Eigenheim Bank v. Halpern, 598 F.Supp. 988 (S.D.N.Y.1984) (where document was identified as privileged in previous litigation and care was not taken to assert and protect client's privilege in document, party's lax, careless, and inadequate procedures resulting in inadvertent disclosure in subsequent litigation constitute waiver).

Comment i. Consequences of client waiver of the privilege. See generally C. McCormick, Evidence § 93, at

347–48 (J. Strong 4th ed.1992). On the irreversible effects of a waiver through subsequent disclosure by a client or the client's authorized agent, see, e.g., Drimmer v. Appleton, 628 F.Supp. 1249, 1252 (S.D.N.Y.1986); United States v. Krasnov, 143 F.Supp. 184, 190–91 (E.D.Pa.1956), aff'd, 355 U.S. 5, 78 S.Ct. 38, 2 L.Ed.2d 22 (1957); Green v. Crapo, 62 N.E. 956, 959 (Mass.1902) (Holmes, J.) (voluntary disclosure through testimony); Hogg v. First Nat'l Bank, 386 N.W.2d 921, 926 (S.D.1986), and authorities cited. On nonwaiver in subsequent proceedings when the original waiver did not in fact result in disclosure of a privileged communication, see, e.g., United States v. Ballard, 779 F.2d 287, 292 (5th Cir.), cert. denied, 475 U.S. 1109, 106 S.Ct. 1518, 89 L.Ed.2d 916 (1986) (that client instituted malpractice suit against lawyer, which would have permitted lawyer there to discover and introduce otherwise privileged communications under exception for privileged communications put into issue by client (see § 80), does not waive privilege for unrelated subsequent criminal prosecution).

§ 80. Putting Assistance or a Communication in Issue

(1) The attorney-client privilege is waived for any relevant communication if the client asserts as to a material issue in a proceeding that:

(a) the client acted upon the advice of a lawyer or that the advice was otherwise relevant to the legal significance of the client's conduct; or

(b) a lawyer's assistance was ineffective, negligent, or otherwise wrongful.

(2) The attorney-client privilege is waived for a recorded communication if a witness:

(a) employs the communication to aid the witness while testifying; or

(b) employed the communication in preparing to testify, and the tribunal finds that disclosure is required in the interests of justice.

Comment:

a. Scope and cross-references. This Section addresses waiver by interjecting the contents of a confidential communication into litigation. On the exception to the attorney-client privilege in fee suits and for lawyer self-defense, see § 83. On the circumstances in which a client can limit liability or justify an action by relying on legal advice, see § 29.

b. Putting a privileged communication into issue. The exceptions stated in Subsection (1) are based on considerations of forensic fairness (compare § 79). If the communication could not be introduced,

a client could present the justification of legal advice in an inaccurate, incomplete, and self-serving way. The issue of reliance on legal advice can be interjected through pleadings or testimony. Waiver extends to all communications relevant to the issue asserted by the client. A tribunal may control discovery to postpone or preterm it the issue. For example, if legal advice is presented as an alternative defense, discovery with respect to that issue may be postponed to allow the client opportunity to determine whether to withdraw that defense.

c. A client attack on a lawyer's services. A client who contends that a lawyer's assistance was defective waives the privilege with respect to communications relevant to that contention. Waiver affords to interested parties fair opportunity to establish the facts underlying the claim. When the lawyer is a party, the privilege is waived under § 83. Proceedings not involving the lawyer as a party include attacks on a criminal conviction on the ground of ineffective assistance of counsel or on a settlement on the ground that the lawyer lacked authority to bind the client (see §§ 26 & 27).

d. Using a privileged communication while testifying or preparing to testify. A witness with consent of or authorized by the client entitled to obtain the privilege might use a privileged communication while testifying or in preparing to testify. An opposing party is permitted to test whether the privileged communication has shaped the testimony. Waiver is automatic when the witness uses the communication in testifying. The standard of permitting review when the presiding officer determines that to be necessary "in the interest of justice" is the formulation employed in the Federal Rules of Evidence (Rule 612(2)). When the witness used the communication to prepare, waiver depends on a determination by the tribunal of whether the witness can recall and testify independent of the communication. Mere review of a privileged communication by a prospective witness does not constitute waiver. The exception should be applied with caution to avoid interfering with legitimate efforts to prepare witnesses for testimony.

If waiver is found, it applies whether the testimony follows or departs from the communication.

REPORTER'S NOTE

Comment b. Putting a privileged communication into issue. At least three approaches to the waiver questions addressed in Subsection (1) have been alluded to in the decisions. See generally Zenith Radio Corp. v. United States, 764 F.2d 1577, 1579–80 (Fed.Cir.1985). The first approach radically holds that, whenever a party seeks judicial relief, the party impliedly waives the privilege. E.g., Inde-

pendent Productions Corp. v. Loew's, Inc., 22 F.R.D. 266, 277 (S.D.N.Y. 1958). A second approach would attempt to balance the need for disclosure against the need for protecting the confidentiality of the client's communications on the facts of the individual case. E.g., Pitney-Bowes, Inc. v. Mestre, 86 F.R.D. 444, 447 (S.D.Fla.1980) (waiver found on balancing test when plaintiff put in issue intent of parties as to construction of terms of agreement); cf., e.g., Black Panther Party v. Smith, 661 F.2d 1243, 1271–72 (D.C.Cir.1981) (balancing when party interjecting legal issue into case claims privilege under First Amendment privilege against discovery); Elia v. Pifer, 977 P.2d 796 (Ariz.Ct.App.1998) (concept of mere possible "relevance" employed). The third approach avoids the extremes of an over-inclusive automatic-waiver rule or an indeterminate, ad hoc balancing approach. Instead, it focuses on whether the client asserting the privilege has interjected the issue into the litigation and whether the claim of privilege, if upheld, would deny the inquiring party access to proof needed fairly to resist the client's own evidence on that very issue. See generally C. Mueller & L. Kirkpatrick, Modern Evidence § 5.30 (1995); C. Wolfram, Modern Legal Ethics § 6.4.7 (1986). E.g., Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D.Wash. 1975). The third approach is followed in the Section and Comment.

Decisions sometimes invoke a shield-but-not-a-sword rationale—a client should be permitted to assert the privilege only in a defensive posture. E.g., Garfinkle v. Arcata Nat'l Corp., 64 F.R.D. 688, 689 (S.D.N.Y. 1974). The shield-sword metaphor fails to capture the sense of the doctrine fully. If followed literally, it could lead to upholding erroneously a claim of privilege, for often the client asserts the privilege defensively. The preferred approach is to require that the client either permit a fair presentation of the issues raised by the client or protect the right to keep privileged communications secret by not raising at all an issue whose fair exposition requires examining the communications. E.g., United States v. Miller, 600 F.2d 498, 501 (5th Cir.), cert. denied, 444 U.S. 955, 100 S.Ct. 434, 62 L.Ed.2d 327 (1979); Handgards, Inc. v. Johnson & Johnson, 413 F.Supp. 926, 929 (N.D.Cal.1976); Skelton v. Spencer, 565 P.2d 1374, 1378 (Idaho 1977), cert. denied, 434 U.S. 1014, 98 S.Ct. 730, 54 L.Ed.2d 758 (1978); cf. also United States v. St. Pierre, 132 F.2d 837, 840 (2d Cir. 1942) (Learned Hand, J.), cert. dism'd as moot, 319 U.S. 41, 63 S.Ct. 910, 87 L.Ed. 1199 (1943) (with respect to selective Fifth Amendment claim, "the privilege is to suppress the truth, but that does not mean that it is a privilege to garble it; ... it should not furnish one side with what may be false evidence and deprive the other of the means of detecting the imposition").

On a claim of reliance on advice of counsel, see, e.g., United States v. Mierzwicki, 500 F.Supp. 1331, 1335 (D.Md.1980) (waiver when person accused of income-tax evasion defended on ground that returns were amended on advice of counsel). Close and difficult questions arise when the client's assertion is not that the client relied on the advice of a lawyer but that the client relied solely on the advice or other actions of another party and, implicitly only, not on the advice of the lawyer. Compare, e.g., Southwire Co. v. Essex Group, Inc., 570 F.Supp. 643 (N.D. Ill.1983) (waiv-

er as to lawyer's opinion of patent invalidity when defendant pleaded plaintiff was estopped to enforce patent due to defendant's detrimental reliance on plaintiff's delay in enforcing patent and when defendant had already interjected lawyer's opinion into case on another issue); League v. Vanice, 374 N.W.2d 849, 855–56 (Neb. 1985) (waiver when plaintiff justified noncompliance with statute of limitations by alleging that delay was caused solely by defendant's concealment of facts); with, e.g., Rhone–Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851 (3d Cir.1994) (no waiver where party places only state of mind in issue, but without specific assertion that state of mind was supported by legal advice); Barr Marine Prod. Co. v. Borg–Warner Corp., 84 F.R.D. 631 (E.D.Pa.1979) (no waiver when defendant raised "meeting competition" defense). At a minimum, the cases agree that a client does not waive the privilege simply by bringing or defending a lawsuit. E.g., Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 35 (D.Md.1974) (no waiver by filing suit placing patent validity and enforceability in issue); Home Ins. Co. v. Advance Mach. Co., 443 So.2d 165, 168 (Fla.Dist.Ct.App.1983) (insurer's suit for contribution, alleging that settlement reached was "reasonable," did not interject issue of legal advice received by insurer).

Comment c. A client attack on a lawyer's services. See generally C. Wolfram, Modern Legal Ethics § 6.4.7 (1986). E.g., Evans v. Raines, 800 F.2d 884 (9th Cir.1986) (habeas corpus claim of ineffective assistance of counsel impliedly waives privilege); Tasby v. United States, 504 F.2d 332, 336 (8th Cir.1974), cert. denied, 419 U.S. 1125, 95 S.Ct. 811, 42 L.Ed.2d 826 (1975) (conviction of prisoner for making false statements sustained on basis of testimony of original defense lawyer rebutting statements, made by prisoner in post-conviction hearing, concerning allegedly incompetent advice lawyer had given prisoner before prisoner had taken stand in original trial); United States v. Woodall, 438 F.2d 1317, 1326 (5th Cir.1970) (en banc), cert. denied, 403 U.S. 933, 91 S.Ct. 2262, 29 L.Ed.2d 712 (1971) (testimony of former defense lawyer admissible after prisoner raised issue of competence of advice given prior to guilty plea); Skelton v. Spencer, 565 P.2d 1374 (Idaho 1977), cert. denied, 434 U.S. 1014, 98 S.Ct. 730, 54 L.Ed.2d 758 (1978) (client's attack on settlement on ground that lawyer wrongfully induced client to accept it); Johnson v. Schmidt, 719 S.W.2d 825, 827–28 (Mo.Ct.App.1986) (action by prisoner against public defender for legal malpractice waives privilege). See also In re Gillham, 704 P.2d 1019, 1020–21 (Mont.1985) (while waiver clearly applies in postconviction proceeding alleging ineffective assistance of counsel, attorney general should apply to court for order preserving responding lawyer from charges of discipline or malpractice for responding).

The evidence codes have attempted to capture the notion made explicit in Subsection (1)(b) through a somewhat vague "breach of duty" exception. The Model Code of Evidence, Rule 213(2)(b) (1942), referred only to an exception for a communication "upon an issue of breach of duty by the lawyer to his client." Subsequent codes expanded the exception to include a breach of duty "by the client to his lawyer." See Uniform Rules of Evidence, Rule 26(2)(c) (1953); Proposed Federal Rules of Evidence, Rule 503(d)(3); Revised Uniform

Rules of Evidence, Rule 502(d)(3) (1974). See also § 83, Reporter's Note.

For obvious reasons of fairness, once a lawyer reveals confidential client information in response to a claim of ineffective assistance of counsel and obtains a new trial, the information may not be employed, over a proper privilege objection, at the retrial. E.g., Commonwealth v. Chmiel, 738 A.2d 406 (Pa.1999).

Comment d. Using a privileged communication while testifying or preparing to testify. The evidence codes have dealt only by indirection with the issue of privileged communications used by a witness while testifying or preparing to do so. Cf., e.g., Revised Uniform Rules of Evidence, Rule 612(b) (1974) (reference to liberal rule of divulging pretestimonial writing used "to refresh memory" when "the court in its discretion determines it is necessary in the interests of justice" but without explicit reference to otherwise privileged material); Federal Rules of Evidence, Rule 612(2) (same). See C. Wolfram, Modern Legal Ethics § 6.4.7, at 274 n.20 (1986); 24 C. Wright & K. Graham, Federal Practice & Procedure § 5507, at 580 (1986).

The House Judiciary Committee believed that Rule 612 of the Federal Rules of Evidence could not be employed to override a privilege claim. See H. R. Rep. 650, 93d Cong., 1st Sess., at 13 (1973) ("The Committee intends that nothing in the Rule be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory."). No anti-waiver language appears in Rule 612, however, and federal courts generally exercise discretion to find a waiver of the privilege when a witness appears to be employing a previously studied privileged document as the basis for testimony. See generally C. McCormick, Evidence § 93, at 346 (J. Strong 4th ed.1992), and authorities cited; see also, e.g., Barrett v. Mummert, 869 S.W.2d 282 (Mo.Ct.App.1994), and authorities cited. For a suggestion of a possibly stricter rule (and one that seems to refer to the separate waiver by subsequent disclosure) (see § 79, Comment *f*, & Illustration 2 thereto), see 3 J. Weinstein & M. Berger, Evidence ¶ 612[04], at 612-34 (1981) (" ... Although some courts apparently assume that any material consulted by a witness prior to trial loses its privileged status, waiver should be found only when the witness has consulted a writing embodying his own communication to counsel, and his testimony at the deposition, or at trial, discloses a significant part of the communication.... "). If witness B (a nonprivileged person) refreshes recollection by examining a privileged writing between a lawyer and client A, unless the exception of § 75 or § 76 applies, waiver occurs under § 79 based on disclosure to a nonprivileged person (witness B).

§ 81. A Dispute Concerning a Decedent's Disposition of Property

The attorney-client privilege does not apply to a communication from or to a decedent relevant to an issue between parties who claim an interest through the same deceased client, either by testate or intestate succession or by an inter vivos transaction.

Comment:

a. Scope and cross-references. This Section is relevant, for example, in will-contest and similar litigation. On invoking exceptions to the privilege, see § 86(3).

b. A dispute between claimants through the same decedent. The exception in the Section is sometimes justified on the ground that the decedent would have wished full disclosure to facilitate carrying out the client's intentions. The dispute might involve either testate or intestate succession or claims arising from inter vivos transactions to which the decedent was a party. The witness will most often be the decedent's lawyer, who is in a position to know the client's intentions and whose testimony ordinarily will not be tainted by personal interest. Suppressing such testimony would hamper the fair resolution of questions of testator intent in will-contest and similar types of cases. It is therefore probable that the exception does little to lessen the inclination to communicate freely with lawyers (see § 68, Comment *c*).

The exception applies even if the personal representative of the decedent client's estate refuses to waive the privilege.

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Comment b. A dispute between claimants through the same decedent. Revised Uniform Rules of Evidence, Rule 502(d)(2) (1974) ("(d) *Exceptions.* There is no privilege under this rule: ... (2) *Claimants through same deceased client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.... "); Proposed Federal Rules of Evidence, Rule 503(d)(2) (1972) (same); Uniform Rules of Evidence, Rule 26(2)(b) (1953) ("(2) *Exceptions.* Such privileges shall not extend ... (b) to a communication relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by *inter vivos* transaction.... "); Model Code of Evidence, Rule 213(2)(a) (1942) ("(2) There is no privilege under Rule 210 as to any relevant communication between a lawyer and his client (a) upon an issue between parties claiming by testate or intestate succession from the client.... "). See generally C. McCormick, Evidence § 94 (J. Strong 4th ed.1992); 2 J. Weinstein & M. Berger, Evidence ¶ 503(d)(2)[01] (1986). Cf. 8 J. Wigmore, Evidence § 2329, 1988 Supp., at 166–67 (J. McNaughton rev.1961) (correcting an older, stricter view not current at the time of 1961 revision).

§ 82. Client Crime or Fraud

The attorney-client privilege does not apply to a communication occurring when a client:

(a) consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so, or

(b) regardless of the client's purpose at the time of consultation, uses the lawyer's advice or other services to engage in or assist a crime or fraud.

Comment:

a. Scope and cross-references. The attorney-client privilege is defined in §§ 68–72. The exception applies to all communications from or to privileged persons (see § 70), if the client's purpose in or use of the consultation is as described. The burden of establishing the elements of the exception is upon a person seeking to overcome the privilege (see § 86(3)).

On a lawyer's responsibilities with respect to counseling a client concerning illegal acts, see § 94. On a lawyer's responsibilities with respect to perjurious or other false evidence, see § 120. A lawyer's duty to safeguard confidential client information (see § 60(1)(b)) is subject to §§ 66–67, permitting a lawyer to use or disclose information as reasonably necessary to prevent (or in some instances to mitigate) certain illegal acts of a client.

b. Rationale. When a client consults a lawyer intending to violate elemental legal obligations, there is less social interest in protecting the communication. Correlatively, there is a public interest in preventing clients from attempting to misuse the client-lawyer relationship for seriously harmful ends. Denying protection of the privilege can be founded on the additional moral ground that the client's wrongful intent forfeits the protection. The client can choose whether or not to commit or aid the act after consulting the lawyer and thus is able to avoid exposing secret communications. The exception does not apply to communications about client crimes or frauds that occurred prior to the consultation. Whether a communication relates to past or ongoing or future acts can be a close question. See Comment *e* hereto.

c. Intent of the client and lawyer. The client need not specifically understand that the contemplated act is a crime or fraud. The client's purpose in consulting the lawyer or using the lawyer's services may be inferred from the circumstances. It is irrelevant that the legal service sought by the client (such as drafting an instrument) was itself lawful.

Illustrations:

1. Client is a member of a group engaged in the ongoing enterprise of importing and distributing illegal drugs. Client has agreed with confederates, as part of the consideration for participating in the enterprise, that Client will provide legal representation for the confederates when necessary. Client and Lawyer agree that, for a substantial monthly retainer, Lawyer will stand ready to provide legal services in the event that Client or Client's associates encounter legal difficulties during the operation of the enterprise. In a communication that otherwise qualifies as privileged under § 68, Client informs Lawyer of the identities of confederates in the enterprise. Client continues to engage in the criminal enterprise following the communication. The crime-fraud exception renders nonprivileged the communications between Client and Lawyer, including identification of Client's confederates.

2. Client, who is in financial difficulty, consults Lawyer A concerning the sale of a parcel of real estate owned by Client. Lawyer A provides legal services in connection with the sale. Client then asks Lawyer A to represent Client in petitioning for bankruptcy. Lawyer A advises Client that the bankruptcy petition must list the sale of the real estate because it occurred within the year previous to the date of filing the petition. Client ends the representation. Client shortly thereafter hires Lawyer B. Omitting to tell Lawyer B about the land sale, Client directs Lawyer B to file a bankruptcy petition that does not disclose the proceeds of the sale. In a subsequent proceeding in which Client's fraud in filing the petition is in issue, a tribunal would be warranted in inferring that Client consulted Lawyer A with the purpose of obtaining assistance to defraud creditors in bankruptcy and thus that the communications between Client and Lawyer A concerning report of the land sale in the bankruptcy petition are not privileged. It would also suffice should the tribunal find that Client attempted to use Lawyer A's advice about the required contents of a bankruptcy petition to defraud creditors by withholding information about the land sale from Lawyer B.

A client could intend criminal or fraudulent conduct but not carry through the intended act. The exception should not apply in such circumstances, for it would penalize a client for doing what the privilege is designed to encourage—consulting a lawyer for the purpose of achieving law compliance. By the same token, lawyers might be discouraged from giving full and candid advice to clients about

legally questionable courses of action. On the other hand, a client may consult a lawyer about a matter that constitutes a criminal conspiracy but that is later frustrated—and, in that sense, not later accomplished (cf. Subsection (a))—or, similarly, about a criminal attempt. Such a crime is within the exception stated in the Section if its elements are established.

The crime-fraud exception applies regardless of the fact that the client's lawyer is unaware of the client's intent. The exception also applies if the lawyer actively participates in the crime or fraud. However, if a client does not intend to commit a criminal or fraudulent act, the privilege protects the client's communication even if the client's lawyer acts with a criminal or fraudulent intent in giving advice.

Illustration:

3. Lawyer, in complicity with confederates who are not clients, is furthering a scheme to defraud purchasers in a public offering of shares of stock. Client, believing that the stock offering is legitimate and ignorant of facts indicating its wrongful nature, seeks to participate in the offering as an underwriter. In the course of obtaining legal advice from Lawyer, Client conveys communications to Lawyer that are privileged under § 68. The crime-fraud exception does not prevent Client from asserting the attorney-client privilege, despite Lawyer's complicity in the fraud.

Compare Illustration 1 to this Comment.

d. Kinds of illegal acts included within the exception. The authorities agree that the exception stated in this Section applies to client conduct defined as a crime or fraud. Fraud, for the purpose of the exception, requires a knowing or reckless misrepresentation (or nondisclosure when applicable law requires disclosure) likely to injure another (see Restatement Second, Torts §§ 525–530 (defining elements of fraudulent misrepresentation)).

The evidence codes and judicial decisions are divided on the question of extending the exception to other wrongs such as intentional torts, which, although not criminal or fraudulent, have hallmarks of clear illegality and the threat of serious harm. Legislatures and courts classify illegal acts as crimes and frauds for purposes and policies different from those defining the scope of the privilege. Thus, limiting the exception to crimes and frauds produces an exception narrower than principle and policy would otherwise indicate. Nonetheless, the prevailing view limits the exception to crimes and frauds. The actual

instances in which a broader exception might apply are probably few and isolated, and it would be difficult to formulate a broader exception that is not objectionably vague.

Consultation about some acts of civil disobedience is privileged under the Section, for example violations of a law based on a nonfrivolous claim that the law is unconstitutional. The same is true of a communication concerning a contempt sanction necessary to obtain immediate appellate review of an order whose validity is challenged in good faith. (See § 94, Comment *e*, & § 105, Comment *e*.) If, however, the client's position is that the law is valid but there is a superior moral justification for violating it, this Section applies if its conditions are otherwise satisfied.

e. Continuing crimes and frauds. The crime-fraud exception depends on a distinction between past client wrongs and acts that are continuing or will occur in the future. The exception does not apply to communications about client criminal or fraudulent acts that occurred in the past. Communications about past acts are necessary in defending against charges concerning such conduct and, for example, providing background for legal advice concerning a present transaction that is neither criminal nor fraudulent. The possible social costs of denying access to relevant evidence of past acts is accepted in order to realize the enhanced legality and fairness that confidentiality fosters (see § 68, Comment *c*).

The exception does apply to client crimes or frauds that are ongoing or continuing. With respect to past acts that have present consequences, such as the possession of stolen goods, consultation of lawyer and client is privileged if it addresses how the client can rectify the effects of the illegal act—such as by returning the goods to their rightful owner—or defending the client against criminal charges arising out of the offense.

Illustration:

4. Client consults Lawyer about Client's indictment for the crimes of theft and of unlawfully possessing stolen goods. Applicable law treats possession of stolen goods as a continuing offense. Client is hiding the goods in a secret place, knowing that they are stolen. Confidential communications between Client and Lawyer concerning the indictment for theft and possession and the facts underlying those offenses are privileged. Confidential communications concerning ways in which Client can continue to possess the stolen goods, including information supplied by Client about their present location, are not protected by the privilege because of the

crime-fraud exception. Confidential communications about ways in which Client might lawfully return the stolen goods to their owner are privileged.

Strict limitation of the exception to ongoing or future crimes and frauds would prohibit a lawyer from testifying that a client confessed to a crime for which an innocent person is on trial. The law of the United Kingdom recognizes an exception in such cases. At least in capital cases, the argument for so extending the exception seems compelling. Compare also § 66 (disclosure to prevent loss of life or serious bodily injury, whether or not risk is created by wrongful client act).

f. Invoking the crime-fraud exception. The crime-fraud exception is relevant only after the attorney-client privilege is successfully invoked. The person seeking access to the communication then must present a prima facie case for the exception. A prima facie case need show only a reasonable basis for concluding that the elements of the exception (see Comment *d*) exist. The showing must be made by evidence other than the contested communication itself. Once a prima facie showing is made, the tribunal has discretion to examine the communication or hear testimony about it in camera, that is, without requiring that the communications be revealed to the party seeking to invoke the exception (see § 86, Comment *f*).

Unless the crime-fraud exception plainly applies to a client-lawyer communication, a lawyer has an obligation to assert the privilege (see § 63, Comment *b*).

g. Effects of the crime-fraud exception. A communication to which the crime-fraud exception applies is not privileged under § 68 for any purpose. Evidence of the communication is admissible in the proceeding in which that determination is made or in another proceeding. The privilege still applies, however, to communications that were not for a purpose included within this Section. For example, a client who consulted a lawyer about several different matters on several different occasions could invoke the privilege with respect to consultations concerning matters unrelated to the illegal acts (compare § 79, Comment *e*). With respect to a lawyer's duty not to use or disclose client information even if not privileged, see § 60; compare §§ 66–67.

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See generally Revised Uniform Rules of Evidence, Rule 502(d)(1) (1974) ("Exceptions. There is no privilege under this rule: (1) Furtherance of Crime or Fraud. If the services of the lawyer were sought or obtained

to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud ... "); Proposed Federal Rules of Evidence, Rule 503(d)(1) (1972) (same); Uniform Rules of Evidence, Rule 26(2)(a) (1953) (attorney-client privilege does not extend "to a communication if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the client to commit or plan to commit a crime or a tort"); Model Code of Evidence, Rule 212 (1942) (similar); C. McCormick, Evidence § 95 (J. Strong 4th ed.1992); C. Mueller & L. Kirkpatrick, Modern Evidence § 5.22 (1995); P. Rice, Attorney-Client Privilege in the United States §§ 8.2–8.15 (1993); 8 J. Wigmore, Evidence § 2298 (J. McNaughton rev.1961); 2 J. Weinstein & M. Berger, Evidence ¶ 503(d)(1) (1986); C. Wolfram, Modern Legal Ethics § 6.4.10 (1986).

Comment b. Rationale. The exception to the attorney-client privilege recognized by this Section is uniformly recognized by courts and commentators and in evidence codes. See, e.g., Clark v. United States, 289 U.S. 1, 14–15, 53 S.Ct. 465, 469, 77 L.Ed. 993 (1933); Alexander v. United States, 138 U.S. 353, 11 S.Ct. 350, 34 L.Ed. 954 (1891); Regina v. Cox, 14 Q.B.D. 153 (Cr. Cas. Res. 1884); C. McCormick, Evidence § 95 (J. Strong 4th ed.1992); 8 J. Wigmore, Evidence § 2298 (J. McNaughton rev.1961); 2 J. Weinstein & M. Berger, Evidence ¶ 503(d)(1) (1986). For a history of the exception, which was fully recognized little more than a century ago, see Hazard, An Historical Perspective on the Attorney-Client Privilege, 66 Calif. L. Rev. 1061, 1063–69 (1978). A history and critical view of some of its modern applications are contained in Fried, Too High a Price for Truth: The Exception to the Attorney–Client Privilege for Contemplated Crimes and Frauds, 64 N.C. L. Rev. 443 (1986).

As with the attorney-client privilege itself (see § 68, Comment *c*), the crime-fraud exception is based on assumptions about probable client and lawyer behavior. Courts and commentators widely acknowledge the force of the surmise that the crime-fraud exception discourages client use of the client-lawyer relationship to assist illegal objectives. E.g., Clark v. United States, 289 U.S. 1, 15, 53 S.Ct. 465, 469, 77 L.Ed. 993 (1933) (dicta); Fellerman v. Bradley, 493 A.2d 1239, 1245 (N.J.1985). A contrary policy speculation, that the crime-fraud exception might cause lawyers not to inquire carefully into client revelations or not to be forthright in their advice to clients to avoid criminal or fraudulent acts, in order to avoid giving rise to the exception, has been rejected as implausible. See Garner v. Wolfinbarger, 430 F.2d 1093, 1102 (5th Cir.1970), cert. denied, 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971). See generally G. Hazard, Ethics in the Practice of Law 27–31 (1978).

Illustration 1 is based on the leading case of United States v. Hodge & Zweig, 548 F.2d 1347, 1354–55 (9th Cir.1977) (crime-fraud exception applies to communications made in course of consultation entered into for purpose of carrying out agreement of members of drug conspiracy to furnish bail and pay for legal expenses of arrested members). See also, e.g., In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026 (5th Cir.

1982) (en banc); In re Grand Jury Investigation (No. 86-3035), 640 F.Supp. 1047 (S.D.W.Va.1986); In re Grand Jury Subpoenas Dated Apr.19, 1978, 451 F.Supp. 969 (E.D.N.Y. 1978).

Comment c. Intent of the client and lawyer. Some courts apply the crime-fraud exception despite the absence of proof that the client intended to commit the illegal act at the time of consulting the client's lawyer. E.g., Fidelity-Phenix Fire Ins. Co. v. Hamilton, 340 S.W.2d 218 (Ky.1960) (when client used second lawyer to file suit on fire-insurance policy despite advice of first lawyer that client's own version of facts precluded suit, testimony of first lawyer concerning advice not to sue was not privileged). See also United States v. Ballard, 779 F.2d 287 (5th Cir.), cert. denied, 475 U.S. 1109, 106 S.Ct. 1518, 89 L.Ed.2d 916 (1986), the basis for Illustration 2 in the Comment. Those courts, in effect, apply a test that looks to the client's intent at the time that the client leaves the consultation. Other courts require a finding that the client's criminal or fraudulent scheme already was formed at the time of the communication. E.g, In re Sealed Cases (Nos. 84-5388, 84-5389), 754 F.2d 395, 399 (D.C.Cir. 1985) (crime-fraud exception applies if "the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme."); In re Murphy, 560 F.2d 326, 337 (8th Cir.1977); Whetstone v. Olson, 732 P.2d 159, 161 (Wash.Ct.App.1986). Because all courts will permit the necessary proof of intent to be made on the basis of a showing that the client-lawyer consultation concerned the future illegal act and that the illegal act was then committed, whatever difference might exist between those views might not be of great practical importance.

The lawyer's ignorance of the client's intent to further an illegal act is irrelevant. E.g., Clark v. United States, 289 U.S. 1, 15, 53 S.Ct. 465, 469, 77 L.Ed. 993 (1933) (dicta); United States v. Soudan, 812 F.2d 920, 927 (5th Cir.1986), cert. denied, 481 U.S. 1052, 107 S.Ct. 2187, 95 L.Ed.2d 843 (1987) (no privilege for client's untruthful statements made te lawyer as part of plan, unknown to lawyer, to give false statements to grand jury under oath); In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026, 1029 (5th Cir.1982); United States v. Calvert, 523 F.2d 895, 909 (8th Cir.), cert. denied, 424 U.S. 911, 96 S.Ct. 1106, 47 L.Ed.2d 314 (1976); Whetstone v. Olson, supra; Regina v. Cox, 14 Q.B.D. 153 (Cr. Cas. Res. 1884); contra In re Grand Jury Proceedings (Thursday Special Grand Jury September Term, 1991), 33 F.3d 342, 349 (4th Cir.1994) (in grand-jury investigation of client wrongdoing, exception inapplicable where proponent failed to prove lawyer was "aware of or a knowing participant in the criminal conduct" of client). The same rule is followed in Great Britain. See R. Cross & C. Tapper, Cross on Evidence 398 (6th ed.1985); M. Howard, P. Crane & D. Hochberg, Phipson on Evidence 513 (1990). Conversely, a lawyer's criminal or fraudulent intent and acts have no bearing on the client's right to invoke the privilege and will not trigger the crime-fraud exception if the client reasonably did not know of the lawyer's state of mind and acts of wrongdoing. E.g., State v. Green, 493 So.2d 1178, 1182 (La.1986).

Comment d. Kinds of illegal acts included within the exception. Courts have applied the exception to a wide

variety of criminal and fraudulent activity. On criminal activity, in addition to the decisions cited elsewhere in this Reporter's Note, see, e.g., State v. Taylor, 502 So.2d 537 (La.1987) (criminal conspiracy to remove relevant physical evidence, murder weapon, from client's home and hide it in lawyer's office). As to fraudulent activity, see, e.g., Pearce v. Stone, 720 P.2d 542 (Ariz.Ct.App.1986) (fraudulent conveyance); Fellerman v. Bradley, 493 A.2d 1239, 1245 (N.J.1985) ("fraud exception ... expands the notion of fraud beyond the traditional tort or criminal law definition ... " and thus includes large variety of frauds on court); Whetstone v. Olson, 732 P.2d 159, 162 (Wash.Ct.App.1986) (highly suggestive coaching of witness); Annot., 31 A.L.R.4th 458 (1984).

The authorities disagree whether the exception should include more than crimes and frauds. The 1953 Uniform Rules of Evidence (Rule 26(a)) and the 1942 Model Code of Evidence (Rule 212) both included a client consultation about a future "tort" as well as about crimes and frauds as misconduct that excepts a communication from the privilege. See also, e.g., 8 J. Wigmore, Evidence § 2298, at 577 (J. McNaughton rev.1961) (it is "difficult to see how any moral line can properly be drawn at that crude boundary [of crime or fraud], or how the law can protect a deliberate plan to defy the law and oust another person of his rights, whatever the precise nature of those rights may be."); Hazard, An Historical Perspective on the Attorney–Client Privilege, 66 Calif. L. Rev. 1061, 1064 (1978) (plausible to classify as tortious any use of legal process other than a legitimate one); In re Sealed Cases (Nos. 84–5388, 84–5389), 754 F.2d 395, 399 (D.C.Cir. 1985) ("crime, fraud or other misconduct"); In re Sealed Case (No. 81–1717), 676 F.2d 793, 812 (D.C.Cir. 1982) ("other type of misconduct fundamentally inconsistent with the basic premises of the adversary system."); Horizon of Hope Ministry v. Clark County, 115 F.R.D. 1, 5–6 (S.D.Ohio 1986) (tort of conspiracy to deprive plaintiffs of civil rights); Diamond v. Stratton, 95 F.R.D. 503, 505 (S.D.N.Y.1982) (tort of intentional and reckless infliction of extreme emotional distress); United States v. United Shoe Machinery Corp., 89 F.Supp. 357, 358 (D.Mass.1950) ("crime or tort") (dicta). See generally Coleman v. American Broadcasting Cos., 106 F.R.D. 201, 207–09 (D.D.C.1985) (discussing authorities); Annot., 2 A.L.R.3d 861 (1965). Such an extension might be particularly apt when dealing with wrongful acts by a government officer. E.g., In re Kearney, 59 A.L.J.R. 749 (Austl.1985) (exception extends to communications between government agency and agency's solicitor for purpose of promulgating regulations concerning Aboriginal lands when regulations were not authorized by statute).

On the other hand, the 1974 Revised Uniform Rules of Evidence (Rule 502(d)(1)), the 1972 Proposed Federal Rules of Evidence (Rule 503(d)(1)), and several state evidence codes that follow them or on which they were based are limited te crimes and frauds. E.g., Cal. Evid. Code § 956 (West 1966). For the reasons discussed in the Comment, the Section is limited to crimes and frauds.

Comment e. Continuing crimes and frauds. On the pivotal importance of the relative timing of client act and consultation, see, e.g, In re

Grand Jury Proceedings (FMC Corp.), 604 F.2d 798, 803–04 (3d Cir. 1979) (district-court determination that crime "has been committed" insufficient to support conclusion that crime-fraud exception applies in absence of further finding that offense was neither future or continuing one). Compare, e.g., In re Witness before the Grand Jury, 631 F.Supp. 32 (E.D.Wis.1985) (client admitted sales of cocaine but reported no income from such sales on tax return prepared by lawyer; failure to report income was fraudulent if not criminal act). But see, e.g., Commonwealth v. Maguigan, 511 A.2d 1327, 1336–37 (Pa.1986) (dicta) (lawyer giving advice to client who was fugitive from justice would become accessory to continuing criminal conduct which excepts communications from attorney-client privilege under crime-fraud doctrine).

On whether an exception should be recognized for a communication concerning wholly past client criminal acts, see 66 A.L.I. PROC. 332–341 (1989) (vote (164–65) to eliminate former Illustration 4 from present § 82 (Tentative Draft No. 2, 1989)). The rejected Illustration was based on State v. Macumber, 544 P.2d 1084 (Ariz.1976) (2 lawyers, prepared to testify that their now-deceased client had confessed to murders for which present defendant was on trial, precluded from testifying by attorney-client-privilege objection raised by prosecutor). On the contrasting rule in the United Kingdom, see M. Howard, P. Crance & D. Hochberg, Phipson on Evidence 500 (14th ed.1990) (privilege for professional confidences "does not apply where the privilege, if granted, would prevent an accused person from calling evidence which might lead to his acquittal on a criminal charge"); e.g., Regina v. Ataou, [1988] 2 W.L.R. 1147 (C.A.) (trial judge empowered to refuse to extend privilege to attempt by accused to cross-examine prosecution witness about conversations with solicitor exonerating accused); Regina v. Barton, [1973] W.L.R. 115 (Cr. Ct.) (privilege does not apply and solicitor must produce any document otherwise admissible to prove that defendant was innocent of charged criminal offense).

Very infrequently, American courts have applied the crime-fraud exception to entirely past acts, although the rare opinion does not clearly indicate awareness that the doctrine is being extended. E.g., Owens-Corning Fiberglas Corp. v. Watson, 413 S.E.2d 630, 638–39 (Va.1992) (asbestos manufacturer's fraud on court in discovery proceeding in another state by denying knowledge of facts contained in otherwise privileged memorandum warrants application of crime-fraud exception to memorandum; drafting of memorandum preceded fraud and no showing that it was prepared in contemplation of fraud).

Comment f. Invoking the crime-fraud exception. Courts have variously phrased the required showing in terms of either establishing a prima facie case, e.g., Clark . v. United States, 289 U.S. 1, 15, 53 S.Ct. 465, 469, 77 L.Ed. 993 (1933) (dicta) ("To drive the privilege away, there must be 'something to give colour to the charge;' there must be *'prima facie* evidence that it has some foundation in fact.' "), quoting O'Rourke v. Darbishire, [1920] A.C. 581, 604 (H.L.); In re Sealed Cases (Nos. 84–5388, 84–5389), 754 F.2d 395, 399 (D.C.Cir. 1985); United States v. Dyer, 722 F.2d 174, 177 (5th Cir.1983); or in terms of establishing probable cause, e.g., In re Grand Jury Subpoena

Duces Tecum Dated September 15, 1983, 731 F.2d 1032, 1039 (2d Cir. 1984); In re John Doe Corp., 675 F.2d 482, 491 (2d Cir.1982). Courts acknowledge that there probably is little practical difference between the two tests as courts apply them in actual cases. E.g., In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983, supra; In re Antitrust Grand Jury (Advance Publications, Inc.), 805 F.2d 155, 165–66 (6th Cir.1986). For an attempt to carve precise contours of the prima-facie showing standard, see, e.g, In re Antitrust Grand Jury (Advance Publications, Inc.), 805 F.2d 155, 165–66 (6th Cir.1986) (must raise more than strong suspicion and more than would be sufficient to escape directed verdict, but need not be as strong as showing needed to effect arrest or secure indictment). On the need to balance in close cases, see, e.g., In re Sealed Cases (Nos. 84–5388, 84–5389), supra, 754 F.2d at 401. Because of the need to dispose of evidentiary questions without detracting from the main purpose of the proceedings, some appellate courts authorize trial courts to make determinations on the basis of documentary submissions, sometimes without hearing evidence or even hearing contradicting evidence from the party attempting to uphold the privilege. E.g., In re Antitrust Grand Jury (Advance Publications, Inc.), supra, 805 F.2d at 167; In re Sealed Case (No. 81–1717), 676 F.2d 793, 815 n.88 (D.C.Cir.1982).

Some states follow a less stringent standard, some a stricter one, in applying the crime-fraud exception. A loose standard might require only that the proponent of the exception demonstrate some foundation in fact. E.g., Caldwell v. District Court, 644 P.2d 26, 33, 31 A.L.R.4th 446, 456 (Colo.1982). A stricter standard might, for example, require that the inquiring party prove the elements of the crime or fraud by a preponderance of the evidence. E.g., State v. Taylor, 502 So.2d 537, 541–42 (La. 1987).

Comment g. Effects of the crime-fraud exception. An early case accepting the crime-fraud exception, Alexander v. United States, 138 U.S. 353, 360, 11 S.Ct. 350, 352, 34 L.Ed. 954 (1891), held that the exception applied only in a prosecution of the client for the very crime about which the client had consulted the lawyer. Commentators have uniformly criticized the decision. E.g., C. McCormick, Evidence § 95, at 350 n.2 (J. Strong 4th ed.1992); 8 J. Wigmore, Evidence § 2298, at 573 n.1 (J. McNaughton rev.1961); C. Wolfram, Modern Legal Ethics § 6.4.10, at 282 n.67 (1986). No subsequent decision has applied the *Alexander* limitation. Among the decisions refusing to apply *Alexander*, see, e.g., In re Sawyer's Petition, 229 F.2d 805, 808–09 (7th Cir.), cert. denied, 351 U.S. 966, 76 S.Ct. 1025, 100 L.Ed. 1486 (1956); In re Berkley & Co., 629 F.2d 548, 554–55 (8th Cir.1980); State v. Taylor, 502 So.2d 537, 540 n.3 (La.1987).

On the limitation of the exception to only those communications that concern the criminal or fraudulent act in question, see, e.g., In re Sealed Case (No. 81–1717), 676 F.2d 793, 814–15 (D.C.Cir.1982); In re Special Sept. 1978 Grand Jury, 640 F.2d 49, 61 n.19 (7th Cir.1980); In re A.H. Robins Co., 107 F.R.D. 2, 15 (D.Kan. 1985); Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 30 (N.D.Ill. 1980).

§ 83. Lawyer Self-Protection

The attorney-client privilege does not apply to a communication that is relevant and reasonably necessary for a lawyer to employ in a proceeding:

(1) to resolve a dispute with a client concerning compensation or reimbursement that the lawyer reasonably claims the client owes the lawyer; or

(2) to defend the lawyer or the lawyer's associate or agent against a charge by any person that the lawyer, associate, or agent acted wrongfully during the course of representing a client.

Comment:

a. Scope and cross-references. This Section recognizes exceptions to the attorney-client privilege for communications bearing on fee disputes between lawyer and client and on a lawyer's defense against an allegation that the lawyer acted wrongfully during the representation. This Section applies only if the communication is otherwise privileged under the general requirements of the privilege (see §§ 68–72).

On the lawyer's authority to use or disclose confidential client information in self-defense, see § 64. On the similar rule with respect to resolving a fee dispute with a client, see § 65. The exceptions to the testimonial attorney-client privilege stated in this Section are counterparts to the exceptions to the confidentiality rule for lawyer self-defense (see § 64) and for compensation claims (see § 65). Under those exceptions, a lawyer is relieved from the normal rule (see § 60) against using or revealing confidential client information adversely to the client's interests. That a lawyer has permissibly made unconsented disclosure pursuant to § 64 or § 65 does not by itself mean that the privilege will be found not to apply under this Section. In some instances the determinations may be different, because a lawyer's reasonable belief controls disclosure under those Sections whereas a judicial determination controls a determination of whether this Section applies and might be made in light of facts not earlier available to the lawyer. On limitations on abusive methods in resolving a fee dispute, see § 42.

b. Rationale. The exceptions to the duty of confidentiality (see § 72) for lawyer disclosure in self-defense (see § 64) and in pursuing a compensation claim (see § 65) and that stated in this Section rest on considerations of fairness (see § 64, Comment *b*; § 65, Comment *b*). To exclude such evidence would leave lawyers uniquely defenseless

against false charges, and leave them unable to assert well-founded claims for fee compensation or oppose disqualification motions and disciplinary charges.

The exception is not limited to communications concerning the size of the fee. A lawyer may, for example, offer proof of substantive conversations with the client that is reasonably relevant to the lawyer's claim for compensation.

c. The exception for fee disputes between client and lawyer. A client's obligation to pay a lawyer's fee is a legally enforceable duty a breach of which entitles the lawyer to sue for damages or defend against a client's effort to recover an asserted over-payment (see § 42). The lawyer must claim the fee in good faith and with a reasonable basis in fact and law. The exception does not apply to a dispute between a lawyer and a third person. Thus, if a law partner sues a former colleague over a division of fees, neither may invoke the exception in this Section. But a lawyer formerly employed as inside legal counsel by a corporation may invoke the exception in a good-faith suit against the corporation for compensation allegedly due.

d. The exception for a lawyer's defense against a charge of wrongdoing. A lawyer may use confidential client information in defending against a charge of wrongdoing brought by either a client or a third person (see § 64, Comments *f* & *g*). For similar reasons the attorney-client privilege does not apply to the lawyer's self-protective use of reasonably relevant but otherwise privileged communications concerning disputed circumstances of a representation. On the rationale and scope of this exception, see § 64, Comments *b-d* & *f-h*.

e. Appropriate use of otherwise privileged communications in self-protection. The lawyer's invocation of the exception must be appropriate to the lawyer's need in the proceeding. The exception should not be extended to communications that are of dubious relevance or merely cumulative of other evidence. A court might find it appropriate to issue a protective order restraining use of the communications beyond the immediate proceeding.

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Comment b. Rationale. The evidence codes contain broadly worded "breach of duty" exceptions to the attorney-client privilege that are designed to cover much the same ground as the exception set out in this Section. E.g., Revised Uniform Rules of Evidence, Rule 502(d)(3) (1974) ("(d) *Exceptions.* There is no privilege under this rule: ... (3) *Breach of Duty of a Lawyer or Client.* As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer."); Proposed Fed-

eral Rules of Evidence, Rule 503(d)(3) (1972) (same); Uniform Rules of Evidence, Rule 26(2)(c) (1953) (same). The Model Code of Evidence, Rule 213(2)(b) (1942), provided an exception only for a breach of duty by the lawyer and not by the client. Most of the imaginable instances in which the lawyer's breach of duty would be relevant are independently the subject of waiver under the rule regarding putting legal advice in issue. See § 80(1). For additional authorities, see § 64, Reporter's Note.

Dean Wigmore attempted to justify the fee-claim and similar exceptions on the ground that, as between lawyer and client, there never was any confidentiality. See 8 J. Wigmore, Evidence § 2312, at 607–08 (J. McLaughlin rev.1961). The rationale claims too much. It presumably would support lawyer testimony about a client revelation in any subsequent litigation and not only in litigation in which the lawyer sues. See C. Wolfram, Modern Legal Ethics § 6.7.8, at 308 n.10 (1986). There is surprisingly little case authority on many of the points stated in the Section.

Comment c. The exception for fee disputes between client and lawyer. See the evidence codes cited in Reporter's Note to Comment *b*, supra.

The few decisions uniformly assert that lawyers may employ privileged client information in fee disputes with clients. E.g., Cannon v. U.S. Acoustics Corp., 532 F.2d 1118, 1120 (7th Cir.1976); Carlson, Collins, Gordon & Bold v. Banducci, 64 Cal.Rptr. 915, 923 (Cal.Ct.App.1967); Mitchell v. Bromberger, 2 Nev. 345, 349 (1866). Compare, e.g., Breckinridge v. Bristol-Myers Co., 624 F.Supp. 79 (S.D.Ind.1985) (restrictions on lawyer's use of confidential information in age-discrimination suit against former employer for forced retirement). Compare also C. Wolfram, Modern Legal Ethics § 7.1.7, at 330 n.90 (1986) (disqualification of lawyer-shareholder as class representative in derivative action against former client of lawyer).

Comment d. The exception for a lawyer's defense against a charge of wrongdoing. See the evidence codes cited in Reporter's Note to Comment *b*, supra. See generally 2 J. Weinstein & M. Berger, Evidence ¶ 503(d)(3)[01] (1986); C. Wolfram, Modern Legal Ethics §§ 6.4.7, 6.7.8 (1986); 24 C. Wright & K. Graham, Federal Practice & Procedure § 5503 (1986). On a client's charge of legal malpractice, e.g., 2 J. Weinstein & M. Berger, Evidence, supra, at 503–72 to 503–73; 8 J. Wigmore, Evidence § 2327, at 638 (J. McNaughton rev. 1961); 24 C. Wright & K. Graham, Federal Practice & Procedure § 5503, at 540 (1986).

On a lawyer's defense against charges brought by a nonclient, see authorities cited in § 64, Reporter's Note to Comment *g*, none of which distinguishes between the agency-confidentiality exception (§ 64) and the exception stated in the present Section under the attorney-client privilege.

Comment e. Appropriate use of otherwise privileged communications in self-protection. On protective orders, see, e.g., Siedle v. Putnam Investments, Inc., 147 F.3d 7 (1st Cir. 1998) (complaint against corporation by former inside legal counsel and claimed by client to contain privileged information ordered sealed pending determination of merits of privilege claims). Protective orders are a common feature of litigation involving otherwise privileged materials. On the corresponding personal obligation

of lawyers to make only proportionate and restrained use of confidential client information in self-defense and in collecting fees, see § 64, Comment *e*, and § 65, Comment *d*.

§ 84. Fiduciary–Lawyer Communications

In a proceeding in which a trustee of an express trust or similar fiduciary is charged with breach of fiduciary duties by a beneficiary, a communication otherwise within § 68 is nonetheless not privileged if the communication:

(a) is relevant to the claimed breach; and

(b) was between the trustee and a lawyer (or other privileged person within the meaning of § 70) who was retained to advise the trustee concerning the administration of the trust.

Comment:

a. Scope and cross-references. This Section states an exception to the attorney-client privilege stemming from a fiduciary relationship between the client and a person to whom the client owes fiduciary duties. The Section assumes that the fiduciary client could otherwise assert the privilege under §§ 68–76.

The exception is of long standing and was the starting point for recognizing the exception addressed in § 85.

In appropriate circumstances, a lawyer may have discretion to use or disclose under other Sections, such as under § 67 on preventing or mitigating financial harm caused by the described client crime or fraud. Under the laws of a particular jurisdiction, a lawyer who knows of a court-appointed fiduciary's intended breach of duty may be required to notify the appointing tribunal. Disclosure in such an instance is required by law within the meaning of § 63.

b. Rationale. In litigation between a trustee of an express trust and beneficiaries of the trust charging breach of the trustee's fiduciary duties, the trustee cannot invoke the attorney-client privilege to prevent the beneficiaries from introducing evidence of the trustee's communications with a lawyer retained to advise the trustee in carrying out the trustee's fiduciary duties. The exception applies in suits brought directly by a beneficiary or by a representative of the beneficiary. It does not apply to communications between the trustee and a lawyer specifically retained by the trustee to represent, not the trust or the trustee with respect to executing trust duties, but the trustee in the trustee's personal capacity, such as to assist the trustee

in a dispute with a beneficiary or to assert a right against the beneficiary.

The exception does not require the beneficiary to show good cause (compare § 85). Nonetheless, the tribunal might enter a protective order to safeguard the interests of other beneficiaries or the trust against unnecessary disclosure.

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On the rule refusing to permit a trustee of an express trust to invoke the attorney-client privilege against a beneficiary, see, e.g., United States v. Evans, 796 F.2d 264, 265–66 (9th Cir. 1986); Washington–Baltimore Newspaper Guild, Local 35 v. Washington Star Co., 543 F.Supp. 906, 908–10 (D.D.C.1982); Riggs Nat'l Bank v. Zimmer, 355 A.2d 709, 713–14 (Del. Ch.1976). On inapplicability of the rule when the trustee seeks legal advice concerning a conflict with a beneficiary, see, e.g., Symmons v. O'Keeffe, 644 N.E.2d 631, 640 (Mass. 1995). An important distinction between the rule of this Section and that of § 85 is that there is no requirement for the purpose of the express-trust-beneficiary rule that the beneficiary demonstrate "good cause." E.g., Helt v. Metropolitan Distr. Comm'n, 113 F.R.D. 7, 10 n.2 (D.Conn.1986) (dictum).

Comment *a* does not take a position on whether or not a lawyer may make out-of-court disclosures of a fiduciary-client's intended breach of trust in order to prevent it in circumstances not constituting a crime or fraud under § 67.

§ 85. Communications Involving a Fiduciary Within an Organization

In a proceeding involving a dispute between an organizational client and shareholders, members, or other constituents of the organization toward whom the directors, officers, or similar persons managing the organization bear fiduciary responsibilities, the attorney-client privilege of the organization may be withheld from a communication otherwise within § 68 if the tribunal finds that:

(a) those managing the organization are charged with breach of their obligations toward the shareholders, members, or other constituents or toward the organization itself;

(b) the communication occurred prior to the assertion of the charges and relates directly to those charges; and

(c) the need of the requesting party to discover or introduce the communication is sufficiently com-

pelling and the threat to confidentiality sufficiently confined to justify setting the privilege aside.

Comment:

a. Scope and cross-references. The exception recognized in this Section applies primarily in suits by shareholders and similar beneficial owners of private organizations. No jurisdiction has yet recognized this exception in citizen suits against a governmental agency (cf. § 74). Because the rule is discretionary with a tribunal, there is no corresponding permission for a lawyer voluntarily to reveal confidential client information.

b. Rationale. Proceeding by analogy from the trustee exception of § 84, the leading decision of Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir.1970), cert. denied, 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971), held that a court could, in appropriate circumstances, refuse to enforce a corporation's otherwise valid attorney-client privilege when shareholders attempt to discover a communication between the corporation's officers and its lawyers. The court also relied on the co-client doctrine (compare § 75), the crime-fraud exception (compare § 82), and the statutory and common-law right of shareholders to inspect books and records of their corporation. That exception is stated in this Section.

Two policy considerations support the *Garner* decision. First, directors and managers of an organization acting in that capacity in principle should not keep corporate information secret from their own principal constituents, the members and shareholders of the organization. Their function is to advance the interests of shareholder-investors and members. Second, in litigation against their constituents, the question of waiver may not be decided objectively. Even if the directors and managers personally named in the suit do not make the determination concerning waiver, there usually exists a close personal and business relationship between the directors and managers who are sued and those empowered to determine waiver. This Section in effect provides a disinterested determination by the tribunal based on all relevant considerations, including protecting the organization's legitimate need for privacy and for effective client-lawyer communications (see Comment *c* hereto). Although the *Garner* principle inevitably introduces a measure of uncertainty into the privilege for organization clients, it probably does little to deter communications in good faith between managers who need legal advice and the organization's lawyer.

c. Application of the organizational-fiduciary exception. A court applying this Section weighs the benefits of disclosure against the

benefits of continuing confidentiality. The determination should be guided by the following considerations: (1) the extent to which beneficiaries seeking the information have interests that conflict with those of opposing or silent beneficiaries; (2) the substantiality of the beneficiaries' claim and whether the proceeding was brought for ulterior purpose; (3) the relevance of the communication to the beneficiaries' claim and the extent to which information it contains is available from nonprivileged sources; (4) whether the beneficiaries' claim asserts criminal, fraudulent, or similarly illegal acts; (5) whether the communication relates to future conduct of the organization that could be prejudiced; (6) whether the communication concerns the very litigation brought by the beneficiaries; (7) the specificity of the beneficiaries' request; (8) whether the communication involves trade secrets or other information that has value beyond its character as a client-lawyer communication; (9) the extent to which the court can employ protective orders to guard against abuse if the communication is revealed; and (10) whether the determination not to waive the privilege made in behalf of the organization was by a disinterested group of directors or officers.

The exception in this Section extends to legal assistance in nonlitigation as well as litigation assistance. With respect to the limited applicability of the attorney-client privilege and work-product immunity to litigation reports and underlying communications in derivative actions, see Principles of Corporate Governance: Analysis and Recommendations § 7.13(e).

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See generally C. Mueller & L. Kirkpatrick, Modern Evidence § 5.17 (1995); 2 J. Weinstein & M. Berger, Evidence ¶ 503(b)[05] (1986); C. Wolfram, Modern Legal Ethics § 6.5.5 (1986).

Comment b. Rationale. The doctrine of Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir.1970), cert. denied, 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971), refusing to recognize the privilege in some shareholder-derivative suits, has been widely followed, including by Delaware state and federal courts. E.g., Bailey v. Meister Brau, 55 F.R.D. 211 (N.D.Ill. 1972); Valente v. Pepsico, Inc., 68 F.R.D. 361, 367–68 (D.Del.1975); Zirn v. VLI Corp., 621 A.2d 773 (Del.1993). One court refused to apply *Garner* in a shareholder derivative action where none of the suing shareholders owned stock at the time of suit. Weil v. Investment/Indicators Research & Management, 647 F.2d 18, 23 (9th Cir.1981). The court that decided *Garner* has refused to impose that limitation. In re International Systems & Controls Corp. Securities Litigation, 693 F.2d 1235, 1239 n.3 (5th Cir.1982). Several decisions have extended the *Garner* doctrine to areas beyond shareholder suits; many of the decisions could have been decided under the rationale supporting § 84.

E.g., Donovan v. Fitzsimmons, 90 F.R.D. 583, 586 (N.D.Ill.1981) (suit by Secretary of Labor under Employee Retirement Income Security Act (ERISA) against pension fund and fund officials); Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co., supra (private suit under ERISA); Quintel Corp. v. Citibank, 567 F.Supp. 1357, 1363 (S.D.N.Y.1983) (bank acted as fiduciary for plaintiff in land transaction); Aguinaga v. John Morrell & Co., 112 F.R.D. 671, 679–81 (D.Kan.1986) (union as fiduciary for union members with respect to duty to bargain for all members in good faith); Helt v. Metropolitan Distr. Comm'n, 113 F.R.D. 7, 9–11 (D.Conn.1986) (action under federal civil-rights statute against trustee of pension plan for sex discrimination in administration of plan). Essential to the doctrine is the existence of a fiduciary relationship between the party seeking to set aside the attorney-client privilege and the managers of the organization that asserts the privilege. E.g., In re Colocotronis Tanker Securities Litigation, 449 F.Supp. 828, 833 (S.D.N.Y.1978).

Some courts have approached the *Garner* line of decisions cautiously because it interjects uncertainty into the attorney-client privilege, thus threatening to impair client-lawyer communications in organizations subject to it. E.g., Shirvani v. Capital Investing Corp., 112 F.R.D. 389, 390–91 (D.Conn.1986). Although the *Garner* rule does increase uncertainty to some extent, the risk is not great for organizations attempting to comply with the law in good faith. In addition, the doctrine permits intrusion on otherwise confidential client-lawyer communications only when a court has determined that the threat to client-lawyer communications and other risks of intrusion are more than outweighed by the inquiring party's need for the information.

Comment c. Application of the organizational-fiduciary exception. The list of factors in the Comment is paraphrased, with some embellishment, from Garner v. Wolfinbarger, 430 F.2d 1093, 1104 (5th Cir.1970), cert. denied, 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971). One *Garner* factor addresses the extent to which the communication relates to advice about the very litigation in which the beneficiary seeks the communication. The factor can be misunderstood. It does not mean that all communications that might also be immunized under the lawyer work-product doctrine (see § 87) should be immune from discovery by a beneficiary, particularly if the communication also is subject to a "good cause" exception as work product. The factor instead refers to situations in which a second lawyer has been retained to defend the organization or its managers against the beneficiary's claim and thus the communications were not contemporaneous with the acts being challenged by the beneficiary. It is important that *Garner* be applied in a way that recognizes the legitimate interest of an organization in resisting a derivative or similar claim. See C. Wolfram, Modern Legal Ethics § 6.5.5, at 289 (1986). It also should be understood to refer to "mental-process work product"—a lawyer's advice to a client, which is not subject to the good-cause exception under the law of lawyer work product. See § 87(1) and Comment c thereto.

TITLE D. INVOKING THE PRIVILEGE AND ITS EXCEPTIONS

Section

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§ 86. Invoking the Privilege and Its Exceptions

(1) When an attempt is made to introduce in evidence or obtain discovery of a communication privileged under § 68:

(a) A client, a personal representative of an incompetent or deceased client, or a person succeeding to the interest of a client may invoke or waive the privilege, either personally or through counsel or another authorized agent.

(b) A lawyer, an agent of the lawyer, or an agent of a client from whom a privileged communication is sought must invoke the privilege when doing so appears reasonably appropriate, unless the client:

(i) has waived the privilege; or

(ii) has authorized the lawyer or agent to waive it.

(c) Notwithstanding failure to invoke the privilege as specified in Subsections (1)(a) and (1)(b), the tribunal bas discretion to invoke the privilege.

(2) A person invoking the privilege must ordinarily object contemporaneously to an attempt to disclose the communication and, if the objection is contested, demonstrate each element of the privilege under § 68.

(3) A person invoking a waiver of or exception to the privilege (§§ 78–85) must assert it and, if the assertion is contested, demonstrate each element of the waiver or exception.

Comment:

a. Scope and cross-references. As a rule of evidence employed in adversary proceedings, the attorney-client privilege is subject to evidentiary and procedural rules. Those rules cover standing, discretion of the presiding officer to apply the privilege in the absence of proper

objection, requirements for a proper objection, the burden of the party asserting either the privilege or waiver or exception, and the duty of a lawyer or similar agent to invoke the privilege.

On the duty of a lawyer to safeguard client information, see § 60. On authorization of lawyers to employ client information in representing a client, see § 61. Section 63 provides that a lawyer who has raised an attorney-client-privilege objection may testify or disclose material claimed to be privileged if ordered to do so by the tribunal. On invoking and waiving the privilege on behalf of an organizational client, see § 73, Comment *j*. On invoking the work-product immunity, see § 90.

b. Objection by the client. A client has standing to object to use of privileged communications (see also §§ 75 & 76). The guardian of a client under guardianship may invoke the privilege, as may a personal representative of a deceased client (see § 77, Comment *c*). Successor in management of an organization client has the same power, for example, a bankruptcy trustee of a bankrupt corporation (see § 73, Comment *k*).

c. Objection by a lawyer or agent. A client's lawyer has both standing and usually a duty to assert the privilege (see § 63, Comment *b*). Under the law of agency, a similar duty might also rest upon an agent of the lawyer (see § 70, Comment *g*) and an agent of the client (see § 70, Comment *f*). See generally Restatement Second, Agency §§ 395–396. A person in position to invoke the privilege should be cognizant that under some circumstances testimony as to a portion of a communication waives the privilege with respect to related communications (see § 79, Comment *f*).

d. Discretion to apply the privilege. A presiding officer of a tribunal has discretion to protect a privileged communication, even if no person with standing has made a proper objection (Subsection (1)(c)). However, ordinarily failure to do so is not error. If the officer raises the issue whether the privilege applies, the privilege must be asserted by a person with standing to object unless failing to do so would manifestly breach a legal duty of that person.

e. A proper objection. As stated in Subsection (2), a person invoking the attorney-client privilege must do so before or at the time that the testimony or other evidence is elicited. If the objection is contested, the objector must establish the elements of the privilege. The procedure for doing so varies among jurisdictions and is beyond the scope of this Restatement. Presiding officers normally have discretion to allow a late objection. Moreover, a stipulation or order might provide that the parties retain the privilege for material produced in discovery (see § 78, Comment *e*).

f. Ruling by a tribunal; in camera inspection. In cases of doubt whether the privilege has been established, the presiding officer may examine the contested communication in camera. The officer also has discretion to conduct in camera review if prima facie evidence of waiver or exception has been presented. Unless the objecting party consents or the privilege objection is overruled, the in camera submission is not made available to any other party. If the privilege is sustained, the submission remains sealed in the records of the tribunal in the event of review on appeal. Submission for in camera inspection does not, by itself, waive the privilege.

g. Redaction. The privilege might apply to only a part of a communication. The communication may be edited (redacted) to remove the privileged portion and the remainder admitted. Redaction is proper if it can be achieved without either disclosing privileged communication or distorting the remainder as evidence.

h. The burden of establishing waiver or an exception. Once a person asserting the privilege has satisfied the burden of demonstrating that it applies (see Comment *e*), the burden of demonstrating that a waiver or exception applies shifts to the party seeking to obtain or introduce the communication. When waiver or exception is contested, the proponent of the evidence must demonstrate that each essential element of waiver or exception is established (see Subsection (3)). On in camera inspection with respect to waiver or exception, see Comment *f* hereto.

REPORTER'S NOTE

Comment b. Objection by the client. E.g., Revised Uniform Rules of Evidence, Rule 502(c) (1974) ("*Who May Claim the Privilege.* The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only in behalf of the client"); Proposed Federal Rules of Evidence, Rule 503(c) (1972); Uniform Rules of Evidence, Rule 26(1) (1953) (" ... The privilege may be claimed by the client in person or by his lawyer, or if incompetent, by his guardian, or if deceased, by his personal representative.... "); Model Code of Evidence, Rule 210(c)(i) and Comment *b* (1942) (client generally); id. Rule 209(c)(i) (incompetent client); 2 J. Weinstein & M. Berger, Evidence ¶ 503(c)[01], at 503–66 (1986) (incompetent client). On protective remedies in addition to the evidentiary objection, see generally C. Wolfram, Modern Legal Ethics § 6.3.4, at 255, 256–57 (1986). On the choice-of-law problems in applying the privilege, see id. at 255. See also, e.g., First Fed. Savings & Loan Ass'n

v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557, 560 (S.D.N.Y.1986) (choice of federal or state law); Brandman v. Cross & Brown Co., 479 N.Y.S.2d 435, 437 (N.Y.Sup.Ct.1984) (choice between law of different states).

A party who is not the client-holder of the privilege or the client's lawyer or agent may not invoke the privilege and may not complain on appeal if the trial court, in ruling on the objection of another person with standing to raise it, erroneously refuses to uphold it. E.g., C. McCormick, Evidence § 92, at 340 (J. Strong 4th ed.1992); 8 J. Wigmore, Evidence § 2321, at 629 (J. McNaughton rev.1961). E.g., Henderson v. United States, 815 F.2d 1189, 1192 (8th Cir.1987); State v. Maillian, 464 So.2d 1071, 1077 (La.Ct. App.), writ denied, 469 So.2d 982 (La. 1985).

Comment c. Objection by a lawyer or agent. E.g., Model Code of Evidence, Rule 210(c)(ii) (1942); ABA Model Rules of Professional Conduct, Rule 1.6, Comment ¶ [20] (1983); 2 J. Weinstein & M. Berger, Evidence ¶ 503(c)[01], at 503–67 (1986); C. Wolfram, Modern Legal Ethics § 6.3.4, at 253–54 (1986). See also § 63, Comment *b*, and Reporter's Note thereto. On the preclusive effect of a client's waiver of the privilege, see, e.g., Barnes v. State, 460 So.2d 126, 131 (Miss.1984). If a former lawyer with whom the client made a privileged exchange and a lawyer now representing the client disagree on whether to assert the privilege, as between them the current lawyer-agent determines whether to assert or waive the privilege. E.g., United States v. DeLillo, 448 F.Supp. 840, 842 (E.D.N.Y. 1978).

Comment d. Discretion to apply the privilege. See C. McCormick, Evidence § 92, at 340 (J. Strong 4th ed.1992); 2 J. Weinstein & M. Berger, Evidence ¶ 503(c)[01], at 503–67 (1986).

Comment e. A proper objection. E.g., Hawkins v. Stables, 148 F.3d 379 (4th Cir.1998) (when client at deposition answered, by denial, whether she had discussion with lawyer, client both waived privilege and showed absence of privileged communication; client or lawyer could have refused to answer and asserted privilege). On the prohibition against blanket objections, see, e.g., United States v. Lawless, 709 F.2d 485, 487 (7th Cir.1983); United States v. El Paso Co., 682 F.2d 530, 541 (5th Cir.1982), cert. denied, 466 U.S. 944, 104 S.Ct. 1927, 80 L.Ed.2d 473 (1984). A client, lawyer, or other client agent who takes the stand, even if called by the client, does not waive the privilege unless the person actually reveals a privileged communication. C. McCormick, Evidence § 93, at 344 (J. Strong 4th ed.1992). That is a corollary of the rule prohibiting a blanket refusal by a client, lawyer, or other client agent to take the stand.

Comment f. Ruling by a tribunal; in camera inspection. The Supreme Court has endorsed in camera review in contested privilege cases. See United States v. Nixon, 418 U.S. 683, 713–14, 94 S.Ct. 3090, 3109–3110, 41 L.Ed.2d 1039 (1974) (executive privilege). In the attorney-client privilege area, in camera inspection has been most controversial with respect to the crime-fraud exception to the privilege. See § 82. See generally Fried, Too High a Price for Truth: The Exception to the Attorney–Client Privilege for Contemplated Crimes and Frauds, 64 N.C. L. Rev. 443, 461–69 (1986). Some decisions permit trial courts to examine the