THE ATTORNEY AND HIS CLIENT'S PRIVILEGES*

A not uncommon factual pattern has recently generated a series of federal cases[1] concerned with the issue of whether an attorney may claim his client's constitutional privilege against self-incrimination. Typically, a taxpayer, having learned of a pending income tax investigation, secures representation by an attorney. Thereafter, the taxpayer sends the attorney some or all of his relevant financial records, including "work papers" prepared by an accountant. The Internal Revenue Service then summons the attorney to produce all documents in his possession relating to his client's tax liability. The attorney refuses to produce them on two grounds: the documents demanded are within the attorney-client privilege[2] and, if produced, they will incriminate his client.

The last two times this factual situation was considered in the Courts of Appeal — *Bouschor v. United States*[3] and *United States v. Judson*[4] — contradictory decisions resulted.[5] The Eighth and Ninth Circuits agreed that the attorney-client privilege was insufficient to protect all the demanded documents.[6] Both courts, moreover, assumed that, had the client been in possession of the documents, he could have refused to produce them on the ground that the documents would have incriminated him.[7] The courts divided, however, on

*United States v. Judson, 322 F.2d 460 (9th Cir. 1963).

1. United States v. Judson, 322 F.2d 460 (9th Cir. 1963); Bouschor v. United States, 316 F.2d 451 (8th Cir. 1963); Application of House, 144 F. Supp. 95 (N.D. Cal. 1956); United States v. Willis, 145 F. Supp. 365 (M.D. Ga. 1955); *In re* Blumenberg, 191 F. Supp. 904 (S.D.N.Y. 1960); United States v. Boccuto, 175 F. Supp. 886 (D.N.J.), *appeal dismissed*, 274 F.2d 860 (3d Cir. 1959); *In re* Fahey, 300 F.2d 383 (6th Cir. 1961).

2. The attorney-client privilege was not asserted in United States v. Boccuto, *supra* note 1, and *In re* Fahey, *supra* note 1. In other cases involving the same factual pattern, the attorney has claimed the attorney-client privilege but not asserted his client's fifth amendment privilege. Colton v. United States, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); Sale v. United States, 228 F.2d 682 (8th Cir.), *cert. denied*, 350 U.S. 1006 (1956).

3. 316 F.2d 451 (8th Cir. 1963).

4. 322 F.2d 460 (9th Cir. 1963).

5. The *Judson* court said that *Bouschor* could be distinguished on the basis of certain factual differences. But the court admitted that the *Bouschor* opinion had not considered these circumstances when deciding the fifth amendment question and stated that it could not agree with the conclusions reached in *Bouschor*. 322 F.2d at 466. Given the way each court analyzed the facts before it, the two holdings are in conflict.

6. 316 F.2d at 456-57; 322 F.2d at 462-63. The Ninth Circuit upheld the attorney-client privilege for the accountant's work papers but denied it for the taxpayer's cancelled checks and bank statements.

Actually the IRS could most likely have secured copies of the checks and bank statements from the client's banks. See Bailin, *Banks Ordinarily Cooperate with IRS in Tax Examinations of Customers*, 14 J. TAXATION 220 (1961).

7. *Bouschor* did not state this explicitly; *Judson* did. 322 F.2d at 463. In neither case did the government attempt to argue on appeal that the client had no fifth amendment privilege. Brief for Appellee, Bouschor v. United States, 316 F.2d 451 (8th Cir. 1963); Brief for Appellant, United States v. Judson, 322 F.2d (9th Cir. 1963). The government might have argued in *Bouschor* that the client had waived his privilege prior to the attor-

the issue of whether the attorney could invoke his client's fifth amendment privilege.

The Eighth Circuit, in *Bouschor,* relied[8] upon the Supreme Court's opinion in *Hale v. Henkel.*[9]

> The right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person.[10]

Underlying this statement in *Hale* was the realization that to allow persons other than the one who might be incriminated to withhold information could cripple investigatory and prosecutory proceedings.

> A privilege so extensive [one invocable by third parties] might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury with regard to the doings or business of his principal . . . .[11]

The *Bouschor* court readily concluded that the *Hale* rule was controlling even where the claiming party was the attorney of the potentially incriminated party.[12] Nor was this application of *Hale* without precedent. Virtually every federal court that had considered the problem had held, on the authority of *Hale,* that an attorney cannot invoke his client's fifth amendment privilege.[13]

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ney's receipt of the documents. See note 60 *infra.* The government might have argued in *Judson* that the cancelled checks and bank statements were "required records" [required by INT. REV. CODE OF 1954 § 6001 and 26 C.F.R. § 1.6001-1 (1961)] and therefore not within the client's fifth amendment privilege by virtue of the required records doctrine of Shapiro v. United States, 335 U.S. 1, 32-35 (1948). The applicability and scope of the *Shapiro* doctrine in the area of taxation has not yet been decided by the Supreme Court. See generally Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination,* 18 U. CHI. L. REV. 687 (1951); Note, 112 U. PA. L. REV. 394, 400-02 (1964).

8. 316 F.2d at 458.

9. 201 U.S. 43 (1906).

10. 201 U.S. at 69-70. This principle has been most recently affirmed by the Supreme Court in Rogers v. United States, 340 U.S. 367, *rehearing denied,* 341 U.S. 912 (1951): "a refusal to answer cannot be justified by a desire to protect others from punishment. . . ." 340 U.S. at 371.

11. 201 U.S. at 70. In addition to this sound policy base, the *Hale* rule is a faithful reading of the language of the fifth amendment: "No person . . . shall be compelled in any criminal case to be a witness *against himself* . . . ." U.S. CONST., amend. V (emphasis added). The amendment does not grant a privilege against being compelled to be a witness *against another.*

12. 316 F.2d at 459. While *Hale* did not itself involve an attorney-client situation, *Hale* did say that there were cases holding that an attorney could not raise his client's fifth amendment privilege. 201 U.S. at 70.

13. Ziegler v. United States, 174 F.2d 439, 447 (9th Cir.), *cert. denied,* 338 U.S. 822 (1949); *In re* Brumbaugh, 62-2 U.S. Tax Cas. ¶ 9521 (S.D. Cal. 1962); United States v. Boccuto, 175 F. Supp. 886, 888 (D.N.J.), *appeal dismissed,* 274 F.2d 860 (3d Cir. 1959); Remmer v. United States, 205 F.2d 277, 285 (9th Cir. 1953) (dictum), *vacated on other grounds,* 347 U.S. 227 (1954), *re-affirmed,* 222 F.2d 720 (1955), *vacated on other grounds,*

But the *Bouscher* result presents every client with a set of unsatisfactory choices. He can choose to withhold all incriminating documents from his attorney and suffer a resultant decrease in the effectiveness of his attorney's services. Or, he can give the documents to his attorney, accept the consequent inconvenience and inefficiency of having to remain in his attorney's presence whenever he is working with the documents or using them at hearings, and thereby preserve his fifth amendment privilege. Or, the client can give the documents to the attorney, not follow him around, and abandon his fifth amendment privilege entirely.

Recognizing the client's predicament, the Ninth Circuit, in *Judson*, repudiated the *Bouschor* result.[14] The *Judson* court refused to accept the anomaly that

> the taxpayer walked into his attorney's office unquestionably shielded with the Amendment's protection and walked out with something less. . . . The taxpayer's only recourse would be . . . marathon footwork . . . .[15]

To free the client from his dilemma, the *Judson* court held, as a matter of constitutional law, that an attorney can invoke his client's fifth amendment privilege:

> [T]he inherent power thus to compel indirectly an individual's [the client's] self-incrimination is curbed by the Fifth Amendment as effectively as the power to compel the same result directly.[16]

The *Judson* result — which eliminates the client's dilemma by allowing the documents to remain privileged in the hands of the attorney — seems eminently sensible. But the constitutional rationale utilized by the *Judson* court to support that result is quite unsatisfactory.

The *Judson* court had to avoid the force of a great deal of case law; its attempts to do so, however, are unconvincing. The court tried to by-pass *Hale v. Henkel*[17] by classifying it as merely one in a line of cases that developed the doctrine that a corporation has no fifth amendment privilege.[18]

350 U.S. 377 (1956); United States v. Willis, 145 F. Supp. 365, 368 (M.D. Ga. 1955) (dictum); Sears Roebuck & Co. v. American Plumbing & Supply Co., 19 F.R.D. 334, 340-41 (E.D. Wis. 1956) (dictum); *In re* Fahey, 300 F.2d 383, 385 (6th Cir. 1961). The Sixth Circuit has more recently followed the holdings of *Fahey* and *Bouschor* in United States v. Goldfarb, 328 F.2d 280, 282 (6th Cir.), *cert. denied*, 377 U.S. 976 (1964). *Contra*, Application of House, 144 F. Supp. 95 (N.D. Cal. 1956); Colton v. United States, 306 F.2d 633, 639 (2d Cir. 1962) (dictum), *cert. denied*, 371 U.S. 951 (1963).

14. 322 F.2d at 466.

15. *Ibid.*

16. 322 F.2d at 468.

17. 201 U.S. 43 (1906). See text at notes 8-13 *supra*.

18. 322 F.2d at 463-64. The *Judson* court reached this conclusion by grouping *Hale* with United States v. White, 322 U.S. 694 (1944), and then focusing its attention on the latter case. This grouping of *Hale* and *White* is inaccurate. In *White*, X sought to withhold documents which incriminated X himself; in *Hale*, X sought to withhold documents which incriminated Y. In *Hale* the Court said X could not protect Y, and stopped right there — never reaching the issue of the nature of the documents and the character of X's possession, which were the main concerns of the *White* case and the ones upon which *Judson* focused.

But this interpretation of *Hale* is not a fair reading of the case. The *Hale* decision specifically stated that its holding that a witness cannot invoke the fifth amendment privilege of a third party was independent of the fact that the third party happened to be a corporation.[19] The Ninth Circuit's treatment of the lower federal court cases[20] is no more satisfactory than its attempt to evade *Hale*. The bulk of these cases held not only that the attorney could not invoke his client's fifth amendment privilege, but also that the client had no privilege.[21] *Judson* seized on this fact and attempted to distinguish the cases by asserting that their statements about the attorney's inability to invoke his client's privilege were not "essential to the results reached therein."[22] An explicit holding, however, is not reduced to dicta merely because there is a second holding in the same case which could equally well have justified the result. Any labelling of either holding as non-essential is an arbitrary choice;[23]

19. A privilege so extensive [one invocable by third parties] might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury with regard to the doings or business of his principal, *whether such principal were an individual or a corporation. The question whether a corporation is a 'person' within the meaning of this Amendment really does not arise* . . . . The Amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself*, and *if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation.*

201 U.S. at 69-70 (emphasis added).

Furthermore, the *Hale* principle has been applied by the Supreme Court where the one whom the third party sought to protect was in fact a person and not a corporation. Rogers v. United States, 340 U.S. 367, 371, *rehearing denied*, 341 U.S. 912 (1951).

20. 322 F.2d at 464-66. These cases are cited in note 13 *supra*.

21. In three cases some defect in the possession of the documents by the attorney or the client was held to have invalidated the client's fifth amendment privilege. *In re* Fahey, 300 F.2d 383, 385 (6th Cir. 1961); Remmer v. United States, 205 F.2d 277, 285 (9th Cir. 1953), *vacated on other grounds*, 347 U.S. 227 (1954), *reaffirmed*, 222 F.2d 720 (1955), *vacated on other grounds*, 350 U.S. 377 (1956); United States v. Boccuto, 175 F. Supp. 886, 889-90 (D.N.J.), *appeal dismissed*, 274 F.2d 860 (3d Cir. 1959). See also note 64 *infra*. In one case the client was held to have waived his privilege by taking the witness stand regarding the documents sought. Ziegler v. United States, 174 F.2d 439, 446 (9th Cir.), *cert. denied*, 338 U.S. 822 (1949). And in another case the court held that the documents sought fell within the required records exception to the privilege against self-incrimination. United States v. Willis, 145 F. Supp. 365, 368-69 (M.D. Ga. 1955). See also note 7 *supra*.

In addition, the *Judson* court evaded Sears Roebuck & Co. v. American Plumbing Supply Co., 19 F.R.D. 334 (E.D. Wis. 1956), by pointing out that the attorney asserting the privileges was not in fact the attorney of the privilege holder. 322 F.2d at 465. However, the *Sears Roebuck* court said the result would be no different even if the privilege asserter had been the privilege holder's attorney. 19 F.R.D. at 341. Finally, the *Judson* majority simply ignored *In re* Brumbaugh, 62-2 U.S. Tax Cas. ¶ 9521 (S.D. Cal. 1962), which was cited both in the dissent, 322 F.2d at 471-72, and in the government's brief. Brief for Appellant, pp. 16, 22, United States v. Judson, 322 F.2d 460 (9th Cir. 1963).

22. 322 F.2d at 464.

23. The *Hale* case shows that neither order of decision is logically compelled; before asking whether the corporation had a fifth amendment privilege, the court held that a third party could not invoke that privilege. See note 19 *supra*.

the *Judson* technique could just as easily be used to reach the opposite conclusion — that the statements concerning the existence of the client's privilege were non-essential.[24]

Furthermore, the *Judson* decision failed to explain adequately in terms of fifth amendment policy why the client's privilege should be extended to his attorney and not to his other agents. If the purpose of the fifth amendment is to protect the incriminated person (the client) from torture or more subtle kinds of abusive questioning, then there is no reason to allow the attorney to withhold his client's incriminating documents. On the other hand, if the purpose of the fifth amendment is to guarantee a "fair fight" between the government and the individual or, as suggested in *Judson*,[25] to force the prosecutor to search for "independent evidence," then there may be an argument for extending the client's privilege to his attorney on the theory that the attorney plays an integral role in the client's "fight" against the government. But many of the client's agents may be important participants in his defense — for example, an accountant may bear the major burden in the defense of a tax evasion case. Distinguishing on the basis of fifth amendment policy between an attorney and other agents of the client would be a difficult, if not impossible, task. If such a distinction cannot be made, either *Hale's* holding that agents cannot invoke the fifth amendment privilege of their principals[26] must be overruled, or a purely arbitrary exception to *Hale* must be made.

Finally, the *Judson* court did not consider thoroughly the availability of nonconstitutional rationales for its decision. If such alternative rationales exist, the *Judson* decision may be criticized for failing to avoid the constitutional issue raised by the attorney's claim of his client's fifth amendment privilege. The doctrine of avoidance of unnecessary constitutional issues is designed to prevent a court from making important and delicate constitutional adjudications until the experience and knowledge necessary for well-informed, considered decisions have been accumulated. A constitutional decision is the least flexible kind of decision that can be made; it cannot be changed by a legislature and is not readily modified or overruled by a court. The force of the avoidance doctrine seems amply demonstrated by the *Judson* case. The Ninth Circuit's use of a constitutional theory raises a number of problems the impact and difficulty of which are not reflected in the holding and reasoning of the opinion. Can an attorney withhold documents incriminating his client if they are received from a third party who could not himself

24. *Judson* has not been followed by any court, even though its result seems quite sensible. It was distinguished in a different fact situation in State v. Olwell, 394 P.2d 681 (Wash. 1964). On the other hand, law review comment has been favorable. See, *e.g.*, Note, 1964 DUKE L.J. 362, 366-68; Note, 49 IOWA L. REV. 967, 976 (1964); Note, 42 TEXAS L. REV. 553, 557 (1964); Note, 38 TUL. L. REV. 206, 207 (1963).

25. 322 F.2d at 466.

26. 201 U.S. at 69-70.

have withheld them?[27] Can an attorney withhold documents incriminating his client if he has received them outside the attorney-client relationship?[28] Can an attorney refuse to answer questions regarding the nature of his services for the client if the answers incriminate the client?[29] Besides the problem of the circumstances under which an attorney can invoke his client's privilege,[30] further questions arise. If the attorney can invoke his client's fifth amendment privilege, can he also waive it by producing the demanded documents even though the client protests? Must the attorney prove actual authorization from his principal before claiming the principal's privilege?[31] Can the client, when questioned at trial, answer that not he, but his attorney, invoked the privilege and thereby avoid the damaging inferences frequently drawn from a claim of the privilege?[32]

This thicket of constitutional questions might have been avoided had the *Judson* court sought an alternative basis for its holding. Underlying the predicament created by the *Bouschor* decision and the constitutional reaction of *Judson* to it is the problem of the effectiveness of the attorney-client relationship. Indeed, in *Judson* the Ninth Circuit explicitly acknowledged its concern for this relationship.

> *No other "third party," nor "agent," nor "representative" stands in such a unique relationship between the accused and the judicial process as does his attorney.* . . . The attorney and his client are so identical with respect to the function of evidence and to the proceedings which call for its protection that any distinction is mere sophistry.[33]

27. As long as the third party held the documents, the client could not prevent their production. "A party is privileged from producing the evidence but not from its production." Johnson v. United States, 228 U.S. 457, 458 (1913).

28. See, *e.g.*, Grant v. United States, 227 U.S. 74 (1913) (package of client's incriminating documents remaining unopened in attorney's safe).

29. See, *e.g.*, United States v. Goldfarb, 328 F.2d 280 (6th Cir.), *cert. denied*, 84 Sup. Ct. 1883 (1964).

30. The *Judson* decision contains little in the way of qualification which might restrict its application to the facts before the court. The only prerequisite to the attorney's right to raise his client's fifth amendment privilege — "if the client himself could have successfully raised it" (322 F.2d at 467) — really says nothing. Anytime an attorney possesses a document or information which incriminates his client, it is by definition true that the client could have withheld it — if he had possessed it. Factual questions, such as whether or not the client ever did *in fact* possess the document or information and how and from whom the attorney did *in fact* receive the document or information, were not explicitly considered in *Judson*.

31. The *Judson* court stated that the attorney would be presumed to know his client's desires, but it also noted that there was ample evidence that the client did desire the attorney to invoke his privilege. 322 F.2d at 467. Yet surely the court did not mean to require such evidence in every case; for to do so would be to put the client right back in the *Bouschor* predicament.

32. Furthermore, a prior claim of the fifth amendment may be used to impeach a witness whose later answers are inconsistent with that claim. In Grunewald v. United States, 353 U.S. 391, 415-24 (1957), evidence that the witness had claimed the privilege was inadmissible, but it was pointed out that had his later answers been inconsistent with that claim, the evidence would have been admissible.

33. 322 F.2d at 467 (emphasis added).

If the concern in *Judson* is the attorney-client relationship, then the court might have looked to the attorney-client privilege for a nonconstitutional rationale for its result.[34] This privilege is a particularly appropriate source of law in the *Judson* situation because it is the long established common law doctrine designed to deal with precisely the problem of what special considerations the law ought to accord the unique relationship between attorney and client. The fifth amendment, on the other hand, is a broadly drawn constitutional privilege which is not especially geared to the peculiarities of the attorney-client relationship.

The attorney-client privilege was developed at common law[35] for the purpose of encouraging full disclosure by the client to his attorney.[36] The privilege protects the attorney from having to disclose confidential communications made by his client in the course of seeking legal advice.[37] The courts exclude from the privilege the following kinds of communications because they are not required by its purpose: communications not made in the course of a professional attorney-client relationship, communications not made in

34. Or, for a more appropriate constitutional rationale, the *Judson* court might have looked to sixth amendment "right to counsel." An argument for protecting the relationship might begin with Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952), and cases cited therein, holding that the sixth amendment guarantees the right of "private consultation" with an attorney.

35. In many states the privilege has been embodied in statutes; however, these statutes have generally been interpreted as merely giving statutory recognition to the common law privilege. 8 WIGMORE, EVIDENCE § 2292; (McNaughton rev. ed. 1961) [hereinafter cited as WIGMORE]; Note, 56 NW. U.L. REV. 235, 240-41 (1961). There seems to be some question whether the attorney-client privilege applicable in federal courts is one of state law or federal law. *Compare* Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960), *with* Colton v. United States, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963). See generally Annot., 95 A.L.R.2d 320 (1964); Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101 (1956).

36. The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.

Hunt v. Blackburn, 128 U.S. 464, 470 (1888), *decree made absolute*, 131 U.S. 403 (1889). See generally 8 WIGMORE § 2291; MODEL CODE OF EVIDENCE, rule 210, comment a (1942). Although the encouragement of full disclosure is clearly the majority view of the policy of the privilege, it has been questioned whether the privilege really promotes this policy. See, *e.g.*, Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487, 491-92 (1928). Other purposes for the privilege have been suggested. Gardner, *A Re-evaluation of the Attorney-Client Privilege (pts. 1-2)*, 8 VILL. L. REV. 279, 308, 316, 511-19 (1963) (regard for human dignity and inviolate personality); MCCORMICK, LAW OF EVIDENCE 182 (1954) (deference to strong sentiment of loyalty attached to attorney-client relationship); Radin, *supra* at 492-97 (protection of attorney's professional duty of fidelity to client). In the early history of the privilege its purpose seems to have been to protect the attorney's oath and honor. 8 WIGMORE § 2290.

37. See generally 8 WIGMORE §§ 2294-2329. The privilege also protects the client from having to disclose confidential communications from his attorney.

confidence, and communications not from the client, but rather from some third party.[38]

The attorney-client privilege was considered by the *Judson* and *Bouschor* courts, but it was denied in both cases.[39] The reason for the denial of the privilege was that the information communicated was contained in documents. Indeed, in most of the recent cases in which the issue of whether an attorney can invoke his client's fifth amendment privilege has been reached by denying (or not considering) the attorney-client privilege, documentary information has been involved.[40] If the clients in these cases had orally communicated self-incriminating information to the attorney, there would have been no doubt that the attorney could withhold that information. The fact that the information was of an incriminating nature would never have been relevant because the attorney-client privilege affords automatic protection for all information orally communicated in confidence.

The barrier to the application of the attorney-client privilege in cases involving documents has been an exception to the privilege known as the "pre-existing document" rule.[41] This rule excludes from the privilege documents created prior to the attorney-client relationship or documents created during that relationship but not intended to be confidential communications. The basis of this exception is the fear that if documents could be withheld by an attorney just as orally-communicated information can be, then, merely by handing his documents to his attorney, the client could shield any or all documents — even those which were not protected by any privilege while in his own hands.[42] The fear that the attorney could become an unwarranted repository for documents is rooted in the assumption that any document once transmitted under protection of the attorney-client privilege would thereafter be immune from compulsory production.[43] On the other hand, a fact once communicated orally would still be compellable. If a fact is communicated orally by a client to his attorney it continues to be accessible to examination. Although neither attorney nor client may be questioned regarding the privileged communication per se, the client may always be questioned on the facts behind

38. Hickman v. Taylor, 329 U.S. 495, 508 (1947); 8 WIGMORE § 2317(2); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950); MODEL CODE OF EVIDENCE rule 210 (1942).

39. See note 6 *supra*.

40. Cases cited note 13 *supra*, except Sears Roebuck & Co. v. American Plumbing & Supply Co., 19 F.R.D. 334 (E.D. Wis. 1956); and United States v. Goldfarb, 328 F.2d 280 (6th Cir.), *cert. denied*, 377 U.S. 976 (1964).

41. See generally 8 WIGMORE § 2307; 58 AM. JUR. *Witnesses* § 501 (1948).

42. *Ibid.*

43. That this assumption is embodied in the pre-existing document rule is clear enough. The reason behind the assumption, however, is never stated. The reason developed hereafter in the text seems the most plausible. One alternative reason, however, might be a belief that a document could not be compelled from the client after transfer simply because he would no longer have it. But this ignores the fact that the client, as principal, could be forced to order return of the document from his attorney, as agent.

the communication.[44] For example, the client may not be asked the question: "What did you tell your attorney about the amount claimed as a business expense?" But he may be asked the question: "Did you spend the amount claimed as a business expense for meals or for travel?" On the other hand, if a document is transferred from client to attorney, the document itself is the communication. Consequently, were the attorney-client privilege applicable, production of the document could not be compelled although the client might be questioned on the facts within it. Since the data contained in the document would likely be extensive and complicated, examination of the client would be infeasible. For example, questioning the client about the contents of a detailed contract or about financial records covering several years would be theoretically possible, but in practice such questioning would be of little value; the document itself would have to be available for its factual contents to be ascertained.

The refusal in *Judson* and *Bouschor* to honor the claim of attorney-client privilege was the result of a mechanical application of the pre-existing document exception [45] without a considered analysis of the policy of that exception. *Judson,* for example, disposed of the attorney-client privilege by relying on the familiar and facile formulation of the pre-existing document rule that a transfer of documents cannot be a communication.[46] The genesis of this formulation of the exception is traceable probably to a desire to frame the exception in terms of the doctrinal language of the privilege, which grants protection to all confidential communications. But the conclusionary language of the courts notwithstanding, the transfer of a pre-existing document is no less a communication than the verbal rendition of facts which took place five years earlier at a time when their legal consequences were not contemplated. To deny that a pre-existing document can be a communication is arbitrarily to deny protection to a great deal of important information which can be adequately expressed and retained only in documents.

Because of their lack of analysis, both *Judson* and *Bouschor* drew the pre-existing document exception more broadly than its policy warrants. The danger that application of the attorney-client privilege to documents might allow the attorney to be used as a repository does not lead inescapably to the conclusion that all pre-existing documents are outside the scope of the privilege. If a client possesses a document privileged while in his own hands — privileged by virtue of the fifth amendment, by the physician-patient privilege, or by any other privilege operational within the jurisdiction — no additional protection would result from allowing the attorney to withhold this document

44. If the client could be questioned regarding the communication itself, the entire attorney-client privilege would be emasculated; if the client could not be questioned on the facts behind the communication, all parties to both civil and criminal litigation could immunize themselves from ever being compelled to testify about anything simply by reciting all relevant facts to their attorneys.

45. 316 F.2d at 457; 322 F.2d at 463.

46. For other instances of this formulation of the pre-existing document rule, see *In re* Blumenberg, 191 F. Supp. 904, 905 (S.D.N.Y. 1960); Grant v. United States, 227 U.S. 74, 79 (1913); United States v. Willis, 145 F. Supp. 365, 368 (M.D. Ga. 1955).

because the client himself could withhold it. There is no possibility that transfer to the attorney could create a haven for the document, and the evil sought to be prevented by the pre-existing document rule is not present. Just as important, the invocation of a broad exception encompassing documents privileged when in the client's hands contradicts the very purpose of the attorney-client privilege — the encouragement of full disclosure between attorney and client. Application of the exception to documents privileged in the client's possession may again force the client to choose between denying the attorney full access to relevant documents and preserving intact their privileged status; whereas applying the pre-existing document exception to only those documents which are not subject to a prior privilege would not discourage disclosure because the client himself would have to produce them on demand. In sum the rationale of the documentary exception to the attorney-client privilege dictates that the client's prior privileges be preserved, but not augmented, in communication with his attorney.

If the pre-existing document exception is limited to papers not subject to a prior privilege in the hands of the client, the rule will not afford documents greater protection from examination than is now given to oral communications. Although a client may be examined on facts verbally communicated to his attorney, he will always be able to invoke any personal privilege which is applicable to the facts in question. For example, when a client, sued on a promissory note, has told his attorney that he paid the debt with a forged check, not only is the communication itself privileged but he may refuse also to answer questions relating to his purported payment to the extent that he can claim his privilege against self-incrimination. Granting the protection of the attorney-client privilege to those transmitted documents which were the subject of a prior privilege will, therefore, only result in a parity of treatment between written and oral communications. In each case the facts privileged before communication will remain inviolate, while those not subject to a prior privilege will have to be disclosed — either because the document remains within the pre-existing document rule or because the client may be questioned directly on those facts.

Nor does the sparse case law in this area preclude the view that documents subject to a prior privilege should be protected by the attorney-client privilege after their transmission to counsel. The *Bouscher* decision cited a number of cases[47] to support its denial of the attorney-client privilege; but although some contained sweeping dicta to the effect that all pre-existing documents are outside the privilege because they are not communications, in all but one[48]

47. Application of House, 144 F. Supp. 95 (N.D. Cal. 1956); Brown v. St. Paul Ry., 241 Minn. 15, 62 N.W.2d 688 (1954); *In re* Colton, 201 F. Supp. 13 (S.D.N.Y. 1961), *aff'd sub nom.* Colton v. United States, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963) (also cited in *Judson*, 322 F.2d at 463); Falsone v. United States, 205 F.2d 734 (5th Cir.), *cert. denied*, 346 U.S. 864 (1953); Grant v. United States, 227 U.S. 74 (1913).

48. Application of House, *supra* note 47. There is one other recent case, not cited by *Bouschor*, which did apply the pre-existing document rule in the face of a valid prior

of the cited cases no valid prior privilege existed.[49] And the one case that did apply the pre-existing document rule in the face of the valid prior privilege gave no reasons and cited no authority for its decision.[50] Moreover, *Bouscher* ignored the frequent dicta in these and other cases indicating that, if the client had possessed a valid privilege prior to the transmission, then the attorney could have withheld the documents.[51]

In addition to applying the pre-existing document rule, the *Judson* and *Bouscher* courts stated or implied that other defects existed which were fatal to the claim of attorney-client privilege. Two of these defects were failures to meet remaining requirements of the attorney-client privilege — *i.e.*, that the communication be "from the client" and "confidential."[52] These require-

privilege. *In re* Blumenberg, 191 F. Supp. 904 (S.D.N.Y. 1960). But *Blumenberg* merely stated the pre-existing document rule and cited three cases — none of which involved a valid claim of a prior privilege. 191 F. Supp. at 905.

In United States v. Willis, 145 F. Supp. 365 (M.D. Ga. 1955), where the pre-existing document rule was applied, the client's claim of prior privilege was invalid. *Id.* at 368-69. In *In re* Brumbaugh, 62-2 U.S. Tax Cas. ¶ 9521 (S.D. Cal. 1962), the client's claim of prior privilege may have been valid, but the denial of the attorney-client privilege was based, not on the pre-existing document rule, but on a lack of requisite confidentiality. *Id.* at 85, 183. (The attorney was to negotiate the documents in commerce after receiving them. See text at note 58 *infra*.)

49. In particular, there was no valid prior privilege in the oft-cited Supreme Court case of Grant v. United States, 227 U.S. 74 (1913); the client's claim of prior privilege was denied. *Id.* at 80.

50. [T]he documents at any time involved were either disclosed to the accountant ... or produced by [him] . . . *prior* to their delivery to counsel. Under such circumstances, it is obvious that no privilege can subsequently arise.

Application of House, 144 F. Supp. at 97-98.

51. See, *e.g.*, Colton v. United States, 306 F.2d 633, 639 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); Brown v. St. Paul Ry., 241 Minn. 15, 33, 62 N.W.2d 688 (1954).

Most of these cases (cited in notes 47 and 48 *supra*) have paraphrased or cited 8 WIGMORE § 2307 (or its counterpart in earlier editions). Wigmore's position is that *all* pre-existing documents are outside the attorney-client privilege — that to compel production of such a document is not to compel the disclosure of a communication. The argument has been made in the text that this ban on documents should be limited to those documents not subject to a prior privilege in the hands of the client and that the attorney-client privilege should include those documents which were subject to a prior privilege. At first blush, Wigmore (and the cases following him) seem to come to the same result because he does allow the attorney to withhold any documents his client could withhold. However, Wigmore's reason for allowing the attorney to withhold is not that the attorney-client privilege warrants protection, but rather that the client's prior privilege continues to operate through the attorney as his agent.

> The attorney is but the agent of the client to hold the deed. If the client is compellable to give up possession, then the attorney is; if the client is not, then the attorney is not. It is merely a question of possession, and *the attorney is in this respect like any other agent.* . . . [T]he doctrine of agency is ample to justify the result.

8 WIGMORE § 2307, at 591 (emphasis added).

This theory does not square with *Hale*, raises the *Judson* constitutional problem all over again, and should be rejected.

52. See text accompanying note 38 *supra*.

ments were developed at common law for oral communications; no corresponding requirements were developed for documents because they were generally excluded from the privilege by the pre-existing document rule. If pre-existing documents subject to a prior privilege are to be treated on a parity with oral communications, they, of course, must meet the requirements of the attorney-client privilege. Requirements for these documents should, therefore, be developed by employing analogies to oral communications.

The Eighth Circuit found a significant defect in the fact that "the papers were prepared by the accountants and not by the taxpayer."[53] This statement seems to suggest that information communicated by document must originate with the client. But clearly a client may orally communicate to his attorney information gleaned from many sources and the privilege will cover it all; protection is not limited to the client's original bursts of insight. The court may have been making an argument that the communication was not "from the client" because the documents were actually sent to the attorney by the accountant; but such an argument fails to consider that these documents had been first prepared and then sent to the attorney at the client's order.[54] By analogy to oral communications, these documents should nevertheless be privileged because the majority rule for oral communications is that communications from the client's agents are within the privilege.[55]

Moreover, the courts in both *Judson* and *Bouscher* thought the documents in question failed to meet the requirement of confidentiality. In order for an oral communication to be privileged, it must be intended to be confidential.[56] Over the years certain factual patterns surrounding oral communications have come to be regarded as conclusive evidence that the communication was not intended to be confidential. Thus courts have found a communication was not intended to be confidential if there was present at the communication a third person who was not an agent of either attorney or client.[57] And the required confidentiality is lacking if the client communicates to the attorney information which by its very nature, or by instruction of the client, must be passed on to third parties or to public officials.[58] It is important to note, however, that these factual situations, which are regarded as conclusive evidence that confidentiality was not intended, relate to circumstances existent at the time and place of communication and not to the prior history of the communicated matter. The relevant intention is that of the attorney and client at the time of the communication between them. The oral information a client gives his attorney in confidence is privileged even if the client received his

53. 316 F.2d at 456.

54. *Id.* at 453.

55. See generally 8 WIGMORE § 2317(1), especially cases cited at 618-19 n.4; Annot., 139 A.L.R. 1250 (1942), and cases cited therein.

56. See 8 WIGMORE § 2311.

57. See cases cited in 8 WIGMORE § 2311 n.6.

58. United States v. McDonald, 313 F.2d 832, 835 (2d Cir. 1963); Colton v. United States, 306 F.2d 633, 638 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 361 (D. Mass. 1950).

information from some third party who did not intend it to be confidential or if the client had previously told the information to another party. By analogy, if the transmission of a document is made to an attorney with the intention that he not reveal its contents or transmit it to a third party, that communication should be regarded as made in sufficient confidence to satisfy the attorney-client privilege even though the document may not have been intended as confidential when received by the client or may have been viewed previously by third parties. For this reason, *Bouschor's* finding that the documents had been previously viewed by third parties[59] would usually be irrelevant to a claim of attorney-client privilege.[60] *Judson's* statements that the documents were "negotiable instruments in commerce" and "never confidential from the time of their creation"[61] — presumably meant to imply that the writings were viewed by many third parties — seem equally off the mark.

A final defect found in *Bouscher* was that the client did not own the documents in question.[62] Since the pre-existing document rule has excluded most documents from the privilege, the question of the legal rights a client must have in a document has not been faced by the courts. It seems obvious that the client must have had legal possession of the document transferred to the attorney; otherwise the attorney would be forced to argue the anomaly that the attorney-client privilege protects illegally obtained documents. But the *Bouscher* case went further:

> Clearly if the work papers were the property of the accountants in the sense that they were owned by them and not by the taxpayer or Bouscher [the attorney], no claim of [attorney-client] privilege could prevail.[63]

This statement can be read to mean that assertion of the attorney-client privilege is possible only when absolute ownership of the document has been established in either the client or the attorney. The court did not attempt to justify such a requirement and no reason for it seems to exist. Certainly this

59. 316 F.2d at 456.

60. An argument might be made that confidentiality is nevertheless lacking in the particular *Bouschor* facts because the third parties who previously viewed the documents were actually IRS agents — the very persons from whom the attorney later sought to withhold the documents. But there seems to be no reason why a client could not change his mind. It is quite possible that he might once show his documents to IRS agents and later (*e.g.*, after having learned of a tax evasion investigation) decide he did not want the agents to see the documents and, while of that mind, transmit the documents to his attorney. Also, if an argument against confidentiality is based on a theory that the parties from whom the documents are being withheld have already seen them, that same argument would probably entail a conclusion that any fifth amendment privilege with respect to the documents had also been waived by submitting the documents for the first inspection. There are fifth amendment cases pointing in the direction that such inspection (if in the same proceeding) would constitute waiver. Grant v. United States, 291 F.2d 227 (2d Cir. 1961), *vacated on other grounds*, 369 U.S. 401 (1962); Nicola v. United States, 72 F.2d 780 (3d Cir. 1934); Glotzbach v. Klavans, 196 F. Supp. 685 (E.D. Va. 1961); Hanson v. United States, 186 F.2d 61 (8th Cir. 1950).

61. 322 F.2d at 463.

62. 316 F.2d at 456.

63. *Ibid.*

requirement would not promote the basic goal of the privilege; as long as possession is legal, transmission of documents should be encouraged to promote full disclosure between lawyer and client. Moreover, the *Bouscher* language is ambiguous and subject to a less restricting interpretation. The court may only have been referring to the property requirement of the underlying fifth amendment privilege.[64] The court may have meant that since the client lacked ownership of the document, there was no valid prior privilege capable of transmission to the attorney; in this posture the repository danger would exist. Supporting this interpretation is the fact that all but one[65] of the cases cited[66] for the quoted statement dealt solely with claims of fifth amendment privilege. And the one case cited which dealt with the attorney-client privilege — one of the Eighth Circuit's own opinions — cited no authority and gave no explanation for its ruling.[67]

By utilizing the attorney-client privilege to preserve, but not extend, the client's prior privileges, protection can be achieved in fact situations like that in *Judson* without contravening the rule in *Hale v. Henkel.* The attorney invokes not his client's fifth amendment privilege but rather the attorney-client privilege. Nor is there any danger that the protection afforded by the attorney-client privilege will reach beyond the attorney to other agents of the client. Finally, because the attorney-client privilege is a well-developed common law doctrine, the many questions[68] raised by *Judson's* constitutional decision are far more readily answered.[69]

64. Whether ownership or mere legitimate possession is required for the fifth amendment is not entirely clear. The landmark case of United States v. White, 322 U.S. 694 (1944), stated:

> The papers and effects which the privilege protects must be the private property of the person claiming the privilege, *or at least in his possession in a purely personal capacity.*

322 U.S. at 699 (emphasis added). *White* has been interpreted not to require ownership. Application of Daniels, 140 F. Supp. 322, 327 (S.D.N.Y. 1956). But it has elsewhere been held that ownership is necessary for a fifth amendment claim. United States v. Boccuto, 175 F. Supp. 886, 890 (D.N.J.), *appeal dismissed,* 274 F.2d 860 (3d Cir. 1959). Compare MODEL CODE OF EVIDENCE rule 206 (1942) denying the privilege if "some other person or a corporation, or other association has a superior right to the possession of the thing ordered to be produced."

Whatever the property requirement of the fifth amendment — be it ownership or some particular kind of possession — it is applicable to the client's property rights in the documents, not to the attorney's rights therein. For the attorney invokes not the fifth amendment, but the attorney-client privilege.

65. Sale v. United States, 228 F.2d 682, 686 (8th Cir.), *cert. denied,* 350 U.S. 1006 (1956).

66. The others were *In re* Fahey, 300 F.2d 383 (6th Cir. 1961), and United States v. Boccuto, 175 F. Supp. 886 (D.N.J.), *appeal dismissed,* 274 F.2d 860 (3d Cir. 1959).

67. Sale v. United States, 228 F.2d at 686.

68. See text accompanying notes 27-32 *supra.*

69. For example, documents received by the attorney from third parties (other than the client's agents) or documents received from the client outside the attorney-client relationship would not be within the attorney-client privilege whether they incriminated the client or not. Likewise, an attorney could not produce over his client's protest documents within the attorney-client privilege because only the client could waive that privilege.