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Attorney-Client Privilege: Wisconsin's Approach to the Exceptions

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ATTORNEY-CLIENT PRIVILEGE: WISCONSIN'S APPROACH TO THE EXCEPTIONS

I. INTRODUCTION

The attorney-client privilege protects confidential communications between an attorney and a client.[1] Protecting confidential communications facilitates uninhibited disclosure between an attorney and a client.[2] However, the promotion of uninhibited disclosure must be balanced with the policy of ascertaining the truth. Although both uninhibited disclosure and ascertaining the truth are necessary in any effective legal system, these concepts often conflict. In an attempt to balance these countervailing policies, five exceptions to the attorney-client privilege have been established: the crime or fraud exception, the deceased client exception, the breach of duty exception, the lawyer as witness exception and the joint client exception.[3] Several of these exceptions, when read broadly, have the potential to render the attorney-client privilege ineffective. To avoid a virtual abrogation of the attorney-client privilege, these five exceptions must be strictly construed.

The five exceptions to the attorney-client privilege are intertwined with the Wisconsin Rules of Professional Conduct for Attorneys. The Rules of Professional Conduct are designed to provide guidelines for attorneys and to provide a structure for regulating conduct through disciplinary agencies.[4] These rules of privilege and professional conduct do not always balance, however, because the Rules of Professional Conduct have the potential to erode the exceptions to the attorney-client privilege. As a result, the merger

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1. An attorney's duty is threefold: An attorney is an officer of the court, a representative of the client, and a citizen with sacred duties to pronounce justice. At times, the role of an attorney is cast into the adversarial system of litigation whereby the attorney must maintain the role of advocate for the party who the attorney represents. To provide an attorney with the tools necessary for effective representation of a client, unfettered disclosure between the attorney and client is necessary. C. MCCORMICK, EVIDENCE § 87 (3d ed. 1984).

2. Attorney-client privilege is based upon common law and "belongs" to the client, whereas attorney work-product is not based on common law and "belongs" to the attorney. The two concepts are separate and distinct. They serve to limit the scope of the discovery process and protect different items from discovery for various reasons. *See* Stover & Koesterer, *Attorney-Client Privilege in Wisconsin*, 59 MARQ. L. REV. 227 (1976). This Comment only addresses the attorney-client privilege. For further discussion on attorney-work product, see Hickman v. Taylor, 329 U.S. 495 (1947); Kopta, *Applying the Attorney-Client and Work Product Privileges to Allied Party Exchange of Information in California*, 36 UCLA L. REV. 151 (1988).

3. WIS. STAT. § 905.03(4) (1987-88); *see infra* note 16 and accompanying text.

4. RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS S.C.R. Ch. 20, at 68 (1988) (Preamble: A Lawyer's Responsibilities) [hereinafter RULES]; *see also* Lund, *Tell Me No Secrets . . . : Confidentiality Provisions of the New Model Rules of Professional Conduct*, 61 WIS. B. BULL. 21 (1988).

between the attorney-client privilege and the Rules of Professional Conduct is unclear and clouds already murky waters. As with the five exceptions to the attorney-client privilege, the Rules of Professional Conduct have the potential to erode the attorney-client privilege and should be strictly construed. Opponents of strict construction might argue that such an application will render the Rules of Professional Conduct superfluous. However, the Rules of Professional Conduct are designed as guidelines and should not supercede the attorney-client privilege which derives its basis in common law.

This Comment will discuss the law in Wisconsin on the attorney-client privilege, its exceptions, and the impact that the Wisconsin Rules of Professional Conduct for Attorneys have upon the attorney-client privilege. Initially, this Comment will discuss the background of the attorney-client privilege and its exceptions, as well as the Rules of Professional Conduct. Next, this Comment will provide an analysis of each exception. In particular, this Comment will examine the impact that the Wisconsin Rules of Professional Conduct for Attorneys may have upon the attorney-client privilege. By virtue of this examination, this Comment proposes that a strict construction should be afforded to the exceptions and to the Rules of Professional Conduct in the interest of preserving the attorney-client privilege.

II. BACKGROUND

A. The Development of the Attorney-Client Privilege

At common law, the attorney-client privilege was based on the theory that the attorney should be able to "keep the secrets confided in him by his client and thus preserve his honor."[5] Subsequently, as the courts began to place less emphasis on the notion of honor and more emphasis on ascertaining the truth to meet the ends of justice, this theory was abandoned.[6] Currently, the attorney-client privilege is designed to encourage full disclosure from the client to the attorney and is vested in the client.[7] Specifically, mod-

5. J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE — UNITED STATES RULES 503, 503-15 (1986).

6. Note, *Attorney-Client Privilege and the Crime-Fraud Exception: Rejection of a Specific Intent Requirement in In Re* Sealed Case, 60 TUL. L. REV. 1061, 1063-64 (1986).

7. Attorney-client privilege was the first evidentiary privilege recognized. 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961); Comment, *Developments in the Law — Privileged Communications*, 98 HARV. L. REV. 1450, 1456 (1985). In Wisconsin, the attorney-client privilege was first recognized in 1878 and revised in 1927. REV. WIS. STAT. § 905.03(4) (1974), *cited in Wisconsin Rules of Evidence and Commentaries*, 59 Wis. 2d R111 (1974). *See generally* Martin, *To Tell or Not to Tell*, 7 CAL. LAW. 21 (1987); McLaughlin, *The Treatment of Attorney-Client and Related Privileges in the Proposed Rules of Evidence for the United States District Courts*, 26 REC. 30, 31 (1971); Neary, *The Vital Lawyer-Client Privilege*, 121 N.J. L.J. 10 (1988); Neuner,

ern attorney-client privilege protects both the communications to the attorney and those communications from the attorney to the client which contain the client's confidences.

The purpose of the attorney-client privilege, which is to encourage full and frank communication between attorneys and their clients, promotes broader public interests in the observance of law and the administration of justice. In the absence of the attorney-client privilege, the confidentiality of communications between attorneys and clients could easily be circumvented, which would adversely affect the attorney-client relationship. The rationale behind the attorney-client privilege is that public policy requires that communications remain confidential in order to make these relationships effective.[8] However, the attorney-client privilege and its potential "zone of secrecy" involve an element of risk.[9]

The rules of evidence relating to the attorney-client privilege are of a very different order than most evidentiary rules.[10] The rules of privilege, which protect confidential communications between an attorney and a client, are not designed or intended to facilitate the fact finding process, nor are they designed to safeguard its integrity. Consequently, the effect of the attorney-client privilege inhibits rather than facilitates the illumination of

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Attorney-Client Privilege, 199 N.Y. L.J. 1 (1988); Raleigh, *Attorney-Client Privileges*, 15 BARRISTER 49 (1988); Raleigh, *Attorney-Client Privileges: Implementing Safeguards to Protect Them*, 24 TRIAL 45 (1988); Spahn, *The Attorney-Client Privilege*, 8 J. NAT'L A. ADMIN. L. JUDGES 54 (1988).

8. C. MCCORMICK, *supra* note 1, § 72, at 171. At times this relationship is referred to as a utilitarian justification for the privilege. Comment, *supra* note 7, at 1502; *see also* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Trammel v. United States, 445 U.S. 40, 51 (1980); Fisher v. United States, 425 U.S. 391, 403 (1976).

9. The term "zone of secrecy" is often referred to in the context of corporate settings due to the frequency of dealings between agents and attorneys. If every agent's communication to an attorney were considered privileged, potentially all of the corporation's activities could be insulated through the attorney-client privilege. This would be an inappropriate use of the attorney-client privilege. A sensible stopping point is necessary. Although this Comment does not address the attorney-client privilege in the corporate setting, seminal case law in that area raises troublesome questions as to what extent the attorney-client privilege should protect corporate employees. *See* Radiant Burners, Inc. v. American Gas Ass'n, 207 F. Supp. 771 (N.D. Ill. 1962); City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962) (communications from an individual in the "Control Group" considered privileged); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), *aff'd*, 400 U.S. 348 (1971) (This court rejected the "Control Group" test and applied the test used in the Seventh Circuit, the "Subject Matter" test.).

10. C. MCCORMICK, *supra* note 1, § 72, at 172; *see also* Kritzer, *The Dimensions of Lawyer-Client Relations: Notes Toward a Theory and a Field Study*, 1984 AM. B. FOUND. RES. J. 409, 409-25.

the truth.[11] Because of its inhibiting effect, Dean Wigmore, an advocate of the attorney-client privilege has stated:

> Its benefits are all indirect and speculative; its obstruction is plain and concrete . . . it is worth preserving for the sake of general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.[12]

In recent years, however, the expanding provisions for discovery[13] have yielded a trend toward more disclosure and a virtual abrogation of the attorney-client privilege.[14] Furthermore, exceptions to the attorney-client privilege and certain provisions of the Wisconsin Rules of Professional Conduct for Attorneys render the privilege ineffective.

The development of the exceptions to the attorney-client privilege derived its basis from the uniformity and frequency of situations in which the policy of the privilege had been overridden. In particular, the judicial system, with its interest in admitting evidence, was the force which consistently applied and defined the exceptions.[15] The five exceptions to attorney-client privilege which have developed are as follows:

> (a) *Furtherance of crime or fraud.* If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or
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> (b) *Claims made through same deceased client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

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11. State v. 62.96247 Acres of Land in New Castle County, 57 Del. 40, 193 A.2d 799 (Del. Super. Ct. 1963) (land condemnation case in which the state claimed attorney-client privilege); *see also* Martin & Thomas, *Controlling Discovery and Guarding Confidential Data*, 17 BRIEF 46 (1988).

12. 8 J. WIGMORE, *supra* note 7, § 2291, at 554.

13. The Federal Rules of Civil Procedure provide for liberal discovery. FED. R. CIV. P. 26-37, 28 U.S.C. § 2072 (1983); *see also* State *ex rel.* Dudek v. Circuit Court, 34 Wis. 2d 559, 150 N.W.2d 387 (1967); Harvey, *The Judicial Assault on the Attorney-Client Relationship: Thoughts on the 1983 Amendments to the Federal Rules of Civil Procedures*, 1 BENCHMARK 17 (1984); Martin & Thomas, *supra* note 11, at 46; O'Neill, *Discovery Under Dudek*, 41 WIS. B. BULL. 44 (1968); Comment, *Wisconsin's New Discovery Statute*, 45 MARQ. L. REV. 600 (1962).

14. *See* Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61 (1973) (In this article, Professor Krattenmaker assesses the privilege rules by analyzing the state created privileges and the place of privileges in the federal courts.); *see also* International Business Mach. Corp. v. United States, 493 F.2d 112 (2d Cir. 1973).

15. *See* Sugar & Zipser, *Federal Rules of Evidence and the Law of Privileges*, 15 WAYNE L. REV. 1286, 1316-17 (1969).

(c) *Breach of duty by lawyer or client.* As to communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer; or
(d) *Document attested by lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or
(e) *Joint clients.* As to a communication relevant to a matter of common interest between 2 or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.[16]

These exceptions have served to render the attorney-client privilege in such instances ineffective, but the exceptions are strictly construed.

The strict construction which is afforded to the exceptions,[17] and the doctrine of waiver,[18] both serve to dissipate the threat of a virtual abrogation of the attorney-client privilege.[19] Consequently, the exceptions maintain a pathway by which the obstruction of justice is thwarted while open lines of communication between an attorney and a client are still promoted.

B. The Development of the Wisconsin Rules of Professional Conduct for Attorneys

By its nature, the legal profession is self-governing, and professional responsibility is the cornerstone of the legal profession's integrity. Frequently, an attorney's integrity is based upon the confidentiality afforded by the attorney-client privilege:

> In all professional functions, a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.[20]

The Wisconsin Rules of Professional Conduct for Attorneys are not intended to stifle such professional freedom, but rather, are guidelines for at-

16. WIS. STAT. § 905.03(4) (1987-88).

17. "The narrowness of scope is due to the procedural effect of placing an article of information under the umbrella of the privilege. Unless one of the few exceptions can be utilized, the protection afforded by the privilege is absolute." *Dudek*, 34 Wis. 2d at 581, 150 N.W.2d at 399; *see also* Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 296 F. Supp. 979 (E.D. Wis. 1969).

18. Waiver is the right afforded to the client to intentionally or voluntarily relinquish the attorney-client privilege. Although waiver will not be discussed in depth in this Comment, an understanding of the concept is essential when examining a client's rights. *See supra* note 2. *See generally* Morvillo, *Attorney-Client Privilege Waiver*, 56 N.Y. L.J. 1 (1988).

19. *See supra* note 17 and accompanying text.

20. RULES, *supra* note 4, at 63.

torneys. They were adopted on January 1, 1988.[21] These new rules are designed to overcome the gaps in coverage and the confusing format which previously served to undermine the purpose behind the 1969 Code of Professional Responsibility.[22] The Rules of Professional Conduct are primarily based upon the 1983 ABA Model Rules of Professional Conduct and are organized to be a guide for lawyers while also setting minimum enforceable standards of conduct.[23]

The Wisconsin Rules of Professional Conduct are a separate body of law and are not intended to govern or affect the attorney-client privilege. However, both the Rules of Professional Conduct and the Rules of Privilege are inextricably intertwined.[24] This Comment will examine the exceptions to the attorney-client privilege and the potential impact that the new Rules of Professional Conduct may have upon the privilege.

III. THE ATTORNEY-CLIENT PRIVILEGE EXCEPTIONS AND THE POTENTIAL IMPACT OF THE MODEL RULES OF PROFESSIONAL CONDUCT

A. The Crime or Fraud Exception

An attorney's advice must not assist the client in breaking the law. Wisconsin Statute section 905.03(4)(a)[25] excepts from the privilege those communications between an attorney and client which are made for the purpose of furthering criminal or fraudulent conduct.[26] The purpose of this exception is to prevent the use of the privilege as a shield for perpetrating a crime

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21. Supreme Court Rules: Chapter 20 — Code of Professional Responsibility, was repealed and re-created as the Wisconsin Rules of Professional Conduct for Attorneys [hereinafter Rules of Professional Conduct]. The committee assigned to study the Code filed its report with the court on January 2, 1985 and a supplement was added on January 24, 1985. The recommendations were published in the Wisconsin Bar Bulletin and a hearing on the report was subsequently held on September 10, 1985.

22. C. WOLFRAM, MODEL LEGAL ETHICS § 2.6.4 (1986).

23. RULES, *supra* note 4, at 63-9.

24. *See* Hildebrand, *Introduction: Model Rules of Professional Conduct*, 60 WIS. B. BULL. 19 (1987) (The Rules of Professional Conduct for Attorneys are not intended to affect the judicial application of the attorney-client privilege. However, they may affect an attorney's application of the privilege.).

25. The crime or fraud exception provides: "(a) *Furtherance of crime or fraud.* If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." WIS. STAT. § 905.03(4)(a) (1987-88) (This privilege exception speaks to the client's knowledge.).

26. Comment, *supra* note 7, at 1509; *see also In re* Sawyer's Petition, 229 F.2d 805, 809 (7th Cir. 1956).

or fraud.[27] Absent this provision, fraudulent conduct could actually be promoted through the attorney-client privilege.

The crime or fraud exception applies, however, only where the client has actual knowledge of the criminal or fraudulent nature of the act. This protects a client who is ill advised that an action is within the law.[28] However, the wrongdoing need not be that of the client.[29] The courts have ascertained a point where an attorney's actions will not be privileged even when the actions relate to a client's prior wrongdoing.[30] An example of this application is found in the case of *Disciplinary Proceedings Against Kells*,[31] where an attorney was suspended from practice for two years for failing to properly maintain a client's trust account. By depositing the proceeds from negotiation into his personal account, and subsequently using the proceeds, the attorney was considered to have actively defrauded a third party.[32] However, the crime or fraud exception does not apply when the client seeks counsel for a legitimate defense.[33] In this instance, a client is guaranteed an attorney's silence through the attorney-client privilege and the privilege against self-incrimination.[34]

Nor will a mere *charge* of fraud free the client's confidences from confidentiality.[35] The standard necessary to determine whether the privilege

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27. The crime or fraud exception is applicable to the tort of intentional infliction of emotional distress. *See* Diamond v. Stratton, 95 F.R.D. 503, 505 (S.D.N.Y. 1982) (An insurance company refused to pay its insured on the grounds that the death was caused by the removal of life support. The recipient claimed that the insurance company did so dishonestly and that the company secured economic benefit from the retained money through increased interest rates and delayed payments.). *See generally* Curriden, *Privilege or Fraud?*, 75 A.B.A. J. 16 (1989); Hagen, *Client Confidentiality: An Overview and the Crime-Fraud Exception*, 2 GEO. J. LEGAL ETHICS 313 (1988); Krach, *The Client-Fraud Dilemma: A Need for Consensus*, 46 MD. L. REV. 436 (1987); Morvillo, *Crime-Fraud Exception*, 199 N.Y. L.J. 1 (1988); Rotunda, *Client Fraud: Blowing the Whistle, Other Options*, 24 TRIAL 92 (1988).

28. WIS. STAT. § 905.03(4)(a) (1987-88), *cited in Wisconsin Rules of Evidence and Commentaries*, 59 Wis. 2d R111 (1973); *see also* Comment, *supra* note 7, at 1542 (If an attorney acts outside of his legal capacity to cover up crime, defraud an insurance carrier, fabricate evidence or for subornation of perjury, the privilege has been pierced.).

29. WIS. STAT. § 905.03(4)(a) (1987-88); *see also* Disciplinary Proceedings Against Kells, 129 Wis. 2d 121, 384 N.W.2d 347 (1986).

30. *In re* Ryder, 263 F. Supp. 360 (E.D. Va. 1967), *aff'd*, 381 F.2d 713 (4th Cir. 1967) (An attorney made himself an active participant in crime by transferring into his own account the proceeds of a crime that his client had committed.).

31. 129 Wis. 2d 121, 384 N.W.2d 347.

32. *Id.* at 126, 384 N.W.2d at 349.

33. United States v. Valencia, 541 F.2d 618 (6th Cir. 1976) (attorney who participated in narcotics transaction with his clients and discussions about representing a client were privileged); *see also* J. WEINSTEIN & M. BERGER, *supra* note 5.

34. *See* J. WEINSTEIN & M. BERGER, *supra* note 5, at 503-68; *see also* Fisher v. United States, 425 U.S. 391 (1976); Sugar & Zipser, *supra* note 15, at 1287.

35. Clark v. United States, 289 U.S. 1 (1933).

should be withdrawn is whether the defendant sought the services of an attorney to enable or aid the commission of what the defendant knew or reasonably should have known to be fraudulent.[36] The Federal Advisory Committee specifically states that for disclosure under the crime or fraud exception, a preliminary finding of fraud is not necessary.[37] And, although recent Wisconsin case law utilizes the term "prima facie showing of fraud,"[38] the courts have noted the difficulty of such a finding, without invading the province of the attorney-client privilege.[39] In these instances, exploration must be undertaken with extreme caution. "While any general exploration of what transpired between an attorney and a client would, of course, be inappropriate, it is wholly feasible, either at the discovery stage or during trial, to focus the inquiry by specific questions as so to avoid any broad injury into the attorney-client communications."[40]

In Wisconsin, the attorney-client privilege extends only to the client, the intended beneficiary, and is limited by the concept of duty.[41] In the event of fraudulent conduct, however, an attorney may be liable for harm caused to a third party.[42] Furthermore, when an attorney assists a client in defrauding a third party, thus actively committing the fraud, that attorney is then subject to disciplinary proceedings.[43]

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36. Dyson v. Hempe, 140 Wis. 2d 792, 413 N.W.2d 379 (Ct. App. 1987).

37. A prima facie showing may be established through an in camera review. The extent of divulgence thereafter is within the trial court judge's discretion. *In re* Berkley & Co., 629 F.2d 548 (8th Cir. 1980) (in camera review); *In re* Blier Cedar Co., 10 Bankr. 993, 999-1000 (Bankr. D. Me. 1981) (in camera review). *But see* Kockums Indus. Ltd. v. Salem Equip., Inc., 561 F. Supp. 168, 171-74 (D. Or. 1983) (court ordered release of documents after viewing them in camera); Research Corp. v. Gourmet's Delight Mushroom Co., 560 F. Supp. 811, 820-21 (E.D. Pa. 1983) (crime-fraud exception applies where prima facie case of fraud is established).

38. Wisconsin courts still cite to the prima facie standard set out in Clark v. United States, 289 U.S. 1 (1933) (A prima facie showing is necessary to break the "seal of secrecy."). *See* United States v. Weger, 709 F.2d 1151 (7th Cir. 1983) (prima facie case was shown by evidence of the client using her attorney's stationery to commit fraud); *In re* Witness Before the Grand Jury, 631 F. Supp. 32, 33 (E.D. Wis. 1985) (The privilege does not exist if there is a prima facie showing that the attorney-client relationship was intended to further criminal conduct.); *see also In re* Special September 1978 Grand Jury, 640 F.2d 49, 59 (7th Cir. 1980) (even if a lawyer is unaware).

39. WIS. STAT. § 905.03(4)(a) (1974) (advisory committee's notes), *cited in Wisconsin Rules of Evidence and Commentaries*, 59 Wis. 2d R111, R120 (1974) (no preliminary finding is necessary); *Berkley*, 629 F.2d at 553 (court rejected claim that prima facie showing needed to be made).

40. WIS. STAT. § 905.03(4)(a) (1974), *cited in Wisconsin Rules of Evidence and Commentaries*, 59 Wis. 2d R120.

41. Green Spring Farms v. Kersten, 136 Wis. 2d 304, 401 N.W.2d 816 (1987) (Although *Kersten* indicates that there is generally no duty to third persons, this case pre-dates the new Rules of Professional Conduct.) The Rules of Professional Conduct, WIS. S.C.R. 20:4.1 (Truthfulness in Statements to Others); WIS. S.C.R. 20:1.6 (Confidentiality of Information) indicate that there is a duty to third persons. *See infra* notes 46-61 and accompanying text.

42. *Id.*; *see also* Goerke v. Vojvodich, 67 Wis. 2d 102, 226 N.W.2d 211 (1975).

43. *See, e.g., Kells*, 129 Wis. 2d 121, 384 N.W.2d 347.

The attorney-client privilege is designed to protect only the information that a client communicates to an attorney which is necessary for the proper, competent and ethical representation of the client.[44] There is recognition of the crime or fraud exception to the attorney-client privilege throughout the Rules of Professional Conduct.[45] While the crime or fraud exception to the attorney-client privilege speaks to the client's knowledge, it should be noted that the Rules of Professional Conduct do not.[46] In contrast, the Rules of Professional Conduct address an *attorney's* knowledge. The Rules of Professional Conduct are intended to be used as guidelines by attorneys. Consistent with both sets of rules is the premise that an attorney should not counsel a client in a manner that promotes criminal or fraudulent conduct. In applicable situations, the Rules of Professional Conduct indicate that a lawyer should discuss the potential implications of legal action. That is, if the proposed actions which have been discussed are illegal, the attorney has a duty to disclose. Thus, such communications may not be held to fall within the ambit of the attorney-client privilege.[47] The client is entitled to know the upside gain and downside risks of a proposed action.

For the most part, the Rules of Professional Conduct serve to reinforce the crime or fraud exception. Supreme Court Rule 20:1.2(d), Scope of Representation ("Rule 1.2"), delineates that an attorney must abide by the client's decisions concerning the objectives of representation and consult with the client as to the manner in which these decisions will be pursued:[48]

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44. Fisher v. United States, 425 U.S. 391 (1976).

45. According to Supreme Court Rule 20:8.4 (Misconduct), it is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) state or imply an ability to influence improperly a government agency or official;

(e) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(f) violate a statute, supreme court rule, supreme court order or supreme court decision regulating the conduct of lawyers; or

(g) violate the attorney's oath.

WIS. S.C.R. 20:8.4 (1988).

46. The Rules of Professional Conduct are designed to be guidelines for attorneys to follow. Such guidelines are essential in the self-governed practice of law.

47. Furthermore, an attorney who has duties which are limited in scope, such as in-house counsel in a corporation, or an attorney who is only hired for a limited purpose, must also inform his or her clients that their communications may not be privileged.

48. According to Supreme Court Rule 20:1.2 (Scope of Representation):

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.[49]

This language indicates that the rule extends an attorney's scope of representation not only to parties of the action, but also to individuals, whether or not those individuals are defrauded parties.[50] This proposition is consistent with the attorney-client privilege because the privilege extends an attorney's liability to a non-client in the event of fraudulent conduct. The impact of Rule 1.2 on the attorney-client privilege is that it further solidifies the need for an attorney to look beyond the immediate scope of representation, to non-clients, and to attempt to dissuade the client from fraudulent conduct.

Simply because an attorney acts on behalf of a client does not necessarily indicate that the attorney condones or endorses the client's behavior.[51] However, if a client's criminal or fraudulent conduct has yet to begin, an attorney will be forced to reveal the client's confidences under Supreme Court Rule 20:1.6, Confidentiality of Information ("Rule 1.6").[52]

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which they are to be pursued. A lawyer shall inform a client of all offers of settlement and abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case or any proceeding that could result in deprivation of liberty, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

WIS. S.C.R. 20:1.2 (1988).

49. WIS. S.C.R. 20:1.2(d) (1988).

50. *See* Hildebrand, *supra* note 24, at 26. (For instance, a lawyer should not participate in a sham transaction such as a transaction to effectuate criminal or fraudulent escape of tax liability.).

51. *See supra* note 48.

52. According to Supreme Court Rule 20:1.6 (Confidentiality of Information):

(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), (c), and (d).

Rule 1.6 permits the attorney to disclose confidences if the client expressly or impliedly consents to such disclosure. This assertion is also consistent with the attorney-client privilege. However, Rule 1.6 provides that in some situations mandatory disclosure is warranted, even without the client's consent. When an attorney reasonably believes that disclosure is necessary to prevent the client from engaging in criminal or fraudulent actions which the attorney reasonably believes are likely to result in death, substantial bodily harm, or substantial injury to the financial or property interest of another, he or she may breach the attorney-client privilege.[53]

In addition, Supreme Court Rule 20:3.3, Candor Toward the Tribunal ("Rule 3.3"), mandates that an attorney disclose to a tribunal a fact that is necessary to avoid assisting the client in a criminal or fraudulent act.[54] These two mandatory disclosure provisions may potentially extend the crime or fraud exception far beyond its original parameters. As a result, the "reasonable belief" of the attorney could undermine the precept of the attorney-client privilege. For instance, if an attorney reasonably but wrongfully believes that the client will engage in fraudulent conduct, the attorney must disclose confidential communications to the tribunal. Consequently, the attorney-client privilege is eroded at the client's expense.

Moreover, permissive disclosure without a client's consent is allowed through Rule 1.6(c)(1), which permits disclosure when necessary to rectify the consequences of criminal or fraudulent acts which were furthered by the

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(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.

(c) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) To rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's service had been used;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

(d) This rule does not prohibit a lawyer from revealing the name or identity of a client to comply with ss. 19.43 and 19.44, Stats. 1985-86, the code of ethics for public officials and employees.

WIS. S.C.R. 20:1.6 (1988).

53. WIS. S.C.R. 20:1.6(b) (1988); *see also supra* note 52.

54. According to Supreme Court Rule 20:3.3 (Candor Toward the Tribunal): "(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal; (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." WIS. S.C.R. 20:3.3 (1988); *see also* Goding, *Lawyer-Client Confidentiality: What Should Counsel Tell the Court?*, 23 TRIAL 59 (1987).

lawyer's services.[55] Again, the attorney-client privilege is waivable at the attorney's discretion. Apparently, unless disclosure is prohibited by Rule 1.6, an attorney may not fail to disclose information to a third party when disclosure is necessary to avoid assisting criminal or fraudulent behavior.[56] It is unclear exactly how Rule 1.6 will impact on the crime or fraud exception; however, the Rule could serve to undermine the strict construction presently afforded to the exception. At present, the crime or fraud exception is strictly construed so as to create only limited circumstances where confidential communications will be revealed. Specifically, the attorney-client privilege no longer applies when a client is using the privilege's protection to further a crime or fraud. Rule 1.6, however, prescribes certain occasions where an attorney is forced to disclose communications and other instances where such disclosure is left to his or her discretion. Consequently, an attorney who holds an expansive view of Rule 1.6 could foreseeably erode the attorney-client privilege.

The Rules of Professional Conduct serve to undermine the strict construction afforded to the crime or fraud exception by leaving unclear the extent to which an attorney should act in his or her discretion. The attorney-client privilege is meant to be waivable only by a client. However, the Rules of Professional Conduct render the privilege vulnerable to the attorney's discretion. Furthermore, the Rules of Professional Conduct are internally inconsistent. For example, Rule 1.2 uses no discretionary language

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55. WIS. S.C.R. 20:1.6(c)(1) (1988).

56. According to Supreme Court Rule 20:3.4 (Fairness to Opposing Party and Counsel):

A lawyer shall not:

(a) Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

WIS. S.C.R. 20:3.4 (1988).

whatsoever. But Rule 1.6 permits full discretion to the attorney and Rule 3.3 mandates disclosure of the client's confidences at the reasonable belief of the attorney. Consequently, it becomes impossible to realistically coordinate the Rules of Professional Conduct with the attorney-client privilege. Since the attorney-client privilege is solely concerned with preserving the confidentiality of communications between an attorney and client, a strict construction must be afforded to the exceptions so that the privilege is not eroded due to the ambiguity in the Rules of Professional Conduct.

B. The Deceased Client Exception

Wisconsin Statute section 905.03(4)(b)[57] excepts from the attorney-client privilege "communication relevant to an issue between parties who claim through the same deceased client."[58] This exception is typically invoked when a party contests a will.[59] The basis for this exception is that when both the proponent and opponent of a will claim to represent the deceased client, disallowance of the privilege should expedite distribution of the estate. There are two rationales behind this exception: (1) An attorney is seen as a mere scrivener for the client and thus is outside the attorney-client privilege,[60] and (2) when a client asks an attorney to draft a will the privilege is forfeited.[61] While either of these theories alone is inadequate for various reasons,[62] the attorney-client privilege exception for the deceased

57. The deceased client exception provides: "(b) *Claimants through same deceased client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction." WIS. STAT. § 905.03(4)(b) (1974).

58. Only a party seeking through the deceased client may utilize this privilege or privilege exception, the latter of which is favored. WIS. STAT. § 905.03(4)(b) (1974), *cited in Wisconsin Rules of Evidence and Commentaries*, 59 Wis. 2d R121 (1974); *see* Sugar & Zipser, *supra* note 15, at 1286 (The rule does not differentiate between testate, intestate or inter vivos because, regardless of which condition applies, efficient distribution is the central concern.).

59. If the contest is between a stranger and one with privity to the decedent, the one with privity may still claim the privilege. Also, if the client is not deceased, the privilege continues until the privilege is waived. Although typically the exception is invoked, when there are two or more claimants, the privilege may be held in abeyance until the end of litigation. *See* J. WEINSTEIN & M. BERGER, *supra* note 5, at 503-72.

60. *See* Stoddard v. Kendall, 140 Iowa 688, 119 N.W. 138 (1909); Black v. Funk, 93 Kan. 60, 143 P. 426 (1914). This theory is easily contested, since only in the rarest of situations would an attorney act solely as scrivener, and not also as an advisor.

61. This is known as implied waiver. *See, e.g.*, Blackburn v. Crawfords, 70 U.S. 175 (1865) (Implied waiver is easily rebutted by looking at the client's intent to keep the will confidential.); *see also* Dickerson v. Dickerson, 322 Ill. 492, 153 N.E. 740 (1926) (The doctrines of presumed intent and implied waiver are accepted by few courts because they avoid the evaluation of competing interests.); Sugar & Zipser, *supra* note 15, at 1319.

62. *See supra* notes 60-61 and accompanying text.

client is an established means for efficient distribution of a decedent's estate.[63]

Wisconsin case law has suggested that when an attorney is a scrivener merely putting an agreement into legal form, the attorney may testify as to his knowledge of the preparation and execution of the agreement and circumstances surrounding delivery, but not to the extent of the legal advice afforded.[64] In a situation such as this, the judge retains discretion to determine the existence of the privilege.[65]

The deceased client exception is commonly used in situations where a dispute exists between claimants arising out of a common decedent.[66] In Wisconsin, this privilege exception is well-established.[67] To properly object to a contested will in Wisconsin, the person objecting needs to hold an interest in the disallowance of a will.[68] If that beneficiary has a substantial right in a prior will of which he is deprived in a subsequent will, the prior will may be admissible to determine standing and is not held to be privileged under the attorney-client privilege.[69]

Also, a prior will or codicil may be essential to determine a decedent's mental capacity[70] or the existence of undue influence.[71] In these instances, if a prior will or codicil of a decedent is in the possession of the decedent's estate, it may be admissible.[72] However, if the instrument is in the attorney's possession, an issue pertaining to privileged communication arises. Typically, when an attorney is holding an instrument on behalf of a client, which is not intended to be made public, it constitutes a privileged communication. Due to the deceased client exception, when there are claimants

63. *See supra* notes 58-59 and accompanying text; *see also* Glover v. Patten, 165 U.S. 394 (1897); *In re* Estate of Dominici, 151 Cal. 181, 90 P. 448 (1907); *In re* Kemp's Will, 236 N.C. 680, 73 S.E.2d 906 (1953).

64. *See* Jax v. Jax, 73 Wis. 2d 572, 581, 243 N.W.2d 831, 836 (1976) (A mere showing that the communication was from a client to his other attorney will not automatically warrant that communication as privileged.).

65. WIS. STAT. § 901.04(1) reads in part: "Preliminary questions concerning . . . the existence of a privilege . . . shall be determined by the judge . . . ." *Id.*

66. *See supra* note 57 and accompanying text.

67. *See supra* note 7 and accompanying text.

68. *See* Estate of Buffington, 249 Wis. 172, 23 N.W.2d 517 (1946) (An heir at law may object if he or she would receive more by dissent if the testimentary disposition were not to be established. A legatee may do so if he or she is able to offer a prior will for probate which contains a more favorable position for him or her.).

69. *See also* Estate of Woelz, 9 Wis. 2d 458, 101 N.W.2d 681 (1960).

70. *See In re* Downing's Will, 118 Wis. 581, 95 N.W. 876 (1903).

71. *See* State v. Beaudry, 53 Wis. 2d 148, 191 N.W.2d 842 (1971); State v. Collentine, 39 Wis. 2d 325, 159 N.W.2d 50 (1968); Estate of Smith v. Fairchild, 263 Wis. 441, 57 N.W.2d 727 (1953); *In re* Downing's Will, 118 Wis. 581, 95 N.W. 876.

72. *See Estate of Smith*, 263 Wis. 441, 57 N.W.2d 727.

through the same decedent, an attorney may be forced to disclose the document or attest to the procedural aspects at issue.[73] If an attorney foresees becoming a witness, it may be to his or her advantage to withdraw from the case.[74]

The Rules of Professional Conduct confront the issue of the attorney-client privilege and the deceased client exception in Supreme Court Rule 20:1.9, Conflict of Interest: Former Client ("Rule 1.9").[75] This Rule reads as follows:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
> (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
> (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.[76]

Rule 1.9 is designed to protect former clients. However, whether an individual is a former client is not always easily discernable.[77] Also, it may be difficult to determine every former client of each attorney within a firm. Yet, the meaning behind "former" may extend to the entire firm's clientele.[78]

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73. A testimentary disposition becomes effective upon the death of the client at which point the attorney owes a duty to the former client. *See infra* notes 75-82 and accompanying text.

74. *See* Allen v. Ross, 199 Wis. 162, 225 N.W. 831 (1929) (attorney withdrew from the case before trial because it was apparent he might be called as a witness); *see also infra* notes 104-15 and accompanying text.

75. *See* Hildebrand, *supra* note 24, at 33 (This rule is designed to protect former clients, whereas Supreme Court Rule 20:1.7 (Conflict of Interest) protects the present client.); *see also* International Business Mach. Corp. v. Levin, 579 F.2d 271 (3rd Cir. 1978) (support for the finding of a continuous relationship and conflict of interest).

76. WIS. S.C.R. 20:1.9 (1988).

77. *Levin*, 579 F.2d at 281 (court found on-going relationship even though work was not presently being done for the client and no retainer arrangement existed); *see also* Silverstein, *Former-Client Conflicts! The Substantial Relationship Test and the Presumption of Divulgence*, 12 J. LEGAL PROF. 219 (1987).

78. According to Supreme Court Rule 20:1.10 (Imputed Disqualification):

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.
> (b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are

Clearly, this rule is applicable in the context of estate administration or estate planning.[79] Under the first circumstance, the client is the estate or trust, and under the second, the client is the fiduciary.[80] As a result, it is the attorney's responsibility to clarify his or her relationship to the parties involved since a client, although recently deceased, may still be protected under Rule 1.9.[81] According to Rule 1.9, an attorney shall not represent another in the same, or in a substantially related matter, where that person's interests are adverse to the former client's. And, an attorney generally is disallowed from using information to disadvantage a former client, except as allowed under Rule 1.6, or in situations where information has become generally known.[82]

According to the deceased client exception, however, when two different claimants seek an interest in the will of the same decedent, the communications between the attorney and the decedent are relevant and admissible.

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materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

WIS. S.C.R. 20:1.10 (1988); *see also infra* note 86 and accompanying text.

79. According to Supreme Court Rule 20:1.7 (Conflict of Interest):

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents in writing after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents in writing after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

WIS. S.C.R. 20:1.7 (1988).

80. *Id.*

81. *Id.* The comment to Supreme Court Rule 20:1.7 (Conflict of Interest) indicates that an attorney must obtain the client's consent in writing. However, consent does not always justify representation when a client has competing interests. *See* Hildebrand, *supra* note 24, at 30-32.

82. *See infra* notes 91-103 and accompanying text.

Although once confidential, this information may now be disclosed in the interest of efficient distribution of the estate.

Rule 1.9 of the Rules of Professional Conduct and the deceased client exception of the attorney-client privilege both serve to protect the interest of the client. While the deceased client exception allows an attorney broad discretion, Rule 1.9 mandates that an attorney shall not represent another whose interests are adverse, unless the client consents. Nor may the attorney use information which relates to the representation to the disadvantage of the former client. Read in conjunction with each other, these rules have the potential to be consistent in situations where the restrictions of Rule 1.9 are not present. Otherwise, Rule 1.9 imposes limitations on the deceased client exception and ultimately thwarts the efficient distribution of the estate.

C. The Breach of Duty Exception

The Wisconsin breach of duty exception to the attorney-client privilege denies the privilege to communications which are relevant to an issue of breach of duty by a lawyer to his or her client, or a client to his or her lawyer.[83] This exception is usually applied in cases where the attorney and client are opponents, such as in controversies over attorney fees,[84] tort claims of inadequate representation[85] or charges of professional misconduct.[86] For obvious reasons, if an attorney is forced to defend such suits, the formerly privileged information must be disclosed. The breach of duty exception derives its basis from fairness and policy reasons which intimate

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83. The breach of duty exception provides: "(c) *Breach of duty by lawyer or client.* As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer." WIS. STAT. § 905.03(4)(c) (1987-88).

84. *See, e.g.*, State v. Markey, 259 Wis. 527, 49 N.W.2d 437 (1951); Murphey v. Gates, 81 Wis. 370, 51 N.W. 573 (1892) (controversy over fees); *see also* Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir. 1974), *cert. denied*, 419 U.S. 998 (1974); Bridges, *ABA Code of Professional Responsibility: An Attorney's Right to Self-Defense*, 40 MO. L. REV. 327 (1975); Possick, *Disclosure of Client Confidences by Securities Attorney Named as a Defendant in a Civil Action Does Not Violate Code of Professional Responsibility*, 29 U. MIAMI L. REV. 376 (1975).

85. *See* Tasby v. United States, 504 F.2d 332 (8th Cir. 1974), *cert. denied*, 419 U.S. 1125 (1975); Dodd v. Williams, 560 F. Supp. 372 (N.D. Ga. 1983).

86. An attorney has a duty to act in the client's best interest in the course of representation. This duty runs from all attorneys of the firm to all of the firm's clients. Breach of this duty results in professional misconduct and the possibility of disciplinary measures being invoked. *See supra* note 78 and accompanying text; Dyson v. Hempe, 140 Wis. 2d 792, 413 N.W.2d 379 (1987); Green Springs Farms v. Kersten, 136 Wis. 2d 304, 401 N.W.2d 816 (1987); Harman v. LaCrosse Tribune, 117 Wis. 2d 448, 344 N.W.2d 536 (1984); Olfe v. Gordon, 93 Wis. 2d 173, 286 N.W.2d 573 (1980); Cook & Schaefer, *Sufficient Reason Needed for Courtroom Tactics*, 60 WIS. B. BULL. 56 (July 1987).

that since the exception is applicable in dealings between an attorney and a client, the duty breached must be one originating from their professional relationship.[87]

A client waives the attorney-client privilege by attacking an attorney's performance,[88] and waiver may occur expressly or impliedly.[89] Similarly, statements made by a representative on behalf of a client, such as counsel, may be deemed a waiver of the privilege.[90] Due to the apparent vulnerability of the breach of duty exception, a strict construction of the statute proves necessary. Just as the attorney-client privilege is sacrificed for efficient distribution of the estate, in this context, the attorney-client privilege is sacrificed to avoid any hindrance of the litigation.[91]

The breach of duty exception also applies when a client fails to pay an attorney his or her fees.[92] In this instance, the attorney may reveal the previously privileged information which has now become reasonably necessary to protect the attorney's own interests.[93] However, in cases where an attorney is one of several defendants, an attorney cannot use information as a threat to the client or as a tool to bolster the other defendants' cases.[94]

In addition, the breach of duty exception applies in cases where inadequacy of representation or professional misconduct is charged. In such cases, the court recognizes that the relationship between the attorney and client is one of trust and confidence and also one which allows the attorney

87. *See supra* note 41 and accompanying text. The statute does not contain "arising out of" language which would clarify whether, in fact, the duty breached need be one arising from the relationship. *See also* Sugar & Zipser, *supra* note 15, at 1321. Moreover, there need not be actual litigation between the lawyer and the client. *See* C. MCCORMICK, *supra* note 1, at 191. Whenever the client makes an imputation against the good faith of counsel, in respect to the professional services, the privilege exception applies to allow the attorney to defend himself or herself. *See Tasby*, 504 F.2d 332; United States v. Mierzwicki, 500 F. Supp. 1331 (D. Md. 1980); State v. Markey, 259 Wis. 527, 49 N.W.2d 439 (1951).

88. *See Tasby*, 504 F.2d at 336; United States v. Woodall, 438 F.2d 1317, 1324 (5th Cir. 1970); Laughner v. United States, 373 F.2d 326 (5th Cir. 1967); *Dodd*, 560 F. Supp. 372; *Mierzwicki*, 500 F. Supp. at 1335.

89. *See* Blackburn v. Crawfords, 70 U.S. 175, 194 (1865); *Tasby*, 504 F.2d 332.

90. *Mierzwicki*, 500 F. Supp. at 1334.

91. *Id.*

92. Clearly, fee arrangements are discoverable. Murphey v. Gates, 81 Wis. 370, 51 N.W. 573 (1892) (attorney allowed to testify to communications to prove the debt that the client owed him); *see also In re* Witnesses Before Special March 1980 Grand Jury, 729 F.2d 489, 491 (7th Cir. 1984).

93. *Murphey*, 81 Wis. 370, 51 N.W. 573.

94. *See* Meyerhoffer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir. 1974), *cert. denied*, 419 U.S. 998 (1974). *But see* McLaughlin, *supra* note 7, at 31 (This article presents another view when an attorney sues the client for fees. On the contrary, when the client is suing the attorney, the court should examine the exception more carefully to insure that divulgence is not held over the client's head as a threat); Housler v. First Nat'l Bank, 484 F. Supp. 1321 (E.D.N.Y. 1980).

to retain a great deal of influence over the client.[95] The court recognizes that there may be a need to testify to communications under established circumstances.[96]

Recently, in *Dyson v. Hempe*,[97] the Wisconsin Court of Appeals applied the breach of duty exception in order to allow the accused attorneys to testify on their own behalf using confidential communications. Dyson brought a legal malpractice action against three attorneys who represented her at different times in a divorce action. She claimed the attorney-client privilege with respect to a number of questions which she had been ordered to answer. The court of appeals reversed the trial court's ruling against application of the privilege and indicated that the attorneys could testify, without Dyson's consent, as to their own communications with her in order to defend against her malpractice charges. However, the court reasoned that the attorneys could not, over her assertion of the attorney-client privilege, use confidential communications on their behalf which were derived from her testimony or the testimony of the other attorneys that she consulted.[98] The court further stated that the mere fact that a communication took place between an attorney and a client did not necessarily render that communication privileged.[99] Wisconsin recognizes only a narrow ambit to

95. *See Markey*, 259 Wis. 527, 49 N.W.2d 437 (disbarment proceedings).

96. *Id.*

97. 140 Wis. 2d 792, 413 N.W.2d 379; *cf.* Foryan v. Fireman's Fund Ins. Co., 27 Wis. 2d 133, 133 N.W.2d 724 (1965) (An attorney disclosed the substance of a privileged conversation, yet that did not violate the attorney-client privilege because his clients were not parties to the action and he did not stand in such relation to the parties of the action.).

98. *Dyson*, 140 Wis. 2d at 811, 413 N.W.2d at 386.

99. Absent waiver, the party invoking the privilege has the burden of establishing it, but the opponent has the burden of indicating to the trial court on his or her motion that he or she challenged confidentiality. *See* Weil v. Investment Indicators, Research & Management, Inc., 647 F.2d 18, 25 (9th Cir. 1981) (inadvertence of disclosure by corporate defendant did not as a matter of law prevent occurrence of waiver of attorney-client privilege claimed by defendant as against certain questions asked by plaintiff during discovery proceedings); *see also Dyson*, 140 Wis. 2d 792, 413 N.W.2d 379 (plaintiff had the burden of establishing the attorney-client privilege, but the defendant had the burden of indicating to the trial court on its motion whether it challenged Dyson's intent of confidentiality); Jax v. Jax, 73 Wis. 2d 572, 243 N.W.2d 831 (1976) (The privilege protects communications, not facts or evidence. Failure to show that the communications were confidential bars the attorney-client privilege within a strict construction of the statute.); State *ex rel* Dudek v. Circuit Court, 34 Wis. 2d 559, 150 N.W.2d 387 (1967) (A party cannot conceal a fact merely by revealing it to a lawyer.); Jacobi v. Podevels, 23 Wis. 2d 152, 157, 127 N.W.2d 73, 76 (1964) (The system and rules should provide access for reasonable means of determining the truth to the parties.); State *ex rel* Reynolds v. Circuit Court, 15 Wis. 2d 311, 317-18, 112 N.W.2d 686, 689 (1961) (In a civil action a defendant may be forced to testify to his or her own action. The attorney-client privilege bars testimony of the attorney or the defendant which reveals the defendant's description of those activities.).

the communications included under the attorney-client privilege and the exceptions which render the privilege ineffective.[100]

In contrast, Rule 1.6 of the Rules of Professional Conduct states that a lawyer may reveal the confidential information of a client to establish a claim or defense on behalf of the attorney in a controversy between the attorney and the client. The lawyer may also reveal such information to establish a defense on the attorney's behalf where the client is involved or in any proceeding concerning the attorney's representation.[101]

This rule, however, steps beyond the breach of duty exception by permitting the attorney wide discretion in determining when confidential communications may be revealed. Under Rule 1.6, the standard to be applied when determining if confidential communications must be revealed is whether the attorney was reasonable. This very arbitrary standard leaves the client subject to an attorney's discretion.[102] It may also place a burden on the client to decide what is or is not important to disclose. As a result, sound legal advice may not be available to the client who elects not to fully inform the attorney. Thus, the professional responsibility rules may erode a client's assurance that the attorney is reliable.

Rule 1.6 permits not only disclosure of confidential matters by the client, but information relating to representation as well, whatever the source.[103] Consequently, the rule may erode the rationale behind the attorney-client privilege. Rule 1.6 recognizes the established exceptions to the attorney-client privilege, and goes a step further by opening the door to ambiguous ways around the attorney-client privilege. Ultimately, Rule 1.6

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100. The *Dudek* court succinctly stated the policy reasons behind the restrictions placed on the scope of the attorney-client privilege as follows:

> In discussing the reasons for the narrowness of the scope of the attorney-client privilege, the courts almost invariably look to the liberal policy of discovery evidenced by the modern statutory pretrial procedures. Besides the fact that the privilege has a long history of rather restricted compass, there is another reason for this restriction other than the liberality of modern discovery. The narrowness of scope is due to the procedural effect of placing an article of information under the umbrella of the privilege. Unless one of the few exceptions can be utilized, the protection afforded by the privilege is absolute. No showing of necessity, hardship, or injustice can require an attorney to reveal the protected information if his client does not waive the privilege, no matter how necessary the information is to a resolution of the particular issue on its merits. This drastic consequence should be narrowly confined.

Dudek, 34 Wis. 2d at 581, 150 N.W.2d at 399-400.

101. *See supra* note 52.

102. As reasonable minds differ, so will the discretion of different attorneys. *See* Helmbrecht v. St. Paul Ins. Co., 122 Wis. 2d 94, 362 N.W.2d 118 (1985) (The duty of an attorney is to use a reasonable degree of care, skill and judgment usually exercised by attorneys under like or similar circumstances.).

103. *See* Hildebrand, *supra* note 24, at 29-30.

may facilitate a decline in the openness and confidence between attorneys and clients unless it is read in light of the strict construction presently afforded to the breach of duty exception.

D. The Lawyer as Witness Exception

Wisconsin Statute section 905.03(4)(d) excepts from the attorney-client privilege those communications relevant to an issue concerning an attested document of which the attorney is an attesting witness.[104] The purpose of the exception is to allow an attorney who is acting as a witness to testify to matters such as the intent or competence of a client and to the attestation or execution of a document.[105] This exception, however, is subject to abuse because it has the potential to destroy the privilege as to all communications relevant to a document.[106]

The lawyer-as-witness exception should be limited to communications which are directly relevant to an attorney's responsibilities.[107] Otherwise, the attorney should not act as a witness to a document which has been drawn as a result of confidential communications.[108] The established rule in Wisconsin is that when an attorney is requested to be a witness and acts in that capacity, the client waives any objections to privilege. For example, when an attorney also witnesses a will, he or she is "free to perform the duties of the position, and to testify to any matters in relation to the will and its execution of which he acquired by knowledge of this professional relation, including the mental conditions of the testatrix at the time."[109]

In the past, courts have looked to the applicable Code of Professional Responsibility section when deciding cases in which an attorney has served

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104. The attorney-client privilege exception for an attorney who acts as a witness reads as follows: "(d) *Document attested by lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness . . . ." WIS. STAT. § 905.03(4)(d) (1987-88).

105. J. WEINSTEIN & M. BERGER, *supra* note 5, at 503-74.

106. Sugar & Zipser, *supra* note 15, at 1321.

107. *Id.*

108. J. WEINSTEIN & M. BERGER, *supra* note 5, at 503-74 (To avoid this problem, another individual could witness the document.); *see also* McMaster v. Scriven, 85 Wis. 162, 55 N.W. 149 (1893) (attorney who drafted the will also witnessed it).

109. State v. Drombrowski, 44 Wis. 2d 486, 171 N.W.2d 349 (1969) (A client's intent with respect to confidentiality is controlling. If a communication is made with the intent to make it public, it cannot later be claimed privileged.); *In re* Downing's Will, 118 Wis. 581, 95 N.W. 876 (1903) (attorney may testify to directions given to him by testator); *McMaster*, 85 Wis. at 169, 55 N.W. at 155 (An attorney may testify as to matters in relation to the will or its execution of which he acquired knowledge by virtue of his professional position.).

in the capacity of a witness.[110] Now, the Rules of Professional Conduct provide guidance for attorneys who also serve as witnesses. Supreme Court Rule 20:3.7, Lawyer as Witness ("Rule 3.7"), states that an attorney should not act as both an advocate and a witness unless the testimony concerns an uncontested issue, relates to the nature and value of legal services rendered in the case or disqualification would work substantial hardship on the client.[111] This rule follows the rationale behind the lawyer-as-witness exception to the attorney-client privilege and indicates that an attorney should not accept the position of witness except where such action is absolutely necessary.

In addition, when an attorney is also acting as an advocate, or is likely to be called as a witness, conflicts of interest or subsequent disqualification may be issues with which to contend.[112] For example, when an attorney acts as a witness, it may appear unclear whether the testimony should be taken as a statement of proof or as an analysis of proof.[113] When an attorney is acting as a witness, he or she makes statements of proof which may include comments as to the testimony of the other witnesses. When an attorney is not acting as a witness, on the other hand, he or she typically gives an analysis of the proof, as apparent in a closing argument. As a result, it may become confusing to decipher which statements constitute the attorney's testimony and which statements are a persuasive analysis of the case. In such situations, the opposing party may have proper grounds for objecting because a combination of the two roles could prejudice that party's rights in the litigation.[114] Also, an attorney who acts as a witness may be jeopardizing his or her own client's confidences and should act as a witness

110. *In re* Featherworks Corp., 25 Bankr. 634 (1982), *aff'd*, 36 Bankr. 460 (1984) (Attorney-client privilege does not bar a former attorney from testifying as to the validity of a claim. The court relied on the Code of Professional Responsibility.).

111. According to Wisconsin Supreme Court Rule 20:3.7 (Lawyer as Witness):

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

WIS. S.C.R. 20:3.7 (1988).

112. *See supra* notes 73-76 and accompanying text.

113. *Id.*

114. Hildebrand, *supra* note 24, at 48.

only on rare occasions. Furthermore, the attorney who foresees becoming a witness should consider withdrawing from the case.[115]

Under the lawyer-as-witness exception, the Rules of Professional Conduct serve to reinforce the strict construction afforded to the attorney-client privilege. This rule, unlike the attorney-client privilege, speaks solely to the attorney and is not waivable by the client. Therefore, the attorney is prohibited from representing a client in situations which may ultimately be to the disadvantage of the client.

E. The Joint Clients Exception

Wisconsin Statute section 905.03(4)(e) states that when an attorney acts for two or more parties who have a common interest, neither party may exercise the privilege in a subsequent controversy with the other.[116] The rule states that communications relevant to a matter of interest between two or more clients, when those communications were made to a lawyer whom they retained in common, will not be privileged in a subsequent suit between the parties.[117] However, communication with the attorney would continue to be privileged in an action between one or all of the clients and a third party.[118]

If this exception was not available, subsequent litigation between joint clients who had previously retained the same attorney would be hindered. Since later litigation is between the joint clients, one client is likely to be advantaged, and the other disadvantaged, through disclosure of the confi-

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115. *See supra* note 78 and accompanying text; *see also supra* notes 79-82 and accompanying text.

116. The joint client exception reads: "(e) *Joint clients.* As to a communication relevant to a matter of common interest between 2 or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients." WIS. STAT. § 905.03(4)(e) (1988); *see also* Quintel Corp. v. Citibank, 567 F. Supp. 1357 (S.D.N.Y. 1983) (The exception applies only where the attorney actually represents both parties.); J. WEINSTEIN & M. BERGER, *supra* note 5, at 503-75 (According to this authority, the principle behind this exception has been given effect in suits between insurer and insured. Also, it has been persuasive in limiting the scope of privilege in stockholders suits.).

117. *See* J. WEINSTEIN & M. BERGER, *supra* note 5, at 503-75.

> In the first place the policy of encouraging disclosure by holding out the promise of protection seems inapposite, since as between themselves neither would know whether he would be more helped or handicapped, if in any dispute between them, both could invoke the shield of secrecy. And secondly, it is said that they had obviously no intention of keeping these secrets from each other, and hence as between themselves it was not intended to be confidential.

Id. (quoting C. MCCORMICK, *supra* note 1, § 91, at 190); *see also In re* LTV Sec. Litig. M.D.L., 89 F.R.D. 595 (N.D. Texas 1981) (A potential controversy between defendants will not be enough to assert the exception.).

118. J. WEINSTEIN & M. BERGER, *supra* note 5, at 503-75.

dential information held by the attorney. Obviously, one client would always invoke the privilege, thereby precluding information which is pertinent to the litigation.

Also, it is reasoned that joint clients have no intention of keeping information in relation to representation secret from each other and hence, as between themselves, the information is not intended to be confidential.[119] However, such communications are still confidential as to third parties. Clearly, where the intent to keep communications secret from one another is lacking, the privilege should not apply.[120] The attorney-client privilege is not intended to keep communications secret when an attorney is consulted by two or more people and each hears what the other has said.[121]

The joint-client exception applies where an attorney is acting for both parties and communications have been made in the presence and hearing of the defendant.[122] The face of the rule, however, does not provide a clear application for former clients.[123] It merely indicates that communications made by any of the clients to a lawyer, whom they retain or consult in common, relevant to a common interest, are not privileged when offered in a subsequent action between the clients.[124] It is the attorney's duty to make clear to the clients the potential downfall of joint representation. In fact, it should be the duty of the attorney to suggest that separate counsel be sought for each client regardless of his or her immediate interests. Currently, this is not specifically required under the joint client exception.[125]

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119. C. MCCORMICK, *supra* note 1, § 95, at 192-93.

120. *See* 8 J. WIGMORE, *supra* note 7, § 2328(2), at 639 (Dean Wigmore notes that where counsel is retained by several clients jointly the waiver should be joint for statements. Joint clients, however, should be unable to waive for disclosure of the other's statements.); *cf.* Sugar & Zipser, *supra* note 15, at 1322-24 (The authors of this article assert that the joint client exception is justified by a weak rationale. The claim that those who seek joint consultation do not intend confidentiality between themselves misses the point. Denial of the privilege on this basis is not a logical result.); *see* Hoffman v. Labutzke, 233 Wis. 365, 289 N.W. 652 (1940); Johnson v. Andreassen, 227 Wis. 415, 278 N.W. 877 (1938); Allen v. Ross, 199 Wis. 162, 225 N.W. 831 (1929).

121. *Johnson*, 227 Wis. 415, 278 N.W. 877.

122. International Business Mach. Corp. v. Levin, 579 F.2d 271 (3rd Cir. 1978) (The attorney-client relationship may be ongoing even if the attorney is not presently representing the client in question.).

123. When joint clients meet separately with the attorney, they may have a false feeling of confidentiality and should be informed that individual conversations do not fall within the purview of the attorney-client privilege.

124. *See infra* note 126. The Wisconsin Rules of Professional Conduct, however, do intimate that seeking separate counsel should be discussed. *See also* Kaap, *Who is the Decision Maker?*, 60 WIS. B. BULL. 56 (July 1987).

125. According to Supreme Court Rule 20:2.2 (Intermediary):

(a) A lawyer may act as intermediary between clients if:

The Rules of Professional Conduct, Supreme Court Rule 20:2.2, Intermediary ("Rule 2.2"), addresses the issue of joint clients.[126] An attorney is an intermediary when two or more parties with potentially conflicting interests are represented by that attorney.[127] Rule 2.2 makes it clear that the attorney needs to disclose the implications of common representation and obtain the consent of each client.[128] Under Rule 2.2, before an attorney may act as intermediary, the attorney must be certain to consult with each client concerning the advantages and disadvantages of the relationship and must obtain each client's consent in writing.[129] Also, the attorney must reasonably believe that the matter can be resolved on terms which are compatible with the clients' interests because the potential for gain to each client outweighs the risks involved.[130] Furthermore, the attorney must reasonably believe that common representation can be undertaken impartially without compromising his or her responsibilities to the client.[131] If the relationship breaks down due to an inability to satisfy the criteria set out in the statute, or upon the request of a client, the attorney is then compelled to withdraw and shall not continue to represent any of the clients in any mat-

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(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without proper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

WIS. S.C.R. 20:2.2 (1988).

126. Hildebrand, *supra* note 24, at 43 (Common representation is often evidenced by the clients' sharing the attorney's fee or from circumstantial inferences.). *See generally* Healy, *Evidence — Attorney-Client Relationship — Privilege and Conflict of Interest*, 71 MASS. L. REV. 150 (1988).

127. *See supra* notes 79-81 and accompanying text. WIS. S.C.R. 20:1.7 (Conflict of Interest) specifies that it is best to get the client's consent in writing.

128. WIS. S.C.R. 20:2.2(a)(1) and (b).

129. WIS. S.C.R. 20:2.2(a)(2).

130. WIS. S.C.R. 20:2.2(a)(3).

131. WIS. S.C.R. 20:2.2(c).

ter which was the subject of intermediation.[132] However, the Official Comment to Rule 2.2 indicates that the rule does not apply to an attorney who acts as a mediator or arbitrator for parties who are not the lawyer's clients.[133]

Supreme Court Rule 20:1.4, Communication,[134] and Supreme Court Rule 20:1.6, Confidentiality of Information,[135] also provide that an attorney, while representing a client, must keep that client adequately informed and maintain confidentiality of information. This requires a delicate balance.[136]

If intermediation fails, the joint-client exception allows confidential communications between the attorney and the clients to be revealed. At that point, it is in the attorney's interest to have obtained a written consent from each client. An attorney who fails to take such precautions will be in a poor position if the clients then bring a subsequent legal malpractice claim, or initiate a disqualification proceeding.[137]

The Rules of Professional Conduct are consistent with the joint-client exception. Rule 2.2 sets out guidelines for an attorney who is compelled to decide whether he or she should represent clients jointly. If the attorney decides to represent the clients, the clients are then fully informed as to the limitation imposed by the joint-client exception. However, if intermediation fails, an attorney must withdraw under Rule 2.2. As a result, the strict construction afforded to the attorney-client privilege is not undermined by Rule 2.2, and the rules compliment each other. This, of course, ultimately benefits the client.

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132. *See* Hildebrand, *supra* note 24, at 43.

133. According to Supreme Court Rule 20:1.4 (Communication): "(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." WIS. S.C.R. 20:1.4 (1988).

134. *See supra* notes 52-53 and accompanying text.

135. *See* Hildebrand, *supra* note 24, at 44 (if the balance cannot be maintained, then representation is improper).

136. Since this is not a typical attorney-client relationship, clients must assume greater responsibility when posturing their decisions. Although joint representation destroys the attorney-client privilege, loyal, diligent, and impartial representation is still required of the attorney.

137. "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." United States v. Nixon, 418 U.S. 683, 710 (1974) (Chief Justice Warren Burger).

IV. CONCLUSION

The attorney-client relationship is formed at the moment that the person consulting the attorney believes that confidential information is being revealed to the attorney. The attorney-client privilege is an evidentiary rule which serves to protect confidential communications between an attorney and a client. Five exceptions to the privilege have developed out of necessity.[138] The courts have interpreted these exceptions in a strict manner to maintain clear standards as to when the attorney-client privilege is appropriate. These exceptions facilitate the fact-finding process while they promote communication between an attorney and a client.[139]

The current state of the law involving the privilege exceptions and the Rules of Professional Conduct is worthy of analysis by any attorney whose role is to promote full client disclosure. To preserve the attorney-client privilege, the exceptions must continue to be strictly construed. Similarly, the Rules of Professional Conduct should not erode the attorney-client privilege through interpretations which further expand the exceptions to the privilege. The attorney-client privilege exceptions must be interpreted in light of the purpose for which they were intended. If indeed this rationale is sustained, then full and frank communication between an attorney and a client will continue to be confidential, and only under five well-established circumstances will that privilege be circumvented.

ANNETTE M. KINGSLAND

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138. Truth, like all other good things, may be loved unwisely — may be pursued too keenly — may cost too much. And surely . . . the general evil of infusing reserve and dissimulation, uneasiness, and suspicion and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, [is] too great a price to pay for truth itself.

Pearse v. Pearse, 63 Eng. Rep. 950, 957 (1846) (Vice-Chancellor Knight Bruce).

139. An attorney is more than a predicator of legal circumstances. United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 359 (D. Mass. 1950). The duty of an attorney expands to encompass social, political, economic, philosophical, and ethical considerations. Upjohn Co. v. United States, 449 U.S. 383 (1980); *see also Professionalism: Committee Issues Recommendations*, 61 WIS. B. BULL. 18 (July 1988) (committee's analysis and recommendations to improve lawyer professionalism).