**Title**

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**Journal**
Journal of Legal Studies, 19(359)

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**Publication Date**
1990

# A POSITIVE THEORY OF THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE

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## I. Introduction

PROTECTING the confidentiality of legal information is an odd goal in a judicial system that values openness as highly as ours does. In some litigation settings we make a fetish out of free access to all information. Modern discovery rules can require parties to exchange boxcars of records with one another, and attorneys are under an obligation to disclose cases that run against the arguments that they make. The argument for openness is, in principle, strong. When there are no surprises at trial, the parties will be more likely to join issue on the real questions of fact and law—those that properly should determine case outcomes.

Why, then, do the confidentiality doctrines remain? The conventional response quickly runs up against an insoluble dilemma. It accepts the aspirations of modern discovery systems, including the one forbidding counsel from participating in perjurious efforts; it posits costless rules of confidentiality that have no effect on the opponent's ability to obtain information; and then it asserts that these supposedly costless rules none-

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[*Journal of Legal Studies*, vol. XIX (June 1990)]
 0047-2530/90/1902-0001$01.50

theless create incentives for clients to disclose information to counsel.[1] How can this be? Only if confidentiality rules increase the cost of obtaining information will the client have an incentive to disclose unfavorable information to the lawyer.

Because of the tension between the conventional view of the confidentiality rules and their purported consequences, some scholars have recognized that the justifications for the rules are insubstantial,[2] but they have not examined the assumption that confidentiality rules are costless.[3] This failure may be a testament to the strength of the commitment to openness in the legal process. To admit that the rules of confidentiality are costly requires one to recognize that they do, indeed, constrain openness. If confidentiality rules impose costs, and we assert that they do, the effect is to increase the cost to the opponent of securing the relevant information, whatever that cost may be. Because of the confidentiality rules, for example, rather than simply ask the attorney to turn over the entire case file, the opponent must secure that information in other ways, such as deposing the client. That in itself may increase costs, and in addition the client will have the aid of counsel before and at the deposition, which may make the opponent's task of extracting the information more difficult and thus more costly still. After all, merely having to ask two questions instead of one to get the requested information increases costs. Under our theory, however, the costs of confidentiality are not regrettable; rather, they are the conditions that create incentives to disclose to the lawyer: the more costly an opponent's efforts to obtain information disclosed to the lawyer, the less likely it is that the opponent will secure that information, and the greater the corresponding incentive to disclose it to the lawyer. Once the information is in the lawyer's possession, he may guide the litigation in directions unanticipated by the client, and here lie the benefits of the confidentiality rules that justify their costs.

In this article, we develop these points and propose a positive theory that explains the confidentiality rules. Two doctrines authorize or mandate lawyers to preserve the confidentiality of their clients' legal affairs.

[1] See, for example, Stephen A. Saltzburg, Corporate and Related Attorney-Client Privilege Claims: A Suggested Approach, 12 Hofstra L. Rev. 279, 283–84 (1984).

[2] It is this recognition that makes explaining such matters as waiver under the privilege so difficult. See, for example, Richard Marcus, The Perils of Privilege: Waiver and the Litigators, 84 Mich. L. Rev. 1605, 1619–22 (1986).

[3] Yet other scholars, convinced that the rules of confidentiality impose greater costs than they secure benefits, argue for eliminating some or all of the rules. See, for example Marvin Frankel, Partisan Justice (1980). For a discussion, see Albert Alschuler, The Preservation of a Client's Confidences: One Value among Many or a Categorical Imperative? 52 Colo. L. Rev. 349 (1981).

The attorney-client privilege exempts from discovery and production at trial confidential communications from client to lawyer, and confidential communications from lawyer to client that may expose a client's confidential communication, if made for the purpose of securing legal advice.[4] The work product doctrine exempts from production material generated by the attorney in anticipation of litigation.[5]

These doctrines affect decision making on two margins. The expectation of confidentiality can affect a client's decision concerning how much unfavorable information to divulge to a lawyer and, at a limit, whether to go to a lawyer at all. Without legal protection, a client might otherwise anticipate that divulging information to a lawyer would reduce an opponent's cost of acquiring it. Thus, contrary to the conventional theory of the privilege, one of the effects of the privilege must be to raise the cost of obtaining useful information once it is in the hands of the attorney. Confidentiality can also affect the amount of information produced by the lawyer. When lawyers cannot produce favorable information without also producing unfavorable information, lack of confidentiality would reduce the amount of favorable information that lawyers would produce.[6]

In brief, our argument is that the attorney-client privilege and the work product doctrine offer two perspectives on a larger goal, which is to

[4] John Henry Wigmore, 4 Evidence §§ 2285–92 (1905). We are relying on the 1905 edition of Wigmore because we are more interested in his views than in those of his subsequent compilers. See also Developments in the Law: Privileged Communications, 98 Harv. L. Rev. 1450, 1501 (1985).

[5] Hickman v. Taylor, 329 U.S. 495 (1947); Fed. Rule Civil Proc. 26(b)(3).

[6] Ethical rules also comprise a form of legally mandated confidentiality. The lawyer's ethical obligations pose the problem of how to prevent the agent from expropriating the principal: the lawyer could threaten to inform on his client and thereby get a payment from him. The other two rules—the attorney-client privilege and the work product doctrine—address a different problem: how much information about legal disputes clients and lawyers will produce. Accordingly, the ethical obligations of lawyers are beyond the scope of this article. The most thorough treatment of the subject is contained in Charles Wolfram, Modern Legal Ethics 299–301 (1986), where Wolfram collects the various arguments advanced in favor of the ethical rules. Wolfram stresses that the lawyer is his client's agent, *id.* at 299, and that, in this role, the lawyer's job is "to assist the client to obtain all that law and the legal system allows the client." *Id.* at 300. Wolfram argues that "[a] detrimental revelation of a client secret is inconsistent with that role and undertaking." For another recent discussion of the ethical rules from a somewhat similar perspective, see Steven Shavell, Legal Advice about Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, and Protection of Confidentiality, 17 J. Legal Stud. 123 (1988). See also Fred C. Zacharias, Rethinking Confidentiality, 74 Iowa L. Rev. 351 (1989). We also put aside the question of the implications of the privilege for nonlitigation-oriented activity. The problem there, again, does not center on the production of legal information. Instead, it centers on providing the optimum incentives to ensure compliance with the law. For a preliminary exploration of that issue, see Ronald J. Allen & Cynthia M. Hazelwood, Preserving the Confidentiality of Internal Corporate Investigations, 12 J. Corp. L. 355 (1987).

increase the amount of information about disputes available to courts and to work against the disincentives to the production of that information which would otherwise exist. In our legal system, lawyers are both conduits of information from their clients to the courts and independent producers of information for the same audience. The attorney-client privilege takes the client's perspective and establishes the level of confidentiality needed to get the client to consult a lawyer and to divulge the optimum amount of information to him. The work product doctrine then takes the attorney's perspective and provides the level of confidentiality needed to induce the attorney to perform the optimal amount of legal investigation.

These two perspectives constitute the basic organizing principle of this article. Section II examines the attorney-client privilege as a method of increasing client divulgence of information to lawyers. It is not divulgence per se that the law values but something more fundamental. The attorney-client privilege is especially designed to encourage clients to divulge unfavorable information on which legal claims frequently depend. We call these claims "contingent legal claims" because they are claims whose validity is contingent on the existence of unfavorable information about the client. It is the exploration of these claims, along with the resultant decrease in the amount of perjured testimony and the number of fraudulent claims, that comprise the benefits conferred by the attorney-client privilege. In Section II, we also show that much of the current doctrine relating to the attorney-client privilege can be explained with this contingent-claim theory.

Section III shifts perspectives and examines the work product doctrine under the assumption that lawyers are involved frequently in "joint production" situations—situations in which they cannot produce information helpful to their clients without also producing information harmful to them. After explaining the joint-production theory in more detail, this part of the article examines the extent to which the work product doctrine can be explained by the goal of increasing the amount of joint production done by lawyers.

## II. The Attorney-Client Privilege and the Contingent Claim Theory

In this section we first discuss the various theories that have been offered either to criticize or explain the attorney-client privilege. We begin with our contingent claim theory and then explore other theories. Next, we examine certain cases—in particular those that have been difficult to explain by conventional theories of the privilege—to see how well they are explained by the contingent claim theory.

## A. *Theories about the Attorney-Client Privilege*

### 1. The Contingent Claim Theory

In contrast to some contemporary theories of the privilege, ours assumes that it must impose some costs on the adversary. If a person believes that disclosure of an unfavorable fact to an attorney could reduce the other side's costs to discover it, this belief may deter the party from divulging the fact to his lawyer. And without a privilege, a party may very well believe that disclosure to an attorney would reduce his opponent's cost of discovery. The attorney is a repeat player in the legal system and so is likely to cooperate with other repeat players. Moreover, the attorney is ethically bound to respect the system's rules. Accordingly, a client could reasonably believe that, in the absence of a privilege, an attorney would truthfully answer the question, "What has your client told you?"[7] A client left entirely to his own, by contrast, may feel that he has more room to maneuver. Thus, one might expect a client to conclude that, absent a privilege, divulging information to a lawyer will reduce his opponent's costs of discovering information.

The existence of a privilege changes things. The privilege, at a minimum, does not decrease the adversary's costs of obtaining information, and, in fact, it may increase them. There is no decrease because the adversary must still obtain information from the client, just as he would have been required to do had the client never consulted an attorney. Costs may increase because the lawyer may give the client guidance in how to respond honestly but craftily to an interrogatory, thus making the adversary's task of obtaining complete information more difficult. In any event, if the privilege does not increase the other side's discovery costs, there is no conceivable reason for it, a point that Kaplow and Shavell have made before us.[8] Moreover, there is evidence suggesting that the privilege does increase discovery costs. The most telling datum may be the continuing existence of attorney-client privilege cases. If opponents could acquire information just as cheaply by alternative means, there would be little reason for them to litigate whether or not that same information is protected by the privilege. In addition, studies indicate that lawyers often assert after trial that the other side did not acquire all the

[7] We are assuming that such a question is asked in a context that includes a legal obligation on the part of the lawyer to respond.

[8] Louis Kaplow & Steven Shavell, Legal Advice about Information to Present in Litigation: Its Effects and Social Desirability, 102 Harv. L. Rev. 565, 570 (1989).

relevant unfavorable factors.[9] Some of these unfavorable facts must be privileged under the current rules, which is one reason they never see the light.

Moreover, notwithstanding the ostensible dedication of the legal system to open discovery, the attorney is not, in fact, expected to act as a police officer, regulating in detail the forthrightness of the client's responses to an opponent. Perjury is a limit, but there is a large gap between absolute candor and perjury. As the activity of the client moves toward the perjurious pole, the chances increase that a court will hold there to be no privilege, but there nonetheless remains a large area within which clients and attorneys may maneuver while blanketed with the protections of the privilege.[10] It is here that the actual incentives created by the privilege become clear, and they entail the possibility that the privilege will detract from, rather than simply be neutral with respect to, the objective of openness in the system.

Given that the privilege must entail costs—and the enormous volume of litigation over the privilege could hardly be explained unless it were clear that the privilege did impede full discovery—it is necessary to understand the benefits that the privilege provides. Existing theories of attorney-client privilege do not answer this question. In fact, two benefits result. First, the privilege facilitates the examination of contingent claims and, in so doing, furthers the values served by those claims. Second, it reduces perjury in the system as a whole.

Many legal claims depend on facts that may appear to the lay person as unfavorable to the party asserting the legal claim. For example, a party's defense of contributory negligence often entails the concession of his own

[9] According to a survey described by Wayne Brazil, Civil Discovery: How Bad Are the Problems? 67 A.B.A. J. 450, 454 (1981). "[t]he predominantly big-case litigators in our sample reported that in approximately 30 percent of the cases they had tried to completion they 'still had arguably significant information (including information protected by privilege) which . . . another party had not discovered.' About 75 percent of these lawyers reported having had that experience in at least one case they had tried to judgment. More than 80 percent of the big-case litigators also admitted having been surprised by new information produced by an opponent in at least one trial, but surprises reportedly occur only in about 15 percent of the tried matters."

[10] The formal rules of confidentiality actually protect a certain amount of evasion by the attorney. For example, the Model Rules of Professional Conduct, in a comment to rules on "Candor toward the Tribunal," state that "[a]n advocate . . . is usually not required to have personal knowledge of matters asserted in [pleadings and other litigation documents], for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer." Model Rules of Professional Conduct Rule 3.3 comment, Representations by a Lawyer [2] (1984). Creating a distinction between the client's and the lawyer's knowledge encourages lawyers to learn of the client's information without fully "knowing" it for purposes of the ethical rules.

negligence. Similarly, for a party to claim that he was incompetent to enter a contract often involves conceding that an agreement was reached.

This contingent structure of the law may be the most visible remnant of the old system of special pleading.[11] Under common law pleading requirements, the parties pleaded against each other until they joined issue on a question of law or fact. Each time one party pleaded, the other would have an opportunity either to demur, to deny the truth of his opponent's allegations, or to introduce new matter and thus to confess and avoid it.[12] In the earliest days of the common law, unlike our modern era, denial and confession and avoidance were strict alternatives. The common law's nurturance of special pleas made contingent claims common. Parties could, and frequently did, confess and avoid the pleas of their opponents. Thus, if a party pleaded the making of a contract, his opponent could specially plead that he was incompetent to contract because of age or some other reason. If a party pleaded that the defendant struck him, his opponent could specially plead that he was acting in self-defense. A special plea (confession and avoidance) by the defendant would open the door to further special pleading by the plaintiff, for instance, that the defendant used more force than was necessary to defend himself. Ultimately, special pleading made lawsuits depend on narrow issues of fact or law, a result that seems alien to our civil procedure. Nonetheless, the hierarchical imprint and doctrinal structure both remain.

Our theory proceeds on the assumption that a modern litigant, like his common-law ancestors, still has two main strategies for defeating an adverse claim. He can deny the claim in its own terms or defeat it with an affirmative defense or some similar contingent claim. In the driver-pedestrian example, the driver can deny he was negligent or prove that the pedestrian was contributorily negligent. However, and this is the heart of the matter, a potential client, ignorant of the law, has one option—not two. He must deny the claim against him in its own terms. Of course, if potential clients were always honest, they would never deceitfully deny claims. We assume that individuals will sometimes be dishonest in pursuit of their self-interest. However—and this is the second crucial component of our argument—a legal regime that reduces the costs of information about contingent claims should facilitate their examination

[11] See Richard A. Epstein, A Theory of Strict Liability, 2 J. Legal Stud. 151 (1973); Richard A. Epstein, Defenses and Subsequent Pleas in a System of Strict Liability, 3 J. Legal Stud. 165 (1974).

[12] See Thomas Chitty, Treatise on Pleading with Precedents and Forms (13th ed. 1859); James Fitzjames Stephen, A Treatise on the Principles of Pleading in Civil Actions (Tyler ed. 1882); Joseph H. Koffler & Alison Reppy, Common Law Pleading 433–531 (1969); Richard A. Epstein, Pleadings and Presumptions, 40 U. Chi. L. Rev. 556 (1973).

and consequently reduce the amount of perjury. Reducing the cost of litigating contingent claims gives potential clients an incentive to substitute away from dishonest denials. Even a client inclined to commit perjury about whether he was in the intersection against the light will have less reason to do so if he can easily learn from his lawyer that the plaintiff's claim can be defeated honestly—by proving that the plaintiff was contributorily negligent in jumping out into the intersection so soon after the light changed, and without looking for opposing traffic.

In sum, by increasing the adversary's costs of obtaining information about communications between lawyers and clients, the privilege facilitates inquiry into legal claims beyond the ken of lay persons. By doing so, the values that underlie contingent claims are furthered, and contingent claims, no less than others, produce real benefits. For instance, if contributory negligence were less often interposed as a defense, it would reduce the incentives of potential victims to use the proper amount of precaution.[13] This praiseworthy result is also accompanied by a decrease in fraud in the system, which occurs each time an individual who otherwise would have committed fraud in litigation is channeled to litigate a truthful contingent claim. Under our theory, then, the ultimate justification for the privilege lies in the improvements in behavior that result from the increased availability of contingent claims.

The foregoing discussion has emphasized how "No, I didn't" and "Yes, but" can be substituting strategies for defendants. What about plaintiffs' claims, though? A plaintiff's original claim may appear to be uncontingent, depending only on facts favorable to it, but even plaintiffs' claims can become contingent when defendants oppose them. For instance, a plaintiff's claim that he lent the defendant money, which the defendant never repaid, begins life in an entirely uncontingent form, as every prima facie showing does. Nonetheless, if the defendant maintains that he was underage at the time he borrowed, the plaintiff's claim changes character, because it can then depend on whether he made the loan so that the defendant could purchase "necessities." Similarly a plaintiff who originally pleads that the defendant was negligent may find that his ultimate claim depends on whether he or the defendant had the last clear chance.

Contingent claims are not strictly affirmative defenses. Suppose that someone has promised that he will put X's firstborn daughter through

[13] See, for example, Richard Posner, A Theory of Negligence, 1 J. Legal Stud. 29 (1973); John Prather Brown, Toward an Economic Theory of Liability, 2 J. Legal Stud. 323 (1973); Mark Grady, Common Law Control of Strategic Behavior: Railroad Sparks and the Farmer, 17 J. Legal Stud. 15 (1988).

college. Making his communication with his lawyer confidential would increase the odds that he would truthfully claim that there was no consideration and reduce the odds that he would falsely claim that he never said it. So long as there is any set of facts more favorable to the party than those which a typical lay person would think necessary to secure a claim or defense, the contingent claim theory would predict a privilege. To give a different example, a plaintiff in a contracts case may think that all contracts have to be in writing to be enforceable and thus is willing to assert falsely that a writing has been destroyed in order to win a case in which there was an oral promise in front of a witness. Encouraging the plaintiff to be truthful with the lawyer will lead the lawyer to direct the litigation toward the enforceable oral contract. Similarly, if a plaintiff is unaware of the nature of executory contracts, he may falsely assert reliance; but if he fully discloses to counsel, the litigation can be channeled in the proper direction.

Because both plaintiffs' and defendants' claims are or can become contingent in the litigation process, we would expect that the privilege would apply to both types. If, by contrast, defendants simply denied claims made against them in precisely the same form originally used by plaintiffs, or if plaintiffs' claims were not or could not become contingent, we would not predict a privilege, even though we would predict that clients would still hire lawyers.

Some legal claims are not contingent. For instance, a creditor's action for money had and received does not usually depend on the existence of some unfavorable fact about the creditor. Under our theory, if all claims were like the creditor's, there would be no reason to have the privilege. When a client can get complete legal advice simply by revealing facts that are favorable to his position, the absence of confidentiality will not deter him from visiting a lawyer or from making a complete divulgence of information to him.[14] It is in the area of contingent claims where the privilege affects clients' incentives, but this is a broad area of the law indeed. The creditor's claim is atypical. Indeed, we suspect that other theorists—notably Bentham, Kaplow, and Shavell—have found the privilege to be socially harmful precisely because they have inaccurately

[14] Were this particular prediction of the contingent claim theory falsified, it would not greatly embarrass the theory. In cases such as the creditor cases, there are no legal claims to develop beyond the charge and denial. As a result, the parties have no incentive to inquire into the communications between their opponents and the opposing lawyers. Consequently, protecting confidentiality in that setting is beside the point, and the privilege is worthless. The theory would be embarrassed by a case that found a privilege where no contingent claim was possible, but the privilege, nonetheless, imposed costs, for example, a creditor case where the possibility of fraud existed.

modeled the legal system. As we will develop below, we could agree with these theorists if they were correct that litigation is merely a process of charge and denial. In such a legal world, confidentiality might well be socially harmful. It is the existence of contingent claims, which these theorists have neglected to notice, that makes the attorney-client privilege socially beneficial.

The legal system might, but does not, make confidentiality depend on whether the client's communication actually bore on a denial or on a contingent claim. It would be difficult, even after litigation, to sort communications so strictly, much more so while litigation is still in progress. Moreover, a strict privilege would neglect the fact that the critical incentives must exist at a time when the reluctant client is still ill informed about the law. Thus, if a hypothetical client would assess some nontrivial probability that a communication would be helpful in devising a contingent claim, we would expect that the communication would be privileged (unless the opponent's costs of self-production by other means are very high). If the privilege were narrower, some contingent claims would be lost. Our theory thus predicts a broad privilege but not an unlimited one. When the lawyer could not possibly use information to develop a contingent claim, and even a relatively ignorant client would know it, our theory predicts that the client's communication would not be privileged. As we discuss below, many cases bear out this hypothesis.

Our theory also predicts that the privilege does not reduce the cost of making a dishonest contingent claim.[15] We will return to this point when we examine the cases because it is critical to our theory. Nonetheless, even if the privilege did, to some extent, reduce the cost of dishonest contingent claims, there would still be the question of which effect dominates: whether the privilege prevents more dishonest denials or induces more dishonest contingent claims.

In sum, the real question raised by the attorney-client privilege is virtually the opposite of the one posed by the many scholars who have criticized it. The question is not whether the privilege increases perjury but whether the increased costs created by the privilege can be justified by the *reduced* perjury that the privilege brings about and by the greater number of contingent claims that it allows to be litigated, with their beneficial real-world effects.

This perspective also provides a powerful ordering principle for the privilege. As a result of failing properly to perceive the incentive structure

[15] This prediction is confirmed in cases such as Nix v. Whiteside, 475 U.S. 157 (1986), in which the Supreme Court held that the attorney acted properly in refusing to permit the client to testify falsely about a claim of self-defense.

that underlies the privilege, traditional theorists such as Wigmore have promulgated a general "absolute" rule followed by a welter of apparently ad hoc case law exceptions. Under our theory, the appropriate question would always remain the same: would providing a privilege advance the exploration of contingent claims at trial? Cases finding no privilege can best be understood as expressing conclusions to the contrary.[16]

Numerous critics have charged that the attorney-client privilege encourages perjury and reduces the deterrent power of the law. We think these theories are wrong and examine the best-known ones here.

### 2. The Morgan Theory

Edmund Morgan's argument against the privilege was that its only practical consequence is to protect perjurers. Morgan thought that the complexity of modern law cases obliges lay persons to seek legal counsel.[17] Such persons could choose either to reveal all their facts to their lawyer or to suppress some. Called as a witness at the subsequent trial, the client would be positioned thus: "If he told his lawyer the truth, he must now tell the same thing from the witness box. If he told his lawyer a lie and sticks to it, he will tell the same story at the trial or hearing. If he told his lawyer the truth and now tells a lie, why should he be protected from exposure? Is the privilege retained in order to protect perjurors? How can that either directly or indirectly further the administration of justice?"[18]

Morgan's primary error was to use the average case to discredit the marginal one. When the marginal case is considered, it becomes evident that instead of increasing perjury, the attorney-client privilege reduces it. Typically, a client will be motivated to commit perjury when someone has made a claim against him. Even if Morgan was correct that people with

[16] The prediction of the contingent claim theory that the privilege is best understood as a qualified, rather than an absolute, bar to discovery is beginning to be explicitly expressed in the cases. See, for example, Greater Newburyport Clamshell Alliance et al. v. Public Service Co. of N.H., 838 F. 2d 13, 19 (1st. Cir. 1988); and In re Grand Jury Proc., Des Moines, Iowa, 568 F. 2d 555, 557 (8th Cir. 1977) (opponent's need relevant to a determination of privilege).

[17] Edmund M. Morgan, Model Code of Evidence, A.L.I. 25 (Foreword) (1942).

[18] *Id.* at 26–27. Morgan's theory was foreshadowed by Whiting v. Barney, 30 N.Y. 330, 332 (1864), in which Judge Selden stated that the original purpose of the privilege came from the ancient rule of procedure that parties could not be compelled to testify. As the rules of litigation became more complex, lawyers became necessary, but "as parties were not then obliged to testify in their own cases, and could not be compelled to disclose facts known only to themselves, they would hesitate to employ professional men, and make the necessary disclosures to them, if the facts thus communicated were thus within the reach of their opponent." *Id.* at 333. Judge Selden then wondered whether legislation placing parties under obligations to testify had removed the reason for the privilege. *Id.* at 342.

legal problems will usually consult lawyers, it does not follow that therefore a client will necessarily disclose to his lawyer all unfavorable facts about himself. On the margin, he will be less likely to do so as the costs associated with disclosure increase. The defendant who is unaware of the defense of contributory negligence is that much less likely to admit his own negligence.

Morgan thought, mistakenly, that the law can reduce perjury only by using sticks; he did not think of carrots. But it makes perfect sense to conceive of confidentiality as a carrot to induce people to refrain from lying; when the attorney-client privilege reduces the cost of contingent claims, it should also reduce the amount of perjury.

### 3. The Bentham-Kaplow-Shavell Theory

Jeremy Bentham's argument against the attorney-client privilege has recently been taken up and extended by Louis Kaplow and Steven Shavell. According to Bentham, the attorney-client privilege reduces the deterrent effect of the law by giving lawbreakers the hope that the unfavorable information that they reveal to their attorneys would never be presented against them in a court of law. With his characteristic flair, he wrote,

> "A counselor, solicitor, or attorney, cannot conduct the cause of his client," (it has been observed) "if he is not fully instructed in the circumstances attending it; but the client" (it is added) "could not give the instructions with safety, if the facts confided to his advocate were to be disclosed." Not with safety? So much the better. To what object is the whole system of penal law directed, if it be not that no man shall have it in his power to flatter himself with the hope of safety, in the event of his engaging in the commission of an act which the law, on account of its supposed mischievousness, has thought fit to prohibit? The argument employed as a reason against the compelling such disclosure, is the very argument that pleads in favour of it.[19]
>
> [T]o the man who, having no guilt to disclose, has disclosed none to his lawyer, nothing could be of greater advantage than that this should appear; as it naturally would if the lawyer were subject to examination.[20]

Kaplow and Shavell make the same point, albeit with a much more elaborate model.[21] Kaplow and Shavell posit that lawyers act as filters for

[19] Jeremy Bentham, 7 The Rationale of Evidence, bk. 9, pt. 4, ch. 5, at 474 *et. seq.* (Bowring ed. 1827) quoted in Wigmore, *supra* note 4, § 2291, at 3200.

[20] *Id.* at 3201.

[21] Kaplow & Shavell, *supra* note 8. The basic model employed by Kaplow and Shavell is, in large measure, an elaboration of a model first proposed by B. Peter Pashigian, Regulation, Preventive Law, and the Duties of Attorneys, in The Changing Role of the Corporate Attorney 21–25 (William J. Carney ed 1982).

the information that triers of fact ultimately receive. When the lawyer is effective, the trier of fact receives less unfavorable information and more favorable information about the client and so is more likely to decide in his favor. According to this theory, the primary effect of the privilege is to reduce the expected sanction that a party faces for a possibly unlawful act. Hence, the privilege ought to be regarded as counterproductive whenever the client is factually liable, excepting only the case where the sanctions for the individual's act are too high. Deterrence would therefore increase, and that would be undesirable only in cases in which the law had established excessive sanctions in the first place. In such a case, the proper reform would be to correct the sanction rather than extend a privilege to suppress evidence.

Although superficially attractive, the Bentham-Kaplow-Shavell theory proves too much. By the same reasoning, for example, people should not be allowed to have lawyers at all. Kaplow and Shavell give no account of the good that the privilege might do, other than to acknowledge that the privilege makes it easier for the innocent to escape liability. Under a normative interpretation of their theory, the privilege should be available only to individuals who have been mistakenly (or maliciously) accused of wrongdoing; or, put differently, people charged with wrongdoing should not be able to consult lawyers unless they are, in fact, innocent. But, of course, if we could tell how cases ought to be decided *dehors* the legal process, there would be little reason to have a legal process or, indeed, to have lawyers.[22]

Kaplow and Shavell's argument fails because it ignores the useful role lawyers play in helping clients to develop contingent claims. To recur to our example, the absence of the attorney-client privilege would make some pedestrians a little more eager to step out into traffic without looking, even though the average pedestrian would not be affected. When clients are deterred from asserting contingent claims because they are reluctant to reveal the bad facts on which such claims may depend, society loses the benefit of whatever interest the contingent claim is supposed to serve. Kaplow and Shavell miss this effect, as did Bentham before them.

### 4. The Wigmore Theory

John Henry Wigmore defended the theory of the privilege against Bentham's attack, declaring, "In order to promote freedom of consulta-

[22] It is unclear precisely of what the Kaplow/Shavell theory of the attorney-client privilege consists. Theories are generally tested by their predictive power. The only prediction that seems to emerge from the Kaplow/Shavell theory is that lawyers should only be provided for innocent individuals if sanctions are set at the appropriate levels. This prediction appears to be falsified by the facts.

tion of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; and hence the law must prohibit such disclosure by the legal advisers except on the client's consent."[23] Bentham's argument was that the privilege operates as a mere filter that would encourage unlawful acts. As Wigmore pointed out, this argument erroneously assumed that "all the acts and facts on one side have been wholly right and lawful and all of those on the other wholly wrong and unlawful."[24] But in a large proportion of cases, each party would have something to fear. Without a privilege, "a person who has a partly good cause would often be deterred from consultation by virtue of the bad part or of the part that might possibly (to his notion) be bad."[25]

Wigmore's idea that the privilege is needed to ensure full disclosure—still the dominant theme in the literature[26]—adumbrates the contingent claim theory by recognizing that the facts and law will not uniformly favor either party. Nevertheless, this idea is too simple to explain the cases. This is particularly evident in the famous Wigmore gloss on the privilege. According to Wigmore, the conditions for the privilege are "Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relevant to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the client waives the protection."[27]

The critical ingredient missing from his exegesis, which has exposed it to the contemporary attack, is any recognition of the relevance of behavioral incentives.[28] Even if each of Wigmore's conditions is met, it would be senseless to provide confidentiality if the privilege would not advance the exploration of contingent claims. Courts have intuited this point and

[23] Wigmore, *supra* note 4, § 2991, at 3196.

[24] *Id.* at 3202 (emphasis in original).

[25] *Id.*

[26] For instance, Saltzburg has written, "It is not unreasonable to assume that some communications would be repressed. Indeed, some potential clients might avoid lawyers altogether, either because of misinformation about the law or because of a misguided notion as to how the information they possess might affect their legal position. Moreover, it is not unreasonable to assume that clients might be inclined to reveal only that information about which they were absolutely certain, fearing that premature communications might adversely affect them in the future." See Stephen Saltzburg, note 1 *supra*.

[27] Wigmore, *supra* note 4 § 2292, at 3204.

[28] This is most likely because Wigmore did not quite accurately perceive the contingent claim theory. Wigmore asserted that "now that [the client] can be freely interrogated and called to the stand by the opponent and made to disclose . . . all that he knows, it is evident that the disclosure of his admissions made to his attorney would add little to the proof except so far as the client is a person capable of perjuring himself when interrogated in court." See Wigmore, *supra* note 4, § 2292, at 3204.

have often refused to recognize a privilege, even when the Wigmore conditions have clearly been met, where doing so would not advance the exploration of contingent claims. Of course, courts have not formulated the issue in this way, but have simply engrafted on Wigmore a long list of ad hoc exceptions. The contingent claim theory explains the cases more parsimoniously than Wigmore's ideas do because it focuses explicitly on the relevant incentives, and it gives a more satisfactory account of the beneficial purposes that the privilege seeks to advance.

### 5. Rights-based Theories

Several commentators have proposed that under some circumstances it would be wrong—immoral—for the legal system to force the disclosure of attorney-client communications. David Louisell, for example, has urged that respect for privacy could adequately explain the privilege.[29] Charles Fried, on another tack, has defended the privilege as necessary to allow people in legal scrapes to discover what their rights are.[30] Neither of these theories adequately explains the privilege.

*a) Privacy.* Louisell's notion that the privilege is founded on privacy leaves one to ponder. "On what is privacy founded? The legal system has routinely sacrificed the privacy of litigants to the interests of justice. A litigant can be obliged to reveal the most sordid and intimate details of his marriage or even to pull his pants down in front of the jury. Of course, one could say that the system respects privacy not absolutely but only to the extent that it respects privacy. Surely a useful theory requires a deeper tread.

*b) Adjective Right.* According to Fried, the attorney-client privilege is rooted in the sense of personal autonomy that legal systems must respect.[31] "[I]t is immoral for society to limit [a person's] liberty other than according to the rule of law," and it is therefore "immoral for society to constrain anyone from discovering what the limits of its power over him are." Similarly, it is "immoral for society to constrain anyone from informing another [about] those limits."[32]

[29] Louisell has written, "[T]here are things more important to human liberty than accurate adjudication. One of them is the right to be left by the state unmolested in certain human relations. . . . It is the historic judgment of the common law . . . that whatever handicapping of the adjudicatory process is caused by recognition of the privilege, it is not too great a price to pay for secrecy in certain communicative relations." See David Louisell, Confidentiality, Conformity and Confusion: Privileges in Federal Court Today, 31 Tul. L. Rev. 101, 110 (1956).

[30] Charles Fried, Correspondence, 86 Yale L.J. 573, 586 (1977).

[31] *Id.* at 586.

[32] *Id.*

Supposing that certain attorney-client communications would be less likely to occur in the absence of the privilege, Fried must explain why refusing to recognize the privilege ought to count as a morally unacceptable "constraint." Not every change in the world that makes a certain end state more or less likely qualifies as a "constraint." When government subsidizes a certain activity (or refuses to subsidize it), it makes the activity more or less likely to occur without "constraining" that result. But even if denial of the privilege is a constraint, the question of justification must be addressed by more than mere assertion. Again, some inquiry into the particular consequences and their desirability is required.[33]

### *B. The Contingent Claim Theory and the Cases*

Since virtually all litigation comes in a contingent form,[34] the various theories can be best tested by looking at the cases that deny the privilege. Here, accordingly, we examine cases taken primarily from Wigmore that evidence scholars, including Wigmore, have found difficult to explain.

The most important prediction of the contingent claim theory is that the privilege will not be interpreted in a way that reduces the cost of dishonest denials relative to that of contingent claims. Our theory posits that the purpose of the privilege is to reduce the number of dishonest denials and correspondingly to increase the number of meritorious contingent claims. If the privilege made it easier for clients fraudulently to deny claims, then it would seriously embarrass our theory of the attorney-client privilege. Accordingly, if a client consults a lawyer simply to get advice useful in dishonestly denying a claim made against him, the contingent claim theory predicts that the bad facts about the client would be unprivileged.

The notorious case of *Clark v. State*[35] bears out the prediction. In

[33] Some commentators have justified the privilege on the grounds that individuals in trouble with the law are in need of a friend. See Albert Alschuler, *supra*, note 3. The cases do not support such a theory. See, for example, United States v. Tedder, 801 F.2d 1437 (4th Cir. 1986). Indeed, in Morris v. Slappy, 461 U.S. 1 (1983), the Supreme Court held that the Sixth Amendment does not guarantee a "meaningful relationship" between attorney and client. Nor are people in trouble with the law the only ones in need of friends. The point, in short, has little explanatory power.

[34] Thus, whenever the Wigmore conditions are satisfied, so, too, would be the demands of the contingent claim theory.

[35] Clark v. State, 261 S.W.2d 339 (Tex, Crim. 1953). *Clark* is a criminal case. In criminal cases, the rules of confidentiality are more powerful than in civil cases as a result of the interaction of the privilege, the right to be free from compelled self-incrimination, and the right to counsel. If material is not found privileged in a criminal case, it would definitely not be found privileged in a civil case. Thus, criminal cases may be instructive about civil cases, but civil cases may not be instructive about criminal cases.

*Clark,* an eavesdropping telephone operator overheard the defendant talking to his attorney about what to do after having killed his wife. His lawyer advised him to get rid of the weapon. The court held that the operator's evidence was admissible against the defendant's claim of attorney-client privilege. The court said that the purpose of the privilege is to encourage the client to disclose to his lawyer all facts "that are material to his defense or that go to substantiate his claim." The court further stated that the communication was "not in the legitimate course of professional employment or preparing a defense at law."[36] The court must have been using "defense" in the narrow sense of contingent claim and the phrase "legitimate course of professional employment" to refer to efforts to reduce fraudulent claims, because obviously the advice that the client got from his lawyer would be useful in denying the state's case in chief. Thus, the *Clark* case, which is only awkwardly explicable from the conventional perspective, is easily accommodated by the contingent claim perspective.

The Supreme Court of the United States reached the same result in *Nix v. Whiteside.*[37] In *Nix,* the defendant was charged with murder. During pretrial preparation, the defendant informed counsel that he committed the act out of self-defense. According to the defendant, he shot the victim as the latter "was pulling a pistol from underneath the pillow on the bed."[38] On questioning by counsel, the defendant admitted he had not actually seen a gun, but asserted that he believed one was there. Immediately prior to trial, the defendant informed counsel that he was going to testify that he actually saw a gun. Counsel responded by informing the defendant that he would not permit the defendant to commit perjury, and that he would inform the court if the defendant attempted to do so. The defendant did not take the stand and was convicted. The Court rejected his argument that his rights had been violated, in part because the counsel had no choice but to do what he did. He could not facilitate the defendant's creation of a fraudulent claim.[39] Thus, although the defendant wished to assert a contingent claim (self-defense), the Court would not allow him to use the privilege to cloak a dishonest contingent claim.

An early case demonstrates how the courts limit the privilege to infor-

[36] We doubt that the communication would be discoverable under the modern doctrine of inadvertent waiver, as some have suggested to us. In any event, that possibility does not impair our positive theory, unless someone can better explain the cases using a theory that depends more heavily on waiver.

[37] Nix v. Whiteside 475 U.S. 157 (1986).

[38] *Id.* at 160.

[39] The same result was reached in State v. Henderson, 468 P.2d 136 (Kan. 1970), and in State v. Phelps, 545 P.2d 901 (Or. App. 1976).

mation useful in developing contingent claims. In *Annesley v. Anglesea*,[40] the plaintiff claimed to be the legitimate son of the defendant's brother and the true heir to the defendant's estates and peerage. During the time that he was perfecting these claims, the plaintiff accidentally killed a poacher. The defendant Lord Anglesea, seizing on this opportunity, tried to hire a leading criminal lawyer to prosecute the plaintiff for murder, offering him a fee of £10,000 to get the plaintiff hanged. The lawyer refused to accept the case. In the subsequent suit for the title to the contested property, the plaintiff called the lawyer to testify about the defendant's communication with him in order to show that the defendant was conscious of the plaintiff's claim of title. In holding that the lawyer could testify, Baron Mountenay stressed that the privilege extended only to matters "necessary" to be communicated to an attorney in carrying out a suit or prosecution in which he is retained, and he suggested that the defendant's communication to the criminal lawyer was unnecessary.

Mountenay's theory comes up short, for in legal matters scarcely any fact is more necessary to communicate than the client's willingness to pay the lawyer's fee. Wigmore's famous gloss also seems too broad to explain the *Annesley* result because it would extend protection to communications "where legal advice of any kind is sought."[41] The *Annesley* defendant was obviously seeking legal advice when he communicated with the lawyer, and as Wigmore well knew, the privilege already had been extended to communications involving lawsuits other than the one at bar.[42] A more persuasive explanation of the *Annesley* result is that the defendant could not possibly have thought, no matter how ignorant he was of the law, that his communication to the criminal lawyer would be helpful in developing a contingent claim. What claim of his could possibly entail the fact that he had offered £10,000 to have the plaintiff hanged?

The contingent claim theory provides a simple explanation for many other cases that have either puzzled prior analysts or forced them to create a welter of exceptions for overly general formulations of the privilege. A modern analog to *Annesley* is *United States v. Woodruff*,[43]

[40] Annesley v. Anglesea, 17 Howell's State Trials 1139, 1225, 1229 (Ir. Exch. 1743).

[41] See text at note 27 *supra*. Wigmore explained *Annesley* as a special case involving "advice in a criminal or fraudulent transaction," which did not fit within his general formulation of the privilege. See Wigmore, *supra* note 4, § 2298, at 3216–20. This explanation also has problems, as Wigmore recognized. If the defendant had told the lawyer that he himself had killed the person the plaintiff had been accused of killing, that communication would clearly have been privileged.

[42] *Id.*, § 2294, at 3208–9.

[43] United States v. Woodruff, 383 F. Supp. 696 (E.D. Pa. 1974).

where the defendant was accused of bail jumping, and the prosecution called his attorney to testify whether he had told the defendant the time and place of trial. The court held that the communication was admissible because it was "nonlegal." Either the court was speaking in the Pickwickian sense, or, what may be equivalent, it was trying to avoid the Wigmore gloss, which sweeps "legal advice of any kind" under the privilege. A better explanation for *Woodruff* is that no legal claim by the defendant could be contingent on the time and place set for his trial. By providing unfavorable information on this subject (if that is even conceivable), the client could scarcely hope to open his attorney's mind to the possibility of some legal claim that he might have. Viewed reciprocally, the only purpose that confidentiality could serve in this type of case is to reduce the client's cost of making a dishonest denial. In such cases, the reason for confidentiality does not exist because no contingent claim could be deterred by the client's expectation that the communication would be revealed.[44]

A similar case is *Modern Woodman of America v. Watkins*,[45] where the beneficiary of an insurance policy sued for the proceeds of two insurance policies that her husband had taken out on his life. Shortly before his death, the husband had consulted with an attorney about a loan. After the loan discussion, the two men shared a drink in the attorney's office and discussed some other business and the husband's problems. The husband told the attorney that he would either "go west" or else they would find him in the river. The insurance company sought to avoid payment on the ground that the beneficiary had poisoned himself. Although the trial court had excluded the beneficiary's conversation with the lawyer on the ground that it was privileged, the court of appeals held it admissible. The information that he intended to kill himself was highly unfavorable both to his own interests and to his wife's, but revealing this information could not possibly deter contingent claims. The client was not providing the information in order to develop a claim against someone else, and under the circumstances it is doubtful that any claim could be based on the information that he intended suicide. The only benefit that confidentiality could serve in this case would be to reduce the cost of the husband's estate's dishonestly claiming the life insurance proceeds.

Another example of the explanatory power of the contingent claim theory is that the courts strain the crime and fraud exception to the Wigmore formulation to reach results easily accommodated by the contin-

[44] See also In re Grand Jury Subpoena (Bierman), 765 F.2d 1014 (11th Cir. 1986); In re Grand Jury Proc., *supra*, note 16, at 555.

[45] Modern Woodman of America v. Watkins, 132 F.2d 352 (5th Cir. 1942).

gent claim theory. *In re Grand Jury Investigation*[46] involved a drug investigation. The defendant was indicted on conspiracy charges. The indictment charged that a part of the conspiracy was "conduct designed to conceal the scope and existence of the conspiracy . . . by providing attorneys . . . for members of the organization arrested for violations of the drug laws."[47] The government asserted that the retention of the defendant's attorney by some unnamed person was in furtherance of the conspiracy and therefore asked the attorney to disclose who arranged his representation of the defendant. The attorney objected on the ground that such information was privileged. The court ordered the lawyer to reveal who retained him. According to the court, the rendering of legal services was itself part of the conspiracy, and thus part of an ongoing crime. The difficulties with this application of the crime and fraud exception are obvious. It suggests that providing counsel, indeed merely obtaining counsel, can itself be viewed as part of a not-yet-proven criminal act. Moreover, it suggests that the privilege does not apply whenever the defense of a criminal charge may promote some subsequent criminal act merely by increasing the chances of an acquittal on the original charges.

In sharp contrast to the crime and fraud exception, the contingent claim theory easily explains the result the court reached. The defendant would not be deterred from disclosing any information to the attorney on which a contingent claim of the client could possibly rest by the fact that counsel was required to disclose who retained him. Accordingly, the contingent claim theory predicts that such information is not privileged, just as the court found.[48]

On occasion, a client might wish to assert a fraudulent claim against someone else, but the contingent claim theory predicts that the attorney-client privilege is inapplicable to these communications. The cases bear out this prediction. In *Gebhardt v. United Railways Co.*,[49] the plaintiff filed a claim against defendant and subsequently admitted to counsel that the claim was false. Counsel refused to prosecute the claim, and plaintiff

[46] In re Grand Jury Investigation, 640 F. Supp. 1047 (S.D. W.Va. 1986).

[47] *Id.* at 1048.

[48] For cases similar to In re Grand Jury Investigation, see In re Grand Jury Proceedings (Company X), 857 F.2d 710 (10th. Cir. 1988); in re Witness before Grand Jury no. 82–5, 558 F. Supp. 1089 (S.D. Fla. 1983). For related cases, see In re Sealed Case, 754 F.2d 395 (D.C. Cir. 1985) (the destruction of evidence amounted to a crime or fraud not protected by the privilege); U.S. v. Laurins, 857 F.2d 529 (9th Cir. 1988) (former counsel permitted to testify that his client had lied about the location of relevant documents); Craig v. A.H. Robins Co., Inc., 790 F.2d 1 (1st Cir. 1986) (permitting counsel to testify concerning spoliation). Again, the strained quality of the traditional theory in these cases is obvious, as is the superiority of the contingent claim theory.

[49] Gebhardt v. United Railways Co., 220 S.W. 677 (Mo. 1920).

obtained new counsel. Defendant subpoenaed original counsel, who was permitted to testify, over plaintiff's objection based on the privilege, concerning plaintiff's concessions that defendant was not liable to plaintiff. Another example is *League v. Vanice,*[50] where plaintiff alleged that defendant concealed a transaction from him. The defendant was permitted to introduce communications between plaintiff and his attorney to demonstrate knowledge of the transactions.

The contingent claim theory can account for many more cases that the traditional theory explains only on more varied grounds. Wigmore's formulation, with its broad protection of "legal advice of any kind," forced him to develop a large number of exceptions and special explanations. For instance, Wigmore noted, petitions by a "client" to a prosecuting attorney were usually admissible against the client in a subsequent action for malicious prosecution.[51] Since the client had no cause at issue, he had no occasion for "legal advice." But surely Wigmore's formulation makes "legal advice" carry an unconventional meaning. The prosecuting attorney told ("advised") the defendant that no indictment would lie. If this advice is not "legal," what is it? The better explanation is that revealing the defendant's application to the prosecuting attorney could not deter the defendant from pursuing any contingent claim with his own lawyer.

Another Wigmore example: instructions to an attorney in drafting a deed. "[F]or deeds and other instruments the privilege has been strictly construed, and where no legal problem has been expressly brought forward by the client, his communications concerning the mere drafting of the instrument have commonly been admitted."[52] Wigmore explained these cases with the idea that the client is not "expressly" seeking legal advice, but again, it is hard to see the cases in this way when the drafting of a deed obviously involves legal considerations. A more straightforward explanation is that, in this situation, no legal claim by the client could be reasonably perceived as contingent on unfavorable information that he would provide his lawyer. Indeed, it is difficult to imagine how the client could provide information against his interest.

Wigmore drew a distinction between "communications," which are privileged, and "acts," which are not. The cases that Wigmore cited, however, can be understood in terms of his distinction only if both concepts are given a quite strained meaning. For instance, in *Daniel v.*

[50] Leavue v. Vanice, 374 N.W.2d 849 (Neb. 1985).

[51] Wigmore, *supra* note 4, § 2296, at 3212–14. Wigmore gives the example of Granger v. Warrington, 8 Ill. 299 (1846).

[52] Wigmore, *supra* note 4, § 2297, at 3214–16 (1905).

*Daniel,*[53] an attorney was allowed to testify why he could not have had any conversation worth repeating with the testator, his client. The reason was that the client was mentally defective. Said the court, "If a lawyer learns from professional visits that he has a fool for a client, whether he acquires the knowledge by the want of intelligent answers, or by study of phrenological developments, the fact is competent evidence in a proper case, and no rule of law forbids the lawyer from delivering it." It is difficult to see how the state of being mentally defective could be an "act" in any literal sense. Instead, the explanation for the case is that the client would not be deterred from exploring with his lawyer the possibility of any legal claim if he also knew that the lawyer could reveal his opinion on the client's defective mental state.

Wigmore also employed the act/communication distinction to explain why some documents given by a client to a lawyer must be disclosed, while others acquire confidentiality.[54] In partial confirmation of our theory, the Supreme Court has used reasoning suggestive of the contingent claim theory in deciding such cases. In *Fisher v. United States,*[55] taxpayers under investigation for violations of the federal income tax laws obtained from their accountants certain documents relating to the accountants' preparation of their tax returns and transferred the documents to their attorneys who were assisting the taxpayers in connection with the investigations. The Internal Revenue Service served summonses on the attorneys directing them to produce the documents, but the attorneys refused to comply. In holding that the documents were discoverable, notwithstanding the attorney-client privilege, the Court said that if the client knows that damaging information could more readily be obtained from the attorney than from himself, the client would be reluctant to confide in his lawyer, and it would be difficult to obtain fully informed legal advice. Noting, however, that the privilege also withholds relevant information from the trier of fact, the court said that it applies only where necessary to achieve its purpose: "Accordingly it protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege."[56] Given that these were preexisting documents that the government could have obtained from the clients (the documents were not subject to Fifth Amendment protection), they

[53] Daniel v. Daniel, 39 Pa. 191, 201 (1861) discussed in Wigmore, *supra* note 4, § 2306, at 3225.

[54] Wigmore, *supra* note 4, §§ 2307–9, at 3226–31 (1905).

[55] Fisher v. United States, 425 U.S. 391 (1976).

[56] *Id* at 403.

would not be appreciably easier to obtain from the lawyers. Therefore, the documents were discoverable.

As the Court noted, it would be a different case if the government faced higher costs to acquire the documents from the client, for instance, if the client had some privilege that the lawyer could not assert. In this case, allowing the government to get the documents from the lawyer could discourage contingent claims because a client would be reluctant to increase the government's access to unfavorable information, even though the client's own contingent claims might be based on that same information.

The contingent claim theory also predicts that documents that the client has prepared expressly for the lawyer's reading would be likelier to be privileged than would preexisting documents. When bad facts are put into writing, it will often reduce the other side's costs of discovering these facts (just as it reduces the costs of the client's attorney). If clients knew that their legal opponents could get access to such memoranda, it would reduce client's incentives to prepare them. The consequence would be to deter contingent claims because giving a legal opponent access to the memorandum would increase the cost (that is, legal risk) of communicating to one's lawyer the unfavorable information on which such contingent claims might be based.[57]

The contingent claim theory also predicts that the privilege does not apply to matters disclosed that could not give rise to contingent claims, for instance, a client's demeanor[58] or a client's handwriting and signature.[59] Similarly, information obtained from third parties is never privileged since disclosing such information would never deter a client from disclosing information to counsel on which contingent claims might rest.[60] At best, keeping such matters confidential would only reduce the costs to a client to concoct a dishonest denial, which is the virtual opposite of the privilege's purpose.

What Wigmore regarded as the special rules bearing on wills[61] can also

[57] Wigmore's conclusion was similar, but it did not rest on detailed reasoning. He wrote, "But where the document is itself the client's written communication, coming into existence merely as a communication to the attorney, the situation is obviously different. This communication itself is not to be disclosed, whether it was made by the client by word of mouth or by writing." Wigmore, *supra* note 4, § 2307, at 3228 (1905) (emphasis omitted).

[58] Brown v. Foster, 1 H. & N. 736 (Exch. 1857).

[59] Hawley v. Hawley, 72 App. D.C. 376, 114 F.2d 745 (1941) (client's handwriting and signature).

[60] See, for example, Matter of Fischel, 557 F.2d 209 (9th Cir. 1977); In re Sealed Case, 737 F.2d 94 (D.C. Cir. 1984).

[61] Wigmore, *supra* note 4, §§ 2314–15, at 3239–41 (1905).

be explained by the contingent claim theory. As Wigmore noted, courts have traditionally allowed lawyers to testify about whether wills have been executed, and Wigmore explains this rule as an example of his act/communication distinction, arguing that the execution of a will is an "act" not within the privilege. A better explanation is that when a testator executes a will he does not thereby provide his lawyer with unfavorable information about himself that might be useful in developing a contingent claim against someone else.

The theory has a number of other predictions that are borne out by the cases. First, when a client consults a lawyer to perform some function that could not possibly lead to a contingent claim, the client's communications ought not to be privileged. In this type of case, the client's expectation that he would be conveying unfavorable information to the lawyer could not deter him from obtaining the lawyer's advice about a contingent claim since that is not his purpose. Accordingly, we find in the cases that the privilege does not apply when the attorney has been retained as an agent to procure a loan,[62] when the attorney is asked to witness a deposit,[63] and in similar cases.[64]

Our core proposition is that the purpose of the privilege is to encourage clients to divulge unfavorable information to their attorneys on which contingent claims might rest. It follows that there is no need for the privilege when a regulatory agency or some other binding authority has obliged the client to hire an attorney and divulge unfavorable information to him. The cases bear out this prediction.[65]

A recent case in the Eighth Circuit Court, *Simon v. G. D. Searle & Co.*,[66] provides yet another demonstration of the explanatory power of the contingent claim theory. The case involved litigation over Searle's intrauterine contraceptive device. During discovery, Searle refused to turn over certain documents prepared by its risk management department. This department monitors the company's products liability litigation and analyzes its litigation reserves. In doing so, the department utilizes individual case reserves determined by the assessment of the company's legal staff. Relying on various arguments of Wigmore, the court held that the attorney-client privilege did not protect the documents prepared by the risk-management department. The court asserted that

[62] Elder v. Hewitt, 126 S.E. 848 (Ga. App. 1925).

[63] McKnew v. Superior Court, 23 Cal. 2d 58, 142 P.2d 1 (Cal. 1943).

[64] See, for example, United States v. Wilson, 798 F.2d 509 (1st Cir. 1986) (privilege not applicable where attorney is merely conduit of information from one person to another).

[65] Eglin Federal Credit Union v. Cantor, Fitzgerald Securities Corp., 91 F.R.D. 414 (N.D. Ga. 1981); In re L.T.V. Securities Litigation, 89 F.R.D. 595 (N.D. Tex. 1981).

[66] Simon v. G. D. Searle & Co., 816 F.2d 397 (8th Cir. 1987).

these documents did not embody communications relevant to obtaining legal advice and that the documents related to business rather than legal matters.[67]

In dissent, Judge Gibson politely noted that the court's opinion verged on the incoherent: "Only by concluding that Searle is in the business of litigation can the court convert these litigation-oriented documents into business planning documents."[68] Judge Gibson's lament is correct but so, too, is the majority's result. No contingent claim could conceivably rest on the information collected and utilized by the risk management department and the company's lawyers. The result reached, then, is perfectly in accord with the predictions of the contingent claim theory, even though, as Judge Gibson rightly says, the court's opinion is virtually nonsense if analyzed from the perspective of the conventional explanations of the privilege.

## III. THE WORK PRODUCT DOCTRINE AND THE JOINT PRODUCTION THEORY

### A. *Introduction*

The work product doctrine has proven to be as puzzling as the attorney-client privilege. The doctrine was first articulated in 1947, in *Hickman v. Taylor*,[69] where the Supreme Court held that there is a qualified immunity from discovery for attorney work product prepared in anticipation of litigation. The plaintiff had brought suit to recover for the death of a seaman in the sinking of the defendants' tug. The defendants' attorney had interviewed all of the survivors of the sinking and taken statements from them. The plaintiff sought copies of these statements in discovery, and the district court held the attorney in contempt for failing to provide them. The Supreme Court reversed, holding that the statements that the plaintiff sought were protected from discovery as attorney's work product. In so holding, the Court did not rely on the Federal Rules of Civil Procedure—though after the *Hickman* case an explicit work product provision was added[70]—but instead found an analogy in the English practice of protecting from discovery all documents prepared by or for counsel with a view to litigation.

Two opinions were filed in the case, that of the Court, authored by Justice Murphy, and a concurring opinion by Justice Jackson (in which

[67] *Id.* at 403.
[68] *Id.* at 407.
[69] Hickman v. Taylor, 329 U.S. 495 (1947).
[70] See Fed. R. Civ. P. 26.

Justice Frankfurter joined). The Murphy opinion stressed that the plaintiff's attorney could have acquired similar statements directly from the witnesses themselves since they were all still alive and asserted that the purpose of the doctrine is to protect the privacy of the lawyer's thoughts. He worried that, if the plaintiff won, lawyers would be deterred from writing down their thoughts. He also predicted that "Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial," presumably because, in the absence of a work product doctrine, lawyers would seek other ways to keep the relevant material out of the hands of their opponents.[71] The Jackson approach had a different emphasis: that discovery of work product would be inconsistent with the adversary system and would allow a lawyer to live on "wits borrowed from the adversary."[72]

Modern scholars have disagreed on both the merits of the doctrine and its justification.[73] The best explanatory account now available is Judge Easterbrook's. He argues that the work product doctrine operates in much the same way as other rights restricting the use of intellectual property.[74] Just as too few songs would be written if there were no copyrights, too little legal information would be produced in the absence of the work product doctrine.[75] Although we rely on Easterbrook's argument that the work product doctrine is essentially a property-right system in some ways similar to copyright,[76] we think he missed the essential idea that makes it important for the law to enforce these property rights. Easterbrook sug-

[71] Hickman, 329 U.S., at 511. Murphy wrote: "[T]he general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order." *Id.* at 512.

[72] *Id.* at 516. Jackson also worried that a contrary decision would allow witnesses to be impeached with opposing counsel's summaries of their pretrial statements, and that, in many cases, opposing counsel himself would have to be called as a witness.

[73] As even those who provide the justifications acknowledge. See, for example, Kevin Clermont, Surveying Work Product, 68 Corn. L. Rev. 755 (1983): "As proof of [the] difficulty [of the work product doctrine], I note—without insult by citation—the serious shortcomings of almost all of that commentary."

[74] Frank Easterbrook, Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information 1981 Sup. Ct. Rev. 309. See also Richard Posner, The Economics of Justice 244 (1983) ("the attorney-work product doctrine is, I think, best understood as the use of secrecy to protect the lawyer's (and hence client's) investment in research and analysis of a case").

[75] See, generally, Edmund Kitch, The Law and Economics of Rights in Valuable Information, 9 J. Legal Stud. 683 (1980); Edmund Kitch, The Nature and Function of the Patent System, 20 J. L. & Econ. 265 (1977).

[76] The first suggestion of this idea in the literature is in Richard Posner, Privacy, Secrecy, and Reputation, 28 Buff. L. Rev. 1, 11 (1979), although the idea is not developed.

gests that the doctrine protects and nurtures lawyer creativity; we think that it mainly protects and encourages something different but just as important—lawyer perseverance.

### *B. Theories about the Work Product Doctrine*

#### 1. The Joint Production Theory

Most litigation activity involves a form of "joint production," whereby the lawyer cannot get information helpful to his side of the case without also producing information helpful to the other side. In order to get helpful information (of which more is preferred to less), he has to take harmful information (of which less is preferred to more). Both a trial lawyer's factual investigations and the resulting legal theorizing are subject to joint production. It is difficult to generate helpful legal theories and useful "facts" without also generating theories and facts more helpful to the other side. A lawyer will normally want to consider carefully the strongest positions that could be asserted by an opponent, and this may oblige an attorney to think about a case from the opponent's point of view.In many factual investigations, the same conditions apply. It is often impossible to interview witnesses in order to find facts helpful to one's own side without discovering facts helpful to the other side.[77]

As Gordon Tullock has pointed out, the private and social value of the investment in lawyering activity may be significantly out of line with each other.[78] Tullock hypothesized that the net benefits from litigation would often appear higher to private litigants than they would to society, giving private parties an incentive to overinvest. In the context of much lawyering activity, however, the reverse may be true. If a legal investigation is subject to joint production, the expected private value of the information generated can quite easily be zero, even when its expected social value is large. In such a case, there would be inadequate private incentive to undertake such investigations, even when they are socially valuable.[79] To the extent that this is true, the concern is the opposite of Tullock's: it is not that too much will be invested in the resolution of "private" disputes but, rather, too little. The work product rule is a solution to this problem.[80] Under this doctrine, attorneys are allowed to hold the detrimental

[77] Wigmore writes, "Men do not gather grapes of thorns, nor figs of thistles; yet they may enter one and the same field and find diverse fruits." Wigmore, *supra* note 4, § 2295, at 3212. He makes little of this insight, however.

[78] Gordon Tullock, Trials on Trial: The Pure Theory of Legal Procedure 154–58 (1980).

[79] For a discussion of the social value of litigation, see text at note 85 *infra*.

[80] Another solution would be for the government to take over the investigative process.

results of their joint production investigations in confidence from the other side, thus lowering the private costs of the lawyering effort.[81]

This strategy has social costs, however, which we predict are reflected in the rules themselves. The principal one is the duplication of production. An optimal rule of confidentiality would seek to maximize the private incentive to undertake socially valuable joint production investigation subject to the constraint of duplication. Formally stated, a party should be able to suppress disclosure up to the point where the value of the increased information produced is equal to the increased costs of the duplicative effort. In addition, under our theory, no valuable incentive is lost by requiring a party to disclose information favorable to his case, so we would expect that such information would be discoverable even when it was produced under conditions of joint production. It is coerced disclosure of unfavorable and ambiguously favorable information (for example, early drafts of legal briefs) that would reduce the private incentive for joint production; so it is here that the courts should be especially protective if they are deciding cases in a manner explained by our theory.

We do not claim that courts have adopted the joint production theory in their opinions but only that this theory gives a better account of the actual results in work product cases than do the stated theories. As will be seen, the privacy theory that Murphy emphasized in *Hickman* is both too broad and too narrow when measured against the subsequent case results that defined the doctrine, including the Court's own. Nonetheless, it is probably no accident that the Court found the *Hickman* facts to be an especially appealing basis for the doctrine. In terms of our theory, the documents that the plaintiff sought were the quintessential result of joint production. When the defendants' attorney interviewed the accident survivors, no one knew the cause of the tug's sinking.[82] Ex ante, the lawyer would have predicted that the interviews would reveal both favorable and unfavorable information about why the tug sank. In this situation, if the defendants' lawyer knew that he would have to disclose to his opponent all the information that he acquired, he would have less incentive to conduct the

[81] The typical criticism of the work product doctrine is that lawyers will investigate and prepare their cases even in the absence of the doctrine. See, for example, Kathleen Waits, Work Product Protection for Witness Statements: Time for Abolition, 1985 Wis. L. Rev. 305, 331 ("Because preparation increases the chances of a favorable outcome, it is its own reward. This remains true even if some of the preparatory documents must be shared with the other side. We therefore should not fear that abolition of work product would cause parties to abandon all investigative efforts."). This is another "lump-up" argument. The concern is not whether all investigative efforts will be abandoned but is, rather, with the scale of the efforts that are undertaken. Disincentives to such efforts are likely to reduce their scale.

[82] *Hickman, supra* note 5, at 498.

interviews in the first place. The consequence would be a reduction in the amount and quality of information available at trial.

Indeed, Murphy's opinion may be read to suggest the joint production theory, although one almost needs a microscope to find it. Recall that Murphy predicted that without the doctrine, lawyers would not write things down and "inefficiency, unfairness and sharp practices" would result. Perhaps what he meant was that, in the absence of the work product doctrine, lawyers would still be reluctant to disclose the unfavorable information yielded by their joint production activities. Hence, lawyers would be reluctant to record this unfavorable information, because doing so would make it more accessible to their opponents. By extension, if lawyers had to cull their records constantly to ensure that they contained nothing unfavorable to their side, it would certainly be inefficient, and lawyers' suppressing unfavorable information (in the absence of the doctrine's protection) may be the sharp practice that Murphy envisioned. Hence, what the Court wrote in *Hickman* is consistent with the joint production theory.

### 2. The Easterbrook Theory

Frank Easterbrook stresses that our legal system relies on the attorney's self-interest to stimulate the production of legal goods or "lawyering."[83] If such goods are to be produced, it will be necessary to allow the producer to profit from the production or otherwise to subsidize the production of such goods. If producers cannot derive any special benefits from their creation, if nonproducers are welcome to use them without having to pay for or contribute to their creation, there is a substantial risk that not enough goods will be produced.[84] Under Easterbrook's theory, the work product doctrine is analogous to copyright protection. Just as the creative efforts of artists must be protected in order to induce their optimal scale, so also must the creative efforts of lawyers.

The copyright theory of the work product doctrine places the wrong stress on the legal production process. The work product doctrine protects not so much legal inspiration, as it does legal perspiration. Thomas Edison would maintain that the two are related, and so do we. Nonetheless, instead of merely protecting the lawyer's creative inspirations as such, the work product doctrine protects a broader class of information: the results of investigations that can yield both favorable and unfavorable information. Of course, even legal inspiration may be produced under

[83] Easterbrook, *supra* note 74.

[84] Richard A. Posner, Information and Antitrust: Reflections on the Gypsum and Engineers Decisions, 67 Geo. L.J. 1187, 1193 (1977).

joint production conditions. In simply thinking about the theory of a case, a lawyer may produce insights more helpful to the other side than to his own. In this situation, both our theory and Easterbrook's predict that the unfavorable insight would be protected by the work product doctrine.

The joint production theory includes legal creativity as a subset. When lawyer-produced information involves no legal creativity, we would predict that the work product doctrine would nonetheless protect it, if the information is produced under joint conditions. Thus, interviewing witnesses in an accident case certainly involves little legal creativity—indeed, the lawyer may often delegate the task to an investigator for this reason—but the results of the interviews should, nonetheless, be protected, at least if courts accept the joint production theory. The reason is simple: interviewing witnesses can just as easily yield unfavorable as favorable information.

We have one further disagreement with judge Easterbrook's analysis. Easterbrook, elaborating on a model first suggested by Tullock,[85] suggests that litigation is often a "fight over spilt milk" where the outcome of the case may have little influence on how the parties behave in the future. If litigation has only a stakes-dividing function, it is socially desirable to restrict as much as possible the expenditure of resources in resolving the dispute.[86] Thus, any incentives to expend resources on such an effort—such as those created by the work product doctrine—would be, as Tullock points out, socially perverse.[87] The error in this argument is that it overlooks the intimate relationship between accurate stakes dividing and rule enforcement. If cases are not accurately decided, the underlying rules will not be implemented, with a corresponding loss in the deterrent function of those rules. Thus, by offsetting disincentives to the production of legal information, the work product doctrine advances rather than retards the social interest, which explains its persistence in the cases. In any event, whether Easterbrook's theory or our own is the better account of the doctrine is something that must ultimately be determined by looking at the cases. It is to that question that we now turn.

### C. *The Joint Production Theory and the Cases*

Both the joint production and the copyright theories see the work product doctrine as creating property rights over information that lawyers produce. The question is which better explains the cases.

*Hickman v. Taylor* is better evidence for the joint production theory

[85] Tullock, *supra* note 78, at 359.

[86] Easterbrook, *supra* note 74, at 359.

[87] Tullock, *supra* note 78, at 155–57.

than for Easterbrook's. This was a purely factual investigation into the reasons for the sinking of a tug and seems to fall squarely into Easterbrook's category of "activities that generate the particular facts of the case." Under Easterbrook's theory, the interview reports should have been discoverable, but under the actual case they were protected. As we have already noted, the joint production theory explains this decision on the ground that the facts could have favored either side, or both at the same time; therefore, protection was needed because otherwise the expected private value of interviewing would have been less than the expected social value.

Some factual investigations involve nonjoint production, and our theory predicts that the information yielded would not be protected by the work product doctrine. In this situation, which is not the usual one, the lawyer expends resources with the expectation that he will get only information helpful to his side and no information useful to the other side. Thus, nonjoint production appears to be the explanation for the rule that one can always discover whether an opponent is insured.[88] It is always helpful and never harmful for a lawyer to learn whether his own client is insured. Therefore, the lawyer's investigation of this fact is nonjoint production and does not require the protection of the doctrine in order to encourage such an investigation. Giving this information the protection of the work product doctrine would simply duplicate costs with no compensating benefit.

The copyright view of work product is especially difficult to reconcile with the fact that an opponent may discover information that is favorable to the attorney's claims. In *Forsythe v. Baltimore & Ohio R.R.*,[89] the plaintiff's interrogatory asked the defendant to "[s]tate on what conduct, course of conduct, acts of omission or commission on the part of the plaintiff you base the allegations of contributory negligence as set forth in your answer." The court rejected the defendant's argument, essentially based on the copyright theory, that the answer inevitably would reveal the knowledge and experience of counsel and therefore constituted work product. The decision is correct because requiring a party to provide his opponent with information that favors his claim does not reduce the incentive to engage in joint production activities, and, accordingly, favorable information is not protected.[90] This is true even if the favorable

[88] Cases so holding are now codified in Fed. R. Civ. P. 26(b) (2).

[89] Forsythe v. Baltimore & Ohio R.R., 15 F.R.D. 191 (D. Pa. 1954). Accord, Baltimore Transit Co. v. Mezzanotti, 174 A.2d 768 (Md. 1961), (interrogatory calling for the facts underlying the defendant company's claim of contributory negligence had to be answered).

[90] B. & S. Drilling Co. v. Halliburton Oil Well Cementing Co., 24 F.R.D. 1 (S.D. Tex. 1959), (defendant entitled to discover plaintiff's anticipated legal contentions).

information was actually acquired in an investigation that might have yielded unfavorable information as well. It is requiring parties to reveal their unfavorable information that reduces the benefit from joint production. The *Forsythe* type of case is especially difficult to explain using Easterbrook's theory that the doctrine seeks to protect lawyer creativity. Presumably under the Easterbrook theory, a lawyer's favorable insights about a case would be the most important matters to protect.

Much information that quintessentially embodies a lawyer's creative talent is unprotected by the work doctrine. For instance, it has been held that demonstrative evidence in the form of exhibits prepared by counsel for trial is not work product.[91] Unless an attorney thought that such an exhibit was favorable to his position, he would not plan to use it at trial. Thus, although the exhibit itself may result from a joint production process—the lawyer may not be sure whether the exhibit will be helpful or harmful until it is actually prepared—once the lawyer decides to use the exhibit, it is clear that it embodies favorable information. Confidentiality is no longer required. Conversely, we would expect that courts would protect tentative exhibits before the preparer has decided whether to use them at trial because at this point there is still the possibility that they contain unfavorable information. The same reasoning explains why expert witnesses must be offered for deposition after a party has decided to call them at trial, but not before. It is very difficult to explain these distinctions if the work product doctrine simply aims to protect legal creativity, as Easterbrook's argument seems to entail.

The explanatory power of the joint production thesis is also made evident in comparing two recent cases. In *In re San Juan Dupont Plaza Hotel Fire Litigation,*[92] the court upheld the lower court's order requiring parties taking depositions to list, five days in advance of a deposition, the exhibits that would be relied on at the deposition. Once a lawyer decides to rely on an exhibit, the conclusion has been reached that the use of it will be favorable, and thus there is no longer a situation of joint production. Accordingly, the joint production theory would predict the outcome reached in the case. By contrast, in *Sporck v. Peil,*[93] counsel wanted to depose opposing counsel as to the documents selected to prepare the attorney's own client for trial. Since preparation entails preparing for both the good and the bad, such a selection process is obviously done under joint conditions. Thus, the result in the case, which was to deny discovery, is predicted by our theory. Indeed, the court commented that "with-

[91] Zimmerman v. Superior Court, 402 P.2d. 212, (Ariz. 1965).

[92] In re San Juan Dupont Plaza Hotel Fire Litigation, 859 F.2d 1007 (1st Cir. 1988).

[93] Sporck, v. Peil, 759 F.2d 312 (3d Cir.), cert. denied, 474 U.S. 903 (1985).

out the protection that the work product doctrine accords his preparation, defense counsel may have forgone a shifting of the documents [or not used them to prepare the deposition witness]."[94] Exactly so.

The cases following *Hickman* also make clear that the work product doctrine protects the confidentiality of work that is not strictly the lawyer's, an aspect of the doctrine that is at odds with Easterbrook's theory but not with our own. Lawyers undertake many factual investigations through agents, and a private investigator is especially likely to be subject to a joint production function since the answers of potential witnesses to his questions will often be more beneficial to the other side than to his own. Whereas the attorney-client privilege primarily protects communications to the lawyer, the work product doctrine routinely protects communications made to the lawyer's agents who are actually undertaking joint production activities.[95] It is difficult to explain these cases on the theory that the work product doctrine seeks to protect lawyer creativity.

The work product doctrine protects documents that necessarily contain both favorable and unfavorable information. Obliging the party to reveal unfavorable information to his opponent would obviously reduce the private incentive to engage in the activity that yielded it. In an antitrust action against an oil company, the court held that the Federal Trade Commission (FTC) could properly withhold a report prepared by expert economic consultants for its attorneys.[96] In a very real sense, this document did embody creative efforts, but that was not the reason it was protected. Since the report discussed a wide range of tactical and strategic issues and options relating to the presentation of the case, it would surely have contained both favorable and unfavorable information, in other words, the results of joint production.[97]

[94] *Id.* at 317.

[95] Sersted v. American Can Co., 535 F. Supp 1072 (E.D. Wis. 1982), (witness statement to investigator protected from discovery); Longs Drug Stores v. Howe, 134 Ariz. 424, 657 P.2d 412 (1983); Rakes v. Fulcher, 172 S.E.2d 751 (Va. 1970) (doctrine extends to persons obtaining statements of witnesses for use of trial counsel); Dingler v. Halcyon Lijn N.V., 50 F.R.D. 211 (E.D. Pa. 1970); Fontaine v. Sunflower Beef Carrier, Inc., 87 F.R.D. 89 (E.D. Mo. 1980) (investigator's work protected); Ex parte May, 393 So. 2d 1006 (Ala. 1981) (insurance adjuster's investigations protected).

[96] Exxon Corp. v. FTC, 466 F. Supp 1088 (D.D.C. 1978). The oil company respondents had sought the report under the Freedom of Information Act, which contains a work product exemption.

[97] See also Mervin v. FTC, 591 F.2d 821 (D.C. Cir. 1978), which was an action by a government attorney for reinstatement and damages on a wrongful dismissal theory. The court held that disclosure of memoranda prepared by government attorneys in an earlier reinstatement action brought by plaintiff was exempt under Freedom of Information Act as attorney work product, and portions of memoranda containing statements of fact concerning dismissal were also exempt since even factual material would be likely to reveal some of attorney's tactical and strategic thoughts.

In order to qualify for work product protection, documents must be prepared in anticipation of litigation. This limitation is one of the most important pieces of evidence in support of the joint production theory. Litigation creates jointness in the lawyer's production because the existence of a legal opponent creates the possibility of one adversary's efforts yielding information of value to the other. Obversely, the production of information has a distinct nonjoint component when no opponent is on the horizon because then the odds are low that possible unfavorable information will ever be helpful to an opponent. Requiring that such information be disclosed subsequently, when the opponent appears, should have little effect on ex ante incentives when the probability of having an opponent is small.[98] Of course, some counseling situations do raise the possibility of producing work that may ultimately help an opponent, but the more definite the opponent's existence, the greater the likelihood of joint production. Without the doctrine's protection, as the probability of litigation increased, the private value of much legal investigation would go down.

In *United States v. Bonnell,*[99] the doctrine protected attorney's notes taken at meetings discussing responses to inquiries made by the IRS to major corporations on matters relating to bribes, kickbacks, political contributions, and the like. The court stressed that the attorney was present because his client thought that the company's tax problems would produce litigation and suggested that it would be a different case if he had been merely counseling the company on how to pay its taxes. As this case suggests, it can sometimes be difficult to determine the point at which increasing anticipation of litigation makes the lawyer's production efforts sufficiently joint to merit protection.[100]

To approach the "anticipation" requirement from a functional point of view is to ask whether the obligation to disclose unfavorable information to an opponent would reduce the level of the activity that yielded it. If there are other economic reasons for producing the information, the doctrine does not apply. Hence, a party's routine report to his employer or

[98] This prediction of the contingent claim theory has recently received some empirical support. In a study of the effect of the attorney-client privilege, Professor Vincent Alexander found that "the circumstances in which the privilege plays a major role in influencing candor seem to be relatively rare. In day-to-day corporate counseling, the findings suggest that a manager's need to cope with a heavily regulated business environment and his sense of trust in counsel are probably sufficient to produce open communications. It is in situations involving potential litigation and matters of a "sensitive" nature . . . that the privilege becomes a conscious concern." Vincent C. Alexander, The Corporate Attorney-Client Privilege: A Study of the Participants, 63 St. John's L. Rev. 191, 414 (1989).

[99] United States v. Bonnell, 483 F. Supp 1070 (D. Minn 1979).

[100] For a similar case, see Cotton States Mut. Ins. Co. v. Turtle Reef Associates, Inc., 444 So.2d 595 (Fla. Dist. Ct. App. 1984).

insurer is not protected, even if it finds its way into the files of the employer's or insurer's attorney.[101] The *Searle* case discussed above is another example. Complementing its attorney-client-privilege holding, the court also held that the disputed material was not protected as work product, primarily because it would have been produced independent of the existence of any particular litigated case.[102]

Many related features of the doctrine are also better explained by the joint production theory. For instance, an attorney's memorandum in a prior case involving different parties does not have protection as work product. In such cases, the ex ante incentives are not affected by the possible disclosure in subsequent unrelated cases between different parties.[103] Indeed, the courts that permit such memoranda to be kept confidential do so explicitly because of the possible ex ante incentive effects; they do so, in other words, because some such memoranda may be prepared under conditions of joint production.[104] A related point is that the party's own prior statement is not subject to the protection of the doctrine.[105] Again, if the purpose of the doctrine is to protect creative efforts, there would be little reason to cut off protection at the end of the litigation that was the first occasion for the lawyer's Promethean leap. Under the copyright theory, that would simply allow young lawyers to expropriate the creative capital of older ones.

The work product doctrine obviously suppresses information. A party must often incur duplicative costs to produce the same information that the opponent is normally entitled to suppress. Predictably, there are situations in which the cost is too high. Thus, under Rule 26(b)(3) of the Federal Rules of Civil Procedure an opponent is entitled to discover a document otherwise protected as work product if she or he is "unable without undue hardship to obtain the substantial equivalent of the materials by other means."[106] Significantly, however, the same rule cautions that "the court shall protect against disclosure of mental impressions,

[101] State ex rel. Dudek v. Circuit Court, 34 Wis. 2d 559, 150 N.W.2d 387, 377 (Wis. 1967).

[102] Note 66 *supra*, at 402.

[103] Honeywell, Inc. v. Piper Aircraft Corp., 50 F.R.D. 117 (M.D. Pa. 1970). Where there is identity of parties, the case may be different, for then the prospect of a party's efforts coming back to haunt him may decrease the incentive to invest in lawyering. Accordingly, many cases find work product to apply in such circumstances. For a discussion, see Jef A. Anderson, *et al.*, Special Project: The Work Product Doctrine, 68 Corn. L. Rev. 760, 855–61 (1983).

[104] *Id.* See also FTC. v. Grolier, Inc., 462 U.S. 19 (1983), where the Court interpreted the Freedom of Information Act to include within work product legal memoranda prepared in unrelated litigation.

[105] *Dingler, supra* note 95.

[106] Fed. R. Civ. P. 26(b)(3).

conclusions, opinions, or legal theories of an attorney." Although legal theories are often produced by a joint production process, which entails the possibility of uncovering legal weaknesses of one's own case, it would be unusual for the cost of duplicative production to be excessive. One lawyer can find the weaknesses about as well as another.

A related doctrine is that a party can be required to divulge the names and addresses of potential witnesses as well as to indicate generally the type of information held by the person listed.[107] Requiring attorneys to turn over lists of potential witnesses seems at first to be inconsistent with the doctrine's purpose of promoting joint production activities. Nonetheless, the names of the witnesses are different from the actual contents of their statements. If a party has to turn over actual statements made by potential witnesses, it inevitably reduces the marginal productivity of his opponent's own joint production efforts. The other party will ask himself why he should incur the cost of interviewing the witnesses when he can get their statements from his opponent. Receiving a list of names, by contrast, can actually increase the marginal productivity of a lawyer's joint production efforts. Before he receives the names, he may think that the cost would be too high to identify and interview them. After he receives the list, he may change his mind about interviewing them, and more information may be produced by the second interview. Alternatively, it would be rare for more witnesses to be produced in a case where one party is allowed to suppress the names of the ones he has identified.

The same point comes from realizing that gathering a list of potential witnesses is always the first step in this type of joint production activity (the second step being to interview them). Since the doctrine is concerned with how much information is produced at the ultimate margin (it is trying to expand this margin), the doctrine's effect is relatively unaffected by inframarginal costs (the private cost of having to divulge a witness list from which an opponent could gather information). Viewed from this

[107] Borse v. Superior Court, 7 Cal. App. 3d 286, 86 Cal. Rptr. 559 (1970); Wolken v. E. W. Howell Co., 41 App. Div. 2d 545, 339 N.Y.S.2d 272 (1973); Barton v. Diesel Constr. Co., 47 App. Div. 2d 729, 365 N.Y.S.2d 197 (1975); Hoffman v. Ro-San Manor, 73 App. Div. 2d 207, 425 N.Y.S.2d 619 (1980); Agranoff v. Jay, 9 Wash. App. 429, 512 P.2d 1132 (1973); Surf Drugs, Inc. v. Vermette, 236 So. 2d 108 (Fla. 1970). The party is not required to set out contents of statements made by these potential witnesses unless the exception just mentioned applies.

The names and addresses of nonexpert witnesses or of persons having knowledge of relevant facts are not protected from discovery by the work product rule. State ex rel. Dudek note 101 *supra,* at 387; Butler v. United States, 226 F. Supp 341 (W.D. Mo. 1964). Similarly, the work product doctrine does not protect information concerning whether statements, opinions, and reports of witnesses exist, or, if they do exist, who made them, when they were made, or who currently has possession of them. Harvey v. Eimco Corp., 28 F.R.D. 380 (E.D. Pa. 1961). See Jeffrey F. Ghert, Annotation, Development, since *Hickman v. Taylor,* of Attorney's "Work Product" Doctrine, 35 A.L.R.3d 412 (1971).

perspective, imposing a duty to disclose witness lists might have the same effect as requiring a party to pay a lump-sum tax (say, a $100) if he decides to interview any potential witnesses at all. The party would interview the same amount, with or without the tax, so long as the net private benefit from all planned interviewing (the private surplus) exceeded the amount of the tax. In situations where the private benefit from interviewing witnesses is large—and here we can take into account the fact that the interviewer need not report their unfavorable statements to his opponent—the ultimate obligation of disclosing their names should have little effect on the amount of interviewing done.

It is not surprising that the joint production theory does not explain all of the cases. For example, *Bogosian v. Gulf Oil Corp.*[108] seems more consistent with the copyright theory. In an antitrust class action that dealers brought against major oil companies, the court held that memoranda prepared by plaintiffs' counsel for review by plaintiffs' expert witnesses, which contained opinions and legal theories of counsel, were protected by the work product doctrine. Nonetheless, the court also held that where the same documents contained both facts and legal theories of an attorney, it would be necessary to redact the document to allow full disclosure of facts while protecting legal theories. Unless these facts were nonjointly produced, or unless the dealers' cost of producing them independently was simply too high, denying them confidentiality seems inconsistent with our theory and with the *Hickman* decision.

No discussion of the work product doctrine would be complete without an analysis of the Supreme Court's landmark decision in *Upjohn Co. v. United States,*[109] which is the most significant case decided on the subject since *Hickman*. When Upjohn learned that one of its foreign subsidiaries had made questionable payments to foreign government officials in order to secure government business, an internal investigation was initiated. Its attorneys sent a questionnaire to all foreign managers seeking detailed information concerning the payments, and the responses were returned to the general counsel. The general counsel and outside counsel also interviewed the recipients of the questionnaire and other company officers and employees. Subsequently, based on a report that Upjohn voluntarily submitted to the Securities and Exchange Commission (SEC) disclosing the questionable payments, the IRS demanded production of the questionnaires and the memoranda and notes of the interviews. Upjohn refused to produce the documents on the grounds that they were protected from disclosure by the attorney-client privilege and constituted the work prod-

[108] Bogosian v. Gulf Oil Corp., 738 F.2d 587 (3d Cir. 1984).

[109] Upjohn v. United States, 449 U.S. 383 (1981).

uct of attorneys prepared in anticipation of litigation. The Supreme Court ultimately upheld both of Upjohn's claims.

In the work product part of its opinion, the Court again reasoned that the revelation of the interview notes would invade the privacy of Upjohn's attorneys, and that to allow disclosure would lead to inefficiency, unfairness, and sharp practices. The court seemed to stress, more than it had done in *Hickman,* the copyright theory of the doctrine. The Court said that the Upjohn attorneys' interview notes surely contained their "mental impressions," if only (as the Court said) in the form of what the attorneys thought fit to write down regarding witnesses' remarks.

We would explain this language on the ground that the mental impressions were protected not so much because they were creative but because they undoubtedly were obtained at a time when it appeared that they would both favor and disfavor Upjohn's legal position—thus being the product of a joint production effort. When Upjohn's attorneys began their investigation, they knew that the government was a likely opponent. They also knew that each interviewee could provide information that was either harmful or helpful to Upjohn's position. Unless the attorneys were able to suppress the unfavorable information, the incentive to undertake the investigation in the first place would have been reduced.

It is interesting that the Court made precisely the joint production point, although it did so in the attorney-client privilege section of its opinion. The lower court had held that the interviews were not privileged, and Upjohn argued that this holding threatened to limit the incentive to undertake investigations. The government argued in response that civil and criminal penalties were sufficient, even in the absence of protection, to ensure that such investigations would take place. The Court said that the government's position "ignores the fact that the depth and quality of any investigations to ensure compliance with the law would suffer, even were they undertaken."[110] Again, although the Court did not explicitly embrace the joint production theory as the basis for its *Upjohn* decision, it accepted its major conclusion: that the quality of joint production activities would decline if the unfavorable results had to be disclosed to legal opponents.

## IV. Conclusion

There are some common themes that run through the law's protection of legal information. As noted above, the essential difference between the attorney-client privilege and the work product doctrine is perspective.

[110] *Id.* at 393 n.2.

The one attempts to make the client a better conduit of information and claims to the courts; the other tries to ensure that lawyers produce enough information about their cases. Each rule operates by blunting a disincentive to information production that arises from the adversary system. For the privilege, the disincentive is the client's fear that adverse information he provides to his lawyer will be given to the other side; for the work product doctrine, the disincentive is the lawyer's concern (on behalf of his client) that the information he produces may be just as helpful to the other side as it is to his own.

It should come as no surprise that the legal rules of confidentiality, so long critized by traditional scholars, can be explained in part through the use of economic analysis. Legal information is an economic good. Accordingly, like any other economic good, it requires a legal system that ensures its optimal production. As economists have long recognized, information is a peculiar economic good—it is often a "public good" that requires special protection. Nevertheless, the rules governing the production of legal information seem largely uninfluenced by the public-good considerations. Because of the adversary system, the same commodity that is a "good" to one side will be a "bad" to the other. It is this good/bad aspect of legal information that determines the rules the law has devised to regulate its ownership.