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The U.S. Law of Client Confidentiality: Framework for an International Perspective

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Charles W. Wolfram

Abstract

In this Article, I will consider two general areas of the U.S. law of confidentiality. In Part I, I will reflect briefly upon what I call “the U.S. culture of lawyer-client confidentiality.” I say “culture” rather than “cult,” and one must guard against temptations to confuse those concepts. Those reflections will serve as background—by way of both match and contrast—to my sketch of the U.S. law of confidentiality in Part II.

ARTICLES

THE U.S. LAW OF CLIENT CONFIDENTIALITY: FRAMEWORK FOR AN INTERNATIONAL PERSPECTIVE

Charles W. Wolfram *

INTRODUCTION

Unlike rock music and cola drinks, some peripatetic Americanisms do not get along particularly well in other cultures. Some such dissonance is abroad in the world over the law of client-lawyer confidentiality as it is applied in the United States. I would like to begin to understand and appreciate that dissonance.

I am not a comparativist and know little detail about the workings of foreign legal systems and cultures.¹ Impelled by those limitations, and not because of nasty insularity or lack of intellectual interest, I must leave to more competent scholars and practitioners the second step of any true comparison—an appreciation of events and institutions far from these shores. I look forward very much to discussion by others of developments such as the much-noticed 1982 decision of the Court of Justice of the European Communities in *AM & S Europe Ltd. v. Commission*.² That decision stated two propositions that U.S. lawyers in particular find troublesome, perhaps astonishing. First, the Court refused to extend what U.S. lawyers would call the attorney-client privilege (on the Continent, the nearest English-language equivalent is “legal privilege”) to communi-

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1. A helpful beginning, examining the scope of the privilege in England and other jurisdictions influenced by English and U.S. law, is D.F. Partlett, *Attorney-Client Privilege, Professions, and the Common Law Tradition*, 10 J. LEGAL PROF. 9 (1985).

2. Case 155/79, [1982] E.C.R. 1575, 1611, [1982] 2 C.M.L.R. 264, 323 (professional privilege does not extend to lawyer who is “bound to his client by a relationship of employment”).

cations with a corporate client's in-house lawyer.³ Second, the Court stated that, in any event, communications would have to involve a lawyer authorized to practice in, and thus subject to, the professional rules of a European Economic Community ("EEC") jurisdiction before the Court would extend the attorney-client privilege to communications involving such a lawyer.⁴

By contrast, U.S. courts, in imposing numbers, have seemingly well established the rule that house counsel functioning as a lawyer (and not, for example, as a business adviser)⁵ qualifies as an appropriate participant with a client in a communication protected under the attorney-client privilege.⁶ In addition, U.S. law seems quite well settled that a legal practitioner functioning as such in a foreign country qualifies as an "attor-

3. *Id.* at 1613, [1982] 2 C.M.L.R. at 324.

4. *Id.*

5. The limitation that the lawyer must be functioning as a lawyer, and not in another capacity such as business adviser, friend, escrow agent, or the like, applies generally to all lawyers, whether house counsel or not. See *RESTATEMENT OF THE LAW GOVERNING LAWYERS* § 122 comment c (Tentative Draft No. 2, 1989) [hereinafter *RESTATEMENT DRAFT NO. 2*]. Here and at other points, I will rely heavily on the *Restatement*, for which I serve as chief reporter. My views and interpretations, of course, are personal and do not reflect policy of the American Law Institute, the organization that sponsors the *Restatement* and that will ultimately approve or disapprove current drafts of it.

6. *E.g.*, *Bruce v. Christian*, 113 F.R.D. 554, 560 (S.D.N.Y. 1987); *Research Inst. for Medicine & Chemistry, Inc. v. Wisconsin Alumni Research Found.*, 114 F.R.D. 672, 676 (W.D. Wis. 1986); *Valente v. Pepsico, Inc.*, 68 F.R.D. 361, 367 (D. Del. 1975). The point was assumed but apparently not argued or explicitly decided in the well-known case *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981) (explicitly referring to corporate client's general counsel as lawyer involved in communications held to be privileged).

We stated this well-settled proposition in the *Restatement*. See *RESTATEMENT DRAFT NO. 2*, *supra* note 5, § 122 comment e ("[L]awyers function in that professional capacity in many role[s], all of which are appropriate settings for application of the privilege under this Section, including such roles as . . . house counsel . . ."); see also *id.* reporters' note ("In-house counsel are professional legal advisers for purposes of the privilege, whether locally admitted or not . . .").

The general legal acceptance of house counsel as "lawyer" finds expression on the debit side of the ledger as well, although not without some ambivalence. Compare, *e.g.*, *Florida Bar v. Weil*, 575 So. 2d 202 (Fla. 1991) (holding that admitted attorney who served as house counsel during period of disciplinary suspension from practice was "practicing law" and thus violating terms of suspension) with, *e.g.*, *In re Bar Admission of Crowe*, 414 N.W.2d 41 (Wis. 1987) (work as in-house counsel in state in which lawyer was not then admitted does not qualify as "practice of law" for purposes of rule waiving bar examination requirement for lawyer previously engaged in practice of law in another jurisdiction for period of years).

ney" under the attorney-client privilege, whether or not the person is admitted to a bar in the United States or, indeed, to any bar.⁷ That result was almost inevitable in a federal political system such as that of the United States. There is, in formal terms, no such thing as a national bar. Lawyers are admitted only in particular states. Lawyers who have gone to the trouble to be admitted specifically in several states are regarded by their fellows and sisters somewhat as a state-fair tattooed lady: the exercise seems more show than utility.⁸ Thus,

7. *E.g.*, *Mitts & Merrill, Inc. v. Shred Pax Corp.*, 112 F.R.D. 349, 352 (N.D. Ill. 1986) (involving German patent agent); *Renfield Corp. v. E. Rémy Martin & Co. S.A.*, 98 F.R.D. 442, 444 (D. Del. 1982) (involving law-trained person functioning in advice-giving role of in-house counsel in France treated as lawyer for purpose of privilege, despite fact that counsel was not eligible for admission to any French bar).

The federative character of the U.S. legal system and the consequent fact of single-state admission has long since made it obvious that an attorney-client privilege limited to locally admitted lawyers would be unwise. Whatever else might be said about the operation of the privilege, surely it provides only a poor method of *ex post* regulation of unauthorized practice by out-of-state lawyers. Catholicity also avoids distracting and potentially thorny choice-of-law issues. See Proposed Federal Rule of Evidence 503(a)(2) advisory committee's note, 56 F.R.D. 183, 238 (1972). At one time, Rule 209(b) of the MODEL CODE OF EVIDENCE (1942) suggested a more restrictive rule. It would have required that a lawyer be authorized "to practice law in any state or nation the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer." See also UNIF. R. EVID. 26(3)(c) (1953). That view has not survived in the United States, and it was removed in the 1974 reworking of the Uniform Rules of Evidence. See UNIF. R. EVID. 502 (1974); see also EDWARD W. CLEARY, MCCORMICK ON EVIDENCE § 88, at 324 (3d ed. 1984); JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 503(a)(2)[01] (1989).

Judicial determinations of whether individual communications are protected by the attorney-client privilege are often sufficiently complex and time-consuming without the addition of foreign-law determination, complete with foreign-law expert witnesses, which was necessitated by the older model evidence codes. The limitation seemed designed to retaliate against non-U.S. legal systems that, presumably, unwisely refused to accept the U.S. conception of the privilege. That intent becomes evident when it is realized that, under that discarded view, communications in the United States by a U.S. client of such a foreign-admitted lawyer legally providing legal services in the United States would, nonetheless, not be privileged.

8. Lawyers litigating in a state in which they are not locally admitted can, in almost every state, obtain temporary local admission through an appearance *pro hac vice*. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 15.4.3 (1986). On admission *pro hac vice* in federal courts, see *id.* § 15.2.4. Frankly, lawyers conducting transactional work ignore state lines; so long as they are admitted in the jurisdiction in which they have an office and regularly practice, most U.S. lawyers feel entirely unencumbered in crossing state lines to confer, advise, negotiate, and take other steps on behalf of clients in states where they are not admitted.

it is familiar and congenial to U.S. courts to think of "foreign-admitted" lawyers as, nonetheless, lawyers in all respects.

Instead of venturing off-shore to understand and critique such developments from a comparative perspective, I will stay close to my home port in my own discussion. In this Article, I will consider two general areas of the U.S. law of confidentiality. In Part I, I will reflect briefly upon what I call "the U.S. culture of lawyer-client confidentiality." I say "culture" rather than "cult," and one must guard against temptations to confuse those concepts. Those reflections will serve as background—by way of both match and contrast—to my sketch of the U.S. law of confidentiality in Part II.

Despite my inability to supply a fully comparative perspective, I hope that consideration of these selected topics sheds some light on the challenge of lawyer confidentiality in international law practice. Although a comparative perspective must be completed by others, such a review of the U.S. law of confidentiality may help to set it into sharper relief. What I attempt to supply here is the perspective that can sometimes be brought to an examination of a country's law by one from another shore, a view that attempts to proceed without preconception or pre-commitment to approve or disapprove. I intend to attempt that here, or at least with as little preconception as a scholar can muster on a familiar subject.

I. *THE U.S. CULTURE OF LAWYER-CLIENT CONFIDENTIALITY*

The U.S. culture of lawyer-client confidentiality derives largely from rhetoric about lawyer-client confidentiality and is thus a figment of the strong U.S. legal imagination. The rhetoric is consistent among speakers and over time. It also purports to provide a program of action, and thus it seems to reflect an ideology. It is radical in the sense that the ideology is avowedly non-pragmatic: proponents vigorously insist on absolute adherence to it, regardless of sacrifice of competing interests. It is radical in a second, core sense as well: the ideology is thought to be central and vital to broader visions, such as that of a just society.

My impression is that the rhetoric of client confidentiality derives from a broader and deeper tradition of U.S. legal radi-

calism. That tradition has been pervasive through the U.S.'s relatively brief social history. The broad strain of radical U.S. legal rhetoric stretches from at least the colonial rhetoric of Patrick Henry and Samuel Adams, through Clarence Darrow, and to Ramsey Clark, William Kunstler, and Ralph Nader.⁹ At times, although radical, this strain of rhetoric has dominated public discussion about some legal issues. The rhetoric is bold, visionary, and resonant with many basic U.S. political and legal themes of a broad sort. These qualities permit it to travel comfortably and sometimes in high style in popular circles, and sometimes to gain strong, if momentary, journalistic appeal. I would place much of what the popular press carries about client confidentiality in this category of radical U.S. legal rhetoric. I will also leave partly at the level of assertion the statement that the U.S. culture of client confidentiality is rhetorical and thus a figment of the public legal imagination. We will also see shortly that there is at least substantial verbal contrast between the claim of the imagination and the reality of the law.

Perhaps the best, and at least the most pithy, way of illustrating the culture of confidentiality is through one of its very occasional official utterances. The example also indicates how occasionally rhetoric, even of a radical kind, can be translated into a kind of official state policy. Here, as I will shortly indicate, the policy statement has an interesting international twist. I have in mind the well-known, but curious, California statute that some people, mistakenly, have understood to describe that state's law of the attorney-client privilege—section

9. I list here only what I might term "public" radicals—those whose careers brought and bring them prominently and recurrently into the public eye. They have thus played occasionally important roles in U.S. social and political history. Also important in a survey of U.S. legal radicalism, which this Article is not, are the "quiet" radicals—intellectuals and writers who are much less widely known, such as Umberto Unger and other members of the Critical Legal Studies movement in the United States today. See WOLFRAM, *supra* note 8, § 5.2 & n.76. Because U.S. politics by and large distrusts and ignores intellectuals, the careers of quiet radicals are played out only in the course of intellectual history. The two schools of legal radicals thus largely ignore each other, although they often share common enemies and some portions of program. I am not aware, however, of any quiet radical who takes the extreme view of client confidentiality that I find in the public radicals. To the contrary, some modern quiet radicals are deeply distrustful of the anti-social consequences of confidentiality. See, e.g., William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WISC. L. REV. 29.

6068(e) of the California Business and Professions Code.¹⁰ The statute at one time simply recited the words of a lawyer's oath, a list of tasks that a lawyer about to be admitted to practice in California swore to perform. Among other duties, a lawyer in California, according to the statute, agrees to bear the heavy responsibility "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."¹¹

Subsection 6068(e) has a lineage, ancient for California, with an international turn. Its predecessor (from which the subsection does not substantially differ) was first enacted in California in 1872, early in its statehood. It was lifted without alteration from section 511 of the original "Field" code of New York.¹² The New York commissioners' notes claim that the language was translated from the statutorily prescribed oath of advocates in the Canton of Geneva.¹³ In the new regulatory era, section 6068(e) gained greater prominence after 1989 as a sort of required supplement to the California lawyers code. Unique among the states, California's lawyers code¹⁴ does not contain any direct requirement of confidentiality. That and similar omissions are covered in code form only by the duties specified in section 6068. By explicit reference in the lawyers

10. CAL. BUS. & PROF. CODE § 6068(e) (West Supp. 1992). Section 6068(e) states in part: "It is the duty of an attorney to do all of the following: . . . (e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." *Id.* In fact, the California attorney-client privilege provisions are found in sections 950 through 962 of the CALIFORNIA EVIDENCE CODE (West 1966).

11. CAL. BUS. & PROF. CODE § 6068(e) (West Supp. 1992).

12. See Report of the Commissions on Practice and Pleadings, Code of Civil Procedure 204-05 (1850) [hereinafter New York Commissions Report]. The copying can readily be explained by the remarkable coast-to-coast influence of the Field brothers, who were originally from New York. The author of the New York Code of Civil Procedure (which, among other ironies, was never enacted in New York as drafted) was David Dudley Field. His brother, Stephen J. Field, the future governor of California and associate justice of the U.S. Supreme Court, was then an influential member of the judiciary committee in the legislature of California. Stephen J. Field was responsible for guiding through it the present section of the modern California code, along with much of its procedural law, using the New York code as a model. See CARL B. SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 54-55 (1969).

13. New York Commissions Report, *supra* note 12, at 205.

14. RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA, CAL. CIV. & CRIM., PROF. RULES pt. 2 (West Supp. 1992) [hereinafter CALIFORNIA RULES]. The California Rules were approved by the California Supreme Court on November 28, 1988 and became effective on May 27, 1989. *Id.*

code, that and other prescriptions also bind California lawyers for disciplinary purposes.¹⁵ California lawyers thus practice under a hybrid system of regulation—part enacted by the state legislature and part promulgated by the California Supreme Court.¹⁶

Three elements in the language of section 6068(e), portraying both its mythic and its radical-heroic qualities, are immediately relevant. First, the statute's protection of client confidences is absolute. Nothing is said in the statute about accommodating other interests through exceptions, of occasionally setting aside the demands of client confidentiality in order to give heed to what may on occasion be a superior legal interest.¹⁷ Second, the client's interest is stated in terms that strongly imply that the lawyer is personally at risk in protecting it, and properly so as a consequence of the lawyer's calling. Third, and following from the prior points, the statute

15. See *id.* Rule 1-100(A) ("The prohibition of certain conduct in these rules is not exclusive. Members are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, § 6000 *et seq.*) and opinions of California Courts."). The pre-1989 California lawyers code did not contain a similarly specific incorporation-by-reference of the State Bar Act. See RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA Rule 1-100 (West 1981) ("Nothing in these rules is intended to limit or supersede any provision of law relating to the duties and obligations of attorneys or the consequences of a violation thereof.").

16. On the customary unwillingness of U.S. courts, including the California Supreme Court (on other issues that are analytically indistinguishable), to permit the state legislature to interfere, even in benign ways, with the power of the judicial branch to regulate lawyers, see generally WOLFRAM, *supra* note 8, § 2.2.3.

17. Take, for example, a lawyer's suit against a client to recover fees for legal services. Such suits are permissible in California, despite the fact that most fee suits would be difficult to the point of impossibility to reconcile with section 6068(e). The way out is found only in California case law—opinions holding that the confidentiality obligation does not apply to reasonable use of confidential client information to recover a fee. *E.g.*, *Henshall v. Coburn*, 169 P. 1014 (Cal. 1917) (permitting Lawyer 2, suing purported clients for fee, to elicit from Lawyer 1, to whom clients had first gone for legal services, confidential client communications concerning whether to involve Lawyer 2 in representation). In contrast, the extravagantly hurtful use of confidential client information to collect a fee is subject to discipline. *E.g.*, *Lindenbaum v. State Bar of Calif.*, 160 P.2d 9 (Cal. 1945) (disciplining lawyer for writing letter to immigration service office to incite investigation of client's wife after client listed lawyer's fee bill as scheduled debt in bankruptcy).

Such a superogatory role for decisional law is hinted at in Rule 1-100 of the California Rules. See CALIFORNIA RULES, *supra* note 14, Rule 1-100 ("Members [of the mandatory state bar] are also bound by . . . opinions of California courts."). Suffice it to say that "bound by" obscures, to say the least, the point that a duty that otherwise would exist under mandatory legislation is being relaxed by courts through the decisional process.

directs lawyers always to subordinate their personal interests to those of the client. In that sense the statute is strongly hierarchical.

I think we will see that the implicit *legal* claims of the California statute are mythological: in California as elsewhere, each of the three propositions is either dead wrong or subject to serious compromise. Only very occasionally has anyone in a position of responsibility read the statute literally. In one remarkable concurring opinion in a 1954 case, two California appellate judges did assert that a lawyer was required by section 6068(e) always to refuse to comply with a direct court order to testify after the lawyer had invoked the attorney-client privilege and the trial court had held that the privilege did not apply!¹⁸ The purpose of such invariable intransigence was to incur a contempt sanction in order to obtain the procedural basis for the lawyer's immediate appellate review. No subsequent California opinion or any other authority supports such a monstrous requirement. The interesting point is that at least on that isolated occasion, the extravagant rhetoric of section 6068(e) was mistakenly thought to prescribe a straightforward legal rule. One point to be made, I suggest, is that even the use of ceremonious and flamboyant language in an otherwise innocuous source such as an oath of office can be rendered dangerous if read literally.

As the next illustration of the U.S. culture of client confidentiality, I turn to the writing of a contemporary scholar. The assuredly most eloquent and long-persisting defender of radical confidentiality is Professor Monroe H. Freedman of the Hofstra University School of Law. His early adventures in this subject deserve to be better known than they are, because they show true lawyer heroism in the face of threatened lawyer martyrdom.¹⁹ In 1966, Professor Freedman had already estab-

18. *People v. Kor*, 277 P.2d 94, 101 (Cal. Ct. App. 1954) (Shinn, J., concurring). With equal intemperance, I have elsewhere dismissed the talk in the opinion as "judicial heavy breathing." WOLFRAM, *supra* note 8, at 254 n.79. For a much more finetuned and discerning examination of the connections between the "secrets and confidences" statute and a state's attorney-client privilege, in a jurisdiction that had copied, in turn, the California oath statute, see *State v. Keenan*, 771 P.2d 244 (Or. 1989).

19. For a brief account of how Professor Freedman's speech brought upon him an ultimately unsuccessful disbarment campaign by several District of Columbia federal district judges, see Charles W. Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809, 824-25 n.54 (1977).

lished a reputation as a rising legal scholar and civil libertarian when he gave a lecture to criminal defense lawyers in the District of Columbia on what he called "the three hardest questions" in criminal defense practice: whether to cross-examine a witness known by the lawyer to be telling the truth, whether to ask a question of a testifying client-defendant when the lawyer knows that the answer will be perjurious, and whether to advise a client about the legal implications of testimony when preparing the client to testify as a witness.²⁰

On the second question, which is most germane to my topic, Professor Freedman's radical answer was that a lawyer not only may but must ask the appropriate questions to guide the client through the perjurious exercise in a way that permits the client to tell the client's false story to the jury as the client wishes to tell it.²¹ Professor Freedman urged that position not at all because he relished falsehood or believed that lawyers could not be asked to detect it,²² but for the logically intelligible reason that any other course would compromise the client's interest in confidentiality. As Professor Freedman would later put it, the problem of client perjury presents a criminal defense lawyer with a "trilemma."²³ First, a lawyer cannot provide competent legal assistance without knowing all the facts that the client knows and is able to tell the lawyer.²⁴ Second,

20. See Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966). See generally MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975).

21. Freedman, *supra* note 20, at 1475.

22. On Professor Freedman's agony over the extent to which his position entails complicity in presenting false testimony, see MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 121 (1990). One important contribution of Professor Freedman's early writing was to explore a central question of epistemology entailed in any claim to take seriously the question of client perjury. To do so requires that we posit that a lawyer will in some circumstances "know" of the perjury. Many lawyers who deny that the question presents a real issue do so on the ground that a lawyer never "knows" that a client will testify falsely. E.g., Panel Discussion, *Professional Responsibility in the Practice of Criminal Law* (remarks of Richard Uviller), in *PROFESSIONAL RESPONSIBILITY OF THE LAWYER: THE MURKY DIVIDE BETWEEN RIGHT AND WRONG* 49, 56 (Nina M. Galston ed., 1976). Professor Freedman disagrees, arguing that lawyers often know of truth or falsity in a client's testimony. See FREEDMAN, *supra*, app. B; see also FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM*, *supra* note 20, at 51-58.

23. E.g., FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS*, *supra* note 22, ch. 6 ("The Perjury Trilemma").

24. *Id.* at 111.

the lawyer must hold "in strictest confidence"²⁵ all communications by the client to the lawyer.²⁶ And third, in presenting a matter to a court, a criminal defense lawyer must act with candor.²⁷ Professor Freedman's solution to the quandary was to give preeminence to the interests of competent representation and client confidentiality and to sacrifice to that extent the interest in sustaining the truth-determining function of trials.²⁸

Although radical at the time, Professor Freedman's forceful statement of his position almost single-handedly set in train a debate that has gripped professional and scholarly attention for the better part of three decades.²⁹ That debate has begun to subside only in recent years.³⁰ Professor Freedman's conception of the reach of confidentiality articulated the view of a sizable segment of U.S. professional opinion, striking the same resonant chord that we see reverberating in the California statute. I say "a sizable segment" of professional opinion, but I do not say a majority. In the debate that ensued after Professor Freedman's views were first published in 1966, lawyers from three rather disparate groups have joined the Freedman side of the debate at least some of the time: criminal defense lawyers, personal injury claimants' lawyers,³¹ and, although in a

25. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM, *supra* note 20, at 27.

26. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS, *supra* note 22, at 111.

27. *Id.*

28. *Id.* at 109.

29. For contemporary responses, see, for example, David G. Bress, *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility*, 64 MICH. L. REV. 1493, 1495-96 (1966); John T. Noonan, Jr., *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485, 1488 (1966).

30. Neither bench nor bar ultimately accepted Professor Freedman's thesis on presenting false client testimony. The opinion that has had the most influence—surprisingly, because of its uninspired reasoning—is *Nix v. Whiteside*, 475 U.S. 157, 170-71 (1986) (dicta) (stating that lawyer who knows of client's intent to commit perjury at criminal trial must not participate in presenting it). Of greater importance, and influential in *Nix v. Whiteside* itself, was the rejection by the American Bar Association of Professor Freedman's thesis in formulating what became Rule 3.3(a)(4) of the ABA MODEL RULES OF PROFESSIONAL CONDUCT (Discussion Draft 1983) [hereinafter MODEL RULES]. The rule states that a "lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures." See *id.* Rule 3.3 (a)(4); see also *id.* comment (stating that "the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party").

31. The position of the personal-injury claimants' bar has been most explicitly articulated. In a document drafted, not surprisingly, by Professor Freedman, the As-

much more guarded form, some corporate lawyers. The majority of lawyers, and certainly a very large majority of U.S. lawyers—the bulk of whom are office lawyers who rarely or never go to court—sat out the debate, either too confused by the contentious discussion, too ill-informed of its doctrinal implications to take sides, or, though sympathetic to Professor Freedman's position, too discomfited by its radicalism to wish to be personally associated with it.

For our purposes, the most salient feature of the Freedman school of confidentiality is not that it has found little success in courts or other official fora. Despite that lack of ultimate official acceptance, it has provided a theoretical basis for those articulate and well-situated lawyers who argue in favor of a very broad reach of client confidentiality. This basis is founded on the client's interest in obtaining effective legal services through fully-informed counsel, and the client's interest in autonomy through being able to resist the state and others,³² with the skilled assistance of a lawyer who is sworn to both fidelity and secrecy.

Let me close this section of my discussion with reflections on causes. How is it possible that a view such as Monroe Freedman's could be so widely acclaimed and exuberantly celebrated despite its rather dismal record of official acceptance? The answer to that question, I think, takes us closer to the mother lode of U.S. legal culture. What is intuitively appealing

sociation of Trial Lawyers of America ("ATLA") put forward a proposed code of lawyers' conduct that would have put Professor Freedman's view into the form of a disciplinary requirement. See ROSCOE POUND-AMERICAN TRIAL LAWYERS FOUNDATION COMMISSION ON PROFESSIONAL RESPONSIBILITY, *THE AMERICAN LAWYER'S CODE OF CONDUCT*, ch. 1, illus. 1(i) & 1(j) (rev. draft 1982). See generally Charles W. Wolfram, *Client Perjury: The Kutak Commission and the Association of Trial Lawyers on Lawyers, Lying Clients, and the Adversary System*, 1980 AM. B. FOUND. RES. J. 964.

32. I speak of "others" because advocates of Professor Freedman's thesis originally put it forward as a special justification for assisting a person accused of a serious crime—thus invoking, at least implicitly, the right-to-counsel guarantee of the Sixth Amendment and the privilege against self-incrimination under the Fifth Amendment. See U.S. CONST. amends. V, VI. Those provisions are applicable, of course, only with respect to criminal proceedings. The thesis has become generalized, however, in Professor Freedman's hands. Although I have found no place where he has defended the position, he has applied it—without further justification—to civil litigants as well as to corporate clients, who have no Fifth Amendment privilege. The ultimate extension occurred in Professor Freedman's ATLA proposed lawyers code, where no distinction was drawn between the types of testimonial settings in which the client perjury occurred. See *supra* note 31.

about Professor Freedman's approach to confidentiality is that it calls upon that most American of pop-jurisprudential rallying cries—the invocation of rights. (It also shares a quality for which lawyers of all stripes frequently call—sharp clarity and ease of application. To paraphrase a noted legal philosopher,³³ a formulation that purports to provide easy answers to difficult questions should be immediately suspect as simple-minded.) Several observers of popular and scholarly legal discourse in the United States have been making the point in recent years that our jurisprudence is often dominated by a rights-compulsive, selfish view of the world.³⁴ If one has a “right,” then all else and all others must step aside and allow the right to be exercised in any way that the right-holder may wish. In this view, the fact that exercising the right tramples on the interests of others, even on important community interests, is not criticism but description. As the California confidentiality statute loftily puts it, the client has a right of confidentiality “at every peril”³⁵ to the lawyer. As was true of the rights revolution in criminal procedure in the heyday of the U.S. Supreme Court under Chief Justice Earl Warren, embracing or rejecting the expansion of the procedural rights of accused persons boils down to a choice between giving ascendancy to the interests of nearly perfect criminal process (for a host of arguable reasons) or giving preference to the community interest in effective law enforcement (for a host of different reasons). What the U.S. legal culture strongly implies, and what the rhetoric of U.S. legal radicalism often encourages one to believe, is that a similar choice must be made with respect to client confidentiality. The client's “right” to confidentiality must be respected above all other interests—without compromise, and without accommodation.

II. *THE U.S. LAW OF CONFIDENTIALITY*

What in fact is going on with the U.S. law of confidential-

33. David Luban, *Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice*, 49 MD. L. REV. 424, 433 (1990). Professor Luban, I hasten to add, was referring not to Professor Freedman's perjury test, but to a prior position of his own on a point not involving perjury.

34. The point has been made most recently by Professor Mary Ann Glendon in *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

35. See *supra* note 11 and accompanying text.

ity? Let me begin by briefly describing the sorts of legal doctrines that a U.S. lawyer has in mind in referring generally to "client confidentiality." We have had occasion to traverse most of this domain in the initial stages of drafting the *Restatement of the Law Governing Lawyers* (the "Restatement").³⁶ Three key doctrines are involved. I will then turn to a discussion of several illustrations that will help us compare the law of confidentiality with what we would expect the law to be given the U.S. myth of client confidentiality.

A. *The Attorney-Client Privilege*

First, and perhaps most familiar, is the attorney-client privilege. The general concept is set out in section 118 of the Restatement, and then elaborated upon in the following sections. The four-fold definition of the privilege is sketched there as follows:

§ 118. The Attorney-Client Privilege

Except as otherwise provided in this Restatement, the attorney-client privilege may be invoked as provided in § 135 with respect to:

- (1) A communication
- (2) Made between privileged persons
- (3) In confidence
- (4) For the purpose of obtaining or providing legal assistance for the client.³⁷

In "restating" the privilege, we restate a doctrine that is a rule of the law of evidence. Technically, it is confined in application to evidence questions that arise in the course of civil and criminal court proceedings.³⁸ As such, the privilege limits the extent to which a party in litigation can force from an unwill-

36. See *supra* note 5.

37. See RESTATEMENT DRAFT No. 2, *supra* note 5, § 118. Sections that follow section 118 expand upon and explore each of the four key components. Section 119 examines communications covered by the privilege. Section 120 describes privileged persons. Section 121 defines "in confidence." Finally, section 122 examines the requirement that legal assistance be the object of a privileged communication. See *id.* §§ 119-122. Further sections examine the privilege as it applies to organizational and multiple clients, duration of the privilege, waivers and exceptions to it, and the process of invoking the privilege and its exceptions. *Id.* §§ 123-135.

38. The privilege has a less certain application in other tribunals such as in administrative and legislative hearing bodies, because those tribunals are often unclear as to the extent to which formal rules of evidence apply.

ing witness a statement or document that is protected as confidential. It does not independently supply the basis on which it can be claimed that a lawyer is required to invoke the privilege or, out of court, to keep client information confidential. Other law, discussed later, supplies that basis. The privilege attaches to any communication if, roughly speaking, it was generated in confidence by either the lawyer³⁹ or the client in the course of a lawyer-client interchange. That which a client communicates to a lawyer under those conditions is subject to the privilege; and, in most jurisdictions, that which a lawyer communicates to a client is equally privileged.

B. *Lawyer Work-Product Immunity*⁴⁰

The second general doctrine is, I strongly suspect, particularly confusing to non-U.S. legal observers—or, for that matter, to a highly perceptive U.S. non-lawyer. It certainly befuddles first-year U.S. law students. The doctrine carries various labels,⁴¹ but is most commonly referred to as work-product immunity. Lawyer work-product is best understood as a broadened but flattened version of the attorney-client privilege.⁴² It

39. On the application of the privilege to lawyer-initiated communications, such as a lawyer's confidential opinion letter to a client, see RESTATEMENT DRAFT NO. 2, *supra* note 5, § 119 comment i & reporters' note.

40. I will here refer to "lawyer" work-product because lawyers are my focus. It should be noted, however, that most versions of the doctrine now extend a similar immunity to work-product produced by a party and a party's agents and insurers, whether they are lawyers or not. See, e.g., FED. R. CIV. P. 26(b)(3) (work-product extends to material prepared "by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)").

41. In New York, the doctrine is found in N.Y. CIV. PRAC. L. & R. § 3101(d)(2) (McKinney 1991) ("[M]aterials otherwise discoverable . . . and prepared in anticipation of litigation or for trial . . . may be obtained only upon a showing that the party seeking discovery has substantial need of the materials . . . and is unable without undue hardship to obtain the substantial equivalent of the materials by other means."). For an interesting and recent decision detailing the differences between the attorney-client privilege and what we are here calling the work-product immunity, see *Spectrum Sys. Int'l Corp. v. Chemical Bank*, 581 N.E.2d 1055 (N.Y. 1991) (stating that although only "material prepared for litigation" is protected as work-product, attorney-client privilege is not tied to contemplation of litigation).

42. Understanding of the work-product immunity has been significantly furthered by the addition of a topic to the Restatement's treatment of client confidentiality, prepared by Professor Linda S. Mullenix of the University of Texas School of Law. See RESTATEMENT OF THE LAW GOVERNING LAWYERS, ch. 5, topic 3 (Tentative Draft No. 5, 1992) [hereinafter RESTATEMENT DRAFT NO. 5]. Among other recent and

is broadened in two directions.

First, lawyer work-product is broader than the privilege because it covers not only confidential whispers between client and lawyer, but much else that is not client-derived. It covers almost everything that a lawyer might develop and generate in the course of preparation of a case for litigation—but only such preparation. For example, similar “work-product” prepared in the course of drafting a will or negotiating an international contract is not protected.⁴³ Indeed, although this comes very close to the line, one case has held that lawyer work in connection with an ongoing dispute between contracting parties that had not degenerated into a sufficiently focused and contentious quarrel is not immune as work-product.⁴⁴ Theoretically interesting arguments could be made for generalizing the work-product protection to include non-litigation work, but prevailing U.S. legal doctrine is quite clear that to qualify as work-product immunized from discovery, material must be prepared “in anticipation of litigation” as the Federal Rules of Civil Procedure describe the limitation.⁴⁵ If material is indeed protected as work-product, the limited, but important, function of the doctrine is to bar pre-trial access to the material through the otherwise broad powers of pretrial discovery.

The second difference between work-product, to the extent that it protects the trial preparation work of a lawyer, and the attorney-client privilege, is the significantly lesser degree to which the work-product must be kept confidential. In general, a lawyer may share work-product more broadly than material claimed to be privileged. Without threat of loss of the immunity, a lawyer may show work-product to, and share it with, persons who are not assisting the lawyer in trial preparation.⁴⁶ For example, a lawyer may share work-product widely within a client's offices, including with those who are not in-

notable works, see generally Elizabeth Thornburg, *Rethinking Work Product*, 77 VA. L. REV. 1515 (1991).

43. RESTATEMENT DRAFT NO. 5, *supra* note 42, § 136(1)(c) & comments j-m.

44. *Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1121 (7th Cir. 1983).

45. FED. R. CIV. P. 26(b)(3).

46. Doctrinally, this can be seen most clearly in the different articulation of the more limited circumstances under which disclosure of work-product to a third person will cause waiver of the immunity. See RESTATEMENT DRAFT NO. 5, *supra* note 42, § 140(4) & comment e, as compared to the much greater vulnerability to loss of the

volved in trial preparation, so long as the disclosure does not create a substantial risk of divulgence to an adversary in litigation.⁴⁷ On the other hand, attorney-client privileged material will lose that status if it is shown—even if inadvertently (although negligently), according to several decisions⁴⁸—to any third person who is not included within the narrow “need to know” circle of those assisting the lawyer in handling the client’s matter.⁴⁹ The privilege is based on a pragmatic judgment that confidentiality is necessary in order to encourage client communication.⁵⁰ If the client shows a willingness to share the privileged communication with non-privileged persons, a court will feel free to find that, in this instance, the assurance of confidentiality was not important to the client, and that the general policy of free access by adversaries to all relevant evidence should prevail.

C. *The Agency Law of Confidentiality*

The third doctrine provides the greatest breadth in its definition of protected information. It is sometimes called, at the

privilege by similar disclosure to a third party, RESTATEMENT DRAFT NO. 2, *supra* note 5, § 129 & comment f.

47. RESTATEMENT DRAFT NO. 5, *supra* note 42, § 140 comment e (“Work-product, including work-product of a lawyer, may be shared freely among the client, the client’s lawyer or other representative, associated lawyers and other professionals working on the matter, actual or potential co-parties, or a client’s business advisers or agents.”).

48. See RESTATEMENT DRAFT NO. 2, *supra* note 5, § 129 comment i reporters’ note.

49. The “need to know” shorthand will do for the present brief description of doctrine, but is not in fact a singular test. Sharing of information within a lawyer’s office, for example, is always privileged, although at least some of that sharing could not be defended on “need to know” grounds. See *id.* § 129. On the other hand, “need to know” is explicitly the doctrine suggested for the sharing of privileged information within an organizational client. See *id.* § 123(4)(b). Only roughly captured by the “need to know” locution are permitted sharings of privileged communications between co-clients or clients with a common legal interest. See *id.* §§ 125 (co-clients), 126 (separately represented clients with common legal interest).

50. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Trammel v. United States*, 445 U.S. 40, 51 (1980) (dicta); *Fisher v. United States*, 425 U.S. 391, 403 (1976). See generally CLEARY, *supra* note 7, § 87; 8 JOHN HENRY WIGMORE, *EVIDENCE* § 2291 (John T. McNaughton rev. ed. 1961); WOLFRAM, *supra* note 8, § 6.1. For a criticism of the rationale, relying on arguments drawn from Jeremy Bentham, see DAVID LUBAN, *LAWYERS & JUSTICE* 189-92 (1988). The Benthamite argument, however, relies heavily on what might be overly simplified distinctions between wrongdoing clients and those in the right. If clients could not readily sort themselves out in that way, a justifiable need for the privilege would still exist.

risk of some obscurity on the margins, the *agency law of confidentiality*.⁵¹ The agency rules are discussed in sections 111 through 117A and B of the Restatement⁵²—the obligations imposed on a lawyer not to reveal confidential client information when doing so would adversely affect the client.⁵³ The most obvious applications of this body of law occur through *professional discipline*, for example through disbarment or suspension of a lawyer's license.⁵⁴ Professional discipline for breaches of confidentiality obligations, I should add, is uncommon, although occasional instances come to light.⁵⁵ In my experience, violations (whether prosecuted or not) are also quite uncommon. A client can also gain a *damage recovery* against the lawyer who unjustifiably divulged confidential information to the harm of the client, or possibly, who threatens such divul-

51. See WOLFRAM, *supra* note 8, § 6.1.1.

52. RESTATEMENT OF THE LAW GOVERNING LAWYERS §§ 111-117B (Tentative Draft No. 3, 1990) [hereinafter RESTATEMENT DRAFT NO. 3].

53. *Id.* § 111(1) ("The lawyer shall not use or disclose confidential client information within the meaning of § 112 about a client if there is a reasonable likelihood that doing so will adversely affect a material interest of the client or if the client has directed that the lawyer not use or disclose it . . ."). The "reasonable likelihood" test is elaborated in comment d of section 111(1) to include whatever uses or disclosures "a lawyer of ordinary prudence would recognize as creating some risk of material misfortune, disadvantage, or other prejudice to a client." *Id.* comment d. Nonetheless, and contrary to the position taken in the *Restatement (Second) of Agency*, comment e of the *Restatement of the Law Governing Lawyers* would permit a lawyer to use confidential client information for the lawyer's self-enrichment, so long as strict application of the test of comment d concerning the risk of adverse effect to the client is satisfied. *Id.* comment e; see RESTATEMENT (SECOND) OF AGENCY § 388 (1957). Naturally, the position of the *Restatement of the Law Governing Lawyers* on the matter is controversial.

54. These forms of discipline occur pursuant to confidentiality rules in lawyer codes that prohibit adverse use or disclosure of confidential client information. See MODEL RULES, *supra* note 30, Rule 1.6; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(b) (1980). A version of the recommended lawyer code provisions on confidentiality is in effect in every U.S. jurisdiction. See generally WOLFRAM, *supra* note 8, § 6.7.2.

55. *E.g.*, *In re Gemmer*, 566 N.E.2d 528 (Ind. 1991) (concerning lawyer suspended, *inter alia*, for writing to state revenue department informing it of client's underpayment of tax following falling out between lawyer and client over fees); *In re Pool*, 517 N.E.2d 444 (Mass. 1988) (order concerning reinstatement of lawyer disbarred for breach of confidence of client by agreeing with prosecutors to tell them where to find client's hidden safe deposit box if they agreed to let him keep cash contents of box); *In re Rubinstein*, 506 N.Y.S.2d 441 (N.Y. App. Div. 1986) (involving lawyer suspended from practice for use of confidential information in insider trading in shares of law firm's corporate client).

gence.⁵⁶ Other remedies are being advocated by client litigants. A recent Ohio case, for example, upheld a trial court order granting an *injunction* against a lawyer who had gained confidential information about safety aspects of an off-the-road vehicle while employed as in-house counsel for an automobile manufacturer and who, after leaving that position, was advertising his availability as an expert witness for those who wished to sue his former client-employer.⁵⁷ A very recent Pennsylvania decision similarly upheld an injunction against a law firm that secretly began to represent competitors of a former client in a highly fact-sensitive area of practice.⁵⁸

Taking this sketch of the U.S. law of confidentiality as a given, to what extent does it fail to bear out the heroically broad, absolute-right claims of the U.S. cult of confidentiality? A complete answer to that question would take us far beyond the remaining pages. I will list and illustrate only a few aspects of the answer. I employ in doing so a pale, written imitation of one version of the U.S. law school classroom exercise in the Socratic technique, that version at least that relies on hypothetical situations to test and extend an understanding of doctrine. In that same tradition, I have loosely based several of the hypothetical situations on entirely imaginary versions of an historical event—the attempted assassination of former U.S. President Ronald Reagan by John Hinckley in 1981.

Hypothetical One: Client rushes into Lawyer's office and blurts out that Client has just attempted to assassinate the President. Lawyer responds, "Fear not. Nothing you say here will leave this office. Tell me everything that happened. Better yet, write it all down on this legal pad, so I can retain all the details." The police later learn of the existence of Client's written account and, still searching for the attempted assassin, seek to compel Lawyer to turn it over.

56. One much discussed but rarely litigated setting is where a lawyer uses confidential client information to usurp a commercial opportunity of the client. *E.g.*, *Leach v. Hough*, 507 A.2d 848 (Pa. Super. Ct. 1986).

57. *American Motors Corp. v. Huffstutler*, 575 N.E.2d 116 (Ohio 1991).

58. *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, No. 99 E.D. Appeal Docket 1990, 1992 Pa. LEXIS 36 (Pa. S. Ct. Jan. 29, 1992). In the interest of full disclosure, I should indicate that I gave expert testimony in favor of the prevailing former client during the trial.

Existing authority strongly suggests that, whatever the strength of the public need for the information in the lawyer's hands, the lawyer need not disclose it because of the operation of the attorney-client privilege and, arguably, the work-product doctrine.⁵⁹ Indeed, disclosure by the lawyer would violate the agency rule of confidentiality.⁶⁰ The fact that the attempted assassination of the nation's highest elected official is involved does make the radical point concerning rights-consciousness, perhaps pressed to some sort of bizarre limit. The important factor under the privilege, and some limitation on its social costs, is that the damage is already complete. All that remains at stake—although it is a great deal—is apprehension and conviction of the attempted assassin.

Hypothetical Two: In the same office interview, Lawyer learns from Client that Client used a cheap "Saturday night special" pistol to do the horrible deed. Client produces the weapon from a pocket in his coat at this point and hands it to Lawyer.⁶¹ Lawyer puts the gun into an office safe for examination and possible future use as evidence for the de-

59. A significant issue under the work-product doctrine concerns whether the anticipation-of-litigation requirement can be satisfied. See *supra* text accompanying note 45. The point is purely academic, of course, because the attorney-client privilege supplies a complete bar to an attempt by the police to seize the statement through mandatory process.

60. See *supra* notes 51-58 and accompanying text.

61. The hypothetical may require some scene-setting. Lawyers trained in other legal systems are usually appalled by such goings-on in a lawyer's office. U.S. lawyers, to the contrary, tend to approach such scenes as presumptively legitimate, even routine. Part of the explanation has to do with guns and their stupidly wide legal availability in the United States. See, e.g., Erik Eckholm, *Ailing Gun Industry Confronts Outrage Over Glut of Violence*, N.Y. TIMES, Mar. 8, 1992, § 1, at 1 (estimating U.S. civilian gun supply at 200 million). More importantly, perhaps, lawyers consider themselves as legitimate, first-line investigators of client involvement in both crimes and civil wrongs.

Gathering and retaining physical evidence, interviewing witnesses, and the like are considered in the United States important and entirely appropriate parts of a lawyer's work. In many other legal systems, such activity would be considered to be entirely impermissible tampering with proof. However, in recent years, even in the United States, it has become somewhat standard doctrine that a lawyer is under an obligation to turn over guns and other implements of crime to the prosecuting authorities under the circumstances of the hypothetical. See RESTATEMENT OF THE LAW GOVERNING LAWYERS § 164 comment d (Preliminary Draft No. 6, 1991) (scheduled to appear in possibly modified form as Tentative Draft No. 6, 1993). The lawyer nonetheless may retain the weapon long enough to examine it, so long as the examination does not alter the appearance of the item or affect its utility for the prosecution as evidence. *Id.*

fense at trial. The police later attempt to compel Lawyer to turn over the pistol for use in prosecuting Client.

The lawyer cannot successfully invoke the attorney-client privilege to prevent disclosure of the pistol because it is not a "communication" between the client and the lawyer. Although the difference may strike some as technical, it harbors a profoundly important point: the privilege is designed, not to protect client interests, but to protect client-lawyer communications. If we stipulate that turning over the pistol would reveal no client communication, the lawyer may be required to do so.⁶² It is not work-product because the lawyer's efforts did not lead to its production. Even if, in different circumstances, the lawyer had expended considerable effort to find the weapon, courts would still hold that it was not work-product. That result would be reached under the rather vague doctrine that treats such physical evidence as a "fact" rather than as work-product.⁶³ The agency rules do prohibit a lawyer from acting in a manner detrimental to the client's interests in confidentiality of the item, but they are subject to several exceptions, one of which requires compliance with a lawful order, such as a subpoena or, if a challenge is made to a subpoena or similar effort to obtain evidence, a court order ruling on such a challenge.⁶⁴ It would be to digress too far to explain and qualify this description, but almost all the extant authority goes much further. The general criminal law prohibition against destruction or concealment of evidence may also require the lawyer to turn the weapon over to the police, even if the authorities are unaware that the lawyer possesses it and even in the absence of any effort on their part to obtain it from the lawyer.⁶⁵

Hypothetical Three: From another pocket in what must be a rather full garment, Client pulls a diary. Apparently Client has been tracking the President for months and has meticulously recorded such matters as the purchase of the pistol, routes the President would travel, methods of the Se-

62. See *supra* note 53.

63. The "fact" qualification to the work-product doctrine is examined in RESTATEMENT DRAFT NO. 5, *supra* note 42, § 136 comment g.

64. RESTATEMENT DRAFT NO. 3, *supra* note 52, § 115.

65. See *supra* note 61.

cret Service in protecting the President, and the like. The police seek access to the diary.

As strongly intimated by my analysis regarding the weapon, the diary is a preexisting document that does not itself constitute a communication to the lawyer within the meaning of the privilege; therefore it is not protected against compulsory disclosure by the attorney-client privilege.⁶⁶ It is not protected as work-product because, again, it was not prepared by the lawyer in anticipation of litigation⁶⁷ and because it is a fact rather than work-product.⁶⁸ Also, although agency law would normally require Lawyer not to reveal the diary, the superior legal interest in law enforcement and the general requirement that a lawyer obey lawful orders even at the expense of client confidentiality will trump confidentiality interests on those facts.⁶⁹

Hypothetical Four: Let me shift focus at this point away from the drama of assassination attempts to the workaday world of corporate law practice. Suppose, instead of the scenario to this point, Client were a large corporation charged by a governmental agency with violation of an environmental regulation. Client's agents have brought to Lawyer's office several boxes of documents detailing the ways in which Client Corporation has been disposing of toxic wastes over the last two decades. The documents are delivered to the lawyer in strict secrecy and revealing them would seriously harm Client. Can Lawyer keep them confidential?

Just as with the weapon and diary of the assassin, the paper trail left by a business client is not protected by either the attorney-client privilege or the work-product immunity and is thus subject to discovery. Again, the critical fact is that the documents preexisted the client-lawyer communications.⁷⁰ Unlike the weapon, however, the documents are not contra-

66. On the preexisting-document rule, see generally RESTATEMENT DRAFT NO. 2, *supra* note 5, § 119 comment j. See also, e.g., *Fisher v. United States*, 425 U.S. 391, 403-04 (1976).

67. See *supra* notes 43-45 and accompanying text.

68. See *supra* note 63.

69. See *supra* note 61.

70. The preexisting-document rule is a corollary of the "fact" exception to work-product immunity. See *supra* note 63. As already mentioned *supra* at notes 37-39, and 66, and accompanying text, the attorney-client privilege is so limited that it

band or an instrument of crime, and therefore almost certainly no independent turnover obligation exists.⁷¹ Therefore, the normal agency rule of client confidentiality applies,⁷² and it requires that Lawyer not reveal the documents or produce them unless and until required by law. In the normal course, we may be sure, compulsory process to obtain the documents will be sought by the regulatory agency, so Client Corporation's respite from mandatory disclosure will probably be brief.

Hypothetical Five: So far we have been dealing with a lawyering activity that is readily recognizable as litigation in one form or another—defending a client against a criminal charge or adversarial regulatory action. Let us shift the focus to an activity in which many more U.S. lawyers engage—office practice. Suppose that Client Corporation, wisely anticipating increased regulatory interest that has not yet surfaced, calls upon Lawyer to conduct interviews throughout Client Corporation's enterprise in order to assess possible exposure to regulatory action. Lawyer conducts extensive interviews with several employees, makes lengthy descriptions of the interviews in the form of memoranda to the lawyer's files, and compiles an elaborate report of several hundred pages that Lawyer sends to Client Corporation's senior executives in charge of environmental matters and overall policy. Several months later, Regulatory Agency starts a proceeding and, learning of the materials, seeks to compel Lawyer and Client to produce them.

The lawyer's conversations with Client Corporation's employees, in many U.S. jurisdictions, are protected by the attorney-client privilege.⁷³ The same is true of Lawyer's extensive

covers only communications between a lawyer and a client initiated as a result of the lawyer-client relationship.

71. See *supra* note 61 and accompanying text.

72. See *supra* notes 51-58 and accompanying text.

73. The basic proposition that the attorney-client privilege applies with respect to communications between corporate counsel and a corporate client is now universally accepted by U.S. courts. See generally RESTATEMENT DRAFT NO. 2, *supra* note 5, § 123. Some legal theorists have not been impressed with the arguments for extending the attorney-client privilege to corporations. *E.g.*, LUBAN, *supra* note 50, at 217-34; WOLFRAM, *supra* note 8, § 6.5.3. Their skepticism has had no discernible effect on the shape of the law. The remaining issue of substantial importance is whether the narrow "control group" test or a broader "subject matter" test (or a variation thereon) is to be applied. The courts are divided, although the federal court decisions have strongly favored an approach much like the broader "subject

report to Client Corporation's senior management.⁷⁴ The extensive file memoranda are immune from discovery as lawyer work-product.⁷⁵

The sweep of that answer may suggest that lawyers might have a market for their services in running corporations—at least running corporations that would pay a premium to gain secrecy. From an opposite direction, several judges and commentators have worried that the corporate attorney-client privilege creates a “black hole” in corporate counsel's office, into which a corporation can deposit documents and information without fear of their later disclosure, with serious consequences for disclosure in trials and for law-compliance interests generally.⁷⁶

At least two considerations probably make the “black hole” concern largely illusory. First, as we have already seen, preexisting documents are not subject to either the attorney-client privilege or the work-product doctrine.⁷⁷ Thus, for the scheme to work, the lawyers would have to be part of the process of generating the documents. Expense alone would preclude that in most instances. Second, if to overcome that doctrinal barrier lawyers become, in effect and at great expense, central managers of the enterprise, the effort will probably fall afoul of another doctrinal difficulty. With respect to the privilege, the client-lawyer communications must be made in the course of the lawyer's providing legal services and not, for ex-

matter” standard. See RESTATEMENT DRAFT No. 2, *supra* note 5, § 123 comment b & reporter's note, comment d.

74. See *supra* note 39 and accompanying text. The question of how extensively an otherwise privileged document may be shared among employees and agents of an organizational client without waiving the privilege has been little discussed in the cases. The *Restatement* proposes a “need-to-know” standard. See RESTATEMENT DRAFT No. 2, *supra* note 5, § 123(4); see also *id.* comment g & reporters' note.

75. RESTATEMENT DRAFT No. 5, *supra* note 42, § 136(1)(b) & comment h (regarding lawyer-prepared work-product). Indeed, material prepared by a lawyer, such as the file memoranda in the problem, will often partake of the special character of mental-impression or “opinion” work-product; discovery of such material through exceptions is subject to much greater restrictions. See *id.* § 138 (regarding opinion work-product).

76. This, for instance, was the concern of the U.S. Court of Appeals for the Sixth Circuit in the *Upjohn* case, as the Supreme Court noted. See *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) (rejecting “zone of silence” argument for narrowing scope of attorney-client privilege in corporate context).

77. See *supra* note 70 and accompanying text.

ample, in the course of providing business advice.⁷⁸ For the most part, U.S. courts have been strict in applying the requirement, and there seems little prospect that the ploy will succeed. Under the work-product rules, of course, the lawyer's activities would not be "in anticipation of litigation,"⁷⁹ and that basis for refusing to disclose would also fail.

Hypothetical Six: Staying with the corporate client focus, suppose that what brings a corporate client's manager to Lawyer's office is a proposed arrangement under which the client will agree to assure lucrative future employment to a person who presently heads a government agency that licenses the activities of the client.

Without putting too fine a point on the matter, the proposed course of action is patently criminal. I raise in this simplistic form the vitally important crime-fraud exception. It operates to limit both the attorney-client privilege⁸⁰ and the work-product immunity.⁸¹ The vital distinction from Hypothetical One is a completed past act there and, here, a future or ongoing course of conduct that constitutes a crime or fraud. One scholar has complained that the breadth of modern regulatory law means that much of what might bring a business client to a lawyer's office will be excepted from the privilege and the immunity.⁸² Courts are unconvinced and have applied the crime-fraud doctrine with impressive vigor.

What about the agency rule of lawyer confidentiality in such a setting? Suffice it to say in this brief survey that some confusion and controversy surrounds the issue. The events in early 1992 afflicting the law firm of Kaye, Scholer, Fierman, Hays & Handler in New York City is a typical setting. A federal banking regulatory agency claimed that the law firm violated federal law by failing to disclose to the agency information necessary in order to permit the agency to do an effective job of regulation.⁸³ The law firm's predictable response was that any

78. See RESTATEMENT DRAFT NO. 2, *supra* note 5, § 118(4); see *supra* note 37 and accompanying text (quoting RESTATEMENT).

79. See *supra* note 45 and accompanying text.

80. RESTATEMENT DRAFT NO. 2, *supra* note 5, § 132.

81. RESTATEMENT DRAFT NO. 5, *supra* note 42, § 142.

82. David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443 (1986).

83. See *In re Fishbein*, OTS 92-19 (Dept. Treas., Off. Thrift Supervision, 1992)

such revelation by them would have violated the agency rule. Unfortunately for those of us with an academic interest in seeing the issue litigated, the case quickly settled.⁸⁴ The issue of disclosing client wrongdoing was, by far, the single most hotly debated issue in the process of developing what became the 1983 American Bar Association ("ABA") Model Rules of Professional Conduct. The resulting Model Rule 1.6—on the agency confidentiality duty and its exceptions—has been the rule most modified in adopting jurisdictions.⁸⁵ Modifications have come primarily in the direction of providing for greater lawyer discretion to disclose in financial-harm cases.⁸⁶ The Model Rule 1.6 "solution" is itself amorphous and ambiguous with respect to the very point we are considering—the discretion to disclose ongoing or future crime or fraud that does not involve death or serious bodily injury.⁸⁷ Dissonance exists between the black letter of Rule 1.6(a) itself, with its apparently

(Mar. 1, 1992 Notice of Charges against Kaye, Scholer, Fierman, Hays & Handler and three partners).

84. On the media attention surrounding the Kaye, Scholer case, see, for example, Stephen Labaton, *U.S. Moves to Freeze Assets of Law Firm for S. & L. Role*, N.Y. TIMES, Mar. 3, 1992, at A1; Edward A. Adams, *Ripple Effects Seen from Kaye Scholer Suit*, N.Y. L.J., Mar. 4, 1992, at 1; Stephen Labaton, *Telling on Clients: When Do Lawyers Blow Whistle? Government Revives Old Debate*, N.Y. TIMES, Mar. 5, 1992, at D13; Jonathan M. Moses, *Kaye Scholer Defense Team Takes Shape*, WALL ST. J., Mar. 5, 1992, at B6; *Judge Declines to Act on Case*, N.Y. TIMES, Mar. 6, 1992, at D6; Stephen Labaton, *S. & L.'s Lawyers Pressured by Suit*, N.Y. TIMES, Mar. 8, 1992, § 1, at 22; David Margolick, *Lawyers Under Fire with U.S. Willing to Go After Law Firms, More Whistle-Blowing on Clients is Likely*, N.Y. TIMES, Mar. 10, 1992, at A1; Amy Stevens & Paulette Thomas, *How a Big Law Firm Was Brought to Knees by Zealous Regulators*, WALL ST. J., Mar. 13, 1992, at A1.

The settlement reportedly requires the firm to pay the government banking regulators US\$41 million, including approximately US\$16 million that will come from the firm partners' own pockets, and it requires disbarment of three of the firm's lawyers (including its former managing partner) from practicing law on behalf of any federally insured financial institution. See Stephen Labaton, *Law Firm Will Pay a \$41 Million Fine in Savings Lawsuit*, N.Y. TIMES, Mar. 9, 1992, at A1; see also Rita Henley Jensen, *Firm, OTS Settled At High Cost*, NAT'L L.J., Mar. 23, 1992, at 1. Undoubtedly, some significant stimulus to a settlement was supplied by the government's unprecedented freezing of much of the law firm's assets by administrative order at the same time that it filed the administrative action against the firm, an action which was criticized by several observers. See, e.g., Linda Himmelstein, *How Thrift Agency Brought Kaye, Scholer to Its Knees*, LEGAL TIMES, Mar. 9, 1992, at 1.

85. MODEL RULES, *supra* note 30, Rule 1.6.

86. See 2 GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING* § AP4:103 (2d ed. 1990).

87. Revelation of confidential client information in the case of threatened (and imminent) death or serious bodily injury is permitted, but not required, under Model Rule 1.6(b)(1), which permits disclosure "to prevent the client from committing a

absolute prohibition against client-injuring disclosures,⁸⁸ and its comment, with its provision for what lawyers now call a "noisy withdrawal."⁸⁹ The inconsistency between the rule and its comment produces clumsiness at best, confusion and misunderstanding at worst. Nonetheless, the ABA House of Delegates recently rejected an attempt by the ABA Ethics Committee to rewrite the rule in a way that would agree with the comment.⁹⁰ The then-membership of the Ethics Committee was contemplating issuing a comprehensive formal opinion to address fraud disclosure issues. What the Committee, now under a new chairman, will do in light of the action of the House of Delegates is unclear.

CONCLUSION

Closely examining the U.S. law of client confidentiality, once again we see the difference between listening to rhetoric and observing what people and institutions do. U.S. legal rhetoric about confidentiality—at least public rhetoric—is expansive, grandiose, and one-dimensional, quite misleadingly so. In fact, the doctrine of client confidentiality is rather determinedly multi-faceted, issue-sensitive, and policy-responsive. The circumstances, at least in many instances and in general

criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." MODEL RULES, *supra* note 30, Rule 1.6(b)(1).

88. *Id.* Rule 1.6(a) ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b) . . .").

89. *Id.* comment (nothing in Model Rules "prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like").

90. See Henry J. Reske & Don J. DeBenedictis, *Ethics Proposals Draw Fire*, A.B.A. J., Oct. 1991, at 34; *ABA Rejects Ancillary Business, Inroads on Client Confidences*, 7 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 256 (1991). The rejected proposal of the ABA Ethics Committee would have added the following subsection to the existing Model Rule 1.6(b) on confidentiality: "A lawyer may reveal such [confidential client] information to the extent the lawyer reasonably believes necessary: . . . (2) to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used . . ." The rationale of many of those in the ABA House of Delegates who opposed the amendment was that any statement in the rule of a *permission* to disclose would be taken to create a *duty* to do so. The suit against Kaye, Scholer may, to some observers, give credence to what otherwise would appear to be an argument based on an improbable assumption of misuse of a permissive rule.

form, do seem to make a difference. Superior legal rights of third persons and society in general do on many occasions override a client's personal interests in confidentiality, at least in forming doctrine.

For the most part, we deal here rather plainly not with a right of confidentiality that has constitutional and thus global dimensions, but with pragmatic concepts and doctrines founded on providing practitioners and their clients with the privacy needed to consult together and to prepare litigation, but no more privacy as against mandatory disclosure for litigation than is necessary for the purpose of encouraging consultation and preparation. For the most part, in my judgment, the risk of creating black holes is not real; as applied by the courts, U.S. confidentiality law requires that the lawyer and client have appropriate attitudes toward legality.

At the same time, the agency rules of confidentiality broadly prohibit a lawyer from disclosing confidential information in all but a few excepted cases. This broad rule, however, operates independently to frustrate searches for important information only in a statistically small number of cases. Even in those instances covered by the rule, I am prepared to trust at least the great majority of practitioners to avoid assisting clients in illegal conduct. And the risk that the minority of lawyers and clients will conspire together, behind a cloak of confidentiality, to frustrate the legal rights of others strikes me, impressionistically, as a lesser social risk than the rather clear harm that would be produced by significant inroads on the law of confidentiality as in fact applied.