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ATTORNEY-CLIENT PRIVILEGE IN WISCONSIN

Harney B. Stover* and Mary Pat Koesterer**

I. INTRODUCTION

The use of discovery techniques in preparation for litigation has expanded greatly in Wisconsin in the last decade. This growth should be expected to continue at an even greater rate since the adoption by the Wisconsin Supreme Court of the new Wisconsin Rules of Civil Procedure (effective January 1, 1976) which provide for very liberal discovery procedures.

Two concepts of law which are frequently used to limit the scope of the discovery process are the attorney-client privilege and the attorney work product rule. Both of these concepts have become firmly established in the law of Wisconsin. However, many attorneys and even judges frequently confuse the two. While a particular item sought to be discovered may be protected by both the attorney-client privilege and the work product rule, the concepts are quite distinct. One is based in the common law and the other is not; one “belongs” to the client while the other “belongs” to the attorney; and each, for the most part, protects different items from discovery for different reasons.

II. ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege has long been an established part of the common law of both England and the United States.† It is given recognition in the attorney’s oath,‡ in the

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Code of Professional Responsibility and in the laws of the states. In Wisconsin, the attorney-client privilege was codified as early as 1878 by the adoption of a statute which appeared in the Revised Statutes of the State of Wisconsin as follows:

An attorney or counselor at law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon in the course of his professional employment.

That statute was based upon a similar section of the New York Code which had been adopted one year earlier. The Wisconsin reviser’s note in 1878 indicated that the statute was declared and adopted as a settled rule of public policy in order to prevent it from being overruled by the statutory pronouncement that a party may be a witness except in certain specified cases. Section 19, Chapter 523, Laws of 1927 added the following sentence to the statute:

This prohibition may be waived by the client and does not include communications which the attorney needs to divulge for his own protection or the protection of those with whom he deals, or which were made to him for the express purpose of being communicated to another, or being made public.

The reviser’s note in 1927 stated that the statute did not express important and well established exceptions to the attorney-client privilege as set forth in court decisions. This statute, as originally adopted in 1878 and revised in 1927, remained unchanged and in full force and effect until the adoption of the Wisconsin Rules of Evidence, which became effective on January 1, 1974. This resulted in the repeal of the foregoing section of the statutes, which had been renumbered in 1971 as section 885.22.

In State ex rel. Dudek v. Circuit Court, the court summarized the policy considerations which have given rise to the attorney-client privilege as follows:

3. 43 Wis. 2d xiii (1969).
6. Id.
11. 34 Wis. 2d 559, 150 N.W.2d 387 (1967).
The policy choice of the rule is clear. The administration of justice is thought best promoted by a rule which encourages clients to reveal the facts fully to their attorneys. By encouraging revelation of facts to the attorney, the privilege is also calculated to serve the basic objective of the jurisprudential system. Without the rule, parties would not reveal all of the facts because of a fear of detriment or embarrassment. It is better to have otherwise concealed facts within the knowledge of the person charged with the direction of the lawsuit, even though he must not reveal the communication, than to have those facts or opinions buried within the knowledge of the client. This is because the lawyer, by application of professional skill, can best make use of what he has learned has really happened and prepare proper defenses to aspects of the case detrimental to his client. Although the communication may not be revealed unless the client so wishes, the result of the privilege is a more informed resolution of controversy, at least in the aggregate number of cases.\(^\text{12}\)

However, because the rule may operate to prevent a full disclosure of the facts, it has always been narrowly construed in Wisconsin.\(^\text{13}\) In the \textit{Dudek} case, the court also set forth the policy reasons behind the restrictions placed on the scope of the attorney-client privilege.

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.\(^\text{14}\)

\(^{12}\) Id. at 578-79, 150 N.W.2d at 398.

\(^{13}\) Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 296 F. Supp. 979 (E.D. Wis. 1969); State \textit{ex rel. Dudek} v. Circuit Court, 34 Wis. 2d 559, 150 N.W.2d 387 (1967).

\(^{14}\) 34 Wis. 2d at 581, 150 N.W.2d at 399, 400.
Because of the conflicting policy considerations, the attorney-client privilege and the exceptions to it must be carefully examined.

A. Nature of the Communication

The attorney-client privilege extends only to confidential communications.\textsuperscript{15} The term "communications" has never been explicitly defined by either the courts or the legislature, although in \textit{Dudek}, Justice Beilfuss indicated that the term does not necessarily include "facts or evidence."\textsuperscript{16} It is clear, however, that written and oral communications from the client to his attorney and the attorney's advice given on the basis of these communications come within the scope of the privilege.\textsuperscript{17} On the other hand, pre-existing documents, such as wills and deeds, do not become privileged merely because the client has placed them in the hands of his attorney.\textsuperscript{18}

A special problem arises when the client conveys information to the attorney through acts instead of words. Although Wisconsin has not specifically dealt with this situation, if the act is essentially communicative and intended to be confidential, it should properly be recognized as a communication.\textsuperscript{19} A parallel situation exists in the definition of a "statement" for the purposes of the hearsay rule. In Wisconsin Statutes section 908.01(1), a statement for hearsay purposes is defined to include non-verbal conduct which is intended to be assertive.\textsuperscript{20} Therefore, when a client reveals confidential information to his attorney in the course of obtaining legal assistance by a gesture or some other physical conduct, that revelation should be deemed a communication within the attorney-client privilege. Nevertheless, it must be pointed out that the application of the

\textsuperscript{15} Wis. Stat. § 905.03(2) (1973): Derber v. Burke, 239 F. Supp. 449 (E.D. Wis. 1965); State \textit{ex rel. Dudek} v. Circuit Court, 34 Wis. 2d 559, 150 N.W.2d 387 (1967); Hoffman v. Labuzke, 233 Wis. 365, 289 N.W. 652 (1940).

\textsuperscript{16} 34 Wis. 2d at 578, 150 N.W.2d at 398.

\textsuperscript{17} State \textit{ex rel. Dudek} v. Circuit Court, 34 Wis. 2d 559, 150 N.W.2d 387 (1967); Continental Cas. Co. v. Pajorzilski, 275 Wis. 350, 82 N.W.2d 183 (1957); \textit{In re Downing's Will}, 118 Wis. 581, 95 N.W. 876 (1903); Horlick's Malted Milk Co. v. A. Spiegel Co., 155 Wis. 201, 144 N.W. 272 (1913).

\textsuperscript{18} McCormick, \textit{Evidence} § 89 (2d ed. 1972); State \textit{ex rel. Dudek} v. Circuit Court, 34 Wis. 2d 559, 150 N.W.2d 387 (1967).

\textsuperscript{19} McCormick, \textit{Evidence} § 89 (2d ed. 1972).

\textsuperscript{20} Wis. Stat. § 908.01(1) (1973): STATEMENT. A "statement" is (a) an oral or written assertion or (b) nonverbal conduct of a person, if it is intended by him as an assertion.
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privilege cannot be made without concrete reference to the specific issues and the particular facts of the case in which the privilege is sought to be invoked.\(^\text{21}\)

Another element essential to the application of the attorney-client privilege is confidentiality. As early as 1902, in the case of \textit{Herman v. Schlesinger},\(^\text{22}\) the court refused to extend the privilege to every communication made to the attorney and to all knowledge obtained by him, whether from the client, from a third party, or from other sources, simply because it is obtained by reason of his professional employment. Citing an earlier decision in \textit{Koeber v. Somers},\(^\text{23}\) the court stated:

\[ \text{[T]he privilege of secrecy as between attorney and client, recognized by the statute, extends only to those communications made by the latter to the former which are of a confidential character...} \]\(^\text{24}\)

Because the privilege is personal to the client, his intention with respect to the confidentiality of a communication should be controlling.\(^\text{25}\)

In keeping with its policy of narrowly defining the scope of the attorney-client privilege, the Wisconsin Supreme Court has defined numerous situations in which any confidentiality is destroyed and the privilege waived. Some of these exceptions to the privilege were codified in the earlier statute dealing with the privilege, and others were added to the new rules of evidence effective July 1, 1974. Confidentiality is most clearly destroyed when the client’s communications to his lawyer are made in the presence of third parties, other than certain agents of the client and of the attorney,\(^\text{26}\) or when the communications are intended to be made public.\(^\text{27}\) A person cannot transform the nature of particular information merely by communicating it to his attorney,\(^\text{28}\) and once the confidentiality has been lost it cannot be regained. Therefore, a strict interpretation of the

\begin{footnotesize}
\begin{enumerate}
\item 34 Wis. 2d at 586-87, 150 N.W.2d at 402-03.
\item 114 Wis. 382, 90 N.W. 460 (1902).
\item 108 Wis. 497, 84 N.W. 991 (1901).
\item 114 Wis. at 393-94, 90 N.W. at 464.
\item Koeber v. Somers, 108 Wis. 497, 84 N.W. 991 (1901); Estate of Hoehl, 181 Wis. 190, 193 N.W. 514 (1923); State v. Dombrowski, 44 Wis. 2d 486, 171 N.W.2d 349 (1969).
\item Wis. Stat. § 905.03(2) (1973); Sears, Roebuck & Co. v. American Plumbing & Supply Co., 19 F.R.D. 329 (E.D. Wis. 1954). [Hereinafter cited as Sears.]
\item Sears, 19 F.R.D. 329 (E.D. Wis. 1954).
\item State \textit{ex rel.} Dudek v. Circuit Court, 34 Wis. 2d 559, 150 N.W. 387 (1967).
\end{enumerate}
\end{footnotesize}
privilege, as required by case law, could result in a waiver of the privilege if the communication were overheard by an eavesdropper. Past cases have, in fact, sustained this view.\(^{29}\) It should be noted, however, that the new rules of evidence provide greater protection against eavesdropping. Furthermore, the intention of the client at the time of disclosure is controlling so that a communication which is originally intended to be made public cannot later be claimed to be privileged.\(^{30}\) For example, in *State v. Dombrowski*,\(^{31}\) the defendant, while under arrest for drunk driving, told his attorney of the location of a body so that the authorities could be notified. When the defendant attempted to assert the privilege during his trial for homicide, the court held that the privilege had been waived because the information had been intended to be disclosed to others.

Another exception to the rule involves communications in furtherance of a crime or a fraud, including, but not limited to, situations in which the attorney and client are conspirators.\(^{32}\) The attorney-client privilege will not be permitted to obstruct justice or further crime, and a client waives his privilege and consequent right to confidentiality when he informs his attorney that he intends to commit a crime or perjure himself.\(^{33}\) The Code of Professional Responsibility goes one step further than the statutory privilege by requiring an attorney to divulge such communications to the proper authorities, if necessary to avert or rectify the wrongdoing.\(^{34}\) Furthermore, an attorney cannot conceal his own participation in crime under the cover of the attorney-client privilege.\(^{35}\) This exception to the privilege, however, does not extend to cases in which a client seeks the legal assistance of an attorney with respect to a crime already committed.\(^{36}\) In such a case, of course, the privilege applies, but the distinction between "confidential communications" and "evidence" becomes crucial. Neither the client nor his attorney is privileged to withhold evidence.\(^{37}\)

\(^{30}\) Sears, 19 F.R.D. 329 (E.D. Wis. 1954).
\(^{31}\) 44 Wis. 2d 486, 171 N.W.2d 349 (1969).
\(^{32}\) Wis. Stat. § 905.03(4)(a) (1973).
\(^{33}\) In re Sawyer’s Petition, 229 F.2d 805 (7th Cir. 1956), cert. denied, 351 U.S. 966 (1956); Christensen v. U.S., 90 F.2d 152 (7th Cir. 1937).
\(^{34}\) DR 7-102(B), 43 Wis. 2d 1xii (1969).
\(^{35}\) Dudley v. Beck, 3 Wis. 246 (1854).
\(^{36}\) Wis. Stat. § 905.03(4)(a) (1973).
\(^{37}\) State ex rel. Dudek v. Circuit Court, 34 Wis. 2d 559, 150 N.W.2d 387 (1967);
Although death of the client does not automatically result in a waiver of the privilege,\textsuperscript{38} it is waived when the communications are relevant to an issue between parties claiming through the same decedent.\textsuperscript{39} The purpose of this exception is to protect and carry out the true intentions of the deceased. Although this waiver of the privilege usually arises in cases of testate and intestate succession, it also is relevant to inter vivos transactions.\textsuperscript{40} A distinction must be made, however, when the parties are attacking the deceased client's will as a breach of contract. In that case, the parties are not making claims under or through the deceased but as adversaries of the deceased and his estate, and the privilege is not waived.\textsuperscript{41}

A similar exception to the rules arises where the attorney is an attesting witness for the client.\textsuperscript{42} If an issue in raised concerning the attested document, the attorney may testify in his capacity as an attesting witness because the privilege was waived to that extent by the very act of the client in having the attorney act as an attesting witness.\textsuperscript{43}

The Code of Professional Responsibility of the American Bar Association and the State Bar of Wisconsin provides as follows:

Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

1. Reveal a confidence or secret of his client.
2. Use a confidence or secret of his client to the disadvantage of the client.
3. Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.\textsuperscript{44}

The confidentiality of communications is deemed waived as a matter of law when there is an alleged breach of duty by

\textsuperscript{38} Wis. Stat. § 905.03(3) (1973); In re Smith's Estate, 263 Wis. 441, 57 N.W.2d 727 (1953); In re Mangan's Will, 185 Wis. 328, 200 N.W. 386 (1924); In re Cramer's Will, 183 Wis. 525, 198 N.W. 386 (1924).

\textsuperscript{39} Wis. Stat. § 905.03(4)(b) (1973); In re Boerner's Estate, 46 Wis. 2d 183, 174 N.W.2d 457 (1970); In re Breese's Estate, 7 Wis. 2d 422, 96 N.W.2d 712 (1959).

\textsuperscript{40} Wis. Stat. § 905.03(4)(b) (1973).

\textsuperscript{41} In re Smith's Estate, 263 Wis. 441, 57 N.W.2d 727 (1953).

\textsuperscript{42} Wis. Stat. § 905.03(4)(d) (1973).

\textsuperscript{43} Boyle v. Robinson, 129 Wis. 567, 109 N.W. 623 (1906); In re Pitt's Estate, 85 Wis. 162, 55 N.W. 149 (1893).

\textsuperscript{44} DR 4-101(B), 43 Wis. 2d xxxviii (1969).
either the attorney or the client. In a malpractice action, the defendant-attorney is entitled to protect himself even if his defense requires the revelation of communications otherwise privileged. It would be unfair to permit a client to claim the privilege and subject his attorney to liability, particularly when the client, himself, is bringing the action. The attorney, however, must be careful to disclose only those communications which are necessary to his defense. An intentional, or even careless, exposure of all transactions with his client may expose the attorney to an additional lawsuit or professional sanctions if such transactions are immaterial to the malpractice issue.

Similarly, if the client breaches his duty to the attorney by not paying his legal fees, the client is effectively estopped from asserting the attorney-client privilege. Again, however, the attorney is relieved of the privilege's restriction only to the extent necessary to protect his own legitimate interests.

A final situation in which a client's communications to his attorney lose their confidential nature is that in which the attorney represents joint clients and a lawsuit subsequently arises between those clients. The attorney's duty, as an officer of the court, is to promote justice. He is not permitted to "take sides" or remain silent where disclosure is necessary to a fair resolution of his clients' dispute. When an attorney agrees to represent both parties in a default divorce action or in a real estate closing, he obviously exposes himself to a potential conflict of interest, and he is required by the Code of Professional Responsibility to make a full disclosure of this fact to his clients before agreeing to act as legal counsel for all of the parties involved. A similar situation may arise in the insurance industry. While the insurer has a duty to defend its insured, there may be a dispute between those parties which will necessitate the appointment of outside counsel for the insured.

47. DR 4-101(B), 43 Wis. 2d xxxviii (1969); Wis. Stat. § 905.03(4)(c) (1973).
51. DR 5-105, 43 Wis. 2d xliv (1969); see the Ethical Considerations, EC 5-15, 16 and 17, 43 Wis. 2d xliii, xliii (1969).
The attorney-client privilege may be denied as to communications among the insured, the insurer and the company’s legal counsel for the period of time during which the legal counsel was representing both the parties. It is quite important, therefore, that the attorney foresee potential conflicts and act promptly to avoid them.\textsuperscript{52}

In summary, the attorney-client privilege applies to communications which are confidential. The attorney is bound by the canons of his profession to protect the confidences of his client, and he should carefully advise his client so that the privilege is not unwittingly waived.

\textbf{B. The Attorney-Client Relationship}

The application of the attorney-client privilege is specifically limited to communications made by the client to his attorney, or the advice given by the attorney to his client based on such communications.\textsuperscript{53} Furthermore, these communications must have been made in the course of the attorney’s professional employment by the client.\textsuperscript{54} This definition raises questions with respect to who qualifies as a “client,” who qualifies as an “attorney” and what constitutes “professional” employment. This section will analyze what constitutes professional employment, while the definitions of attorney and client will be dealt with in a later section.

The term “professional employment” refers to the relationship between the attorney acting in his capacity as a legal adviser and the client who has approached the attorney for the purpose of utilizing his professional skills. It is not necessary that the client retain the attorney consulted or that he pay a fee for the services rendered. In \textit{Bruley v. Garvin},\textsuperscript{55} a 1900 case, the defendant had approached an attorney, related his case and elicited a legal opinion. The attorney, when called as a witness in the lawsuit, testified that he knew the defendant was involved in a lawsuit and that he was seeking legal advice on the matter. However, he was not retained by the defendant and

\textsuperscript{52} DR 5-105, 43 Wis 2d xivii (1969).
\textsuperscript{53} State ex rel. Dudek v. Circuit Court, 34 Wis. 2d 559, 150 N.W.2d 387 (1967).
\textsuperscript{54} State ex rel. Dudek v. Circuit Court, 34 Wis. 2d 559, 150 N.W.2d 387 (1967); Continental Cas. Co. v. Pajorzelski, 275 Wis. 350, 82 N.W.2d 183 (1957); \textit{In re Downing’s Will}, 118 Wis. 581, 95 N.W. 876 (1903); \textit{In re Sawyer’s Petition}, 229 F.2d 805 (7th Cir. 1956), Brayton v. Chase, 3 Wis. 406 (1854); Dudley v. Beck, 3 Wis. 246 (1854).
\textsuperscript{55} 105 Wis. 625, 81 N.W. 1038 (1900).
did not consider him a client. The court held that the defendant's communications were privileged:

In order to entitle a client to the statutory privilege, it is not absolutely essential that a fee should be paid, or that there should be an actual retainer. The exclusion of the evidence is founded upon public policy, in the furtherance of justice, to the end that a man may have free and unrestrained communication with his legal adviser. There can be no reasonable doubt that Salter [the attorney] was, for the time being, Garvin's legal adviser. Garvin unquestionably sought him and stated his case to him in his professional capacity, in order to get legal advice thereon.58

Furthermore, it is not necessary that legal proceedings be commenced or contemplated before an attorney-client relationship exists. The court, in Dudley v. Beck,57 quoted Greenough v. Gaskill,58 with approval

If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceeding successful, or all proceedings superfluous.59

However, a social visit with an attorney does not constitute a professional relationship and statements made in such a context are not privileged.60

There are several ways in which an attorney can serve his client which do not involve his professional skills as such. For example, in Lacey v. Estate of Hanrahan,61 the plaintiffs brought an action against the decedent's estate for money paid to the decedent during his lifetime. The attorney for the decedent had written a letter to the plaintiffs regarding the matter, and the court held that the attorney's testimony with regard to the contents of the letter was not privileged.

We think it clearly appears from the testimony that Mr. Egan acted merely as a scrivener, and not as an attorney, and that

56. Id. at 631, 81 N.W. at 1039-40.
57. 3 Wis. 246 (1854).
58. 1 Mylne & Keene, 98.
59. 3 Wis. at 255.
60. In re Schmidt's Estate, 266 Wis. 182, 62 N.W.2d 908 (1954); In re Callahan's Estate, 251 Wis. 247, 29 N.W.2d 352 (1947).
61. 165 Wis. 352, 162 N.W. 179 (1917).
he was correctly permitted to testify as to the contents of the letter, and that his testimony should be strictly confined to that, and not to statements made to him by the deceased.

In other situations, an attorney may be acting only as an agent of his client. Lawyers employed in the patent department of a corporation or as house counsel for an insurance company frequently act in this capacity. Several jurisdictions have held that communications made to these attorneys, as agents, are not within the ambit of the attorney-client privilege and, in view of Wisconsin's definition of the attorney-client relationship, the same result would probably be reached in this jurisdiction.

The capacity in which the client acts in his transactions with his attorney may also determine whether the necessary professional relationship exists. In Estate of Hoehl, the administrator of the estate was sued for fraud. The court held that the communications made by the administrator to his attorney regarding the estate were not privileged. The lawyer was not the administrator's private attorney but represented him only in his capacity as administrator. The attorney, therefore, had a duty to serve the estate and the court as well as the administrator, and communications regarding the estate could not be concealed. In another case the client sought legal counsel from his attorney on one matter, and in the course of their dealings he made certain admissions regarding another unrelated matter. The court held that these latter communications were not protected by the privilege because they were not made within the scope of the existing attorney-client relationship.

The attorney-client privilege continues to apply after the relationship is terminated, but only as to those confidential communications made while the relationship was in existence. An attorney who had represented a husband and wife in adoption proceedings and damage suits was later retained by the husband in a divorce action. The wife attempted to disqualify the attorney from testifying at the divorce proceedings, after he

62. Id. at 354-55, 162 N.W. at 180.
63. See Annot., 98 A.L.R.2d 228 (1964).
65. 181 Wis. 190, 193 N.W. 514 (1923).
66. The Plano Mfg. Co. v. Frawley, 68 Wis. 577, 32 N.W. 768 (1887).
had withdrawn from the case, on the ground that he had previously been her attorney. The court found that the attorney had represented both husband and wife only in matters where there had been no conflict of interests. Since there was never any attorney-client relationship between the attorney and the wife in respect to divorce, the attorney’s testimony was admissible.\footnote{67. Grosberg v. Grosberg, 269 Wis. 165, 68 N.W.2d 725 (1955).}

**C. Voluntary Waiver**

Under the common law it was clear that only the client could waive the attorney-client privilege.\footnote{68. Hunt v. Blackburn, 128 U.S. 464 (1888); \textit{In re Sawyer’s Petition}, 229 F.2d 805 (7th Cir. 1956).} The Wisconsin statute which was in effect until the new Wisconsin Rules of Evidence became effective on January 1, 1974, expressly indicated that only the client could waive the privilege.\footnote{69. Wis. Stat. § 885.22 (1971).} The new rules of evidence adopted the same rule\footnote{70. Wis. Stat. § 905.03(3) (1973).} except that the client class was enlarged to include not only the client himself but also the client’s guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. Where an attorney’s services in a transaction are rendered to several clients, confidential communications to him in regard thereto and his advice thereon to the clients cannot be disclosed unless all of the clients waive the privilege.\footnote{71. Herman v. Schlessinger, 114 Wis. 382, 90 N.W. 460 (1902).} However, there can be no waiver in the situation where two or more clients have retained and consulted the same attorney in a matter of common interest, because the communications to the attorney are not privileged in a subsequent action between the clients.\footnote{72. Wis. Stat. § 905.03(4)(e) (1973).} Where the client has died, the privilege can still be waived, provided all of the parties who claim under the client so stipulate.\footnote{73. \textit{In re Brzowsky’s Estate}, 267 Wis. 510, 67 N.W.2d 384 (1954).} Again, however, there is no privilege as to communications relevant to an issue between parties who claim through the same deceased client, whether the claims are by testate or intestate succession, or by inter vivos transfer.\footnote{74. Wis. Stat. § 905.03(4)(b) (1973).} Hence, there can be no waiver issue in such
instances. The successor of an assignee for the benefit of creditors or a trustee cannot waive the attorney-client privilege as to his predecessor's communications to his attorney. A trustee in bankruptcy probably can waive the attorney-client privilege because he stands in the place and stead of the bankrupt or, in the case of a bankrupt corporation, in the place and stead of its directors.

D. The Corporate Client

Problems can arise in determining who is a client, when will a person qualify as a client, who is an attorney and when is an attorney acting as such. In the case of an individual, there is no great difficulty in identifying both the attorney and the client. However, when the client is a corporation, there are a number of problems involved in determining the communications and persons protected by the attorney-client privilege.

The leading case on this subject is Radiant Burners, Inc. v. American Gas Association. That case considered in depth the issue of whether or not a corporation may claim an attorney-client privilege and stated:

It is our considered judgment that based on history, principle, precedent and public policy the attorney-client privilege in its broad sense is available to corporations, and we so hold.

The attorney's work-product rule announced in Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), remains unimpaired and it is something separate and apart from attorney-client privilege.

Where a corporation is a client it must act through its officers and agents. The character of the corporate organization will vary from the small, family type, one-man variety to the giant with its thousands of employees. The problems concerning confidentiality will necessarily vary accordingly.

There is no reason to believe that the required confidentiality cannot properly be maintained within the corporate family. It can just as readily be dissipated. These matters will all have to be resolved on a case-by-case basis. No one is wise enough to decide them in advance.

75. Herman v. Schlessinger, 114 Wis. 382, 90 N.W. 460 (1902).
77. 320 F.2d 314 (7th Cir. 1963), cert. denied, 375 U.S. 929 (1963).
Certainly, the privilege would never be available to allow a corporation to funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure. Likewise, it seems well settled that the requisite professional relationship is not established when the client seeks business or personal advice, as opposed to legal assistance.

A corporation is entitled to the same treatment as any other "client"—no more and no less. If it seeks legal advice from an attorney and in that relationship confidentially communicates information relating to the advice sought, it may protect itself from disclosure, absent its waiver thereof.\(^7\)

A number of cases from other circuits have similarly held that a corporation is a client for the purpose of invoking the attorney-client privilege.\(^7\) Also, the Wisconsin Rules of Evidence clearly make reference to "a corporation" as a client in the section on who may waive the privilege.\(^8\)

The question then arises as to which communications of what employees of a corporation are subject to the attorney-client privilege. It is clear that the client must be seeking and receiving legal advice and not business advice on behalf of the corporation or the persons connected with it.\(^9\) In this regard, the advice sought and given need not be solely legal but must be predominantly legal advice and not solely, or even substantially, business advice.\(^8\)

Two tests have developed for determining which corporate employees' communications to an attorney for the corporation will be subject to the attorney-client privilege. The first is the

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78. Id. at 323-24.
"control group" theory or test which requires that the communicant be in a position to control or take a substantial part in the decision about any action to be taken upon the attorney's advice, or at least that the communicant be a member of a group having such authority. This theory was really developed in 1962 and has been followed by a number of courts since that time. (The test is whether or not the person communicating with the attorney on behalf of the corporation is in a position to control or take some substantial part in formulating corporate action upon the attorney's advice.) A corporate employee who is merely a witness to the communication is not a member of the "control group." Similarly, an investigator appointed by the corporation to investigate patent right conflicts, an unidentified employee, or one identified by position only, and a project engineer have been held not to be members of the so-called "control group." It has been determined that since they would not take a substantial part in decision-making based upon legal advice rendered to them for the corporation, communications to them and their communications to an attorney would not be privileged. Although membership in the "control group" is generally determined by the degree of participation in the decision-making process rather than rank, it has been stated that the rank of a corporation's employees, servants and agents can be a factor in determining membership in the "control group."

The second and more recent test for determining when a corporate employee's communications to or from an attorney are protected by the attorney-client privilege is the "subject matter" test. The Seventh Circuit Court of Appeals rejected the "control group" test in *Harper & Row Publishers, Inc. v. Decker.* In that case the court held that a communication from a corporate employee to the corporation's attorney was

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89. Rucker v. Wabash R. Co., 418 F.2d 146 (7th Cir. 1969).
90. 423 F.2d 487 (7th Cir. 1970), aff'd, 400 U.S. 348 (1971).
privileged even though the employee was not actually a member of its control group. The court found that he was sufficiently close to and identified with the corporation to render his communication to the corporation's attorney privileged, in view of the fact that the communication in question was made at the direction of his superiors and the "subject matter" upon which the attorney's advice was sought concerned the employee's performance of his employment responsibilities. This would appear to be a logical approach to the problem of identifying and protecting the confidentiality of communications between a corporation and the corporation's attorney regardless of the rank or position of the person making or receiving the communication on behalf of the corporation.

With regard to who is the "attorney" to whom or from whom communications are privileged, it is clear that independent counsel for the corporation would qualify and that the privilege would extend to counsel's associates and employees. Corporate general counsel and their clerks have been held to constitute attorneys within the attorney-client privilege, and in-house counsel qualify under the same circumstances as outside counsel. Of course, in all instances, whether involving outside counsel or the corporation's so-called in-house counsel or permanently employed general counsel, the communication must otherwise qualify for the protection afforded by the attorney-client privilege.

On the most interesting and important questions in this area concerns the role of an independent attorney who is serving on a corporation's board of directors or who is acting as a trustee in some capacity for a corporation. Apparently there are no decisions on this subject, although for many years it has been quite common in the United States for attorneys to serve as directors of corporate entities. Attorneys are frequently asked to serve as directors of corporations for the purpose of rendering legal advice in the event that the board is faced with a problem which requires immediate legal interpretation.

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Problems may arise when an attorney is serving in a dual capacity as a member of the board of directors and as counsel for the corporation. When a question of privilege arises in this context, it is important that a distinction be made between communications made by the attorney in his capacity as a director and those made in his capacity as legal counsel. Only those communications made to the attorney in his capacity as legal counsel and the legal advice rendered by him are subject to the attorney-client privilege. It must always be remembered that the attorney-client privilege, having a tendency to prevent full and open disclosure of the truth, is to be construed as narrowly as possible.95 This means that where there is any question as to whether the attorney serving on the corporate board of directors is acting in his capacity as an attorney or in his capacity as a director of the corporation, the question will be resolved in favor of full disclosure.

From a very practical point of view, it would probably be in the best interests of the corporate client if the corporation’s general counsel, whether outside counsel or house counsel, did not serve in a dual capacity as both general counsel and director of the corporation. This would enable the corporation to minimize the risk of foregoing the right to invoke the attorney-client privilege in questionable instances of communications between the board of directors and the general counsel. As pointed out previously, corporations frequently seek attorneys to serve on their boards of directors in order to obtain immediate legal advice at board meetings and business advice tempered by sound legal background, knowledge and reasoning. However, it is also true that all too often corporations, particularly small ones, seek attorney board members in order to avoid payment of some legal fees, and that some attorneys seek and accept corporate directorships in order to “hold the client.” Neither of the latter reasons justifies the risk that the corporation might thereby be giving up or substantially narrowing its right to invoke the attorney-client privilege in the event of civil or criminal litigation. In more cases than not, a corporation’s interests would be better served by not having its general counsel serve on its board of directors but instead attend all board

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meetings strictly for the purpose of being available for and rendering legal advice and consultation.

E. The Work Product Protection

In the course of discovery proceedings, confusion frequently arises over which matters are covered by the attorney-client privilege and therefore enjoy a status of absolute privilege, and which matters are covered by the attorney's work product rule and therefore are conditionally protected from discovery. The work product rule and the attorney-client privilege are two distinct legal concepts, and the former will not be covered in depth in this article. However, the following distinctions should be kept in mind.

While the attorney-client privilege applies to communications and advice thereon between the attorney and client, the work product rule applies to the information the lawyer has assembled and the mental impressions, legal theories and strategies that he has pursued or adopted as derived from interviews, statements, memoranda, correspondence, briefs, legal and factual research, personal beliefs, and other tangible or intangible sources. It must always be remembered that the attorney-client privilege belongs to the client; only the client, or someone acting on his behalf, can claim the privilege and only the client can waive it. The work product rule, on the other hand, protects the attorney's work, and only the attorney himself can claim the protection.

As to the rules and guidelines for invoking the attorney's work product rule, reference should be made to the leading decision of the United States Supreme Court in Hickman v. Taylor, and the leading decision of the Wisconsin Supreme Court in State ex rel. Dudek v. Circuit Court.

F. New Federal and State Rules of Evidence

The new Rules of Evidence for Wisconsin Courts and Court Commissioners, which became effective January 1, 1974, are

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96. 34 Wis. 2d at 589, 150 N.W.2d at 404.
97. In re Sawyer's Petition, 229 F.2d 805 (7th Cir. 1956); State ex rel. Dudek v. Circuit Court, 34 Wis. 2d 559, 150 N.W.2d 387 (1967); Herman v. Schlesinger, 114 Wis. 382, 90 N.W. 460 (1902).
98. 34 Wis. 2d 559, 150 N.W.2d 387 (1967).
100. 34 Wis. 2d 559, 150 N.W.2d 387 (1967).
substantially the same as what were then the Proposed Federal Rules of Evidence. These new rules are, for the most part, a more extensive codification of Wisconsin case law. However, they do to some extent alter or extend the existing law as to attorney-client privilege. The new statute, renumbered section 905.03 of the Wisconsin Statutes, reads as follows:

905.03 Lawyer-client privilege

(1) Definitions. As used in this section:

(a) A “client” is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view of obtaining professional legal services from him.

(b) A “lawyer” is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(c) A “representative of the lawyer” is one employed to assist the lawyer in the rendition of professional legal services.

(d) A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(2) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client,

(a) between himself or his representative, or

(b) between his lawyer and the lawyer’s representative, or

(c) by him or his lawyer to a lawyer representing another in a matter of common interest, or

(d) between representatives of the client, or

(e) between lawyers representing the client.

(3) Who may claim the privilege. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in exist-

The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.

(4) Exceptions. There is no privilege under this rule:

(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

(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; or

(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; 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.

Unfortunately, the new rule on attorney-client privilege is similar to the old rule in that it fails to define "communication." However, the new rule does define "attorney" and the general rule of privilege in such a manner as to change the prior law. In *Brayton v. Chase*, the court held that only those communications made to an attorney who was licensed to practice in Wisconsin courts could be accorded the privilege. Statements made to an assistant of the attorney were not protected. The new rule rejects this position. Section 905.03(1)(b) defines "attorney" as anyone authorized to practice law in any state or nation and anyone who the client reasonably believes is so authorized. Therefore, the law in *Brayton* is now overruled. According to the committee notes of the judicial council, the burden will be on the client to show the reasonableness of his belief that the one to whom he made confiden-

103. 3 Wis. 406 (1854).
104. Id. at 407-09.
tial communications was an authorized attorney.\textsuperscript{105} Apparently, the test will be an objective rather than a subjective one.

Under the new definition of the general rule of privilege, the protection against "eavesdropping" has also been extended.\textsuperscript{106} Previously, in order for a communication to maintain its nature of confidentiality, it could only pass between the client and his attorney. Now, under section 905.03(2), the privilege extends to confidential communications between the client and the attorney, their representatives, and attorneys representing the same client or clients joined by a common interest. The only qualification placed on this extended rule is that the communications must be made for the purpose of facilitating the rendition of professional legal services to the client.\textsuperscript{107}

As pointed out earlier, the Wisconsin rule with respect to attorney-client privilege was based on the then proposed federal rule. However, Public Law 93-595, Section 1, January 2, 1975, which created the new Rules of Evidence for United States Courts and Magistrates\textsuperscript{108} did not adopt the proposed rule on attorney-client privilege. Instead, Article V, Rule 501, states:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

This statement of the general rule creates some confusion. In federal courts, Wisconsin's new rule on attorney-client privilege will apply only to civil actions, while the common law will apply in criminal actions. The practical effect of this anomaly may be insignificant since Wisconsin's rule is basically a devel-

\begin{itemize}
\item \textsuperscript{105} 56 \textit{Marq. L. Rev.} 243 (1973).
\item \textsuperscript{106} \textit{Id.} at 245-46.
\item \textsuperscript{107} \textit{Wis. Stat.} § 905.03(2) (1973).
\item \textsuperscript{108} 28 U.S.C. (1975).
\end{itemize}
opment and codification of the common law. However, with respect to the definition of an attorney and the extension of the protection against eavesdropping, the federal district courts in Wisconsin may be applying a different and more narrow rule than would be used in the Wisconsin state courts where a criminal action is being tried.

III. CONCLUSION

The privilege afforded confidential communications between attorney and client has been recognized in Wisconsin for approximately a century. The law in this area has not changed substantially over the years and the new Wisconsin Rules of Evidence, for the main part, codify existing case law. However, we can expect more cases involving the corporate client who wishes to claim the privilege and new developments in this area. In any case, it is the duty of attorneys to be aware of the law and how to properly use it in the best interests of their clients and the administration of justice.

Attorney-Client Privilege Guidelines

A. Communications from client to attorney and the attorney's advice thereon leading to or in the course of the attorney's professional employment cannot be disclosed without the client's waiver of the privilege. The privilege must be asserted by the attorney in the absence of the client's waiver.

B. Communications subject to the privilege:
1. Must be confidential.
2. Must come from the client.
   And in the case of a corporation,
   a. From an employee having some element of control and participation as to any decision on the attorney's advice, or
   b. From an employee, at the direction of his superior where the subject matter is the performance by the employee of his duties of employment. (7th Circuit)
3. Must be made to the attorney in his capacity as attorney for the client.
   a. Includes the attorney’s associates, employees, and representatives.
   b. Includes persons authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.
4. Must be related to the subject for which the attorney is to be or has been employed.

C. Waiver
1. Can only be made by the client.
   a. If the client dies, can be made by all who claim under him.
   b. Cannot be made by an assignee.
2. Must be made by all clients, if there is more than one involved.

D. Exceptions
1. Communications concerning a crime or fraud to be committed.
2. Communications concerning a crime or fraud being committed by attorney and client.
3. Communications which the attorney needs to disclose to protect his own rights (only to the extent necessary for his own protection) or the rights of those with whom he deals.
   a. In the case of attorney/client litigation.
   b. In order to protect against charge of fraud or crime.
4. Communications made to the attorney to be communicated to another or to be made public.
5. Communications made in the presence of third parties, strangers, etc.
6. Communications concerning an attested document to which the attorney is an attesting witness.
7. Communications relevant to a matter of common interest in litigation between joint clients.