A Re-Evaluation of the Attorney-Client Privilege (Part I)

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A RE-EVALUATION OF THE ATTORNEY-CLIENT PRIVILEGE†
(Part I)††

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... this problem of holding a just balance between the claims of the State and the rights of the individual. ... For my part, I think that it is far more than a question of treating X or Y fairly in the individual cases: I think that unless we can find a general solution to this problem we shall fail to preserve an essential part of the pattern of our own democracy.*

I

INTRODUCTION

DEAN POUND HAS spoken of the sterility of the eighteen century natural law in the hands of the American judges in the nineteenth century.¹ The reason for this was that the rational underpinning was not a good foundation — it was much too absolute, too much was

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* Kilmuir, The State, the Citizen and the Law, 73 L.Q. Rev. 172 (1957).

The writer will state at the outset that he has drawn on the writings of Roscoe Pound as background material throughout this paper. He believes it is necessary to have some frame of reference, whether it be business, economics, philosophy, history, or other thought modes, and his is to an undefined extent sociological juris-
expected of it. Likewise the lawyer in the nineteenth century perceived
of an idealized version of the common law as the true law or natural
law, and this tendency is present in the twentieth century, even to the
extent of perceiving the true law to be an idealized version of the
law as it existed in the nineteenth century, a much simpler period
in the history of our society. This tendency is due in part to the
natural lag which must inevitably exist between society in transition
and the law which develops afterwards. Yet it is also due in part to
man's yearning for the simple life and in this country the tendency
to idealize the law of the rural nineteenth century scene and to pretend

prudence. By this the writer means a way of looking at or thinking about law,
having in mind the understanding of the role of law in society and the application
of the social sciences to the study of law in action and the rendering of law more
effective as an instrument of social control for the ends which law is designed to
accomplish in the civilization of the time and place. Moreover, the subject of
privilege, being in the realm of value judgments, lends itself easily to analysis from
this viewpoint and particularly with reference to the balancing of interests.

The writer's reading indicates that other background materials are available
which would lend authority to the same frame of reference, but the careful and
extensive writings of Dean Pound are more familiar to the writer and are there-
fore more readily accessible for easy reference and citation. The writer does not
subscribe to sociological idealism wholeheartedly, however. In fact, he believes that
he is a legal realist as to what courts and people do in fact. Yet, he does have
ideals, and he believes with Dean Pound that the judicial search for law is to be
governed, as in the past, by the ideals of the end of law and the legal order. "Such
ideals must be our main reliance today and tomorrow." Pound, The Theory of
Judicial Decision, 36 HARV. L. REV. 940 (1923). How does this fit in with realism?
To quote and paraphrase the great idealistic philosopher Albert Schweitzer, "[M]y
knowledge is pessimistic [realistic], but my willing and hoping are optimistic
[idealistic]." Out of My Life and Thought, 240 (1933, Campion tr.; postscript
by Skillings, 1952). The writer also believes firmly in judicial empiricism, reason
tested by experience, with perhaps a dash of intuition. It is against the back-
ground of this philosophy that this paper has been developed.

The writer would like to add a quotation from Professor John M. Maguire,
which he will endeavor to hold up as a model: "This paper purposely avoids
chockingly profuse documentation, that bane of much contemporary legal writing
in the United States. Setting out the thesis that we do not now have the
answers, it is meant to be provocative instead of definitive. Provocation works
better when short and sharp." Conscience and Propriety in Lawyer's Tax Practice,
13 Tax L. REV. 27 n. 1 (1957). Moreover, this position is more necessary here in
the area of case law by virtue of the fact that most decisions are a mere mechani-
cal application of precedent with little well considered judicial reasoning about
the underlying policies involved. Finally, in the citation of authority, secondary
sources only will be indicated generally for well settled propositions, except where
the writer has something more to say on the point. These authorities, particularly
the treatises of Wigmore and McCormick, contain a wealth of case material, and
no purpose would be served in its regurgitation when the work has already been
done and done so well. Furthermore, this practice is necessary to save time and
space and to devote these precious items to the service of concentration on the
topics which research and evaluation have indicated to be primary items for con-
sideration in connection with the writer's central theme.

2. See Pound, Law and Morals 87 et passim (2d ed. 1926). The word
"absolute" is used herein in the sense of eternal, immutable, and inherent in the
nature of things (sometimes, as inflexible, unyielding).

3. See Pound, Natural Natural Law and Positive Natural Law, 68 L. Q. REV.

4. See Holmes, Law and the Court, in Collected Legal Papers 290, 294-95
(1920), for a colorful description of this lag and why it must ever be present.
But quaere: Is this necessarily true in periods of sharp mutation from the past,
for example, the eighteenth century? Today?
that it continues to exist and predominate in twentieth century urban America.\textsuperscript{5} This mode of thinking has had a strong affect on the development not only of our constitutional law but of all phases of the substantive law and procedure as well.

The nineteenth century saw great reforms in the law, and legal procedures were somewhat simplified. The first steps were taken in overcoming technical adversary theories of litigation and in making the courts more of a forum for the ascertaining of the true facts in cases presented for decision, thereby enabling the triers of fact to render more accurate verdicts. Between 1854 and 1883, in England, legislation was enacted prescribing a simple procedure for the discovery in advance of trial of all relevant facts known to a party about the opponent's case.\textsuperscript{6} This was immediately successful, since the right of a party to discovery of all the facts within the opponent's knowledge was already a well established right in equity. There was no opposition on the part of the English bar, and the procedures were worked out so as to make the ascertaining of this evidence, through written interrogatories, a standard part of the pretrial procedures. Here, the English bar drew the line, however, and discovery procedures have not been substantially changed since that period.

The development was somewhat different in the United States. Here, law and equity were already merged in a number of states, and equitable discovery was thus available at law in such states. Moreover, the discovery procedures were being extended piecemeal in all of the American jurisdictions. The result is to be found in the various types of discovery statutes which were enacted in the several states and which continued to exist without substantial change down to the time of the "open" discovery movement in the second and third quarters of the present century. The successful application of these statutes, however, was impeded by the tendency of the bench

\textsuperscript{5} For good general illustrations, see Pound, \textit{Liberty of Contract}, 18 \textsc{Yale} L. J. 454 \textit{passim}, esp. at 481-82 (1909).

\textsuperscript{6} The English Judicature Act of 1873 (36 & 37 Vict. c. 66) provided for the final merger of law and equity and for a single form of procedure. The Common Law Procedure Act of 1854 (17 & 18 Vict. c. 125) had conferred discovery powers on the common law courts. Procedural improvements affecting discovery came as late as 1883. See Millar, \textit{Mechanism of Fact Discovery: A Study in Comparative Civil Procedure}, 32 \textsc{Illinois} L. Rev. 261, 424 at 442-46 (1937), for a good summary of the later English developments.

These procedures had long been available by bill in equity, but the procedures were cumbersome and in effect required a special auxiliary suit. The simplified procedures adopted for extension of equitable discovery as it then existed to actions at law will be referred to hereafter as "liberal" discovery, as contradistinguished from "open" discovery, by which we mean the opportunity to ascertain through the judicial process in the same action and in advance of trial knowledge of all facts relevant to the subject matter of the lawsuit from all available sources, unless such facts are privileged from discovery by virtue of some countervailing policy of the law.
and bar to maintain the technical interpretations formerly practiced in equity and to refuse to disclose such evidence freely and fairly. The attitude of the legal community was one of opposition to the disclosure of one’s case in advance of trial, and this attitude was strongly felt in the restrictive interpretation of discovery statutes and in the relegation practically to oblivion of the fundamental equitable principle referred to above. The objective sought by counsel was the dramatic pageantry of the climatic movement of surprise (and victory) in open court. The result was that the contentious attitude of counsel, together with the technicalities of the rulings, the lack of adequate sanctions for enforcement, and the preoccupation of both courts and lawyers with other aspects of the litigation process prevented the practice of directing written interrogatories to the opponent (and the development of this technique) from gaining the success which it had achieved in England, where special commissioners were appointed to handle the pretrial aspects of the case and, this method of discovery became standard procedure in all important litigation.

The oral deposition however was more popular in America, though its most effective use was hindered by the expense, the consumption of time, and the lack of trained reporters of testimony. Also, the interpretation of the term “relevance” in the more narrow sense, as that which has probative value on the actual issues framed by the pleadings, resulted in the courts applying the same technical rules of evidence in pretrial deposition hearings as were applicable in trials in open court. These factors caused liberal discovery to be only partially successful in America, in that it never enabled a party to achieve the same understanding of the opponent’s actual knowledge of the case as in England. For such understanding, the lawyers and their clients relied upon their own extra-judicial resources, which however became more and more limited with the transition from a rural to an urban society.

The times were not yet ripe for the advent of a streamlined system of open discovery, but the continuing failure of the legal system to meet the requirements of society was becoming increasingly apparent. Yet, open discovery would come only with the passing of the courtroom scene as the dramatic center of the community life, the growth of a new generation of lawyers, the congestion of court calendars, and the new complexities of life, together with the concomitant difficulties of ascertainment of the facts in twentieth century urban America. Important also was a change in attitude of the public and the bar as to what constitutes justice. The idea that the party with the rightful claim to a
decision in his favor should be deprived of that decision because of a surprise turn in the trial which diligent counsel failed to meet and for which he could not reasonably be blamed came to be looked upon as a just basis for criticism of the system itself. These factors, coupled with diversion of the business traditionally handled by lawyers to other professional groups and the transfer of large areas of legal matters from the courts to administrative agencies, made it apparent to the farsighted that the judicial system itself, far from having attained the degree of perfection formerly proclaimed by many leaders of the profession, would require substantial reform in all aspects of its procedures. This would include the drastic revision of the discovery procedures no less than other parts of the judicial machinery. Yet, this revision took place only piecemeal, and discovery procedures offered more than ordinary resistance to reform — first in legislative enactment and later in the resistance of the bar to interpretation in accordance with the spirit of the measures, and also in judicial reluctance to change. More than two generations of reform agitation followed the English reforms and the reform of pleadings procedures in America before the first great stride was made in this direction through the adoption of a system of open discovery. It came first in the federal jurisdiction, where the discovery procedures had remained the most undeveloped, in the form of the Federal Rules of Civil Procedure, adopted in 1938.7 This initial victory, however, placed the federal system far in advance of the English practice. Since the adoption of the federal rules, state court jurisdictions have been gradually adopting similar open discovery procedures. Today, the bar in general is conscious of the advantages of full disclosure in the interest of accuracy in fact-finding, which in turn tends to support the ends of justice.8 This

7. The Federal Rules of Civil Procedure were adopted in 1938. Rule 26 (b) provides for liberal discovery of "any matter not privileged, which is relevant to the subject matter involved in the pending action. ... It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." The last sentence was added by amendment in 1946. Rules 26-36 contain the five principal methods of discovery. See also 4 Moore, Federal Practice ¶ 26.23 [3, 7, 8] (2d ed. 1950) (hereinafter cited as Moore).

This last point was settled in England at least as early as 1875. See Blackburn, J., in Hutchinson v. Glover [1875] L. R. 1 Q. B. D. 138 (C.A.). In answer to an objection that it was not clearly shown that the document in question would be evidence for the party claiming inspection, he said: "Whether a document would be evidence or not for the party claiming inspection is not a test of the right to it. Everything which will throw light on the case is prima facie subject to inspection."

For post-Revolutionary development of fact discovery in America, see Millar, op. cit. note 6 at 446-452.

8. "The starting point in the consideration of any privilege is the realization that its universal and immediate effect upon the search for truth is to close off one avenue of information about the facts. The policy issue, then, is whether the
of course is a full swing of the pendulum from the attitude which held out for the sporting theory of justice, broad rules of privilege, and the technical rules of exclusion existing at the classical common law.

By the beginning of the present century, efforts were being made to reform the law of evidence so as to make it a simple, easily applied set of rules designed for ascertaining the truth, justifiable by reason of public policy, and workable in practice. Much of this goal has been accomplished; but, much remains to be done and progress therefore continues.

In one area of the law of evidence, namely, the area of personal privileges, much criticism has been made of the rules as being conducive to injustice by reason of their prevention of full disclosure of all relevant facts, thereby tending to cause inaccuracies in the trial of lawsuits. In general, the rules of law in this area were well worked out by the beginning of the present century. This, however, was not the case as to all aspects of the law of personal privilege. New developments in the area of adjective law have taken place in the context of the emergence of a new and different kind of society from that which existed in the nineteenth century. Among the factors which have affected recent developments in procedure have been the following: new emphasis upon and an enlarged conception of the nature and scope of human rights; new complexities in the detection of criminal activities and in the prosecution of persons charged with crime; the rise of the modern business corporation and complex business methods and activities. These developments have made it necessary to apply rules and principles of law formulated for use in our earlier society to the situations arising in our present-day world. This in turn has made it necessary to revise the old rules to meet the needs of the new age and to create new rules when the old ones could not be adapted to the changed conditions. The result has been a somewhat \textit{ad hoc} extension of the rules of privilege, often without adequate attention to and understanding of the philosophy of privilege. Furthermore, until recently, the tendency has been to extend the attorney-client privilege far beyond what strict adherence to policy (and precedent) might reasonably be said to require.

In our adversary system of administering justice, the lawyer occupies a central position as investigator, adviser, manager, and repository of facts and law. This makes the attorney-client privilege the most important of the personal privileges, especially from the resulting benefits justify this sacrifice of the interest of truth." McCormick, Evidence 288 (1954) (hereinafter cited as McCormick).
standpoint of its involvement, actual or potential, in every lawsuit. Moreover, it is the privilege in which lawyers as a class are most directly interested and over which they have the greatest degree of control. It is the privilege which is most directly a part of the litigation process in every instance. Therefore, in any case for the examination of the place of the privileges in the law of today, this privilege would have the claim to be first evaluated.

Much has been written on the attorney-client privilege, but only Professor Wigmore's monumental treatise has attempted in recent years to examine the underlying policy of the privilege as well as to state the rules of evidence which are necessary to support that policy. However, Wigmore's treatment of the matter, based largely on history and analysis, was the product of institutions and modes of thought of the nineteenth century, stemming mostly from, and in answer to, the rationalist analysis of Jeremy Bentham.9 New developments, derived from new modes of thought, based upon new experiences in a vastly different society and tempered by considerations derived from experiences with the methods of modern science, totalitarian governments and ideologies, and a quickened interest in humanitarian principles and human rights,10 should now be taken into account in any evaluation of the rules of law, procedural as well as substantive. Therefore, the writer believes that further consideration of the privileges in relation to their proper place in a rational scheme of evidence is in order. Rules of procedure can only be justified when based upon sound policy, and such policy must give effect to some intrinsic value which the law endeavors to support. As Dean Pound would put it, we must weigh our procedures with reference to the substantive rights which we are endeavoring to secure.11 The writer will examine the attorney-client privilege against

9. Wigmore was born in 1863 and received his law degree in 1887. Wigmore's edition of GREENLEAF ON EVIDENCE appeared in 1899, and the first edition of Wigmore's own treatise on evidence appeared in 1906. The ideological nineteenth century did not end until 1914, however.


11. Dean Pound to the writer in a personal conference, Harvard Law School, February 25, 1958. Mr. Sutherland has put it thus: "Legislation designating the method of enforcing and establishing substantive rights, as a general rule, is enacted not for an end in itself, but to provide a better way of accomplishing an end." III SUTHERLAND, STATUTORY CONSTRUCTION § 6802 at 321 (3rd ed. 1943).
this background (and will consider the other personal privileges incidentally, where appropriate to illustrate the thesis which he has formulated).

The writer believes that the attorney-client privilege should be preserved but that it should again be restricted in scope to the narrow area of the personal relationship of the client to his attorney in their face-to-face dealings. When thus limited, it will not substantially affect the processes of accurate fact-finding and yet will preserve the most essential values which should be recognized as the basis for the justification of the continued existence of the privilege in the twentieth century. An evaluation of this proposition will be the subject of this paper.

II

HISTORY AND POLICY OF THE PRIVILEGES

A. History:

At the early common law, testimony of witnesses was the exception rather than the rule, and there was no such thing as compulsory testimony. The modes of trial were formal and certainly unscientific in the sense that they were not based on the ascertainment of the facts and the application of the law to such facts, as is true today. In fact, it was not until the latter part of the seventeenth century that the modern modes of trial in open court by impartial jurors came into existence, and the conception of the rule of law was likewise slow in developing.

12. By "face-to-face" dealings, we mean what the client seeking legal advice says directly to the attorney in a personal conference and in strict confidence. To give adequate protection to such communications, what the attorney says to the client in reply must generally be covered also. For reasons of necessity and convenience, communications transmitted by messengers should likewise be covered. An interpreter or a translator would fall in the same category as a messenger. These kinds of situations will be referred to hereafter when used in connection with the attorney-client communications as "the face-to-face situation," and the relationship of the client and his lawyer encompassed thereby will be referred to as "the face-to-face relationship."

13. Hickman v. Taylor, 329 U.S. 495, 508 (1947), is a recent leading case that by specific language and broader implication tended to recognize the proper scope of the privilege. The implications of this case will be discussed briefly in Section Five, Subsection E post and will be dealt with more fully in a forthcoming paper.

14. IX HOLDSWORTH, A HISTORY OF ENGLISH LAW 177 et seq. (3d ed. 1944) (hereinafter cited as HOLDSWORTH). See also VIII WIGMORE, EVIDENCE § 2290 (3d ed. 1940) (hereinafter cited as Wigmore), for a good short history of testimonial compulsion.

15. IX HOLDSWORTH 177 et seq.

16. Id. 130-31, 178, 181; and 1 HOLDSWORTH 312-21, esp. at 319 (7th ed. 1956), on the origin and development of the jury system.

17. See Corwin, The Higher Law Background of American Law, 42 HARV. L. REV. 149, 171-72 (1928-29); revised and published in book form under the title of
As a result of this slow evolution of the mode of trial to the present day system, the right to insist upon the production of evidence for purposes of proof did not come into being all at one time but rather developed piecemeal, with numerous exceptions to the rules for the compulsory production of testimony. These exceptions are only gradually being eliminated, and remnants thereof remain in the system of evidence to the present time.

Moreover, it was not until the sixteenth century that the practice of relying on the sworn testimony of witnesses became general. One reason for this was that such evidence was usually most untrustworthy. Since suits frequently originated in deliberate perjury, the courts took a strict attitude toward witnesses who might voluntarily come forward and testify, by enlarging the offenses of maintenance and conspiracy. But if a witness gave his testimony at the request of the court, it was a defense to the charge of maintenance. Nevertheless, the practice of the use of testimony of witnesses, once begun, was continued with increasing frequency until it became the predominant mode of proof. By the time of the Tudors the tide had turned in favor of the production of evidence chiefly through witnesses, at least for the purpose of making out the case for the Crown. By the statute of 1562-1563, it was provided that witnesses could be compelled to attend court and testify; and by the middle of the seventeenth century, the functions of the witnesses and the jury were entirely distinct. The basic evolution of the system to one of trial in open court was now complete.

Furthermore, the only mode of taking testimony at common law was in open court. The bill of discovery and the bill to perpetuate testimony were equitable in nature and, as has been pointed out previously, did not become a part of the regular modes of pretrial procedures until relatively modern times. In chancery, discovery was limited to the opposing party's testimony, and even this could be elicited only as to such material facts, including documents, as related to the proponent's case. One could not discover the case of the opponent. Also, the bill of discovery never extended to third parties or their documents. In theory, the party was merely inspecting that which was his own. For example, a plaintiff in bringing an action on a contract might inspect the contract in the defendant's...
possession but not the release. Statutes later extended this right of discovery to cases at law. Except where based on the equity practice, such statutes were broader than in equity; for example, a particular statute might extend to all witnesses in civil cases. Criminal discovery got off to a late start and has developed more slowly. It is only now coming to receive substantial attention by the courts, legislatures, and jurists.

Until recently, it remained the rule in this country that a party did not have to give testimony or submit to examination except upon deposition pursuant to subpoena or in open court. This still remains true in the case of third parties; notice, however, has been made sufficient to require litigants themselves to testify in civil cases. In criminal cases, persons charged with crime are not required to speak, not even when under arrest and in the custody of the sheriff. Thus, it is readily apparent that the notion that one is not under any legal duty to disclose matters of personal knowledge (except where specifically required to do so by legislative enactment) has had a long past in our history and still retains substantial vitality, even in the face of modern attitudes of liberality toward discovery and fact-finding. This has resulted in a way of thinking on the part of the bar which presumed the privilege of freedom from giving information to the fact-gatherers. Any infringement on this presumption of freedom from compulsory disclosure had to be justified and would be vigorously opposed. The converse position might have been logically and reasonably accepted and any claim of privilege required to be justified, but in actuality this attitude continued to exist and to control legal thinking until well into the second quarter of the twentieth century. Its effects are to be seen in the juristic decisions pertaining to pretrial discovery and testimonial immunity at the present time.

With this general background in mind, it is easy to understand how the attorney-client privilege originated in our law. It was recognized in the reign of Elizabeth I, almost contemporaneously with

22. See discussion of depositions and discovery in VI \textit{Wigmore} § 1845 et seq., esp. §§ 1850, 1856, 1856a, 1856c, 1856d, and 1857.
23. For a good recent discussion, see \textit{McCormick} 210; see also VI \textit{Wigmore} § 1850. And see Louisell, \textit{Criminal Discovery: Dilemma Real or Apparent?} 49 \textit{Calif. L. Rev.} 56 (1961), esp., the authorities cited at 57 note 2 and 59 note 9. For a brief description of modern English criminal discovery, which is more advanced than criminal discovery in the United States, see \textit{id.} 64-67.
the creation by statute of the general rule of compulsion. But though the privilege was thus early established, the theory upon which it rested was not finally settled until near the beginning of the eighteenth century, with the result that the scope and conditions of the privilege were not settled until after the middle of the nineteenth century. Moreover, the rationale of the privilege as adopted in the eighteenth century was a priori and incomplete, in that it took what is only one of the factors on which is based the policy supporting the privilege as the total justification for the privilege. As a result of the acceptance of this more limited raison d'être, the privilege has failed to withstand the logical attacks of the able analysts of the modern law of evidence.

At the early common law, the privilege belonged to the attorney entirely — it was a matter of honor which he should not be required to violate. He was thus free to disclose the communication or to decline, as he saw fit. This was a natural carry-over from the time when the attorney was ethically bound to secrecy and could not be required to reveal his client's communications, because he could not be required to testify at all unless he chose to do so. The leaders at the bar constituted an ancient and honorable class, the upper reaches of which merged in the peerage. The attorney or solicitor did not stand so high. He was not a gentleman but was a man of business and the obedient servant of the family whose property and affairs he managed. As the sense of honor was adequate to exempt the barrister from being asked questions touching his dignity, there was an equally old and powerful feeling that a servant must keep his master's secrets, and the attorney was generally in that class, though not a servant in the specific sense which English law attaches to that term.

As Professor Radin has pointed out, the duty of loyalty of the servant was not only obvious but also had authority to sustain it. Under Roman law, a servant (who was also a slave) might not give testimony against his master. The rule was the same for parents and

26. IX Holdsworth 201-02.
27. Id. 202.
28. For a good recent criticism, reminiscent of Bentham, see Morgan, Foreword to The Model Code of Evidence 22-31 (Am. L. Inst. 1942), discussing the personal privileges.
29. There were two other consequences: the privilege lasted only for the duration of the particular case, and the client might be compelled to answer by a bill in equity. When the basis for the privilege changed, the client could no longer be reached in equity, first as to the particular case; later, as to any instance. See VIII Wigmore §§ 2294 at 564, 2324.
31. Id. 487-88.
children, patrons and freedmen, and in criminal cases a long list of others.\textsuperscript{32} Advocates from ancient times could not be called as witnesses against their clients while the case was in progress. By later imperial mandate they were made incompetent to testify at all in such cases.\textsuperscript{33} That the Roman precedent was the source of the English rule cannot be proved. The better view is that it may have had some influence, even on the theory of the barrister’s honor, but the various factors heretofore indicated, in the setting of the period of the origin of the modern English law, must have all contributed to the establishment of the attorney-client privilege as a lasting development. Professor Radin maintains that from the late eighteenth century, the privilege in English law has been sustained upon the theory of the attorney’s duty of loyalty to the client.\textsuperscript{34} While this has been an important if generally unarticulated premise, there have been others no less important. The composite whole of those factors (in combination) resulted in the development of the English common law trial process as adversary in nature. This, together with the mode of proof established for the production of evidence by witnesses in open court, generally to be evaluated by a jury, and with numerous safeguards (real or supposed) against false and misleading evidence, was the source of the origin and continuation of the privilege.

With the perfection of the modern mode of trial, by evaluation of the evidence produced in open court, plus the use of compulsory processes against witnesses in general when necessary to obtain their testimony, it was no longer possible to exempt the attorney as a witness on the basis of honor alone.\textsuperscript{35} Other people had honor and were forced to violate confidences by compulsory process of the courts.

\textsuperscript{32} Ibid.

\textsuperscript{33} Id. 489. The basis of the exclusion was the general moral duty not to violate the underlying \textit{fides} on which the family was built, but the rationalization of the rule was that the testimony was valueless either for or against the litigant (when favorable, there was strong motive for misstatement; when against, the litigant was unworthy of belief). At Rome, the public policy which supported the privilege was directed against the corruption of the family (or quasi-family) relations which would result if the fullest confidence of the members was not maintained. This policy was deemed superior to that which sought the correct settlement of controversies or the punishment of offenders, with the exception of treason. \textit{Id.} 491-92.

\textsuperscript{34} Id. 492. The writer would qualify this by saying that the duty of loyalty has been at least an important factor in the recognition of the privilege as a policy at variance with the policy favoring the production of all available evidence.

\textsuperscript{35} Professor Radin suggests that the attorney’s honor might yet be the better basis for the privilege (\textit{pudor}). This would leave the attorney free to speak if he should choose. Thus, reputable clients and attorneys would be fully protected, but the disreputable client might suffer. So much the better, though in the case of the disreputable attorney there would be danger of blackmail. Radin does not consider this a great danger, however, as the bar could deal with disreputable attorneys. \textit{Id.} 493-94. The writer suggests that not only would there be danger of blackmail, but the public would fear the treachery of the legal profession, and this would cause more harm than any actual blackmail.
Moreover, by the time of the eighteenth century, the rationalists were requiring the justification of the various legal rules and doctrines; and in order to place the privilege on a sound rational basis, it became necessary to justify it on stronger grounds of policy than loyalty alone or to discard it altogether.36

The eighteenth century has been described as the century of reason; the nineteenth century, as the century of experience; and the twentieth century, as the century of intuition.37 In the eighteenth century, the great social movement which was to produce modern notions of humanitarianism and a whole new scheme of values was only beginning to take shape in men's minds in the form of new ideals.38 The nineteenth century was a reaction from the unbridled reason of the eighteenth century and a period of consolidation of prior gains. The twentieth century has the work and experience of the two previous centuries of progress on which to build, plus new discoveries pertaining to the nature of man, discoveries which indicate that a thing may be of perceived value without being exactly explicable in terms of reason and experience alone.39 But in the eighteenth century all of this necessarily lay in the future. The schemes of the rationalists had not yet faced the test of experience. To borrow a phrase from Justice Frankfurter, "the compendious expression for all those rights which the courts must enforce because they are basic to our free society"40 was an ideal which was only beginning to take shape. Today's world was beginning to emerge from its chrysalis but was only in its first stages of scientific and humanitarian development. Modern society was still too close to its primitive origins to

36. VIII WIGMORE § 2290 at 547-50. The matter was finally settled in the Duchess of Kingston's Case, 20 How. St. Tr. 586 (1776), which held that the honor of the attorney was no ground for refusal to testify. The "point of honor" thus disappeared forever as a basis for the privilege, but its expiration was viewed with reluctance by many. VIII WIGMORE § 2286 at 536. In the 1700's the point of honor carried so much weight that it almost succeeded in obtaining the creation of other privileges. The new theory began to appear in the early 1700's and the two were co-existent for a time. Id. § 2290 at 548.

37. Roscoe Pound, General Introduction to SIMPSON AND STONE, CASES AND READINGS ON LAW AND SOCIETY xvii (1948), where Dean Pound expresses it thus: "In jurisprudence we are dealing with experience developed by reason and reason tested by experience. The seventeenth and eighteenth centuries put their faith in reason. The nineteenth century, in the main line of its thought, put its faith in experience. The twentieth century has been putting its faith in intuition." The phrase "experience developed by reason and reason tested by experience" is the essence of Pound's conception of the judicial empiricism of the common law tradition and is frequently repeated in his various writings. E.g.: NEW PATHS OF THE LAW 13 (1950); THE TASK OF LAW 62 (1944). In fact, it is reflected in the title of one of his most recent books, LAW FINDING THROUGH REASON AND EXPERIENCE (1960). And see generally, CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).


39. See the reference to "reason and experience" made by Dean Pound, supra, note 37.

attempt to execute its finer ideals. For example, the judicial sanction of torture had been abolished for only a century.41

Eighteenth century rationalism resulted in the notion that the silence of the attorney was necessary in order that the client might trust his legal advisor more fully. The attorney's freedom from compulsion, it was believed, would make the client feel more secure in disclosing to counsel, freely and without fear, all of his knowledge of the case. It was of course apparent that the attorney must have this information readily available in order to properly prepare and present the client's case. This is the first essential step in the administration of justice in an adversary system of trial of cases. Men recognized that society has an interest in the fair administration of justice and that the fact-finding process in adversary litigation can be accurately administered only when the lawyer involved is entirely familiar with his client's cause. This requires that the client should have confidence in his attorney and that the attorney should be free to keep the client's secrets inviolate. Originally, the protection of the privilege covered only situations in which the attorney was consulted for purposes of litigation which did in fact take place; but the coverage was extended in the nineteenth century to include all cases where legal advice was sought for any purpose,42 and this is within the sound policy of the privilege.43

As a result of the law reform movement during the latter part of the nineteenth century, discovery procedures were improved and extended so as to cover all relevant and unprivileged materials in the possession of the parties, and under special circumstances in the possession of third parties. This liberal discovery was contrary to traditional procedures favoring secrecy, as has been indicated previously. The reform of discovery came as the result of a growing feeling that to insure justice to all it is necessary that technicalities which prevent the production of all relevant evidence should be abolished.44 This feeling led to the simplification of the rules of evidence

41. This took place in the seventeenth century. See IX Holdsworth 230.
42. VIII Wigmore § 2294 at 563-65 and cases cited.
43. This is true in theory at least. Moreover, the rules of evidence which prevent the complete disclosure of all relevant evidence rest on some ground of policy rather than (as was earlier believed to be the case) that disclosure was in conflict with other proper modes of trial (IX Holdsworth 193-94); or that it might result in perjury which would mislead the jury.

The rationale of the broader rule (extending privilege to client's communications for advice not resulting in litigation) is the fostering of complete freedom in the non-litigation area. This is important as tending to prevent litigation from developing. VIII Wigmore § 2295 at 568.
44. For a good philosophical consideration of the justification of compulsory discovery in its broadest phases, see VI Wigmore §§ 1845-46.
and the elimination of many rules which interfered with the ascertainment of the facts during a trial.\textsuperscript{45}

Today, it is generally recognized that except in certain situations where a party is not bound by the testimony of his witness\textsuperscript{46} or where a party has some good basis for understanding what testimony he can expect his witness to give in advance of the witness's taking the stand, the witness should not be called to testify.\textsuperscript{47} The best method for ascertaining this information was formerly the personal interview, but under present day conditions, the best method is generally found to be the oral deposition, preceded by an interview when practicable.\textsuperscript{48} In former times, perhaps the task of interviewing witnesses was relatively easy, but in our complex modern society this is not generally the case unless the witness is in some way interested in the outcome of the litigation. For this reason, it is considered to be a sound practice to take the deposition of a prospective witness in advance of trial if this is permitted under the local rules, both for the purpose of discovery (that is, the ascertainment of what he can be expected to say),\textsuperscript{49} and perpetuation of his testimony, so that if anything happens to the witness, his evidence will be available; also, incidentally, for protection in two other respects: (1) if the prospective witness knows that his story has been taken down, he is less likely to change it; and (2) if he should change it, counsel can claim surprise and use the witness's prior deposition to impeach his testimony in open court.

However, in view of the comparatively early reform of English procedure in regard to discovery and perpetuation of testimony,\textsuperscript{50} the courts protected certain areas of knowledge from disclosure to a greater extent than they would today if faced with the problem for the first time. This was in part due to the fact that novel ideas are always dealt with in conservative manner. But there were more important reasons. These derived from two sources: (1) English

\textsuperscript{45} That is, as compared to the time of reform in American procedure. There is still much work to be done, and this paper is only a small facet of it.

\textsuperscript{46} For the reason why one was held bound by the testimony of his witnesses at common law, see IX HOLDSWORTH 208-09.

\textsuperscript{47} Put another way, generally speaking, a party should not call a witness or ask one on the stand a question unless he knows in advance what the answer will be.

\textsuperscript{48} Under open discovery, the direction of written interrogatories to the opponent has become a popular method of ascertaining the opponent's knowledge of the facts of the case and the sources of evidence. The discovery of witnesses' statements taken by the opponent's agent other than his counsel is now becoming important under the American practice, but is not available under the English practice when such statements were taken in preparation for trial.

\textsuperscript{49} This has two aspects: What the witness knows about what his opponent already knows and what he may know that the opponent does not know but would like to ascertain.

\textsuperscript{50} See note 6 ante.
discovery procedures by bill in equity, from which the attorney always remained free; and (2) the solicitor-barrister division in the legal profession, with its resultant effect on the mode of trial preparation. As to the second item, it must always be borne in mind that the privilege developed in the context of litigation is in an adversary system. And at the beginning of the nineteenth century, the privilege was still limited in scope to those instances in which the client had made the communications to counsel in anticipation of litigation or at least when the very real possibility of litigation was the motivating factor. In those instances, the client’s communications to the solicitor were reduced to writing by the latter and incorporated in a brief which would be laid before the barrister first for his advice in regard to litigation and later for the barrister’s assistance in connection with preparation of his case in court. Such a brief would obviously have been most valuable to the opponent, but the tradition and feelings of the English bar were strongly opposed to its being made available to the opponent, and its production through the use of pretrial discovery devices was to be repeatedly denied. This brief of the solicitor is protected both by the personal immunity accorded to the lawyer not to be required to testify (or to produce his brief) and by the recognition of a privilege of the client not to disclose his communications to counsel.

As to the first item, it must be understood that while the client could not be a witness in his own behalf in the common law courts, he could always be examined on deposition in equity by the opponent as to the facts which were not immune from pretrial discovery. The attorney, however, could not be examined by bill in equity, but he could be examined like any other witness in the common law courts, and he could be examined on deposition under the liberal discovery procedures. Yet, since he could not be examined as to privileged matters, the question as to the scope of the privilege had to be resolved. A privilege for the client’s communications was recognized when these communications were made in anticipation of litigation. Hence, it was recognized that the attorney could not be examined as to such communications when made by the client under circumstances such that litigation might reasonably be contemplated. In this respect, the courts adopted an objective test.

This was the situation in England during the early part of the nineteenth century. Yet, the circumstances were not favorable to

51. In England the solicitor “makes a case for counsel” and in so doing prepares written documents and sets forth the evidence in written form; while in the United States, the client discusses his case orally with the attorney who will take it into court.
such narrow confinement of the privilege. The attorney's distaste for personal involvement in his client's affairs was undoubtedly an unarticulated factor in these circumstances. The nineteenth century rationale of privilege\textsuperscript{51a} did not justify the distinction between communications made by the client for professional advice which was sought for the purpose of conducting his affairs generally and communications made by the client in order to determine his course with respect to litigation, actual or prospective. The protection of the privilege was as justifiable in the former instance as it was in the latter one. Hence, the extension of the privilege to cover all communications made by the client to his counsel in the course and scope of the professional relationship was inevitable. Yet this extension took place only after much travail and turmoil over the period of half a century. It came in two steps, the first being the recognition of an immunity of the attorney from compulsion to testify to such communications. Even as to the attorney there was some hesitation, but by 1833 it was recognized that the attorney could not be required to disclose the client's communications made in the course and scope of the professional relationship, whether made in anticipation of litigation or solely to enable the attorney to furnish legal advice.\textsuperscript{52} The client could still be required to testify as to such communications, however. The extension of the same immunity to the client as the attorney now enjoyed passed through a tardily similar stage of legal development, and the point\textsuperscript{53} continued to be argued until the decision of Minet v. Morgan, in 1873.\textsuperscript{54} Thereafter, the client's communications were fully protected from disclosure by either the lawyer or the client.\textsuperscript{55}

The area covered by the privilege was further extended however.\textsuperscript{56} The "case made for counsel" and sent from solicitor to

\textsuperscript{51a} Hereinafter referred to as the Wigmore rationale, not because Wigmore originated it but because he was the last great writer on the law of evidence who after considering it affirmed it without question.

\textsuperscript{52} The leading English case on the privilege is Greenough v. Gaskell, 1 Myl. & K. 80, 102, 39 Eng. Rep. 618 (1833), where Lord Brougham made this statement: "If, touching matters that come within the ordinary scope of professional employment, they [legal advisers] receive a communication in their professional capacity, either from a client or on his account, and for his benefit in the transaction of his business, or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as a party or as a witness."

\textsuperscript{53} That is, the client's freedom from compulsion to testify.

\textsuperscript{54} L. R. 8 Ch. 361, 366.

\textsuperscript{55} This controversy did not echo in the United States, and here the courts gravitated naturally to the largest interpretation of the privilege. VIII Wigmore § 2294 at 563-65.

\textsuperscript{56} Wheeler v. LeMarchant, [1881] L. R. 17 Ch. Div. 675, 681, held that documents prepared by third persons are protected from discovery "where they have
barrister was eagerly sought after by bill of discovery. This solicitor’s brief included not only the record of the client’s communications but also the record of the solicitor’s preparations. The former are communications by the client, and they are privileged as such. The latter are not of the same nature and hence are not entitled to the claim of privilege by virtue of the nineteenth century rationale. Yet, the English courts accorded similar protection to these preparations. There already existed the tradition which protected the lawyer from discovery in equity of evidence acquired in professional confidence (in anticipation of litigation). The attorney’s knowledge was imputable to the client, however, and thus could be discovered through procedures directed to the client. But the courts refused to permit this, though discovery was frequently sought during this period.

A bill in equity was nearly always sought before litigation was ventured. This resulted in resistance to the claim of privilege by advocates in need of proof, and the converse efforts on the part of the legal profession to extend the protection of the privilege. The many English rulings resulted from demands of the client to protect this “key to his case.” Both the client’s communications and the lawyer’s investigations were generally lumped together and held privileged. Yet, discriminating judges have recognized the latter as a distinct category of evidence which is immune under a distinct but related privilege. The general failure to distinguish these two categories, together with the sharp contests and the fine discriminations in the English rulings tended to make this area a prolific source of litigation, though today the decisions tend to turn largely on factual interpretations. This state of affairs did not exist in the United States, where the relation between the attorney and his client was direct and their communications generally oral. The documents which the client come into existence after litigation commenced or in contemplation, and when they have been made with a view to litigation, either for the purpose of obtaining evidence to be used in such litigation or of obtaining information which might lead to the obtaining of such evidence.”

Lyell v. Kennedy, [1883] L. R. 9 App. Cas. 81, 87, 93, held that documents obtained by the defendant "at the instigation of a solicitor" "for the purpose of defending himself against various claimants" and placed in his solicitor’s hands are privileged; and the court went on to say: "[A] collection of records may be the result of professional knowledge, research and skill; it is the solicitor’s mind, if that be so, which has collected the materials; . . . you cannot have disclosure of them without asking for the key to the labor which the solicitor has bestowed in obtaining them."

The solution worked out in England and followed in some American courts is to allow discovery of agents' reports generally but to recognize here a privilege not peculiar to agents' reports — the privilege against disclosure of papers made or compiled by or for a litigant or his counsel as part of the special preparation of a lawsuit. The same rule applies in Canada. McCart v. McCart, [1939] 3 D. L. R. 777 (Ontario) (detective reports relating to proof of adultery obtained for counsel). Other cases are cited in VIII WICMORE § 2319 n. 1.

57. Id. § 2294 at 566.
transmitted to counsel would not be privileged in any event. The extracted oral statement was of little value compared to the unchangeable writing existing under the English practice. Thus, there was no long drawn out struggle such as occurred in England.

In England the courts went so far as to extend the privilege to cover all preparation of the attorney for trial, including freedom from discovery of statements of witnesses who were independent third parties. The legal climate in which the broad recognition of privilege under reformed English practice developed deserves mention. Though the privilege had an early origin, many points were not finally settled until the middle of the nineteenth century, during

58. VIII WIGMORE § 2307. This is a point frequently not well understood by counsel today. Only documents which originate as communications to counsel are privileged. Pre-existing documents have no better claim to such protection than evidence in general. If the rule were otherwise, all documentary evidence in the possession of the parties would become privileged simply by being transmitted to counsel. This would not only be unnecessary to the effective communication of the client with counsel but would not meet the test of confidentiality which is basic to the inception of a personal privilege.

59. Id. § 2294 at 567.

60. E.g.: Ankin v. London & N.E.R. Co., [1930] 1 K.B. 527 (documents taken from defendant's officers and third parties for solicitor in litigation held to be privileged); Norton v. Defries, [1882] L. R. 8 Q.B.D. 508 (shorthand notes taken by defendant in another action between the same parties touching the same subject and in part for subsequent litigation held privileged); Wheeler v. LeMarchant, [1881] L. R. 17, Ch. Div. 675, 681 (report of surveyor to solicitor for purpose of enabling him to advise client held not privileged, but court said that it would be privileged if made with view to litigation); M'Corquodale v. Bell, [1876] L. R. 1 C.P.D. 471 (communication by representative of a third person to plaintiff's solicitor held privileged as document obtained with view to litigation); Walsham v. Stainton, [1863] 2 Hem. & M. 1, 71 Eng. Rep. 140 (where solicitor obtains help of another in order to give advice, here accountant, the matter is privileged); Curling v. Perring, [1835] 2 Myl. & K. 380, 39 Eng. Rep. 989 (motion for production of correspondence between solicitor and third party refused). See also: 4 MOORE 26.23 [2] at 1090 et seq.; VIII WIGMORE §§ 2317-19.

Until recently the American courts have tended to follow the English example uncritically, though there is now developing a tendency to re-examine the matter in the light of new attitudes toward discovery. In fact, until the advent of our liberal discovery principles, it was often difficult to tell whether a court denying discovery was basing its decision on the absence of a right to discovery of the moving party or the assertion of a privilege by the opponent. The two principles were frequently confused. See VIII WIGMORE §§ 2318-19.

61. Id. § 2290 at 548. As a consequence of its tardy origin, the detailed rules of the privilege were still formative during the first half of the 1800's and the precedents often contained overtones of the older notion of attorney's honor long after its repudiation, thus resulting in a confused volume of rulings. Ibid. The only limitation on the English rule of privilege is that the information must have been gathered for the purpose of litigation or with the possibility of litigation in mind or in order to obtain legal advice thereon. What amounts to such a contingency depends upon the facts of the particular case, and the courts have not been entirely consistent in where they have drawn the line. Routine reports not primarily for legal advice or litigation are not privileged, but documents may be privileged though brought into existence for more than one purpose if primarily for a legal purpose. Here again the courts have had difficulty in drawing the line.

It is questionable as to whether the recognition of an immunity for such dual purpose documents is sound, because they fail to meet the prerequisite test of confidentiality (required before the privilege will be accorded). The point has been most effectively made in Comment, Agents' Reports and the Attorney-Client Privilege, 21 U. CHI. L. Rev. 752 (1954). The only question here is whether we should require the same high degree of confidentiality for documents which are in
which period the new rules of discovery were put into effect. Moreover, at that time there were still rules of incompetency which had great vitality, and the privilege itself did not seem to be so great an obstacle to the discovery of the approximate truth when considered together with these additional obstructions to the discovery of truth.\textsuperscript{62} Also, the parties were now being allowed to testify for the first time at the trial, and much of the earlier pressure for the attorney's examination was automatically removed — since the client could be compelled to testify directly to what the attorney could only testify that he had learned from the client.\textsuperscript{63}

The rule of attorney-client privilege was basically very simple: that the communications of the client to the attorney were privileged when the consultation was for the purpose of litigation which did in fact occur.\textsuperscript{64} During the pre-modern era, most consultations between attorney and client undoubtedly occurred in connection with litigation. When consultation for purposes of legal advice became more frequent, the privilege was naturally extended to cover such communications. By 1833, the privilege had been extended to cover communications made by the client to the attorney, either in connection with litigation or for the purpose of obtaining legal advice sought for any lawful purpose. Both the attorney and the client were now protected from compulsory disclosure, though the client could still be examined by bill in equity.\textsuperscript{65} It was not until 1873 that the client was fully protected (both at law and in equity), and thereafter the boundaries of the privilege for attorney and client each remained

\[\text{the nature of preparatory materials (sometimes described as in the nature of} \]
\[\text{\"work product,\" being protected from discovery by a quasi-privilege). On this} \]
\[\text{point see Symposium,} \]
\[\text{\textit{Developments in the Law — Discovery,}} \]
\[\text{74} \text{ \textit{Harv. L. Rev.}} \]
\[\text{940, 1045 (1961).} \]

\[\text{The leading English case of Westminster Airways, Ltd. v. Kuwait Oil Co.,} \]
\[\text{[1951] K.B. 134, 22 A.L.R. 2d 648 (communication between insured and his broker} \]
\[\text{after it became clear that plaintiff would file suit held privileged), did not involve a} \]
\[\text{third party situation; hence, it is not cited in the first paragraph of note 60. To} \]
\[\text{separate business items which end up in the lawyer's office from legal items, the} \]
\[\text{English courts emphasize the time element. This however is an artificial test, which} \]
\[\text{is illustrated by the rule that communications made to obtain legal advice are} \]
\[\text{privileged though litigation never in fact takes place. The difficulty comes in the} \]
\[\text{area outside of the actual communications of the clients to their lawyers. What} \]
\[\text{transpires directly or through agents after litigation has begun or is threatened} \]
\[\text{may have the protection of the privilege though it is in fact only routine business} \]
\[\text{correspondence. In theory, however, such communications must be made in con-} \]
\[\text{templation of litigation or with the idea of litigation as the motivating factor. (This,} \]
\[\text{however, the writer submits is not enough to bring the immunity of the quasi-} \]
\[\text{privilege into play.)} \]
\[\text{Wigmore pointed out in 1940 that the English courts do not} \]
\[\text{have a definitive decision on privilege, and this remains true today. VIII} \]
\[\text{Wigmore} \]
\[\text{§ 2319 at 622-23.} \]

\[\text{62. The subject is covered in II} \]
\[\text{Wigmore} \]
\[\text{§ 483 et seq.} \]

\[\text{63. See VIII} \]
\[\text{Wigmore} \]
\[\text{§ 2291 at 557.} \]

\[\text{64. Id.} \]
\[\text{§ 2290 at 549.} \]

\[\text{65. The attorney could not be examined, however. See text at note 53,} \]
\[\text{ante.} \]
the same. Put another way, in the area of communications by the client to the attorney, neither could be compelled to disclose more or less than the other. The privilege of the late common law period thus continued to be limited to what might be described as a "face-to-face situation," and was thus quite narrow in scope. It was circumscribed by the principle of "the face-to-face relationship," namely, that only communications made in confidence by the client to the attorney for purposes of obtaining legal advice should be protected from disclosure through compulsory process of law. Thus, what the client might say in a personal interview with his solicitor was privileged. The advice which the solicitor gave, based on the facts related by the client, was also privileged. This, however, was not to protect the lawyer or to satisfy his desire for either secretiveness or the maintenance of his personal honor untarnished. Rather, it was the theory that disclosure of the attorney's advice might give a clue as to what the client had said to the attorney. At one time the scope of the privilege was no broader than that.

Yet the growth of the privilege did not stop at that point. The privilege had a tendency to expand in its coverage from the beginning. From the face-to-face situation, the scope of the privilege was next broadened to cover the attorney's clerk (as a matter of convenience). The clerk's knowledge of the client's communications, acquired through his personal presence at the interview or by reason of his work on the case in the lawyer's office, would not be subject to compulsory disclosure; otherwise, the facility of consultation would be reduced, and the subsequent preparation might also suffer. Next, the client's agent was covered, so that the client would be able to send a written or oral message to his attorney, and this is undoubtedly reasonable under any policy which is designed to make the privilege easily available to clients in general.

66. VIII Wigmore § 2294; see text at note 54, ante; see VIII Wigmore § 2295 as to rationale; also, note 43, ante.

The privilege does not extend to advice sought for non-legal purposes. But a matter committed to a legal adviser is prima facie for legal purposes. It is not always easy to distinguish the two situations. See United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950).

67. When the privilege had been conceived as based on the honor of the attorney, it had not protected the client from discovery by a bill in equity. VIII Wigmore § 2294 at 563, § 2290 at 548.

68. Id. § 2317 at 615.

69. Id. § 2320 at 625; see McCormick § 93 at 186-87.

70. VIII Wigmore § 2301 at 584.

71. But their presence must be reasonably necessary. Gariepy v. United States, 189 F. 2d 549 (6th Cir. 1951); Himmelfarb v. United States, 175 F. 2d 924 (9th Cir. 1949) (presence of accountant in tax fraud case held not indispensable). The case has been criticized by the tax bar. See 10 Tax L. Rev. 227, 233 (1954).

72. VIII Wigmore § 2317 at 616-17.
The English courts have gone much further than this, however. They have extended the "privilege" to cover all preparation of the client which could reasonably be found to have been made with the possibility of litigation in mind, although it might also have been made for other purposes; and all investigations of the attorney even though they were routine and might have been made by anyone, when such investigations were of the nature of conversation or written communications with third parties, or consisted of the actual collection of information for the attorney by an agent of either the client or the attorney.

The American courts seem never to have gone quite so far, but the limited discovery procedures of the last one hundred years make it difficult to say just how far they did go. Moreover, since the adoption of the federal rules in 1938, the trend in this country has been to some extent to reduce the broad area of coverage which has hitherto been recognized, at least in the peripheral areas.

73. It should be pointed out that this is only a test of the applicability of the privilege in litigation-type situations. It obviously could not be more, because consultations are privileged when legal advice is sought without the possibility of litigation in mind. See discussion in text following note 64, ante; see also VIII Wigmore § 2319 (2) at 622.

This "spurious privilege situation" results from attempts to extend the protection to reports and preparations of the client's agents in litigation-type situations where the agents are not merely conduits between the client and the attorney but are creating or gathering independent evidence which the opponent seeks to obtain by discovery. In the case of the client alone or the agent as mere conduit, the problem does not arise. This inherent self-contradiction therefore suggests that (aside from consideration of principles and policy) the privilege has been extended out beyond the limits of the area where it can be utilized with facility, by prompt and obvious rulings, as the problems arise. (This is sometimes referred to as "the Thayer Principle." See note 120 and text at notes 208-10, post.)

74. Loc. cit. notes 60 and 61, ante. There is only one instance in which the privilege is not equally broad for the attorney as for the client: Communications between solicitors and non-professional agents or third parties is limited to cases where litigation is actual or anticipated. There is no such limitation in the case of the client. See 12 Halsbury, Laws of England 40-49, esp. 44-46 (3d ed. 1955); Wills, Evidence 281 (3d ed. 1938). The expanded area of the privilege, which covers materials gathered in preparation for trial, has been described as quasi-privilege in England.

75. See VIII Wigmore § 2319, § 2294 at 566-67. In the United States, the courts have failed to perceive the distinction between privilege and quasi-privilege and have extended the former to cover some of the materials acquired in preparation for trial (where the clients' agents or the attorneys' agents have been the "fact-gatherers"). More recently, this expansion of the classical privilege has been restricted by some courts and a qualified immunity granted to the lawyer for preparatory materials gathered by him or his assistants. This has been described as "the work product of the lawyer."

76. E.g.: Hickman v. Taylor, 329 U.S. 495 (1947) (statement of attorney taken as investigator held not privileged but subject to qualified immunity which could not be destroyed without showing of good cause); Dowell v. Superior Court, 47 Cal. 2d 483, 304 P. 2d 1009 (1956) (inspection of party's own statement allowed; court noted trend toward liberal discovery); Holm v. Superior Court, 42 Cal. 2d 500, 267 P. 2d 1025 (1954) (investigator's report, including driver's statement and photographs, held privileged; inspection of party's own statement allowed); Schmitt v. Emery, 211 Minn. 547, 2 N.W. 2d 413 (1942) (statement taken by claims agent employed by bus company from bus driver concerning accident, obtained in anticipation of litigation upon direction of attorneys and delivered to attorneys, held privileged);
In England, by reason of the statutes governing disclosure (which entitle each party to discovery of all documents and information in the possession of the opponent), discovery of the knowledge of the parties, including statements of the witnesses in their possession, has rarely been denied except on the grounds of privilege. This has made it necessary in each lawsuit to separate ordinary business documents from documents prepared for the purpose of litigation. There has been substantial dispute in this area, where different inferences can be drawn from the application of the law to the facts. Generally, however, the line has been drawn liberally in favor of the privilege. For example, the concept of privilege has been carried so far that it has been held to protect the client from compulsory disclosure if he obtained a statement for the use of his solicitor in proceedings pending or anticipated, even though he obtained the statement for other purposes and intended to settle the matter, if possible, without resort to a solicitor. This investigatory privilege, sometimes designated as quasi-privilege in order to distinguish it from the classical or true privilege, was thus extended to cover all materials and information obtained by the party or his attorney after it became apparent that litigation might develop. The need for the freedom of the solicitor

Cote v. Knickerbocker Ice Co., 160 Misc. 658, 660, 290 N.Y. Supp. 483 (1936) (holding report privileged only if attorney-client relationship existed at time of delivery to insurer); Robertson v. Commonwealth, 181 Va. 520, 25 S.E. 2d 352 (1943) (report not privileged because prepared in course of business, but case represents liberal trend in construction); Tomek v. Farmers Mut. Auto Ins. Co., 268 Wis. 566, 68 N.W. 2d 573 (1955) (information obtained in investigation by attorney held not privileged; statute limits privilege to transactions with client). See also: Notes, 139 A.L.R. 1250 (1942) (privilege as applicable to communications between attorney and client’s agent); 146 A.L.R. 977 (1943) (report by agent to principal in regard to matters afterwards in litigation as privileged); 22 A.L.R. 2d 659 (1951) (reports from insured to insurer as privileged); 73 A.L.R. 2d 12, esp. 84-100, 133-42 (1960) (statements of parties or witnesses as subject to pre-trial or other disclosure, production or inspection); Comment, Agents Reports and the Attorney-Client Privilege, 21 U. Chi. L. Rev. 752 (1954); 4 Moore §§ 26.23 at 1090 et seq.; VIII Wigmore §§ 2317-19; McCormick § 100.

But there are still anomalies in the English precedents. E.g.: In re Holloway, [1887] L. R. 12 Prob. Div. 167 (Eng.). Anonymous letters received by plaintiff were held not privileged, but anonymous letters received by her attorney were held privileged. This decision can be rationalized, however, if the privilege is conceded to the attorney’s preparation, as it is in England under the label of quasi-privilege. Ogden v. London Electric R. Co., [1933] 149 LTns (Eng.) 476 — C.A. This case might be said to constitute the furthest limits of the extension of the quasi-privilege. See also cases cited in note 60 ante; and 166 A.L.R. 1429, 1440-41 (1947).

77. Ogden v. London Electric R. Co., [1933] 149 LTns (Eng.) 476 — C.A. This case might be said to constitute the furthest limits of the extension of the quasi-privilege. See also cases cited in note 60 ante; and 166 A.L.R. 1429, 1440-41 (1947).

78. See Anderson v. Bank of British Columbia, [1876] L.R. 2 Ch. Div. — C.A., esp. opinion by Jessel, M.R. which gives the clearest discussion of the distinction between privilege and quasi-privilege. The writer would designate this as the great English case on privilege. Compare Greenough v. Gaskell, [1833] 1 Myl. & K. 80, 39 Eng. Rep. 618 (note 52 ante), which loosely lumps the two categories together. This failure to distinguish quasi-privilege from the classical or communications privilege may have resulted in some confusion in the decisions themselves. It has certainly caused misunderstanding in the United States, where in many jurisdictions only the communications privilege is recognized, of the precedential value of the English decisions.
to prepare his case without fear of discovery of the materials which he gathered in advance of the trial was recognized. The quasi-privilege had its origin in this felt need. The extension to his agents followed naturally, due to the limited capacity of the solicitor to conduct a large volume of preparation when his services were in demand. The extension of the quasi-privilege to cover the client and his agents, however, was the result of a fiction that the client was the agent of the attorney for the purpose of making investigations which the latter would make personally if circumstances permitted it. The result has been to throw a blanket immunity around the preparatory materials of litigation in England, and this has undoubtedly off-set the advantage to accuracy in fact-finding that has resulted from the tendency of the English courts to interpret the classical privilege narrowly. It cannot be doubted that the solicitor-barrister division of the litigation process in England has been an important factor in this manner of treatment. Also, a philosophy of trial strategy which considers the "surprise element" an important value to be preserved has had its influence.

As a result of differences in legal history which have just been discussed, the development of the basic principles of our law of privilege came full blown, based largely on English precedents. But in the United States, liberal discovery did not in practice have any great significance, and consideration of certain problems in fringe areas was not forced upon the courts until more recently. Moreover, a tendency to equate the scope of the privilege with the scope of the area of materials free from discovery has frequently led to confusion, unreliability of precedent, unjust expansion of the privilege, and opposition to liberal construction of discovery statutes and more comprehensive remedial legislation at each step. Nor has Wigmore

79. The courts have been conservative in interpreting the rules of liberal discovery in America. Thus, in Thompson v. Harris, 355 Mo. 176, 195 S.W. 2d 645 (1946), under a statute which allows discovery of "evidence material to any matter involved in the action," the court refused to allow inspection of plaintiff's statement and third party witnesses' statements obtained by defendant's investigators. The court based its decision on the theory that these items would not be admissible on behalf of plaintiff except for purposes of impeachment.

The denial of discovery has also been put on the ground that discovery extended only to matters material and necessary to plaintiff's case and did not extend to the opponent's case.

The general rule in the United States has thus far refused discovery of reports and witnesses' statements of the opponent, and when liberal discovery has been so broadened as to completely eliminate this restriction, the courts have fallen back upon the privilege as a defense. In the case of the federal courts, a "qualified immunity" was created to achieve this result.

There is a paradox in the assignment of the hearsay rule as the reason for denial of discovery. This rule is designed to make the trial more accurate by keeping out misleading information, but in this instance it is used as a justification for denying access to information which would make the trial more accurate.
been so keen in perception of analytic principles or so critical of exclusionary rules and precedents in this area as he has been in general. We are now in a new stage of development, forced upon us by the recent institution of rules of ultimate liberality for the discovery of evidence.\(^8\) The new developments are largely concerned with the degree and scope of protection to be accorded to agents of the client and agents of the attorney. A question yet to be adequately faced is that of the applicability of the privilege to the modern corporation, particularly in the light of the altered status of the large or quasi-public corporation, and the applicability of the privilege to governmental bodies and public agencies. Another question pertains to the scope of the protection which should be accorded to the individual’s right to privacy, which is threatened with invasion from new and dangerous quarters in the form of modern scientific devices, against which the individual is helpless. This, however, is a part of the larger problem of infringement on individual freedom.

Wigmore, who favors the privilege, acknowledges that “[i]ts benefits are all indirect and speculative; its obstruction is plain and concrete.”\(^8\) The privilege can only be justified by underlying principles which support the policy that is recognized and enforced through the rules of law which taken altogether constitute the privilege as an area of substantive law — which, however, is generally thought of as adjective law, because of its juxtaposition to and interrelation with the divers aspects of production of evidence in connection with pretrial and trial procedures. These principles must derive their life from twentieth century values. To measure the privilege in the light of these values requires that we should first answer the question as to whether the privilege can be justified at all in today’s world. This in turn requires the consideration of the preparatory and trial process in our adversary system of litigation against the background of our twentieth century scheme of values. If the policy is sound, then the question arises as to how far the rules, coterminous with underlying principles, should extend.\(^8\) Consideration of the case law indicates that it is well settled in most areas of attorney-client privilege. This means that rules and principles are coterminous in these

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\(^8\) The new system might well be characterized as “open discovery.” An idealized version of open discovery would mean a system in which all evidence which is relevant to the subject matter and not privileged should be available to the party desiring it in advance of trial and without need for first overcoming procedural impediments.

\(^8\) VIII WIGMORE § 2291 at 557.

\(^8\) A related question is how “absolute” should the privilege be in the areas where it is held to exist. Should it be of temporary duration or permanent in nature? Should it be easily overcome, as by waiver, termination by death, change of circumstances, hardship, or loss of confidential character?
areas. Such areas will not require treatment in this paper. But in areas of current uncertainty, the search for the correct solution is apparent from a consideration of the many cases which are being decided by the courts. In this area of current growth and development, there are new factors to be weighed and decided and earlier precedents to be re-examined and re-evaluated in the light of recent experience and current needs. The remainder of this paper will be devoted to this objective.

B. Policy:

The most devastating attack upon the privilege was made by the great rationalist philosopher Jeremy Bentham. Bentham considered the argument that if there were no privilege, potential litigants would not seek the advice of counsel. His reply may be summed up as follows: to deter a guilty man from seeking legal advice does not thwart justice but rather aids it, while the innocent man is not deterred, as he has nothing to fear by the disclosure of his communications to counsel. It has been said that this argument "cannot really be met as long as we keep on the level from which Bentham views the subject." But this is the level of pure abstraction, and the matter is not so simple as Bentham makes it appear. Furthermore, the context of the privilege in actual practice must be considered. For example, there may be a greater problem in counsel's obtaining the whole story once a person has summoned the courage to consult with counsel. Then, there is the problem of the client's feelings, the relation between the client and his lawyer as a counsellor and advocate, and finally, the position of the lawyer in the eyes of the public. All of these facets of the complex relationship which tends to develop between the client and his attorney are a part of the larger

83. Bentham, Rationale of Judicial Evidence, b. IX pt. IV, c. 5, in VII Works 474 et seq. (Bowering's ed. 1843); quoted in part in VIII Wigmore § 2291 at 553-55.

84. VIII Wigmore § 2291 at 555. Bentham considers the arguments supporting the privilege and answers them as follows: 1. Treachery. Ans. The lawyer is no more to be charged with betraying his client when required by law to testify than a close friend would be. 2. When the client has something to hide, he will not repose trust in his attorney. Ans. True, but the public good will not be better served by adopting a policy which would cause trust to be reposed in such instances. 3. The lawyer needs accurate knowledge to conduct the case properly. Ans. True, but if the client is guilty, he cannot complain if he loses the case. 4 Rules of the chase must be observed. Ans. Yes, if safety of the guilty is the objective. What would be the advantages resulting from abolition of the privilege, Bentham asks. Ans. There would be little difference in the evidence available, since clients would seek lawyers of their own level, but a higher tone of morality would prevail at the bar. Loc. cit. supra note 83.

85. Radin, op. cit. note 30 at 491.

86. Ibid.
whole that must be considered in any fair evaluation of the privilege. Bentham obviously oversimplified the matter. If Bentham's position were unassailable, surely it would have had many ardent champions among the leaders of the bench and bar. Yet this has not been the case. Generally, the great men of the law have either favored the privilege or remained uncommitted on the issue. Bentham, Lord Langdale, and Chief Justice Appleton of Maine were the only eminent parties in radical opposition to the privilege prior to the twentieth century. And the rank and file of the legal profession have favored it strongly, either from a sense of professional pride or the felt need for its protection of the attorney-client relationship or both.

The modern rationale of the privilege, since the latter part of the eighteenth century, has been the policy promoting free consultation of clients with their legal advisors. Dean Wigmore accepted this position and also answered Bentham by raising four objections to the latter's abstract oversimplification of the problem, to wit:

1. In civil cases there is often no hard-and-fast line between guilt and innocence.
2. In most civil cases it does not happen that all of the facts on one side are wholly right and all of those on the other side are wholly wrong. There is a mixture on both sides in varying proportions. Both plaintiff and defendant may have fear of disclosing some part of his case. The party having the better case would be deterred from seeking legal advice, and this is not good for the administration of justice.
3. To deter a wrongdoer from seeking legal advice is not an unmixed good. It depends upon the ethics of the bar. Counsel can always decline a case, persuade his client to abandon it, or settle the case when some moral claim is present. Moreover, if the privilege were abolished, there are ways in which a guilty party could derive quite as much assistance from his legal adviser as at present.
4. Contrary to Bentham the consideration of "treachery" is important. The position of counsel would be most disagreeable if he were forced to testify against his client. It would be disturbing to his peace of mind and would create an unhealthy moral state.

Wigmore added two other points: (1) that in criminal cases, if the privilege were abolished, the prosecution might tend to rely

86a. Professor McCormick adds this point: "The need for such encouragement [to communication by the client to the attorney as the privilege affords] is understood by lawyers because the problem of the guarded half-truths of the reticent client is familiar to them in their day to day work." McCormick 202.
87. VIII Wigmore § 2291.
88. Id. § 2291 at 550.
89. Id. § 2291 at 555-58.
on defense counsel's testimony to the neglect of other and better sources of truth, while the defendant would not be deterred from seeking counsel but rather from disclosing incriminating facts; and (2) that the loss to truth is comparatively small in modern times, since the parties themselves can now be examined.

The late Professor Radin deemed that the main argument made by Professor Wigmore in support of the privilege is that a policy favoring frank disclosure discourages litigation. Professor Radin then proceeded to show, by the use of a hypothetical example, that this result does not necessarily follow from a policy promotive of frank disclosure. But he found a justification for the privilege in a broader if more nebulous principle, which can perhaps best be described as the right of the client to command the attorney's loyalty. Professor Radin stated his rationale of the privilege in the following language:

The real fact is that, whether we admit it or not, the Roman and the medieval attitudes are very much in our bones. We, too, think that the relationships based on mutual fidelity are valuable constituents of our society and we do not relish the idea of disturbing them even to aid the processes of formal justice. And, although we are conscious of lay derision, we still think of the fraternity of the law as a nobless of the robe, who are bound by a pondonor and have no few conventional duties that are not without their influence in facilitating and smoothing the social functions in which they intervene.

90. Id. § 2291 at 556, 557. The writer would challenge this last statement in two areas: (1) corporate and governmental privilege; and (2) agents' reports.

91. Op. cit. note 30 at 491. Wigmore's full disclosure argument has been answered by Professor Morgan on two occasions: Op. cit. note 28; Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence, 10 U. Chi. L. Rsv. 285, 288-90 (1943). Professor Louisell has answered it by the general tenor of his writings on the subject and in his plea for a new departure. He insists that the social ethos is the really important factor, that Wigmore's treachery argument is the best one which he advanced, and that the lawyer's treachery would pervert the function of counselling. Louisell, Confidentiality, Conformity and Confusion: Privilege in Federal Courts Today, 31 Tul. L. Rev. 101, 112 et passim (1956) (hereinafter cited as Louisell).

92. Op. cit. note 30 at 491-92. Thus, the client may hold back facts from counsel notwithstanding the privilege, he may seek another attorney and hold back facts related to the first attorney, or he may persuade an unethical attorney to take his case in any event.

A recent case which illustrates this proposition is Maier v. Noonan, 174 Cal. App. 2d 260, 344 P. 2d 373 (1959). Plaintiff consulted an attorney about bringing a paternity suit, admitting intercourse with a third party during the relevant period. Plaintiff brought suit, using a different lawyer, although the particular information was probably not privileged and thereby risked having it brought out against her in court. But cf. People v. Singh, 123 Cal. App. 365, 11 P. 2d 73 (1932), in which an attorney was criticized for testifying against his former client that the client had suggested bribing the jury (unprivileged communication).

Finally, Professor Radin considered what would be the result if the privilege were abolished and the matter left to the compulsory processes of the law and the ethics of the profession. He concluded that such a change would make little practical difference; the result would be much the same as at present. The honorable attorney would continue to practice law while maintaining principles based on loyalty and honor, while the dishonest attorney would not take his affirmative duties94 any more seriously than he now takes his duties when consulted by clients for the purpose of criminal or tortious activities which they intend to carry on thereafter — and with as little risk of prosecution. Furthermore, the creation of legal duties not likely to be effectively enforced would tend to hurt the general moral tone of the profession95 and thus to bring the private civil law into disrepute in the community.

The writer agrees with Professor Radin that the idea of "mutual fidelity" and the honor of a dynamic social organization are important values in our society. If not the very "woof and warp" of our adversary system of judicial administration, they at least constitute the foundation upon which the attorney-client relationship rests and without which it could not exist as a working part of the judicial system. Lawyers are at worst a class that is in disrepute with a large part of the public, by the very nature of its occupation, which in certain respects stirs up and thrives on strife. At their best, lawyers are the mainstay of our judicial system. Without them, the legal system as we know it could not operate effectively, and in any modern system of government in which politico-economic freedom is treasured, lawyers are essential to keep the system working under proper tension. The lawyers have played an important role in the history of western society from the days of the Greeks and the Romans. They have contributed much to the growth of individual liberty, often being the bulwark between oppressive policies of state and the rights of the citizen or subject. In the history of man's long struggle to attain a higher level of social life and values, lawyers have fought against state oppression of the individual, have fought to vindicate individual rights, and have struggled to maintain the rule of law and to uphold the cause of human dignity in an ever widening stream.96 If it should become the practice to call an attorney

94. That is, to voluntarily come forward and testify against his client or at least to tell the truth when compelled to testify.
95. Op. cit. note 30 at 493-96. Professor Radin suggests that the honor of the attorney remains an important factor in the preservation of the privilege today. See note 35 ante.
96. See generally CORWIN, LIBERTY AGAINST GOVERNMENT (1948.)
to the stand and force him to testify against his client, the client would not only fear to make full and frank disclosure to his counsel in many instances — he would despise and doubt, rather than trust and honor his individual attorney, as he generally does at the present time.97 Not only would this result in a lowering of the moral tone of those who are in the profession, but it would cause self-respecting people to avoid the law as a profession. This would strengthen the position of the unethical element, and it would cause a general lowering of ethical standards.

Professor Radin's argument of "mutual fidelity" is closely akin to and perhaps only a broader statement of Dean Wigmore's treachery argument. Dean Wigmore's first three arguments actually fall under one heading, namely, there is generally no open-and-shut case, no clear-cut instance of black and white, no hard-and-fast line between guilt and innocence, no case where an honest lawyer cannot exert an influence for the good of both society and his client. Most cases are one of a variety of shades of gray, and this is true in criminal cases as well as civil cases. It is true not only as to the personalities involved but also as to the factual situations themselves.98 It is even true of the law in its unsettled areas and of the application of the law to the facts when neither the law nor the factual situation is in dispute. That cases do fall in this "in between" area is what makes the sense of treachery loom large, because of the large area over which it has room to roam, if not curbed by some such protective measure as the privilege affords. On the other hand, it is the sense of treachery difficulties which would cause the potential litigant to shun the lawyer's office (and the client to be reluctant to make full disclosure once there). Thus, these two categories, though separate and distinct, are closely interrelated and are important factors in the generally felt need for the protection afforded by the privilege.

The following experience of the writer during his early days of practice will illuminate the degrees of the gray problem. After he had practiced for only a short time, the writer expressed his surprise to an old and distinguished lawyer that so many intelligent people could not make an intelligent statement of the facts of a problem concerning which they sought legal advice. The old lawyer said that this is frequently the case and that under such circumstances it is the duty of counsel to determine what the facts are as best he can and

97. See Drinker, Laymen on the Competency and Integrity of Lawyers 7-8 (reprint from TENN. L. REV., April 1952).
then tell his client what actually happened. This is undoubtedly proper, though it may take much thought and investigation and fitting together the pieces of evidence like parts of a jig-saw puzzle. And this is true even though the client may have been an eyewitness to some part of the overall situation, since no eyewitness can claim omniscience. This is one of the most difficult, yet one of the most essential functions of the lawyer in the adversary process. Its most effective use requires great skill, which comes only with much experience in counselling people and a high aptitude for working with people and understanding human nature. One must always use care, however, to avoid coaching a party or witness to testify to facts not within his personal knowledge and, as both a practical and an ethical matter, should caution him to testify only to his perceptual knowledge.

The writer has spoken of the above occurrence to some laymen who immediately concluded that the old attorney was dishonest. The writer, however, believes that the old lawyer had a high sense of both honesty and loyalty and that these laymen were both inexperienced and naive. The old attorney was suggesting only what every lawyer should do when he accepts a case: gather the data, analyze it, and prepare it so as to make the most favorable presentation for your side; then look at it skeptically and advise your client as to the possibilities, freely, honestly, and fearlessly. Even then a lawsuit is a very unpredictable thing. As Professor Morgan has repeatedly warned his students: "You'll sweat blood when your [key] witnesses are on the stand."

99. See also Simon, The Attorney-Client Privilege as Applied to Corporations, 65 Yale L.J. 953, 954 at note 6 para. 3 (1956).
100. See also Almo v. Del Rosario, 98 F. 2d 328 (D.C. App. 1938) (holding that plaintiff was not concluded by his own testimony). See also op. cit. note 98.

As a distinguished criminal lawyer once told a young trial court judge in the presence of the writer, the facts all fit together to form a coherent pattern. When a lawyer gets a case, the facts do not seem to form any clear pattern, and it is his first task to assemble them and arrange them into a meaningful picture of what has transpired. The lawyer must present to the trier of fact as good a picture as can be presented at second hand, in the mind's eye, so to speak. To do this, he must first re-live the facts himself. When he endeavors to do so, he may find some facts of varying significance which do not fit into the pattern in a meaningful manner. If this is the case, then he must continue to re-live the facts until they all achieve meaningful significance in the harmonious arrangement of the scheme as a whole. Only when the lawyer has thus mastered the facts is he in position to try the case. Mastery of the law is important, but the facts are generally of controlling importance.

101. AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL ETHICS, Canon 39 (witnesses); Canon 22 (candor and fairness) (hereinafter cited as Canon ....); and see text at note 104 post. For a good statement of the American position from the practical standpoint, see Hawkins, The Trial of a Lawsuit in the United States, 46 A.B.A.J. 821, 826 (1960).

102. To his class in Evidence, Harvard Law School, Summer Term, 1946, the writer being present.

On the elusive nature and fluidity of facts in the trial courts, see generally FRANK, LAW AND THE MODERN MIND (1930).
The above-indicated practice is not only entirely proper, but it helps the lawyer to play a more constructive role in the administration of justice. If the privilege were abolished, the lawyer would be seriously handicapped in performing this function, because he would be required to narrate in detail, both on oral deposition and from the witness stand, the conversations with his client. Opposing counsel could create a false impression of the circumstances in a great many instances; and, especially before juries, who are unlearned in such matters, 102a a lawyer skilled in histrionics could make a field day of it. At the outset of the case, any lawyer would thus be forced to forego the basic duty of rendering his highest devotion to his client's cause — by not helping the client to figure out what happened on the crucial occasion — or to take a chance, in rendering such devotion, that cross-examining counsel would be able to make it appear, from the testimony of the lawyer being examined that he the latter had fabricated the client's version of the facts. Here, the sense of treachery element looms large.

There is, however, another aspect of the matter, namely, the lawyer's duty to assist his client to have self-knowledge, so that the latter may discover his problems and enlighten himself as to the correct solution, to feel that he shares control with his lawyer and that they are together in victory or defeat. This sense of rapport is an important factor in the achievement of a feeling of individual justice under our adversary-type of judicial system. The creation of this sense of empathy and of unity will frequently represent counselling at its best, and no inconsiderable part of counsel's role will consist in counselling by indirection and cross-examination of the individual client. 103 Moreover, counsel is frequently faced with fluidity of the facts and tenuousness of the relationship in the early stages of the

102a. This is ethically condemned but unfortunately is a matter of common practice at the present time. The standards of the bar being what they are, it may be expected to continue thus so long as the materialistic aspects of our culture are held up as the incentives for endeavor, which means the indefinite future.

103. Mr. Simon sheds light on this practice and its possibilities in the following passage: "It seems to this writer that the true subjects of the privilege are the clients who are in the common position of not really 'knowing' the facts because they do not understand the significance of what they think they saw or now remember. It is precisely because facts are subtle, elusive, and often unknowable that counsel (in civil as well as in criminal cases) is expected to show them in their best light, just as his adversary has the task of putting them in their worst. The entire process of cross-examining one's own client in camera, of finding and presenting facts whose exact contours may never be known, is in our society a vital aspect of legitimate partisanship. Perhaps there are some isolated areas of adjudication where clients should be required to throw themselves upon the mercy and discretion of an impartial inquisitor. Yet it hardly seems feasible to dispense with the adversary system everywhere and at one blow. The result would not be less partisanship, but a different kind, for the unscrupulous lawyer and the dishonest client would be able to thread a path that the more conscientious could never follow." Simon, op. cit. note 99, 954-55 n. 6.
case. Here, the privilege is an important factor in helping the skilled counsellor to provide the client with the sense of security and confidence which will enable the lawyer and the client to work out the matter as a team in such a way that if individual justice cannot be made to prevail it will at least have had a fair chance. It is doubtful if the lawyer would have the necessary freedom and persuasiveness to handle the matter with the same skill and devotion, particularly in the case of the client with intense personal problems — with the accompanying state of emotional involvement — in the absence of a substantial amount of freedom from the threat of compulsory disclosure of at least that information which would tend to make the client look ridiculous, hurt his standing in the community, or seriously threaten his economic interests. Yet, it is in this area that the practice of law achieves its best results — by reason of the services offered to the individual client during times of difficulty, doubt, and emotional turmoil. If freedom from compulsory disclosure were not assured, the lawyer simply could not assume the role of counselor with the high degree of effectiveness that the achievement of justice requires and which generally obtains in the practice of law today.

Even in criminal cases there is a stronger argument for preserving the privilege than that the prosecutor will work up a good case from his own resources, and a better reason than that the defendant will lie to his counsel about any incriminating items — however important these factors might be. There is the notion of a fair trial, with adequate representation. There is serious doubt as to whether this is possible unless there is freedom for the client and his attorney to prepare the case without the knowledge and interference of the state. In any event, it does not appear unreasonable that the state, with all its vast resources, should be required to prove its own case unaided by the almost subjective admissions of the individual in this important area of "interest in personality," where personal freedom may hang in the balance. As Professor McCormick has pointed out in connection with the privilege against self-incrimination, if the privilege were taken away, the lawyers in many instances would be hard put to make a fight worthy of a fee.104 Thus a man's right to his day in court would be seriously infringed.

Yet, the principle is bigger and more important than that. The question is, do we want to put the highest safeguards around the accused in criminal cases. There is a close connection between the

104. McCormick 165.
privilege against self-incrimination and the attorney-client privilege in criminal cases. In fact, the latter is a logical extension of the former in the area of the criminal law. There are too many miscarriages of justice as it is without adding a restriction here. Is not this privilege of having a confidential legal advisor just one of the precautions which we should take in our effort to safeguard the liberty of the accused until he has been proven guilty? But above and beyond that, should we not allow the defendant, for reasons of his personal sense of security and fair play, the right to a trusted legal adviser whom he can use fully and freely and without fear that what he discloses to such adviser may be used against him? The writer believes that in choosing between competing values we should endeavor to preserve the privilege in its essential area, the face-to-face situation. In the area of the criminal law, the privilege of confidential communications between the client and his legal adviser should be recognized as a human value in a class with the privilege against self-incrimination, the privilege against illegal search and seizure, and the constitutional right to counsel. The protection of such a minimal right to security of personality as was recognized by the Supreme Court in denying the state courts the power to act upon evidence obtained through the use of a stomach pump on the person of the defendant without his consent is a case in point. Therefore, for our purposes, Rochin v. California is another landmark of the law.

In the Rochin case, Justice Frankfurter, speaking for the majority, first pointed out the requisites of due process and then went on to hold that it violates due process for a law enforcement officer to extract evidence from the stomach of a suspected law violator. Such methods "do more than offend some fastidious squeamishness of private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. . . . They are methods too close to the rack and screw to permit of constitutional differentiation. . . . Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society." He then characterized the conduct

105. Id. § 75; Morgan, op. cit. note 28, 7, 27; Radin, op. cit. note 30, 493.
106. See Borchard, Convicting the Innocent (1932); Frank and Frank, Not Guilty (1957).
108. Rochin v. California, 342 U.S. 165 (1952). It should be pointed out that as of the present the due process clause is not held to guarantee the privilege against self-incrimination from infringement by the states. See Adamson v. California, 332 U.S. 46 (1947), with strong dissent.
110. Discussed in text at note 276, post.
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as "offensive to human dignity." The Supreme Court of California had denied a hearing after affirmation of a judgment of conviction by the District Court of Appeal; two judges dissented. Other courts have allowed conduct which would seem to be highly improper in a humane society. Justice Frankfurter seems to have difficulty in precisely articulating his standards, but is this not because these standards, drawn out of an evolving social ethos, are not capable of more precise statement at the present stage of legal development? Nevertheless, it is being recognized that, at least in extreme cases, the concept of human dignity is protected by the due process clause of the United States Constitution. This is a definite advancement. No previous Supreme Court decision had gone so far. The courts of the British Commonwealth do not seem to have been disturbed by the problem, though a similar question has arisen in Canada.

The writer submits that time has not vindicated Bentham's reply to the "rules of the chase" argument in support of the privilege. This argument has more force today than when it was first promulgated.

111. 342 U.S. 165, 172, 173-74 (1952). It should be pointed out that here accuracy is not the vital factor. "To attempt in this case to distinguish what lawyers call 'real evidence' from verbal evidence is to ignore the reason for excluding coerced confessions. Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently true. Coerced confessions offend the community's sense of fair play and decency...." Frankfurter, J., in Rochin v. California, 342 U.S. 165, 173 (1952).


113. The examples are too numerous to require citation. A single confession-due process case will suffice: Brown v. Mississippi, 297 U.S. 278 (1936). See also Paulsen, The Fourteenth Amendment and the Third Degree, 6 STAN. L. REV. 411 (1954); McCormick Ch. 12.

114. Rex v. Brezack, [1950] 2 D. L. R. 265 (Ont. C.A.). Here, two officers were rather vigorous in pouncing upon the defendant and choking him in an endeavor to prevent his swallowing narcotics. Subsequent search revealed no narcotics on the defendant's person, but capsules were found in his car nearby. The court was not disturbed by the conduct of the officers but found that the defendant had committed an assault in biting the fingers of the officers when inserted into his mouth in an attempt to recover the drug erroneously believed to be secreted there. This case is compared with Rochin in a Comment on Rex v. McIntyre, [1952] 2 D. L. R. 713 (Alta. Sup. Ct.) (analysis of blood sample removed from person of accused without warning held admissible), in 30 CAN. B. J. 747 (1952).

The effect of Rochin in California may be seen from the change of attitude manifested in People v. Martinez, 130 Cal. App. 2d 54, 228 P. 2d 26 (1954), where an officer placed a choke hold on the defendant, forcing him to spit out the narcotic package. In reversing the conviction, the Court of Appeal observed that the question "is not how hard an officer may choke a suspect to obtain evidence but whether he may choke him at all." 130 Cal. App. 2d 54, 56. The Court declared that the Rochin case "should serve as a warning to all those who are tempted to use brutal force for the extraction of evidence from the person of the accused." Id. at 58.
Yet, its statement by Mr. Denman (later Lord Chief Justice) is as fine as any:

[It has been argued by a defender of this privilege that the guilty are entitled to be protected to a certain extent; that supposed policy has been thus phrased:] "Even in the few instances where the accused has intrusted his defender with a full confession of his crime, we hold it to be clear that he may still lawfully be defended. The guilt of which he may be conscious, and which he may have so disclosed, he has still a right to see distinctly proved upon him by legal evidence. . . . Human beings are never to be run down like beasts of prey, without respect to the laws of the chase. If society must make a sacrifice of any one of its members, let it proceed according to general principles, upon known rules, and upon clear proof of necessity. . . ."]

If this reasoning be not true, then "due process of law" means nothing. It is only a question of degree between adherence to fair procedures — giving due regard to the substantive ends to be accomplished, as well as the human sensibilities and values which must be preserved in the course of achieving such accomplishment — and the innovation of the patriot Robespierre, that the preferring of a charge before the French Revolutionary Assembly should be the equivalent of trial and conviction.

While this illustration may be said to represent a difference in degree so great as to amount to a difference in kind, it nevertheless serves to illustrate the vital importance of procedural rights in a world which is sensitive to the finer nuances of individual justice. The long history of civil procedure bears witness to that, while the light afforded by the history of procedural due process in our constitutional law is its best evidence. This does not mean that our procedures must be exhausted into an art made esoteric with the worship of technicalities. That condition has been the vice of two former periods of our legal history. Rather, it means that fair procedures must be developed and followed. Generally speaking, our procedures must have such degree of flexibility as will facilitate the accomplishment of their purposes, but within the limits of such reasoned flexibility they must be enforced or carried out. Our pro-

115. Loc. cit. note 83, ante. A statement by Mr. Denman (later L.C.J.), which is answered by J. S. Mill, editor of Bentham's treatise, in "the best Benthamic spirit." VIII Wigmore § 2321 at 553 n. 2.

116. To hold otherwise is to allow the state itself to engage in acts of illegality, to give legal recognition to lawlessness in the enforcement of our laws. This, for example, is the view expressed by Holmes, J., dissenting, in Olmstead v. United States, 277 U.S. 438 (1928).

117. See Belloc, Robespierre 310, 339-56 (1908); for a short account, see Morley, Biographical Studies, Robespierre, 241-362 at 340-62 (1923).
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In procedures are no less important than the substantive principles they are designed to secure. Fair procedures, faithfully administered, are the specific guarantee to the general populace of the substantive rule of law. The attorney-client privilege in the criminal law is a part of that essential minimum which is designated as procedural due process. In the civil law, it is one of the devices by which the right to reasonable privacy is secured in the area of personal relations (without the necessity of a forced election which could have the effect in individual instances of a denial of justice, the threat forever lurking in the background). Would not important procedural safeguards be lacking if the attorney-client privilege were abolished? In any event, Bentham’s argument to the effect that the guilty have no right to the protection afforded by technical rules of procedure is patently unsound. To hold otherwise is to decree judicial fiat on an ad hoc basis in the place of equality before the law, with the ultimate goal of social justice.

It has been said that the privilege is on the way out, and that the path it may follow is that from rule to discretion. The writer submits that as a general proposition this should not be permitted to occur. The path we take will depend upon a choice of competing values, both of which have strong claim to recognition. Since the claim of evidence is constant and all inclusive, while the claim of privilege is only occasional and limited, a proper choice requires that the latter should yield to the former except in those instances where to yield would mean the surrender of the principle itself in its essence. The claim of privilege not to disclose must be carefully balanced against the claim of evidence to compel disclosure, in the light of the particular kind of circumstances. On balance, the result will be that in a narrow area, that of the face-to-face relationship, the privilege should be preserved as an absolute rule of exclusion, with certain rare exceptions to be hereinafter noted. In another area, there should be a qualified immunity or rule of discretion, and in all

118. The writer sometimes uses the term “social justice” to mean the equivalent of a fair hearing and the term “individual justice” as that which an omniscient being would decree after such a fair hearing, thus giving the individual his personal “just due.” The term “social justice” is used in that sense above.
119. McCormick 166. To the same effect is Oldham, Privileged Communications in Military Law, Military Law Rev. July, 1959, 17, 66. He argues for the privilege and against making numerous exceptions to it but believes that a “sound discretion” should be reposed in the law officer “to overrule privileges for considerations of justice.” To the same effect is the Report of the Committee on Improvements in the Law of Evidence, American Bar Association, Section of Judicial Administration, pt. III, § 12 (March 15, 1938). De Parcq agrees with McCormick that the privilege is on the way out. De Parcq, The Uniform Rules of Evidence: A Plaintiff’s View, 40 Minn. L. Rev. 301, 322 (1956).
120. Cf. McCormick 208-10. The criticism of such classification as Professor McCormick suggests is that it interferes with the Thayer principle of keeping the rules of evidence simple and easy to apply. See Thayer, A Preliminary Treatise on Evidence 529 (1898).
other areas the privilege should not be recognized at all. The proper scope and flexibility of the privilege will be considered in the remaining pages of this paper.

III

PRACTICAL CONSIDERATIONS

The writer submits that the attorney-client privilege can be rested upon a sounder foundation than any that has heretofore been suggested and that it must be placed on such firm foundation if it is to survive as a generally unqualified immunity in the modern law of evidence. Professor Wigmore articulated two specific and practical elements of this foundation in his degrees of gray argument and in his sense of treachery argument. Professor Radin sought a stronger foundation for the privilege, but his rationale took a negative turn when he went back to the Middle Ages and the Civil Law to find its justification in a certain immaturity persisting in human personality development down to the present time. Professor Louisell, more recently, has made a convincing case for justifying the personal privileges on the basis of our cultural values. Each of these justifications of the privilege contains an element of the truth. The last-named one represents a positive and more comprehensive approach to the problem and thus seems to the writer to be nearer to the solution of the problem (the comprehensive basis).

The seventeenth and eighteenth centuries were the age of reason and enlightenment. Believing that “reason” was the key which could unlock the universe, men undertook to remake society on rational principles. Institutions which had come down from the past were made to stand the test of reason or be cast aside. But much that had been handed down from prior ages was of value, though it might not be justified by abstract reason readily perceived, and the seventeenth and eighteenth centuries did not have many of the valuable tools which the modern social sciences are developing for measuring social institutions and how they function. In the Age of Reason, men worked on the basis of pure reason and the imaginary projection of hypothetical situations into the future. The result, in the case of the attorney-client privilege, was an abstract defense, based on the ideal


Dean Griswold has made a strong plea for the preservation of the privilege against self-incrimination as a part of the civilized values of our culture. GRISWOLD, THE FIFTH AMENDMENT TODAY (1955).
of loyalty or the felt need of encouraging full disclosure of the client to his legal counsellor; or a rationalistic attack, such as Bentham made, without giving sufficient consideration to the realities of everyday life. Thus it came about, by reason of the milieu in which the great thinkers of the day lived and worked, that their attacks and defenses of the privilege were a priori and little more. Today, we are better informed. We know that while reason is a valuable tool, it is not the only one. We also know that the product of reason must be constantly re-evaluated in the light of experience, new learning, methods, and values. In fact, that is the method of judicial empiricism, in the finest tradition of the common law, the search for the workable legal precept, the principle which is fruitful of the good result.

Finally, we can bring to our aid in evaluating the privilege much practical experience of the last three centuries from the court records, the personal recollections (often unrecorded) of bench and bar, and the studies in the various fields of the social sciences. While our analytic synthesis must be largely rationalistic, it will be made in the context of this growing yet time-proven method.

Dean Wigmore proceeded mainly after the manner of the rationalists but also urged certain practical considerations. He adopted the view that the public policy favoring full disclosure by the client to his counselor of all facts within his knowledge is very important. In support of this viewpoint, he put forth the treachery argument and the degrees of gray theory of the value of the case. He argued that recognition of the privilege actually discouraged litigation. This has already been discussed briefly, and Professor Radin's related views have also been considered. These facets of the foundation of the privilege are important, but they are not the rock foundation upon which the privilege must be anchored as sound legal principle. The privilege is based upon ethical values which are more or less intuitively understood by the legal profession generally. There are circumstances which follow as a natural effect of the privilege and which tend to support these ethical values. These circumstances tend to have important bearings on a large part of our litigation process. Hence, the privilege, though having its origin and its scope in abstract theoretical considerations, has highly practical

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123. For example, see Cardozo's four methods of the judicial process, namely: logic, history (evolution), custom, and sociology. Cardozo, The Nature of the Judicial Process 30-31 (1921).
124a. He pointed out that in criminal cases the privilege is necessary to the defendant's day in court and that the loss of evidence therefrom is comparatively small in modern times, since the parties can now testify.
125. See text at note 85 et seq.
effects or results. Therefore, at this point, the writer will briefly consider the privilege from the practical standpoint of everyday life in the law.

The reluctant litigant has no choice other than to seek the aid of an attorney when his interests are seriously threatened in areas where legal action or defense is the most effective remedy. Of course, there will always be reluctant suitors, and this will be true whether or not there is a privilege. It cannot be told of course whether the parties would be any more reluctant if the privilege were lost. Probably not in today's sophisticated world, since a party can consult a lawyer without giving the complete account, and this is well understood by the rank and file of the general public, not to mention the more elite. Nevertheless, there will always be a certain amount of hesitancy by the timid and the hunted in consulting counsel, and we cannot be sure as to just how much the existence of the privilege tends to negative such natural hesitancy of people in these categories. If this alone were the problem, then we might well hesitate to insist upon the retention of the privilege, because of an inability to reason from the premises to the conclusion (of its proven value). Its degree of value here will always tend to remain largely in the area of speculation. However, when we reach the area of actual consultation of the lawyer by the client, we are on more solid ground in support of the privilege. Even here, however, it is soon apparent that the client in general has no other choice than to make full disclosure to his lawyer, for his own enlightened self-interest. Nevertheless, if he does not make full disclosure to his lawyer there is nothing which can be done about it — except that the experienced counselor can exercise patience and use his persuasive powers. In fact, it is often the case today that the client will fail to fully disclose the facts of his case to his counsel even though he is fully protected from compulsory disclosure of either himself or his lawyer through the judicial process, and is well aware of this protection.

In practice, this is what may actually happen: before he goes to a lawyer, the client makes a judgment as to how much he will tell and how he will relate it. His conclusion may be firm or it may be flexible. He may revise it from time to time. The lawyer himself may not clearly conceive the position which he should take at the beginning of a new professional relationship, though it can be safely said that in general he desires to have the facts as soon as he can obtain them. In a particular case, however, he may endeavor to obtain full disclosure either at once or gradually, as he wins the client's confidence and establishes a good relationship. On the other hand,
the lawyer may not want to know all the facts. He may prefer to
guess and to deal with what the client tells him, feeling that he thus
has a wider range of choice in preparing and choosing his course of
action, and this is particularly true in criminal cases, where the
necessity for a trial may be inevitable and the liberty of the client may
hang in the balance. Yet, if there were no privilege, the tendency
of defendants to make full disclosure in the vast majority of the cases
would undoubtedly be diminished in substantial degree, and the
lawyer would probably make less effort to learn everything about
the matter. In fact, it might well become the lawyer's ethical duty
to warn the client that anything the client might say could be used
against him.

The relationship of attorney and client is close and personal. For
it to be most effective, there should be complete trust and confidence.
A high degree of trust and confidence is difficult for the profession
to achieve under present favorable circumstances. It would be more
difficult without the rules of privilege. The promotion of justice
is a most important value in any rationally oriented society. In our
system of administering justice, the attorney plays a pivotal role.
"[T]he lawyer's office is the very ante room of the courthouse." The
lawyer himself is the main actor on the little stage of the court-
room trial. It is necessarily this way in an adversary system of
litigation. Yet in all he does, the lawyer acts for his client, and he
owes the highest duty of devotion to the client's cause. It is essential
that this relationship of attorney and client should be protected by
the cloak of secrecy, unless the client should choose to waive the
protection. But it is equally important for evidentiary purposes that
this protection should extend only to the personal essence of that
relationship. This basis for limitation of the privilege must always
be kept in mind. It is when the courts have failed to do just this
that they have extended the privilege beyond the area of its natural
confines, that is, the area where the privilege should inhere, if we are
to recognize a privilege.

If the option of secrecy could not be reserved to the client,
the following undesirable results would tend to occur in a great many

126. The writer once saw a motion picture in which this was the case. A
skillful criminal defense lawyer represented a woman charged with murder. He
suspected that she was guilty and had no plausible defense. He did not press her
to obtain the true facts. Had he done so, his hands would have been securely tied,
but on the basis of her rather implausible story, he at least presented a defense
to the jury. Discussion with members of the criminal bar indicates that they have
no one generally accepted method of handling such potentially dangerous situations.
127. MCCORMICK 222.
128. E.g., see VIII WIGMORE § 2306 (Communications distinguished from Acts:
Client's Conduct, Appearance, Abode, etc.) ; §§ 2307-20.
cases, without any offsetting advantage on the side of evidence. Let us assume a common type of situation: The client C consults attorney A and is advised that C does not have a good cause of action. C then consults attorney B but changes the facts which he relates to B sufficiently to overcome the defects in his case that A has pointed out in the prior conference. Since A (not knowing what C has told B) would have an ethical duty not to disclose that he had been previously consulted, particularly if requested not to do so, the information contained in C's communication to A might well never come to the knowledge of the opponent. Hence, A would never be subpoenaed to give his deposition or to take the witness stand. But if this information should come to light and A were required to give his testimony, C could explain that his subsequent reflection or investigation, as the case might be, had indicated the facts to be different from those he had originally believed. C might even deny that he had told A that the facts were thus and so (that is, different from what he told B), and who could say that he might not be making the statement with an honest belief in its truth? All lawyers who have had experience with clients know that these instances do frequently occur, because they happen in cases where there is not the slightest motive to falsify or where integrity is unimpeachable or both. Under these circumstances, harm would have been done to the attorney-client relationship, the court's time would have been consumed, and yet the end result would probably not be substantially different from the one at the present time (when the privilege is recognized). In fact, if it should appear that the client was actually using the series of consultations as a basis for fabricating a claim or cause of action, there would be adequate grounds for either the first or the second attorney to come forward and disclose what he might know about the matter, under the tort or crime exception to the privilege. This is a partial answer to

129. But see Radin, op. cit. note 30, 492, 494-97; Canon 37; A.B.A., OPINIONS OF COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, Opinions interpreting Canon 37 (1957 ed.) (hereinafter cited as Opinion ....). The attorney's duty of fidelity to his client is not co-extensive with the privilege but extends over a wider area.

130. More rarely, though occasionally, it turns out that the client's version of what he formerly said to counsel is the more accurate one. This may happen more frequently than astute counsel would like to believe. Yet in most instances the trier of fact would probably tend to believe the lawyer, as a more impartial witness than the client. This would mean that when the client was right and the original lawyer was in error as to what had been said, the cause of justice would not be served by having the lawyer's testimony available.

131. See MCCORMICK 202. Mere variance does not show fraud so as to permit disclosure under this exception.

132. Discussed in text at note 150 et seq.
Professor Radin's argument against Dean Wigmore's statement of the practical difficulties which would arise if the privilege were abolished. Here, not only is the sense of treachery element lurking in the background, but the degrees of gray argument rushes to the forefront. The example given, which is a classical one, is an oversimplification of the problem, as it assumes a clearcut case on the facts, which we cannot have as a general instance, and yet the law in this area must be designed to meet the general average. Moreover, when the case is less clear, the argument for the privilege is even stronger.

Furthermore, assuming that the privilege were abolished, we cannot say that evidence would inevitably profit. That it would profit might be true in the case of the unwary, but are they not the ones least likely to falsify in any event? Are they not the ones about whom we should show some concern as a class to whom protection ought to be accorded? For the litigation-wise, there would be ways to avoid the disclosure of the facts of their case to counsel until they were in a position to understand something of the legal significance of such facts. For example, a way in which disclosure might be avoided (if the privilege did not exist) would be for the client to put to the attorney a hypothetical case. It is questionable if the attorney would be required to disclose the hypothetical case and the advice based thereon except under the most unusual circumstances. There are many variations of the possibilities here for obtaining sound legal advice without substantial risk of discovery of the actual facts known to the communicant or his purpose in having a conference with the lawyer. Thus, it is not uncommon for clients to call attorneys on the telephone, either anonymously or giving their names. The attorney might give the advice requested without inquiry; or if he learned the name of the party making the inquiry, he might immediately dismiss the matter from his mind and never recall it again. If he did recall it, he might not remember the name of the party calling or the details of the conversation or both. This is not at all unusual when the lawyer's mind is only mo-

133. Radin, op. cit. note 30 at 492. And see text at note 91 ante.

On this point, see generally Agency Problems in the Law of Attorney-Client Privilege IV, text at notes 58-59 et seq. (tentative draft of unpublished paper by the writer, to which reference is also made in note 343 post).

134. Because there is nothing to show that the case is based on circumstances other than conjecture. (The writer has had such cases put to him in private practice.) In fact, it would probably be unethical for the lawyer to disclose such a conversation, whatever he might suspect about the client's motives (as will be readily perceived when the attorney's ethical duties of confidentiality and loyalty are considered).

135. See note 129 ante.
mentarily diverted from the task at hand to one on the periphery of his consciousness. If the lawyer were later questioned about such a situation, he would certainly have to give the consultant the benefit of any doubt on the point of memory. Moreover, such a device (as the casual telephone consultation) could lend itself to abuse as a standard of subterfuge by the weak and the unethical, thus tending to discriminate against the lawyer with high ethical standards and to lower the moral tone of the profession generally. In addition to the casual or anonymous telephone consultation, wary and crafty individuals bent on litigation under any circumstances might well consult counsel initially through intermediaries, with the same or even greater effectiveness in maintaining the desired secrecy.

The aforesaid examples, however, assume a crystallized case, that is, one in which the client knows all of the important facts and their interrelationship and legal significance. Yet, this is generally not true when the client first seeks an attorney. As the late Judge Frank has taught the theorists, and as the practicing lawyers have known all the time, facts are slippery things, and they are crystalized at the beginning of a lawsuit only when there is some peg, some tether restricting the ambit of imagination around which a fertile mind can range. Thus, Harry Sabboth Bodin, the famous New York trial lawyer, describes a case in which an astute cross-examiner won a victory by pinning down an opposing party on the witness stand during the trial as to a certain fact which had only hidden significance. The technique is familiar trial strategy, though trial counsel generally do it almost instinctively when confronted with the situation. In this case, the witness (plaintiff) did not know the significance of a certain fact X. When asked about it on cross-

136. It would give the unethical attorney a potent weapon for compelling an honest party who had consulted him not to thereafter retain a different lawyer. Yet, neither dishonest lawyer nor client could be compelled to disclose what had transpired unless it was to their interest to do so, and then they would be able to restate the circumstances to suit the needs of their case as they conceived such needs. (This is a facet of the problem of "compelling perjury.")

137. This is a further answer to Professor Radin's argument against Dean Wigmore's statement of the practical difficulties which would follow if the privilege were abolished. The general area of attorney-client relations would be disturbed, the court's time would be consumed, and little if anything more would be accomplished toward the discovery of objective truth than at the present time. Both here and in the last illustration considered, there would of course be a big temptation on the part of both the lawyer and the client to commit perjury.

138. See Frank, Law and the Modern Mind, esp. first few pages (1930).

139. The written document is the most common example of such a tether. A good photograph is another example.

140. Bodin, Principles of Cross-Examination 66-70 (P.L. J. 1953 ed.). See also Cornelius, Trial Tactics Ch. IV, Preparation of a Case for Trial, 33 et seq. (1932).

141. The fact X was that a certain conversation took place on a certain date. This was not important in itself, but the defendant could prove that he had been
examination, he testified positively to its existence in a certain manner and form, and as a result he lost the case. If he had been less positive on this point, he would probably have come away the victor. Had he known of the significance of the matter, he might have given a qualified answer which could have been changed later, thus making insignificant the particular issue on which the case was actually decided. When the hidden significance of the fact X (the date on which a conversation had taken place) became apparent, the party could have said that he was obviously mistaken. The defendant would not have been able to disprove the substance of the plaintiff’s claim, since the particular evidence was more available to the plaintiff. A sympathetic jury might well have accepted a plausible explanation, even an error in memory, because such mistakes are a part of the common experience of mankind in circumstances where there is no motive to falsify. Furthermore, while it is probable in the particular case that the plaintiff’s claim was fabricated, it is by no means certain to the writer that this was the situation. And whether or not the particular conversation did actually take place on some other date, there are many cases of similar tenor in which witnesses are obviously mistaken about important facts and yet are truthful in the substance of their testimony. This is particularly true in the case of items such as dates, time, quantity, figures, and other numerical or quantitative items, and descriptions of people. The Chinese have a proverb that one picture is worth a thousand words; and, an experienced trial lawyer-author (quoting from another source) recognized the difficulties inherent in the problem when he made the following statement: “I would sooner trust the smallest slip of paper for truth than the strongest and most retentive memory ever bestowed on man.” It is well recognized by those who work with factual details that the memory of man is an inaccurate instrument when it comes to the recollection of details of past events, especially when unverified by other sensory data. It is equally well recognized that the accuracy of man’s initial sensory impressions depends upon numerous imponderables, both subjective and objective, such as his apperception, his immediate physical sensitivity, the surrounding conditions of the natural world, and his relationship to those conditions. All of these items make every case and every witness unique — aside from the fact that there are many out of town on the date on which plaintiff had positively asserted that the conversation took place.

142. It is believed that this example indicates that if there were no privilege, the lawyer’s position would be rendered more difficult by reason of the slippery nature of the facts alone.

142a. CORNELIUS, TRIAL TACTICS 62 (1932).
occurrences in which the detailed circumstances cannot be accounted for by the best trained minds, working with the developed techniques of this scientific age.

These factors should be carefully considered in connection with any proposal to abolish the privilege. It dramatically points up the question: When considered in general, would the information gained from the compulsory disclosure by the client and the lawyer of the communications of the former to the latter be of substantial value to the opponent and ultimately to the trier of fact? The answer to this question becomes even more difficult when weighed against the increased cost of preparation and consumption of time which would result from the opening up of a whole new area for pretrial discovery and trial presentation.

As the writer has shown above, there are many situations in which the client could, if warned in advance, qualify or change his answer (whether honestly or otherwise), without raising an ethical problem for counsel. In fact, in the particular instance related above, it appears to the writer that plaintiff's counsel was probably not adequately prepared for the trial, and certainly he did not properly prepare his client for standing up under cross-examination. The technique for avoiding such pitfalls is well known to good trial counsel and the witnesses are routinely prepared to meet the various kinds of problems with which they may be confronted on the stand. Here, the witness should not have been merely warned, but should also have been indoctrinated against testifying too positively in doubtful areas and given illustrations of how such positiveness of assertion might result in harm to the client's cause. Counsel and the client should also have "re-lived" the case together until they understood all of its ramifications. By then, the lawyer should have known whether or not his client's claim was genuine. Of course, this was probably one of those cases where the matter of costs to the parties was important, and the defendant's honor was worth more to him, a prominent man of business, than the plaintiff's additional salary was worth to him, a working man. Such circumstances incidentally make out a strong case for pretrial discovery, since today the particular situation would be thoroughly investigated in advance of trial and the element of surprise thereby eliminated, at least when one is represented by diligent counsel. The defendant's verified evidence as to his being in Florida on the date when the plaintiff testified that they had conferred in New York points up another important factor: it is only when there is evidence available which will settle the matter beyond dispute that the facts can be pinned down prior to
the taking of written statements and depositions, or the actual trial itself; and, even then, there are exceptions. There are renowned instances of doubtful factual circumstances in cases that have worried the most intimate and indefatiguable counsel of the parties for the remainder of such counsels' lives. There is no such thing as an "open and shut" lawsuit. A fortiori, there is no such thing as an established set of facts — not even from the client's own mouth — in advance of the trial and the decision itself.\footnote{142b} If this were not the case, lawyers would not "sweat blood" while their key witnesses are on the stand. Furthermore, a different version of the facts may appear on a retrial of the case, and the versions at times are so dissimilar as to bear little or no resemblance. Yet, this again is only a partial answer to Professor Radin's reply to Dean Wigmore.\footnote{143}

The point here is that, assuming Professor Radin's chosen example, which we have shown would not be true to circumstances in many instances, nevertheless, it cannot be convincingly argued that if the privilege did not exist the actual results in accuracy of fact presentation would be substantially better than at the present time. The privilege affords a party and his counsel the opportunity to work the case up before presenting the client's version of the case for the first time. Yet, on the other side of the ledger, there would be substantial harm to the relationship of the party and his lawyer and to clients and lawyers in general, and consumption of much valuable time of the parties and the courts in working out the rules of the game and then in continually enforcing them. Of course, it cannot be denied that there are many cases in which a party would obtain some valuable piece of evidence that might not otherwise be had through diligent investigation and the use of pretrial discovery methods. Still, it does not presently appear that these instances would occur often in proportion to the vast amount of litigation which is in the courts. Furthermore, in general, the time and expense incurred thereby would probably not make the results worth the effort. Yet once the privilege should be abolished, conscientious counsel would feel that his duty to the client would require that he exhaust his pretrial remedies in this area, so as to avoid the possibility of overlooking some avenue of discovery of

\footnote{142b} Even then, it is the decision which determines what the facts were, and this determination may be a far cry from reality. What lawyer has not laughed at the "de jure" determination of the facts? The decisions of both courts and juries are at best "impressionistic" — no less than the observations of the witnesses themselves. They aim at a "rough and ready" justice by approximation, often ignoring specific "hard" facts in order to reach what appears to be "just about right" or their idea of substantial justice in the particular case. Yet, the result is often more in accordance with the kind of solution which we would like to see than that which strict adherence to technical facts and rules of law would permit.

\footnote{143} See text at notes 91-92.
information that might lead to his gaining an advantage over the opponent.

All of these complex factors merely go to show that when a case is still in its subjective stage, before the facts have become crystallized and fitted into the finished jigsaw puzzle, so to speak, it cannot be said with confidence what the decision ought to be. Hard facts are crystallized facts, presented by the parties after careful deliberation (not lightly) and with knowledge of the consequences. They are the positions on which the parties stake their cases, so to speak. It is only when the parties have had this opportunity for formal presentation of their cases that we are in a position to say that the parties ought to be held bound by what they have said, though we, as advocates, may wish to test such a deliberate statement of the case against as much of the composite picture as can be obtained.

The privilege is qualified by another principle of law which is basically sound but which has sometimes been applied in such a manner as to work an injustice. This is the principle of waiver and the rules based thereon. The principle of waiver is on solid ground (1) when the client makes a voluntary decision not to claim the privilege; and (2) when he takes a position that would give him an unjust benefit were the waiver doctrine not applied — for example, when on direct examination the client testifies to what he told his attorney and then objects to having the attorney testify as to what he (the client) said. But the courts have shown some confusion in applying the rules pertaining to waiver of privilege, and the unwary counsel may be trapped, to the detriment of his client. This is particularly true when inquiry is made of a party on cross-examination as to what he has told his attorney. There is a split of authority as to whether the party will be found to have waived the privilege when he answers without objection. In some jurisdictions the waiver doctrine has been carried to such an extreme that the client by merely taking the stand and testifying to the facts within his knowledge has been held to have waived the privilege. This puts counsel to a rather unhappy choice as to whether to forego his client's testimony or to suffer the loss of the privilege. In addition, there are problems revolving around the lurking possibility of an adverse inference from the

144. WIGMORE §§ 2327-29; MCCORMICK § 97. A valuable note on waiver is contained in 51 A.L.R. 2d 521 (1957).

145. Cases cited in id. at 544; and see MCCORMICK 197.

146. Ibid. and cases cited in n. 4 there. The reasoning of these cases is based on an erroneous analogy to the case of the criminal defendant who waives the privilege against self-incrimination by taking the stand and testifying for himself.
claim of privilege, particularly during the jury trial. "Waiver" has been well defined as the intentional relinquishment of a known right, with full knowledge of its existence, including all the facts. When waiver is the result of ignorance of technical rules, it basically works against the policy of the privilege and cannot be justified.

In addition to the principle of waiver, the crime or tort exception is an equally sound qualification of the privilege. A principle which so far separated law from ethics as to hold that a relationship conceived in wrongdoing was entitled to protection could not justify itself in a society guided by moral principles. Whether the exception should go so far as to apply to conversations of a client with his attorney for legitimate purposes but perhaps used for unlawful purposes, raises an interesting but difficult question of interpretation. This was one facet of the problem presented by the case of In re Selser. Here, the majority held that the privilege does not apply, but this decision was probably reached by viewing the activities of the client as a state of continuous participation in the affairs of a criminal syndicate. The dissenters viewed the particular challenged situation more in isolation and relied upon the good faith of the attorney in asserting the claim of privilege. Another difficult question arises when the purpose of the client is wrongful but does not involve moral turpitude. On this point, there is some disagreement.

In Clark v. State, the defendant, having committed murder, consulted his counsel by telephone and was advised to dispose of the murder weapon. The court held that an eavesdropping telephone operator could testify to the conversation, as it came within the crime or fraud exception and the eavesdropping exception to the rule

147. See People v. Shapiro, 308 N.Y. 435, 126 N.E. 2d 559, 51 A.L.R. 2d 515 (1957); McCormick § 80.
148. See definition of "waiver" in Words and Phrases (Perm. ed. 1940).
149. For further discussion of the subject of waiver, see generally an article by the writer, Principles of Waiver — Attorney-Client Privilege, 35 Cal. B. J. 262 (1960).
150. VIII Wigmore §§ 2327-29; McCormick § 99; Note, 125 A.L.R. 508 (1940).
152. See VIII Wigmore § 2298 at 547; McCormick 202.
153. 261 S.W. 2d 339 (Tex. Crim. App. 1953); cert. den. 346 U.S. 855 (1953); noted in 32 Texas L. Rev. 615 (1954). There are other difficulties apparent in the case. The court allowed the introduction of evidence obtained by eavesdropping of a special kind that could not readily be detected and that was in violation of the rules of the telephone company. Since the court talked about the tort or crime exception, the possible violation of the constitutional right to counsel was not considered. There is also the legal and ethical question as to how far a lawyer can ethically go in advising a client in a criminal case how best to protect himself. Cf. Quick, Privilege under the Uniform Rules of Evidence, 26 U. CinC. L. Rev. 537, 541-42 (1957).
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of privilege. As to the former, the difficulty revolves around the problem of proof. The Texas court had no difficulty, however, because it applied the eavesdropping exception. This rule is a constant threat to the application of the personal privileges in their most vital areas. Where this exception is not adhered to, the state would be without the requisite proof of color of wrongdoing, unless the lawyer should choose to come forward and voluntarily disclose what has transpired. Counsel would hardly do that in a case like the Clark case, where he was a party to the conspiracy to obstruct justice, presumably carried out by the client, since the murder weapon was not found.

The crime or tort exception plays a valuable role in the law of attorney-client privilege. In addition to keeping the law aligned on the side of morality in the theoretical sense, it frees the hand of counsel to aid the law in bringing to justice an unscrupulous person who would use the law for nefarious ends. When counsel had become a party to such schemes, the rule enables the law to act against both client and lawyer. They can no longer use the privilege as a shield. Their confidences are without the pale of the law.

Yet this exception is no palladium for the good conduct of the attorney and his client. It cannot prevent the client with an unlawful purpose from seeking the advice or help of counsel. It cannot prevent counsel from giving advice and actively participating in the nefarious schemes of his clients, if counsel so chooses. Such conduct is rather common for lawyers of the shyster class, and such lawyers even go to the extent of faking records, while there are more numerous cases in which they take great precautions both to protect and to elogie confidential records. Nor has this practice always been confined among the more shady-dealing part of the bar. In The Great Mouthpiece, the author relates how defense counsel “bugged” the office of the district attorney of Westchester County, New York, in an important case, and how the late William J. Fallon, as assistant district attorney,  

154. The general rule is discussed in VIII WIGMORE § 2326 (favoring); MCCORMICK § 79 (critical). Cf. VIII WIGMORE § 2339; MCCORMICK § 86 (marital communications). The UNIFORM RULES OF EVIDENCE, Rule 26 (1) (c) (ii) (1954), do not recognize this rule (hereinafter cited as UNIFORM RULES, R. ...).  

155. Cf. Clark v. United States, 289 U.S. 1 (1933) (“To drive the privilege away, there must be prima facie evidence that it has some foundation in fact.” Cardozo, J., in case involving fraud of a juror, but the principle is followed in cases involving the tort or crime exception); United States v. Bob, 106 F. 2d 37, 125 A.L.R. 502 (2d Cir. 1939).  

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in turn seized the files of defense counsel. Irving Stone, in his superb biography of Clarence Darrow, tells how both Darrow and the district attorney surreptitiously examined the files of each other in the celebrated case of the McNamara brothers, who bombed the Los Angeles Times Building back in the first decade of the present century. In that case, the really important evidence was kept in the minds or on the persons of counsel and their trusted confidential agents. This example par excellence, however, did involve less illustrious counsel. This was the adoption of a general practice by that classic law firm of Howe and Hummel, attorneys for the New York underworld of the end of the last century, of maintaining a minimum of records of their clients' legal affairs, because the records might later prove embarrassing. These lawyers were well aware of the crime or tort exception to the privilege. In the notorious Dodge-Morse case, which ranged over the United States for more than a decade, finally resulting in the disbarment and criminal conviction of Abraham H. Hummel, the records could not be produced in court on subpoena, simply because there were none. No records had been kept!

It is of course readily apparent that the privilege serves as a cloak for many confidential relationships which rightfully fall within the tort or crime exception to the privilege. In such instances, the lawyer is able to take advantage of the appearance of things, and the courts are reluctant to force disclosure, since once the secret has been told, the damage is done, even though the disclosure should show that the claim of privilege was justifiable. This, on first appearance, is a telling argument against the retention of the privilege. Yet, aside from the value of the privilege in other areas, its abolition would not be an unmixed blessing even here. The examples discussed in the last few pages would tend to demonstrate this point, for the unethical attorney is not deterred by the loss of privilege, while the ethical attorney will endeavor to maintain high standards of conduct whether the privilege is preserved or abolished.

The argument here is not that because attorneys might be dishonest we should make it easier for them to be that way (by retaining the privilege). Rather, it is that the policy of full disclosure would put a premium on dishonesty, thus lowering the standards of the profession and making it more difficult to maintain an honorable and

158. Stone, For the Defense 273 et seq. (1941).
159. Robere, Howe & Hummel (1947). The Dodge-Morse Case is discussed at 154 et seq.
upright bar. The dishonest attorney and client will not be appreciably hurt by a rule of compulsory disclosure, but the honest ones, in addition to being subjected to the psychological notions of treachery, would often have their hands tied far more securely than at the present time. Moreover, such a policy would cause uncertain fears on the part of the public and would aggravate a tendency now present on the part of some people to seek dishonest lawyers to represent them when their cases are good ones. The circumstances as a whole could cause some good men to shun the law as a profession. These factors would generate pressures in some lawyers to stoop to unethical practices which they might otherwise have the moral courage to refrain from doing. In the present state of our society, such circumstances certainly would not create a healthy outlook on the part of either client or counsel but would tend to bring out individual weaknesses and flaws of character.

It is frequently true at the present time that many people feel that even though one might have a just cause, nevertheless, he should seek a shyster lawyer, since such a lawyer will have more leeway to fight with whatever weapons the opponent might select, thereby making victory more certain for the cause of the client. Such a lawyer, they will argue, can bolster up the case, if necessary, to vindicate the cause of justice, by tactics which the punctiliously honest lawyer must shun. This feeling about lawyers is not unusual on the part of clients and litigants. The writer has seen it manifested both in his private law practice and in everyday life. It is not uncommonly found in literature. The detective fiction of Erle Stanley Gardner, while frequently a far cry from legal reality, deals in questionable and unethical tactics by defense counsel — the famous Perry Mason — in the interest of good causes for honorable people. If the client knew that he would be forced to disclose in court what had transpired between him and his lawyer and that the latter would be required to submit to cross-examination thereon, the client might well feel that he was being put at a decided disadvantage, in that his opponent, only occasionally dishonest (but far more frequently believed to be dishonest), would gain an advantage not only by such personal dishonesty but also by his counsel's willingness to take the stand and affirm the most favorable story, whatever it might be.\textsuperscript{160} A weak character might lie as a result of this feeling, rationalizing that it was necessary in his own enlightened self-interest. A stronger character, while resisting such temptation, might nevertheless feel, par-

\hspace{1cm}\textsuperscript{160} This will be allowed for the purpose of rehabilitating a witness in certain situations. IV Wigmore §§ 1126, 1129; McCormick 108-09.
particularly if he should lose his case, that he and all other honest litigants were being imposed upon by the practice of such a system. Such a condition would have an adverse effect on the general attitude of the public toward the courts as the dispensers of justice. Yet, it is probably as important for the people to feel that they are obtaining justice as it is that they actually should obtain it. This feeling that substantial justice is generally being achieved might be seriously impaired by the abolition of the privilege. The writer fears that the resultant general atmosphere would be conducive to the rationalization of a lower level of conduct on the part of both the bar and the litigants.

There is another side to this argument: As has been pointed out, most clients are neither black nor white in their moral conduct, and their claims are neither entirely valid nor invalid. Many a good client has lost a good case through being persuaded by his unethical lawyer to bolster it up with perjured testimony of a non-existent eye-witness, a forged document, or some other fabricated measure. Perhaps more common, however, is the mere slanting of the facts in presentation beyond the favorable presentation which constitutes good advocacy. But whether the case is good, bad, or somewhere in between, a client who hires an honest lawyer may be saved from dishonest practices. This tends to preserve high standards of justice and to maintain that respect for the law which must be one of the foundations of civilized government. In other words, the honest lawyer can do as much to maintain honesty in the courts and thereby to further the administration of justice as the dishonest lawyer can do to defeat the fair administration of justice.

As an example in point, consider the case of "Sam the Lookout," who was being pressured by his captain and shipmates to give dishonest testimony in the interest of their cause, which they considered a just one.161 In the absence of a privileged relationship, counsel would hardly have been able to learn the true facts of that case, and it might have been a case in which he would not even have wished to know them. In fact a lawyer with a reputation for disregarding the facts might have been chosen. Yet, it was a case in which an honest lawyer could bring greater pressure to bear to make the parties tell the truth, perhaps to settle the controversy with good feelings on the part of all concerned. It should also be recognized that the lawyers themselves, as individuals, are neither wholly honorable nor entirely dishonorable, but like their clients they range through all gradations

of ethical character and conduct. The attitude which Mr. Dooley reflected in a rather penetrating observation to Mr. Hennessy at the turn of the century remains with us strongly at the present time: "I wud lie to get a frind out iv throuble or an inimy in, to save me counthry, if 't was not surrounded already by a devoted band iv heroic liars, to protict me life or me property, but if annybody ast me how I done it, I'd lie out iv it."\(^{162}\)

For these reasons, it behooves the state to maintain a policy which favors the public's choosing honest lawyers. The privilege helps to keep the honest lawyer's resources more on a par with the resources of the dishonest lawyer. This in turn affords the client greater freedom to choose an honest lawyer and the honest lawyer more latitude in dealing with his client's cause as an advocate during its formative stages. Here it is important that the ethical lawyers should not be placed in a strait jacket. If they should be, some would remain punctilliously honest and lose their clients or the clients would suffer; others would reduce their standards in varying degrees. For the utterly unethical there would be no problem, but their relative flexibility would be increased. While the ultimate victims would be the clients, the actualization of their status as victims would occur only when the legal compulsion to make disclosure impinged on their individual personalities.

Furthermore, in addition to the arrant factor in human nature, there is the natural, reasonable, and proper desire of men to arrange their affairs in order before formally presenting them to the public. The privilege affords men a reasonable expectation that this desire will be carried forward to fruition. In the absence of the privilege, this desire would be frustrated in many instances, particularly where there was diligent counsel on the opposing side of the case. In some of these instances, individual justice might miscarry, as a result of the improper presentation of one's story before he had taken time to think the matter through to its ultimate conclusion. This right to tell one's own story in his own way and at the time of his own choosing is an important interest of personality, closely akin to if not actually a part of the right to privacy. It might be described as the preliminary right to privacy or the right to privacy in the subjective stages of the matter, before the interest of the state in the production of evidence requires a formal presentation of the pretrial foundations of such evidence. This assumes, of course, in an area where all is not a matter of black and white, that one is going

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162. Finley Peter Dunne, Mr. Dooley's Opinions, On Lying, 87 at 90 (1901).
to tell the truth as best he can, but in doing so he wants to make it appear in as favorable light as the circumstances will permit, and he wants to give his version of the matter in a friendly and sympathetic frame of reference. Does not the privilege assist us here? The writer believes that it does. To use the metaphor of the stage, it seems no more than right that we should be permitted to prepare ourselves and study our presentation before the dress rehearsal and the opening night. The late Charles P. Curtis has excellently stated the point:

To every one of us come occasions when we don't want to tell the truth, not all of it, certainly not all of it at once, when we want to be something less than candid, a little disingenuous. Indeed, to be candid with ourselves, there are times when we deliberately and more or less justifiably undertake to tell something less or something different. Complete candor to anyone but ourselves is a virtue that belongs to the saints, to the secure, and to the very courageous. Even when we do want to tell the truth, all of it, ultimately, we see no reason why we should not take our own time, tell it as skillfully and as gracefully as we can, and most of us doubt our own ability to do this as well by ourselves and for ourselves as another could do it for us. So we go to a lawyer. He will make a better fist of it than we can.¹⁶³

This leads into another aspect of the matter, which relates to our system of litigation as a part of the received common law. Even though the "sporting theory of justice"¹⁶⁴ is no longer popular, our system of judicial administration remains adversary in nature, with certain inherent characteristics (which reflect both its advantages and its limitations). Among these is the nature of a lawsuit as a contest between opposing parties, who are themselves responsible for obtaining and presenting the evidence and pointing out the applicable rules of law. Inherent in the very nature of the system is the pivotal role of the lawyer in litigation. Moreover, within the limits of the observable rules of law and ethics, the lawyer's obligation to act and his duty of loyalty run to his client.¹⁶⁵ This is true even though the lawyer should believe that justice lies on the other side of the case. It has been said that the lawyer has no other master than his client and that the court itself comes second by the law's own command.¹⁶⁶

One of the strongest statements of this tenet of loyalty was that put

¹⁶³ Curtis 8-9.
¹⁶⁴ See I Wigmore §§ 27, 57, 194; VI Wigmore § 1845 at 345 et seq. esp. 375-76; VIII Wigmore § 2251.
¹⁶⁵ See Canons 5, 6, 15, 37; cf. Canons 22, 29, 32; see Opinions thereunder.
¹⁶⁶ Curtis 3. But see Drinker, Some Remarks on Mr. Curtis' 'The Ethics of Advocacy,' 4 Stan. L. Rev. 349 (1951). There is a difference of opinion as to
by Lord Brougham in his defense of Queen Caroline, where he said to the House of Lords:

I once before took occasion to remind your Lordships, which was unnecessary, but there are many whom it may be needful to remind, that an advocate, by the sacred duty which he owes to his client, knows in the discharge of that office but one person in the world — that client and no other. . . . Nay, separating even the duties of a patriot from those of an advocate, and casting them if need be to the wind, he must go on reckless of the consequences, if his fate it should unhappily be to involve his country in confusion for his client's protection. 167

This being true, there is the matter of treachery to be considered, but there is more than mere treachery — there is the matter of the lawyer's identifying himself with the client's cause. The attorney must decide at the outset of the case whether to embrace the cause as his own, and if he decides in the affirmative, he must remain with it. If he should later desire to withdraw from the case, it will be necessary for him to obtain permission of the client. If the client should refuse his permission, the attorney cannot withdraw from the case without an order of the court, and this will not be given unless the lawyer shows good grounds for withdrawing. Furthermore, except infrequently and under special circumstances such withdrawals by permission of the court are frowned upon by both the bench and the bar. The attorney is in charge of the case and to some extent vouches for the good conduct of the client, where this is within his control. 168 If the attorney cannot give his best effort to the matter, he must withdraw from the case, but even then his withdrawal is subject to the condition that the client's cause must not be prejudiced thereby. In such instance, the court would not permit counsel's withdrawal, at least in the absence of affirmative consent from the client. 169

This attitude toward withdrawal by counsel from a case is reflected in the canons of ethics, which provide that an attorney should not accept a case in which he might be a material witness. While this

whether a lawyer could ethically go so far as to lie for his client. Curtis 7 et seq.; Drinker (contra).

168. See canons 24, 29, 31, 32, 41, and Opinions thereunder.
169. See Canons 5, 15, 30, 31, 32, 37, 41, 44; Drinker, Legal Ethics 140-42, 144-45, 146-49 (1953). See also Lawyers' Problems of Conscience 1-23 (Am. Law Student Ass'n, 1953); Maguire, op. cit. note 1, 35-37, 39 n. 46 (1957). Moreover, the lawyer may never thereafter take a position whereby he may use confidential information for an adverse purpose (without the permission of the client or former client). Consolidated Theatres v. Warner Bros., 216 F. 2d 920, 52 A.L.R. 2d 1231 (2d Cir. 1954) (plaintiff's attorney disqualified from representing adverse interest of former client in anti-trust suit, pursuant to Canon 6).
principle has never been adopted as a rule of law, it is recognized as ethically sound, because of the central role of the lawyer in the litigation process. The attorney by becoming a witness might strongly influence the trier of fact, either for or against the client, depending upon the opinion which the trier should entertain of counsel, the party, and the cause. Furthermore the attorney himself could not maintain the desired impartiality in his role as witness, while his services in that capacity (and his knowledge of the facts) might affect his capability, as an advocate, to give his undivided loyalty to his client.

Finally, there exists as a practical consideration in support of the preservation of the privilege what Professor McCormick has referred to as the “cake of custom,” the innate desire of people to follow the history and usages with which they are familiar. When this desire is coupled with the professional relationship to experts (attorneys) in an adversary system of law, an extra quota of the sentiment of loyalty attaches, “and this sentiment would be outraged by an attempt to change our customs so as to make the lawyer amenable to routine examination upon the client’s confidential disclosures regarding professional business. Loyalty and sentiment are silken threads, but they are hard to break.” As a result, the privilege could hardly be abolished today, in any event, but its obstructive effects can be reduced and contained within reasonable bounds; while at the same time its benefits can be retained for the public good.

Opponents of the privilege have argued that the public is unaware of its existence until a particular individual is advised thereof by his lawyer, and therefore the privilege does not have the beneficial effect of making the client feel able to communicate freely with his lawyer. But this ignores the over-all pattern of general effect of the personal privileges, the strength of custom and tradition in the fabric of our society, and the picture of justice as a whole. While these factors cannot be measured with exactitude, neither can they be ignored. Law is “the explicit and articulate part” of what is implicit in a culture. Jurisprudence is “an anthropology of the literate part of our culture.” Law is not only reposed upon “a base of what Sumner has called folkways or mores, and what Ruth Benedict was calling patterns of culture, but contained these within itself. These

170. Canon 19; DRINKER, op. cit. note 169, 158. See Note, Ethical Propriety of Attorney’s Testifying in Behalf of his own Client, 38 IOWA L. REV. 139 (1952).
171. McCormick 182.
172. Ibid.
folkways, these mores, these patterns were part of the law, and perhaps the most important part of it. It has been said that the privilege against self-incrimination is taken in by the members of the criminal element in their infancy and with their mothers' milk. While the other privileges may not be so well known and understood, they are intuitively felt and relied upon generally and are readily accepted as natural when explained by counsel. The privileges as received ideals of the common law are an important part of our mores. Social anthropology corroborates this. Ruth Benedict has lucidly described this phenomena in the following illuminating passage:

No man ever looks at the world with pristine eyes. He sees it edited by a definite set of customs and institutions and ways of thinking. Even in his philosophical probings he cannot go behind these stereotypes; his very concepts of the true and the false will have reference to his particular traditional customs. The life history of the individual is first and foremost an accommodation to the patterns and standards traditionally handed down in his community. From the moment of his birth the customs into which he is born shape his experience and behavior. By the time he can talk, he is the little creature of his culture, and by the time he is grown and able to take part in its activities, its habits are his habits, its beliefs his beliefs, its impossibilities his impossibilities. Every child that is born into his group will share them with him, and no child born into one on the opposite side of the globe can ever achieve the thousandth part. There is no social problem it is more incumbent upon us to understand than this of the role of custom. Until we are intelligent as to its laws and varieties, the main complicating facts of human life must remain unintelligible.

It has been argued that the privilege affords its chief benefit in excluding proof which would enable an opponent to make out a prima facie case or defense; and that except for this, it is of dubious value, as the trier of fact may draw an adverse inference from its use

174. Id. 485.
175. Professor John M. Maguire, to his class in Evidence (taught jointly with Professor E. M. Morgan), Harvard Law School, Summer Term, 1946, the writer being present.
176. BENEDICT, PATTERNS OF CULTURE 2 (1934).
177. Baldwin v. Commissioner, 125 F. 2d 812, 141 A.L.R. 548 (9th Cir. 1942), is a good illustration. In a suit for estate taxes on a gift of realty made in a manner to take effect in possession and enjoyment at death, the only evidence available to the government consisted of privileged communications. There was no fraud involved, because the decedent made the gift to avoid probate problems and did not consider the tax angle. It could be argued that she meant the privilege to be temporary only, as in the will cases, but the court treated it as having passed to the devisee as her personal representative. (See MCCORMICK § 98; VIII WIGMORE § 2314.)
in any event. The writer, however, must disagree. The privilege has an affect in all cases, either actual or potential. We cannot say that it has greater affect on the accuracy of the findings of fact in one type of case than in another. There is at present no way to objectively test this matter. Moreover, by reason of its mere existence the privilege prevents the seeking of privilege-protected evidence, especially in the pretrial discovery stage of the lawsuit. If the existence and nature of such evidence is never ascertained in the pretrial discovery proceedings, then (except by chance) no effort can be made to draw it out at the trial. No actual claim of privilege will be made, because it will not be necessary to make it. Thus, the trier of fact has no occasion to know about the non-use of such evidence and, therefore, cannot draw any adverse inference therefrom.

Furthermore, probably the only parties who will ever know specifically that damaging evidence has been withheld from the opponent and ultimately from the trier of fact will be the withholding party and his counsel.

In the law of attorney-client privilege there are two degrees of confidentiality, degrees which blend into each other but which are basically so different as to deserve at least de facto recognition as distinct classifications. This dichotomous nature of the privilege is generally overlooked: (1) There are the numerous communications pertaining to the problem concerning which advice is sought. These the client will make to his lawyer with reasonable freedom and sense of security or well-being. They may include items which the client would be reluctant to communicate in the absence of the privilege, but they will be found to contain nothing concerning which he would feel more than the ordinary amount of hesitancy in imparting to one who he feels is strongly on his side in a problem situation. (2) Beyond that, however, there are in varying degrees facts requiring revelations


179. While this is a practical "benefit," it is merely incidental to the underlying policies discussed herein, and even the party must as a practical matter realize the greatest benefit from the sense of security or freedom from fear which he is thus enabled to achieve "in the anteroom of the court" and in the courtroom itself.

180. The avoidance of the time consuming examination of counsel in pretrial discovery proceedings is not an unimportant item to be considered.

For a case in which the appellate court felt that the erroneous allowance of the claim of privilege was not harmless error, see Maier v. Noonan, 174 Cal. App. 2d 260, 344 P. 2d 373 (1959) (hearing in Supreme Court denied). In a paternity suit, the defendant got to the jury with his own evidence but would have been able to cast strong doubt on plaintiff's case had he been allowed to show what plaintiff had stated to an attorney whom she had consulted but did not retain.

181. See text at note 178; op. cit. note 149 at 271 n. 32, 273 n. 38; cf. id. 280-83.
which would tend to disgrace and to incriminate. These are items which the client would be reluctant ever to impart to anyone except the most trusted confidant. They are items which the client would intend that his lawyer should never reveal to anyone.

Every lawyer of mature years has experienced this last-described type of situation and has realized the inestimable value of the privilege in such cases. In this area of really confidential communications, there is every reason to believe that the client's secrets are seldom if ever reduced to writing. They remain a matter of sacred trust, as safe as if in the bosom of Mr. Tulkinghorn. It is here that the privilege has its greatest claim to necessity and where it should be guarded most carefully. Here, its preservation is necessary to the fair administration of justice. Here, its denial would prevent the communication of the facts to counsel; or if the facts were communicated, the sense of treachery when counsel was forced to disclose them (or to lie in order to avoid disclosing them) would tend to make the attorney an object of contempt and thus would tend to pervert the function of counselling. It is here that the privilege deserves the claim to recognition that no other personal privilege can make. Whatever modifications in the present law may be made in the interest of greater accuracy in fact-finding, great care should be taken to assure that this hard core area of the privilege is adequately safeguarded and remains free from compulsory disclosure in all except the most extreme cases, as where life or personal liberty hang in the opposing balance.

These factors are practical considerations, and they exist in innumerable and diverse forms, as variegated as life itself. Moreover, they change in sometimes sharp and sometimes imperceptible gradations, as the social milieu of a society changes in response to the external stimuli of the complex modern environment. But there are

182. The term "hard core area" of the privilege is used hereinafter in a somewhat looser sense, however. It is used, unless otherwise noted, to mean the area embraced within the face-to-face relationship, having in mind that the privilege is most essential for the protection of the communications subsumed under the second category set out above. The term "hard core area" of the privilege as descriptive of the said second category, while readily understood, could not be accurately delineated by counsel and the courts, since its boundaries would tend to be somewhat subjective and to involve impossible problems of effective interpretation. Hence, the proper construction should be liberal in the area delineated by the face-to-face relationship and strict in peripheral areas beyond that area.

183. "Here . . . Mr. Tulkinghorn has at once his house and office. He keeps no staff; only one middle aged man . . . who sits in a high Pew in the hall . . . He wants no clerks. He is a great reservoir of confidences, not to be so tapped. His clients want HIM. He is all in all." DICKENS, BLEAK HOUSE Ch. 10. Compare with text at notes 157-58.

184. This is because compulsory discovery is a potential factor in all attorney-client situations, whereas, it is generally only a more or less remote possibility in other personal privilege type situations.
more than these practical considerations of how modern man behaves in his basic socio-psychological essence in our society that should be considered in the restatement of policy in support of the privileges. There is more than a realistic appraisal of man's inherent limitations in our society. There is a recognition of a new set of values in the twentieth century, values beyond the vindication of the immediate rights of the parties in the particular litigation, values based on the over-all picture of the end of law in our society. These values have already been briefly mentioned. Their philosophical significance will be examined and illustrations considered in the remaining sections of this paper. Hence, we move from empirical specification to trans-empirical derivation and justification.