

4-1-1995

## Drawing Negative Inferences Upon a Claim of the Attorney-Client Privilege

Deborah Stavile Bartel

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

---

### Recommended Citation

Deborah S. Bartel, *Drawing Negative Inferences Upon a Claim of the Attorney-Client Privilege*, 60 Brook. L. Rev. 1355 (1995).  
Available at: <https://brooklynworks.brooklaw.edu/blr/vol60/iss4/2>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

# DRAWING NEGATIVE INFERENCES UPON A CLAIM OF THE ATTORNEY-CLIENT PRIVILEGE<sup>†</sup>

*Deborah Stavile Bartel\**

## INTRODUCTION

The attorney-client privilege lies at the foundation of the American legal system.<sup>1</sup> One of the oldest privileges recognized by the common law,<sup>2</sup> it safeguards the attorney-client relationship by protecting from disclosure certain communications between client and lawyer.<sup>3</sup> Despite the privilege's roots in the English common law and the American adversary system of justice, confusion still surrounds the evidentiary ramifications of its assertion. When the attorney-client privilege is invoked,<sup>4</sup> some courts will permit the fact-finder to draw an adverse inference.<sup>5</sup> While the federal rules of evidence take no

---

† © 1995 Deborah Stavile Bartel. The author dedicates this Article to the late Honorable James Hunter III, Unites States Court of Appeals for the Third Circuit, a great teacher, a wise judge and my good friend.

\* Visiting Associate Professor of Law, Touro Law School. My thanks to Touro Law students RoseMarie Rotondo and Robert Venturo for their research assistance. My gratitude to Professors Gary Shaw and Bruce Green for their comments and to Celio Barenholtz, Esq. for her contribution and counsel.

<sup>1</sup> *A.B. Dick Co. v. Marr*, 95 F. Supp. 83, 101 (S.D.N.Y. 1950), *appeal dismissed*, 197 F.2d 498 (2d Cir.), *cert. denied*, 344 U.S. 878 (1952).

<sup>2</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Union Carbide Corp. v. Dow Chem. Co.*, 619 F. Supp. 1036, 1046 (D. Del. 1985); 8 WIGMORE ON EVIDENCE § 2290, at 542 (Chadbourn rev. 3d ed. 1979).

<sup>3</sup> The attorney-client privilege may be stated as follows:

(1) Where legal advice of any kind is sought, (2) from a professional legal advisor, in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at that instant permanently protected (7) from disclosure by himself or by the legal advisor (8) except when the protection is waived.

8 WIGMORE, *supra* note 2, § 2292, at 554.

<sup>4</sup> Throughout the discussion, this Article assumes that the assertion of the privilege is valid and it has not been waived.

<sup>5</sup> Generally, an adverse inference is a reasonable deduction made by the fact-finder drawn from proven facts. *Braycovich v. Braycovich*, 314 P.2d 767, 771 (Cal. Ct. App. 1957); *see infra* notes 106-33 and accompanying text.

position on this issue,<sup>6</sup> some state codes of evidence prohibit a fact-finder from drawing an adverse inference upon a claim of privilege but fail to distinguish between the different privileges.<sup>7</sup> In addition, some courts require the privilege to be invoked in the fact-finder's presence while others consider this to be prejudicial error.<sup>8</sup>

This lack of uniformity in the treatment of the attorney-client privilege is troubling. The inconsistent treatment arises from the failure to determine whether the goals of the privilege are promoted or impeded by allowing an adverse inference. Further compounding the problem, some courts and legislators confuse claims of attorney-client privilege with the fifth amendment privilege against self-incrimination.<sup>9</sup> As a result, some jurisdictions have imposed evidentiary consequences, appropriate in the fifth amendment context, to claims made under the attorney-client privilege.<sup>10</sup>

Some state evidence codes that forbid an inference were conceived at a time when the fifth amendment privilege was believed to forbid all negative inferences upon its exercise.<sup>11</sup> Subsequent case law developments, however, curtailed the fifth amendment privilege's protection from adverse inference. Today, a claim of fifth amendment privilege permits a negative inference in civil proceedings,<sup>12</sup> and indeed some commentators argue that the inference is necessary.<sup>13</sup> Some even believe that an adverse inference should be permitted in a crimi-

---

<sup>6</sup> See *infra* notes 174-75 and accompanying text.

<sup>7</sup> Proposed Federal Rule of Evidence ("FRE") 513 also known as Supreme Court Standard 513, would disallow any negative inference from the assertion of any privilege. The Advisory Committee borrowed this prohibition from the fifth amendment context, relying on *Griffin v. California*, 380 U.S. 609 (1965). Approximately 30 states have adopted some version of proposed FRE 513. See *infra* notes 174-90 and accompanying text.

<sup>8</sup> See *infra* notes 115-23 & 180-81 and accompanying text.

<sup>9</sup> See FED. R. EVID. Advisory Comm. Note to Proposed Rule 513; see also VT. R. EVID. 512 reporter's notes at 375 ("If a privilege is important enough to protect, the policy of protection should not be undermined by putting a price on the exercise of the privilege."); MCCORMICK ON EVIDENCE § 76, at 155-56 (Edward W. Cleary ed., 2d ed. 1972).

<sup>10</sup> See *infra* notes 179-84 and accompanying text.

<sup>11</sup> *Griffin*, 380 U.S. at 611.

<sup>12</sup> *Baxter v. Palmigiano*, 425 U.S. 308, 335 (1976); *Brink's Inc. v. City of New York*, 717 F.2d 700, 709 (2d Cir. 1983).

<sup>13</sup> Robert Heidt, *The Conjurer's Circle—The Fifth Amendment Privilege in Civil Cases*, 91 YALE L.J. 1062, 1088 (1982).

nal case when the fifth amendment privilege is asserted.<sup>14</sup> To the extent the rule applied to the attorney-client privilege follows the rule applied to the fifth amendment, these developments in fifth amendment law erode the protection of the attorney-client privilege from negative inference. In response to this decline in fifth amendment protection, legislators have amended two state evidence codes to permit an adverse inference from any claim of privilege—including the attorney-client privilege—in civil proceedings.<sup>15</sup>

This trend is problematic. The fifth amendment analogy should not be used; it should not jeopardize the protection from inference afforded the attorney-client privilege. The fifth amendment analogy fails adequately to protect the attorney-client relationship. A negative inference decreases the protection of the attorney-client privilege and undermines its efficacy in encouraging communications. The civil/criminal dichotomy, useful in the fifth amendment context, makes no sense for the attorney-client privilege. An adverse inference thwarts the purposes underlying the attorney-client privilege regardless of whether the case is civil or criminal in nature. The evidentiary fate of the attorney-client privilege must be severed from that of the fifth amendment privilege to guard against improper negative inferences.<sup>16</sup> This separation is proper because their theoretical underpinnings and policies differ. Just as the appropriate scope of a privilege is best determined by reference to its underlying purposes, the appropriate evidentiary consequences of a claim of privilege ought to be decided with reference to its purposes.<sup>17</sup>

This Article explores the appropriateness of permitting a negative inference upon a valid claim of the attorney-client privilege. Part I traces the historical origins and the policy justifications for the attorney-client privilege. After examining

---

<sup>14</sup> OFFICE OF LEGAL POLICY, U.S. DEPT OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON ADVERSE INFERENCES FROM SILENCE: TRUTH IN CRIMINAL JUSTICE REPORT NO. 8 (1989) [hereinafter REPORT TO ATTORNEY GENERAL].

<sup>15</sup> See *infra* notes 189-90 and accompanying text.

<sup>16</sup> See, e.g., *Phillips v. Chase*, 87 N.E. 755, 758 (Mass. 1909) (allowing adverse inference on assertion of attorney-client privilege because it is the rule when the self-incrimination privilege is invoked).

<sup>17</sup> See *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *United States v. El Paso*, 682 F.2d 530, 538 (5th Cir. 1982), *cert. denied*, 466 U.S. 944 (1984).

utilitarian, non-utilitarian and full utilitarian justifications, this section concludes that each continues to present sound theoretical bases for the attorney-client privilege.<sup>18</sup> Next, Part II explores the origins and purposes of the fifth amendment privilege, contrasting its scope with the attorney-client privilege. Part III then examines the conflicting status of current case law as it applies to the permissibility of adverse inferences when the attorney-client privilege is invoked. Part IV considers the differing legislative approaches to the permissibility of a negative inference on a claim of privilege. Part V explores the relationship between inferences and a claim of privilege, including distinguishing the attorney-client privilege from the fifth amendment privilege and discussing the inappropriateness of an analogy between a claim of privilege and the missing witness doctrine. Finally, Part VI discusses how an inference undermines the policies of the attorney-client privilege and proposes a draft rule of evidence to prohibit such inference except when the interests of justice require in a criminal case. Ultimately, this Article demonstrates that because negative inferences are inconsistent with the attorney-client privilege's justifications, they should be prohibited.

## I. JUSTIFICATIONS FOR THE ATTORNEY-CLIENT PRIVILEGE

Privileges—rules of evidence that give parties the right to withhold relevant information during litigation—exist despite the legal system's general goal of truth seeking. By their very nature privileges stop the flow of information, thereby denying the public's right to "every man's evidence."<sup>19</sup> Privileges exist to advance extrinsic societal values irrelevant to the lawsuit. The scope of a privilege appropriately extends therefore only as far as its policy reasons dictate.<sup>20</sup>

Indisputably, the attorney-client privilege works to fore-

---

<sup>18</sup> See *Privileged Communications*, 98 HARV. L. REV. 1450, 1504 (1985).

<sup>19</sup> 8 WIGMORE, *supra* note 2, § 2192, at 70; The Supreme Court has often reiterated this maxim. See, e.g., *United States v. Nixon*, 418 U.S. 683, 709 (1974); *Branzburg v. Hayes* 408 U.S. 665, 688 (1972); *United States v. Bryan*, 339 U.S. 323, 331 (1950); *Blackmer v. United States*, 284 U.S. 421, 438 (1932).

<sup>20</sup> *Trammel v. United States*, 445 U.S. 40 (1980) (holding that the spousal privilege permitting one spouse to stop the other from testifying had no support in contemporary society and, thus, constricted the privilege.)

close the discovery of some information, namely the statements between client and lawyer.<sup>21</sup> But the attorney-client privilege does not bar testimony about the underlying facts in the dispute. The client can still be questioned about the facts giving rise to the matter under legal consultation. Only the substance of what the client and lawyer discussed is shielded. This typically results in a significantly smaller sphere of withheld information than the privilege against self-incrimination where access to the underlying facts in dispute is foreclosed if the person from whom the information is sought would be exposing herself to potential criminal liability by responding to the request for information.<sup>22</sup> Commentators occasionally have advocated abolition of the attorney-client privilege, arguing it has outgrown its usefulness in civil cases.<sup>23</sup> Critics also have asserted that the privilege should be strictly construed because it is a self-generated privilege, created by lawyers, designed to protect communications to lawyers.<sup>24</sup>

Abolition of the privilege is an unlikely prospect. Courts and lawyers agree the attorney-client privilege is useful and necessary for navigating through a complex system of laws and court proceedings. Although the privilege itself may not be abolished outright, decreasing the scope of its protection by allowing an adverse inference creates the risk of shrinking the effective protection of the privilege. Clients need to consult with lawyers to avoid legal problems, not necessarily in reaction to existing legal problems. To encourage greater public conformity to complex regulated areas of the law, it is important to encourage legal consultations, not to burden consultations between client and lawyer with a penalty for a subsequent failure to waive the privilege. Lawyer consultations will be effective only if the client can openly and candidly discuss the matter at hand. Fear of having to waive the privilege or suffer an adverse inference will hinder the openness of the client's communications, rendering the legal advice ineffective

---

<sup>21</sup> See generally 8 WIGMORE, *supra* note 2, §§ 2290-2329.

<sup>22</sup> See *infra* part III for a fuller discussion of the privilege against self-incrimination and how it operates.

<sup>23</sup> See, e.g., Edmund M. Morgan, *Foreword* to MODEL CODE OF EVIDENCE 27 (1942).

<sup>24</sup> Daniel Capra, Address at the New York State Bar Association Seminar on New York and Federal Evidence (Oct. 7, 1993).

or meaningless. The modern social justifications for the attorney-client privilege are ample. They are also distinct from the privilege's historical foundations, to the extent those roots can be traced at all.

### A. *History of the Privilege*

Apart from fragments of decisions dating to the Elizabethan period, the first reported decisions involving the attorney-client privilege in England occurred in 1654. In the next ninety years a total of fourteen reported cases involving the attorney-client privilege were reported.<sup>25</sup> American cases did not appear until the 1820s and then were ambiguous on the scope of the attorney-client privilege.<sup>26</sup> American courts generally were reluctant to recognize the privilege, allowing it to evolve slowly and with a number of exceptions concerning criminal acts or wrongdoing.<sup>27</sup>

Scholars disagree over the initial rationale for protecting attorney-client communications from disclosure.<sup>28</sup> Some posit that the privilege first may have been conceived as a logical outgrowth of the privilege against self-incrimination.<sup>29</sup> American law contains some very limited historical support for this view. For example, at least in criminal cases, some courts have recognized an "incrimination rationale" for the attorney-client privilege<sup>30</sup> and used this rationale as an analytical tool to determine the scope of the privilege. The extent of material protected from disclosure was determined by assessing whether the information sought from the attorney would incriminate the client.<sup>31</sup> The incrimination rationale as a theoretical foun-

---

<sup>25</sup> Geoffrey C. Hazard, Jr., *A Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1070 (1978).

<sup>26</sup> *Id.* at 1087 & n.120, 1089.

<sup>27</sup> *Id.*

<sup>28</sup> See *Privileged Communications*, *supra* note 18, at 1502.

<sup>29</sup> See *Rochester City Bank v. Suydam Sage & Co.*, 5 How. Pr. 254, 258-59 (N.Y. Sup. Ct. 1851); 9 WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 201-03 (1926); 3 WILLIAM BLACKSTONE, *COMMENTARIES* \*370. To the extent the attorney-client privilege is thought to have a constitutional foundation in American law, the privilege is thought to be grounded in the sixth amendment right to counsel, not the fifth amendment right against self-incrimination. See *infra* note 50 and accompanying text.

<sup>30</sup> See, e.g., *Coplon v. United States*, 191 F.2d 749 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952).

<sup>31</sup> See, e.g., *Baird v. Koerner*, 279 F.2d 623, 633 (9th Cir. 1960) (shielding

dation for the attorney-client privilege is no longer recognized in any jurisdiction.<sup>32</sup> To the extent the attorney-client privilege is thought to have a constitutional basis in current American law, it appears to be grounded in the sixth amendment right to counsel—not in the fifth amendment right against self-incrimination.<sup>33</sup>

A second possible origin for the privilege, one favored by Wigmore, is rooted in English notions of honor.<sup>34</sup> The code of honor among “gentlemen lawyers” was thought to forbid an attorney from divulging any matter spoken in confidence.<sup>35</sup> Compelled disclosure was thought to compromise the gentleman lawyer’s honor.<sup>36</sup> Clearly such a rationale is an inadequate justification for employing the privilege in today’s legal climate.<sup>37</sup>

---

client’s identity under the attorney-client privilege where attorney made payments to IRS on anonymous client’s behalf because this information “may well be the link that could form the chain of testimony necessary to convict an individual of a federal crime”); accord *United States v. Jones*, 517 F.2d 666 (5th Cir. 1975).

<sup>32</sup> See, e.g., *Doe v. United States*, 742 F.2d 61, 62-63 (2d Cir. 1984). Compare *In re Witnesses Before the Special March 1980 Grand Jury*, 729 F.2d 489, 492-94 (7th Cir. 1984) with *In re Grand Jury Proceedings*, 680 F.2d 1026 (5th Cir. 1982). See also *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447 (6th Cir. 1983), cert. denied sub nom., *Durant v. United States*, 467 U.S. 1246 (1984); *Phaksuan v. United States*, 722 F.2d 591, 593 (9th Cir. 1983) (information regarding the fee arrangement not privileged “even though it may evidence wrongdoing by the client”); *In re Special Grand Jury No. 81-1*, 676 F.2d 1005 (4th Cir.), vacated sub nom., *In re Harvey*, 697 F.2d 112 (4th Cir. 1982) (en banc); *Baird*, 279 F.2d at 635; JACK B. WEINSTEIN & MARGARET A. BERGER, *CASES AND MATERIALS IN EVIDENCE* 1451 (8th ed. 1988).

<sup>33</sup> See *infra* note 48 and accompanying text.

<sup>34</sup> See 8 WIGMORE, *supra* note 2, § 2286, at 528-31; Hazard, *supra* note 25, at 1070; Morgan, *supra* note 23, at 25; *Privileged Communications*, *supra* note 18, at 1502. In general, Professor Hazard takes issue with Dean Wigmore’s claim that the attorney-client privilege was transplanted to the United States without controversy. See Hazard, *supra* note 25, at 1087 n.120.

<sup>35</sup> 8 WIGMORE, *supra* note 2, § 2286, at 530-31. A similar notion of loyalty to the client appears to have supported the Roman attorney-client privilege. See Max Radin, *The Privilege of Confidential Communications Between Lawyer and Client*, 16 CAL. L. REV. 487, 488 (1928).

<sup>36</sup> Whether these reasons or others originally gave rise to the development of the privilege is far from clear. See Hazard, *supra* note 25, at 1070 (tracing the ambiguity in the privilege’s origins and refuting the attempts of other scholars, including Wigmore, to identify the original reasons for the creation of the privilege).

<sup>37</sup> *Duchess of Kingston’s Case*, 20 How. St. Trials 355 (1776). The “honor of lawyers” rationale may not be totally irrelevant as a justification for the privilege. Modern emphasis on a lawyer’s avoidance of even the appearance of impropriety,



Initially, the privilege operated in a manner that allowed only the attorney the right to assert the privilege and denied the client the privilege.<sup>38</sup> In time, courts recognized the usefulness of designating the client the privilege holder and the decision whether to waive or assert the privilege became the client's alone.<sup>39</sup>

## B. *The Privilege's Purposes*

Whatever the precise origins of the privilege, moral concerns, not practical ones, originally justified the attorney-client privilege. These early justifications were in the nature of rights: the right of the client against indirect self-incrimination and the right of the lawyer not to compromise his integrity or honor. The early rationales of the privilege stemmed from the "belief that disclosure is intrinsically wrong."<sup>40</sup> This type of justification—concerned solely with the rights advanced by the privilege rather than with its social utility—is referred to as "non-utilitarian."<sup>41</sup>

Early pragmatic justifications known as "utilitarian" justifications also supported the privilege and existed simultaneously with the non-utilitarian justifications. Early utilitarian justifications for the privilege included providing "subjectively for the client's freedom of apprehension in consulting his legal adviser,"<sup>42</sup> facilitating the client's ability to conduct litigation of complex issues,<sup>43</sup> allowing an open exchange of communica-

---

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A) (1990), would seem to militate against permitting or requiring a lawyer to give testimony against his client which arises from the confidential communication of the client protected by law. For a lawyer to testify against one who has sought his guidance and experience appears arguably to be improper without some social justification. For example, protecting the public against ongoing or future crime or fraud allows a lawyer to disclose a client's confidence and such disclosure appears to be "proper." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1982).

<sup>38</sup> Morgan, *supra* note 23, at 25.

<sup>39</sup> Morgan, *supra* note 23, at 25; *see also* King v. Barrett, 11 Ohio St. 261, 263 (1860).

<sup>40</sup> *Privileged Communications*, *supra* note 18, at 1502.

<sup>41</sup> *Privileged Communications*, *supra* note 18, at 1502.

<sup>42</sup> 8 WIGMORE, *supra* note 2, § 2290, at 543.

<sup>43</sup> *See* Hutton v. Robinson, 31 Mass. (14 Pick) 416, 422 (1833); Anderson v. Bank of British Columbia, 2 Ch. D. 644, 649 (1876); Annesley v. Earl of Anglesea, 17 How. St. Tr. 1139, 1223 (Ex. 1743); 8 WIGMORE, *supra* note 2, § 2290, at 543 (citing HOLDSWORTH, *supra* note 29, at 202).

tions between client and legal advisor, and, perhaps most importantly, promoting more effective advocacy by lawyers.<sup>44</sup>

Modern justifications for the attorney-client privilege still may be categorized as non-utilitarian (rights-based) or utilitarian (pragmatic). Rights-based rationales continue to flourish as theorists justify the privilege as the "right of every person to freely and fully confer and confide in one having knowledge of the law,"<sup>45</sup> as a protection of the right of privacy<sup>46</sup> and as a promotion of the right of individual independence and autonomy within the confining framework of a given system of laws.<sup>47</sup> Other theorists justify the attorney-client privilege by espousing its constitutional roots in the guarantees of the right to counsel and the right against compelled self-incrimination.<sup>48</sup> Non-utilitarians also maintain that the attorney-client privilege is "grounded in a policy entirely extrinsic to the fact-finding process: its purpose is to foster a confidence between client and attorney that will lead to a trusting and open dia-

---

<sup>44</sup> See *Privileged Communications*, *supra* note 18, at 1503.

<sup>45</sup> *Baird v. Koerner*, 279 F.2d 623, 629 (9th Cir. 1960) (the right to confer with skilled knowledgeable counsel to assure adequate advice and a proper defense); cf. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1981) ("A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client.").

<sup>46</sup> James A. Gardner, *A Re-Evaluation of the Attorney-Client Privilege*, 8 VILL. L. REV. 279, 316-38 (1963); Thomas G. Krattenmaker, *Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach*, 64 GEO. L.J. 613, 652 (1976); Thomas G. Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61, 85-94 (1973) (discussing testimonial privileges and the right of privacy and speech); David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101 (1956); *Privileged Communications*, *supra* note 18, at 1504.

<sup>47</sup> *Clute v. Davenport Co.*, 118 F.R.D. 312, 314 (D. Conn. 1988); see also Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 605-06 (1980) (describing the importance of evidentiary privileges for confidential communications used by both lawyers and psychiatrists).

<sup>48</sup> *Coplon v. United States*, 191 F.2d 749 (D.C. Cir. 1951) (government intrusion into criminal defendant's attorney-client relationship violated sixth amendment right), *cert. denied*, 342 U.S. 926 (1952); Hazard, *supra* note 25, at 1062 (privilege necessary to protect right to counsel and right against self-incrimination); Comment, *Extending The Attorney-Client Privilege: A Constitutional Mandate*, 13 PAC. L.J. 437, 441-42 (1982); Note, *Attorney-Client Privilege for the Government Entity*, 97 YALE L.J. 1725, 1730 (1988). But see *Beckler v. Superior Court*, 568 F.2d 661 (9th Cir. 1978); *Magida v. Continental Can Co.*, 12 F.R.D. 74, 76 (S.D.N.Y. 1951), *aff'd*, 231 F.2d 843 (2d Cir.), *cert. denied*, 351 U.S. 972 (1956); Saltzburg, *supra* note 47, at 603 n.14.

logue between them."<sup>49</sup> To these theorists, the client's need for this confidential dialogue in and of itself is sufficiently important to justify the privilege regardless of whether the dialogue promotes other benefits to society.

Despite ample support for the existence of the privilege based on non-utilitarian justifications, the utilitarian theoretical foundation is the favored justification for sheltering attorney-client confidences.<sup>50</sup> Wigmore formulated the classic utilitarian balancing test to justify preserving the confidentiality of client communications to lawyers: the injury to the attorney-client relationship by the disclosure of the communication must be greater than the benefit that would be gained thereby for the correct disposal of the litigation.<sup>51</sup> Utilitarians maintain the attorney-client privilege exists to protect a relationship that is a mainstay of our system of justice: lawyer and client.<sup>52</sup> The privilege is vital to encouraging full and frank communication between clients and legal advisors<sup>53</sup> and to promoting the efficient administration of justice.<sup>54</sup>

---

<sup>49</sup> *Commonwealth v. Sims*, 521 A.2d 391, 394 (Pa. 1987); see also 8 WIGMORE, *supra* note 2, § 2196, at 111; *id.* § 2291, at 545; *id.* § 2324, at 631.

<sup>50</sup> See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Garner v. Wolfenbarger*, 430 F.2d 1093, 1100-04 (5th Cir. 1970); 8 WIGMORE, *supra* note 2, § 2285, at 527; *Privileged Communications*, *supra* note 18, at 1502-04; Note, *supra* note 48, at 1729-31.

<sup>51</sup> 8 WIGMORE, *supra* note 2, § 2285, at 527.

<sup>52</sup> *Clute v. Davenport Co.*, 118 F.R.D. 312, 314 (D. Conn. 1988); see *Saltzburg*, *supra* note 47, at 605-06 (describing a lawyer's importance in the operation of our legal system).

<sup>53</sup> *Upjohn*, 449 U.S. at 385; *Trammel v. United States*, 445 U.S. 40, 51 (1980); *Fisher v. United States*, 425 U.S. 391, 403 (1976); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888); Note, *supra* note 48, at 1729.

<sup>54</sup> *Rossi v. Blue Cross & Blue Shield*, 73 N.Y.2d 588, 592, 540 N.E.2d 703, 705, 542 N.Y.S.2d 508, 510 (1989) (the attorney-client privilege is designed to foster "uninhibited dialogue between lawyers and clients in their professional engagements, thereby ultimately promoting the administration of justice"). As one commentator has summarized the policies of the attorney-client privilege:

The purposes and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosures to the attorney of the client's objects, motives and acts. This disclosure is made in the strictest confidence, relying upon the attorney's honor and fidelity. To permit the attorney to reveal to others what is so disclosed, would be not only a gross violation of a sacred trust upon his part, but it would utterly destroy the usefulness and benefits to be derived from professional assistance. Based upon considerations of public policy, therefore, the law wisely declares that all confidential communications and disclosures made by a client to his legal advisor for

Utilitarians also justify the attorney-client privilege by arguing that it contributes to the fact-finding process of our adversarial system. The privilege encourages a client to reveal more relevant facts to his lawyer so that the lawyer is better able to develop a fuller factual record on behalf of the client. This factual development improves the accuracy of the fact-finding process. Utilitarians rationalize the confidentiality of attorney-client communications because it is deemed essential to the lawyer's performance of her role as advocate. Unless the client is free to disclose everything, good as well as bad, the lawyer cannot be properly prepared to defend or promote the client's case.<sup>55</sup> If the lawyer is able to prepare properly she will make better decisions about whether to maintain a case, assert a particular defense, or settle the case. The privilege, therefore, helps ease courts' burden in managing cases.<sup>56</sup>

Outside of the litigation context the attorney-client privilege is considered to be critical to the effectiveness of the lawyer's role as advisor. Without the confidentiality insured by the privilege it is feared the client will not disclose troublesome facts. As a result, the lawyer's advice will be either inadequate, useless or misleading.<sup>57</sup> Utilitarians, therefore, justify the attorney-client privilege on the ground that "encouraging clients to make the fullest disclosure to their attorneys enables the latter to act more effectively, justly and expeditiously, and that these benefits outweigh<sup>58</sup> any costs resulting from the loss of relevant facts in court.<sup>59</sup> Modern utilitarian supporters

---

the purpose of obtaining professional aid or advice, shall be strictly privileged; that the attorney shall not be permitted without the consent of his client, and much less will he be compelled to reveal or disclose communications made to him under such circumstances.

2 FLOYD R. MECHEM, MECHEM ON AGENCY § 3397, at 1877 (2d ed. 1914).

<sup>55</sup> Hazard, *supra* note 25, at 1061.

<sup>56</sup> See *Privileged Communications*, *supra* note 18, at 1506-07, 1515 & 1517.

<sup>57</sup> *Privileged Communications*, *supra* note 18, at 1506-17; see also Morgan, *supra* note 23, at 26. On the other hand, Morgan was not concerned in the least that bad advice or inadequately prepared litigation would follow from a client's suppressing unfavorable facts from his lawyer if no privilege protected the communications. Morgan asked: "Whom has he to blame but himself? Why should he be saved from his own deceit?" Morgan, *supra* note 23, at 26.

<sup>58</sup> Doe v. United States, 742 F.2d 61, 62 (2d Cir. 1984) (quoting 2 JACK B. WEINSTEIN & MARGARET A. BERGER, EVIDENCE, ¶ 503[02], at 503-16 (8th ed. 1988)).

<sup>59</sup> See *Fisher v. United States*, 425 U.S. 391, 403 (1976).

of the privilege continue to argue, as did Wigmore, that the privilege should apply only when the benefits of confidentiality outweigh the benefits of disclosure.<sup>60</sup>

In addition to the non-utilitarian and utilitarian justifications for the attorney-client privilege, a third theoretical framework has been suggested to justify the privilege. Described as "full utilitarianism," this theory incorporates the traditional concerns of non-utilitarians into "a broad utilitarian framework."<sup>61</sup> Full utilitarians recognize that the privilege benefits individuals by facilitating rights such as the right to privacy,

---

<sup>60</sup> See Note, *The Attorney-Client Privilege: Fixed Rules, Balancing and Constitutional Entitlement*, 91 HARV. L. REV. 464, 465 (1977); *Privileged Communications*, *supra* note 18, at 1501. Professor Saltzburg criticizes Wigmore's balancing test for erroneously imagining a loss of information. Professor Saltzburg argues that the privilege itself creates the disclosure of information. Therefore, he argues, if the protection is eliminated the disclosure will cease to exist. The privilege, Professor Saltzburg asserts, does not deprive fact-finders of any information that would exist in the absence of the attorney-client privilege. Stephen A. Saltzburg, *Communications Falling Within the Attorney-Client Privilege*, 66 IOWA L. REV. 811, 817-18 (1981); Saltzburg, *supra* note 47, at 609-11; accord Commission on Professional Responsibility, Roscoe Pound American Trial Lawyer's Foundation, Rule I cmt. (Discussion Draft 1980).

Because Wigmore's balancing test assumes a loss of information, it can be criticized on an additional ground. Since the client can always be questioned on the underlying facts of the dispute, in effect, no information relevant to the disputed facts is kept from the fact-finder. This is especially so where the client is consistent, i.e., where the client told the truth to his lawyer and testifies truthfully about the underlying facts at trial or told lies to his lawyer and holds to that same story at trial. In each case, the information to be gleaned from disclosure of the communication between attorney and client is merely cumulative and corroborative of information already available to the fact-finder.

The only time "information" is lost is where the client tells one version of events to his lawyer and another to the fact-finder. See, e.g., *Nix v. Whiteside*, 475 U.S. 157 (1986) (client changed story to strengthen defense of self-defense). In *Whiteside*, the lawyer's threat to reveal the client's perjury if the client offered perjured testimony was held to not violate the right to counsel guaranteed by the Sixth Amendment nor to compromise the attorney-client privilege. *Id.* at 174. This turn of events is the rare exception, not the rule. In practice, clients infrequently tell their lawyer one thing and then testify to another. Clients are usually more consistent, perhaps only telling so much of the truth as the client wishes, but usually not changing details because to do so is evidence of the client's original mistrust of the lawyer. The attorney-client privilege, therefore, does not, result in a loss of information to the fact-finder or, to the extent it does, it is an infrequent occurrence. *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) ("Application of the attorney-client privilege . . . puts the adversary in no worse position than if the communication had never taken place").

<sup>61</sup> *Privileged Communications*, *supra* note 18, at 1505 & nn.27-29; see also *id.* at 1504-09.

the right to professional legal advice to address the law's complexity, and the right to be secure in the "expectations essential to making and carrying out life's plans."<sup>62</sup> Full utilitarianism also takes into account the social good achieved by privileged counseling, which promotes client conformity to the law and in turn produces the further benefits of reduced litigation and fewer social wrongs.<sup>63</sup> This full utilitarianism approach therefore advocates a broad privilege that would exempt from protection only those communications that further on-going or future crime or fraud.<sup>64</sup>

Present justifications for the privilege are numerous. It would be exceedingly difficult for businesses and persons alike to conform to the vast body of law and regulations that govern their conduct without the legal guidance emphasized by full-utilitarians. Furthermore, the privilege benefits not only individual clients but also significantly contributes to the efficiency of our litigation system. Our court system could not function without lawyers who, aided by the privilege, weed out inadequate claims, eliminate flimsy defenses and satisfactorily settle the great majority of civil disputes. Similarly, in the criminal setting, the majority of persons accused of criminal wrongdoing could not present a winning trial defense or strike a fair plea bargain without lawyers with whom they felt secure in fully disclosing information. The privilege is clearly desirable and justified by the important rights it facilitates for clients and the benefits it provides to society.

## II. ORIGINS OF THE PRIVILEGE AGAINST SELF-INCRIMINATION

The origins and purposes of the privilege against self-incrimination differ from those of the attorney-client privilege. The contrast between the two privileges suggests that they need not be treated identically as some legislators and courts

---

<sup>62</sup> *Privileged Communications*, *supra* note 18, at 1517 ("a layman worried about incrimination might be reluctant not only to relate all relevant information to an attorney, but also to seek the aid of an attorney in the first place. . . . [A] full utilitarian perspective . . . leads to a privilege that is well-tailored to the purpose of inducing laymen to seek legal assistance"); *see also id.* at 1506-07 & 1515; *Doe v. United States*, 742 F.2d 61, 63 (2d Cir. 1984).

<sup>63</sup> *See Privileged Communications*, *supra* note 18, at 1517.

<sup>64</sup> *Privileged Communications*, *supra* note 18, at 1509, 1513-14 & n.72.

have required.

Although the English common law privilege and the American constitutional privilege against compelled self-incrimination have existed for quite some time, neither may have originated as early as commonly is thought.<sup>65</sup> Dean Wigmore dates the English recognition of the privilege to the second half of the seventeenth century.<sup>66</sup> Professor Langbein, however, marks it considerably later, contending that until the late eighteenth century, persons suspected of crime in England were the principal evidentiary resource of pretrial criminal investigation. Langbein further contends that the structure of the English common law criminal trial was inconsistent with the notion that an accused person had the right to remain silent.<sup>67</sup> Langbein describes the criminal trial model before the late eighteenth century as one in which a defendant not only was denied counsel in almost all felony cases but also lacked the presumption of innocence and faced a prosecutor who bore either a poorly defined burden of proof or no burden at all. During this era, the criminal defendant's only practical defense was to answer the evidence and charges in his own words.<sup>68</sup> To remain silent where a defendant had no counsel to speak for him, where the defendant lacked the presumption of innocence, and where the prosecution did not bear a burden of proof beyond a reasonable doubt was a sure road to conviction. The forces of the English trial process were inconsistent with a right to remain silent until the modern adversarial process developed.

The reasons for the development of the privilege against self-incrimination also may differ from what the accepted wis-

---

<sup>65</sup> See John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047 (1994); Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1087-90 (1994).

<sup>66</sup> Wigmore contends the privilege was broadly accepted by the 1660s. 8 WIGMORE, *supra* note 2, § 2250, at 289-90 n.105; see also John H. Wigmore, *The Privilege Against Self-incrimination: Its History*, 15 HARV. L. REV. 610 (1902); John H. Wigmore, *Nemo Tenetur Seipsum Podere*, 5 HARV. L. REV. 71 (1891).

<sup>67</sup> Langbein, *supra* note 65, at 1056-57.

<sup>68</sup> Langbein, *supra* note 65, at 1057. With the development of representation by counsel in felony cases by the late eighteenth century, the criminal defense bar developed and changed a criminal trial from one in which the accused spoke to one that tested the prosecution's evidence without the defendant answering the charges. *Id.* at 1066-71.

dom has taught. Older scholars, such as Dean Wigmore, assert that the privilege arose in reaction to centuries of torture, tyranny and persecution at the hands of the ecclesiastical courts and the prerogative courts of the Star Chamber and the High Commission.<sup>69</sup> These courts administered *ex officio* oaths requiring persons under investigation to answer truthfully questions put to them by the court during the pretrial investigation.<sup>70</sup> The consequences of refusing to swear the oath or answer questions were dire: imprisonment or torture.<sup>71</sup> The received wisdom has been that these practices spawned the privilege against self-incrimination, allowing the defendant the right to stand silent when facing her accusers whether before or during the trial.

Recently, however, some legal historians have begun to posit that although Americans and Englishmen understood the common law to prohibit the use of torture to extract information from criminal suspects and, on occasion, to prohibit the compulsion of an oath, early American courts routinely questioned suspects and criminal defendants and used those statements against them. This practice continued well after the enactment of the Fifth Amendment.<sup>72</sup> The Fifth Amendment, Professor Moglen contends, was not intended to discontinue the English common law practice of routinely questioning criminal suspects and defendants and employing those statements

---

<sup>69</sup> WIGMORE, *supra* note 2, § 2250, at 278-82; see also 2 SIR FREDERICK POLLOCK & FREDERIC W. MATTLAND, *THE HISTORY OF ENGLISH LAW* 541-44 (2d ed. 1968) (1895); Leslie H. Dills, *The Permissibility of Comment on the Defendant's Failure to Testify in His Own Behalf in Criminal Proceedings*, 3 WASH. L. REV. 161, 162 (1928).

<sup>70</sup> Langbein, *supra* note 65, at 1073.

<sup>71</sup> Langbein, *supra* note 65, at 1073; Dills, *supra* note 69.

When a person was brought before the Court of High Commission or Star Chamber, he was commanded to answer whatever was asked of him, and subjected to far-reaching and deeply probing inquiry in an effort to ferret out some unknown and frequently unsuspected crime. He declined to answer on pain of incarceration, banishment or mutilation. And if he spoke falsely, he was subject to further punishment. Faced with this formidable array of alternatives, his decision to speak was unquestionably coerced. These were the lurid realities which lay behind enactment of the Fifth Amendment.

Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964); see also Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 686-87 (1968); Heidt, *supra* note 13, at 1083.

<sup>72</sup> Moglen, *supra* note 65, at 1129.



against them. Professor Moglen asserts that the presence of American defense counsel in the nineteenth century, with their legal strategy and reinterpretation of the language of the Fifth Amendment, lead to the development of the criminally accused's right to remain silent. According to Professor Moglen, the criminal defense bar was responsible for shaping the concept of the privilege against self-incrimination to include the accused's right to stand silent in the face of evidence. The right to remain silent was a tactical procedure promulgated by the defense bar, not an inherited, immutable common-law right of Englishmen passed along to Americans in the form of the Fifth Amendment.<sup>73</sup>

Professor Langbein similarly argues that the privilege against self-incrimination in England arose not in reaction to the earlier excesses of coercion in the forms of oaths and torture, but because of the trial strategy of defense counsel in the late eighteenth century.<sup>74</sup> Before the defense bar developed, Professor Langbein contends, there was no thought that the suspect or defendant had a right to remain silent. "Indeed, 'the assumption was clear that if the case against him was false, the prisoner ought to say so and suggest why, and that if he did not speak that could only be because he was unable to deny the truth of the evidence.'"<sup>75</sup> The privilege against self-incrimination, embodied in the phrase "Nemo tenetur seipsum podere," originally did not include a right to remain free from the negative inference that the suspect was silent because he had nothing to say to dispute the evidence.<sup>76</sup>

Today the Supreme Court has enumerated numerous policies that support the fifth amendment privilege, including:

our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play, which dictates "a fair state-individual balance by requiring the government to

---

<sup>73</sup> Moglen, *supra* note 65, at 1130.

<sup>74</sup> Langbein, *supra* note 65, at 1047.

<sup>75</sup> Langbein, *supra* note 65, at 1066 (quoting J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND: 1660-1800, at 348-49 (1986)).

<sup>76</sup> *Waterfront Comm'n*, 378 U.S. at 55; see also Friendly, *supra* note 71, at 686-87 (1968); Heidt, *supra* note 13, at 1083.

leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire [burden of proof]"; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life;" our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection for the innocent."<sup>77</sup>

The privilege against self-incrimination ultimately seeks to "protect the individual from oppression at the hands of a state exercising its awesome powers of investigation to ferret out wrongdoing."<sup>78</sup> The modern privilege encompasses not just the right to refuse to answer, but the right to refuse even to be questioned. A custodial suspect in the United States has the power to determine whether an interrogation session will proceed or end.<sup>79</sup>

In contrast to the origins of the attorney-client privilege, the privilege against self-incrimination did not arise to encourage a socially esteemed relationship between two people.<sup>80</sup> In fact, the privilege has nothing to do with protecting any interpersonal relationship. Rather, it grows out of concern for the moral and physical integrity of persons accused of criminal misconduct, relieving them of the necessity of proving their innocence.

As a result of the different purposes of the attorney-client and self-incrimination privileges, they are quite different in scope. For example, the attorney-client privilege may be waived only by the client as privilege holder.<sup>81</sup> In contrast,

---

<sup>77</sup> *Waterfront Comm'n*, 378 U.S. at 55 (citations omitted).

<sup>78</sup> *Marine Midland Bank v. John E. Russo Produce Co.*, 50 N.Y.2d 31, 42, 405 N.E.2d 205, 211, 427 N.Y.S.2d 961, 967 (1980).

<sup>79</sup> *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966); *Michigan v. Mosley* 423 U.S. 96, 100 (1975).

<sup>80</sup> In addition to the attorney-client privilege, certain privileges arose to protect relationships society seeks to protect and encourage, such as the spousal privilege, e.g., FED. R. EVID. 505(a), the physician-patient privilege, e.g., CAL. EVID. CODE 990-903 (1966), and the priest-penitent privilege, e.g., FED. R. EVID. 504(a)(1). Other privileges, however, grow out of the recognition of other socially important values, for example, the state's secret privilege, e.g., FED. R. EVID. 509, the government's informant privilege, e.g., FED. R. EVID. 510, or the trade-secrets privilege, e.g., FED. R. EVID. 508.

<sup>81</sup> Those matters that a lawyer may disclose, a client's future or ongoing crime or fraud, are outside the definition of communications protected by the attorney-client privilege. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR. 4-101(c); see

there are many ways to surmount a claim of fifth amendment privilege.<sup>82</sup> For example, the fifth amendment privilege can be challenged on the ground that the response sought will not incriminate<sup>83</sup> or by asserting that a criminal prosecution is barred by the statute of limitations,<sup>84</sup> by double jeopardy,<sup>85</sup> or past grants of immunity.<sup>86</sup> The narrowed application of fifth amendment protection developed strictly as a result of judicial identification and interpretation of the policies of the privilege. No similar narrowing attacks have or ought to succeed with respect to the attorney-client privilege.

An additional distinction between the attorney-client and self-incrimination privileges is that the former exists where the information would not incriminate. Unlike the privilege against self-incrimination, the attorney-client privilege applies whether the information communicated to the lawyer would exonerate the claimant from liability or is irrelevant; where criminal and civil prosecution are time barred; where any other theory, such as collateral estoppel, *res judicata*, ratification, settlement and accord, or release protect the privilege holder from liability. Furthermore, whereas death terminates the privilege against self-incrimination, the attorney-client privilege survives death.<sup>87</sup>

The attorney-client privilege is believed by some to advance the development of facts in a way that the privilege against self-incrimination cannot. Because the attorney-client privilege encourages frank disclosure to one's lawyer, ultimately it may serve the truth-seeking process of litigation. This cannot be said of the fifth amendment right to remain silent, which operates in disregard of the search for the truth. The privilege against self-incrimination is justified as striking a fair balance between state and individual, requiring the state to shoulder the entire burden of proof before anyone suffers a

---

also *Nix v. Whiteside*, 475 U.S. 157, 168 (1986). Thus, disclosure of those matters are not attacks on the attorney-client privilege. See generally, Note, *The Client-Fraud Dilemma: Need for Consensus*, 46 MD. L. REV. 436 (1987); *Privileged Communications*, *supra* note 18, at 1509.

<sup>82</sup> Heidt, *supra* note 13, at 1071-75.

<sup>83</sup> Heidt, *supra* note 13, at 1071-80.

<sup>84</sup> Heidt, *supra* note 13, at 1078-80.

<sup>85</sup> Heidt, *supra* note 13, at 1075-78.

<sup>86</sup> Heidt, *supra* note 13, at 1080.

<sup>87</sup> See, e.g., *Philips v. Chase*, 87 N.E. 755 (Mass. 1909).

criminal conviction.

Another distinction is that since the client can be questioned about communications shielded by the attorney-client privilege, it does not bury the underlying facts. The bar only forecloses making the client or lawyer state what was disclosed to the lawyer. This is not true of the fifth amendment privilege, which shields compelled disclosure of the underlying facts from the mouth of the accused, even where the fact-finder has no other access to those facts. Finally, only natural persons have a privilege against self-incrimination,<sup>88</sup> while collective entities and corporations can assert an attorney-client privilege.<sup>89</sup>

These distinctions in how the two privileges operate are a result of judicial recognition that the policies of the two privileges are different and, therefore, different scopes of protection are required to effectuate them. The fact that the self-incrimination privilege has been elevated to constitutional dimension while the attorney-client privilege is of common-law origin is irrelevant to a determination of the ambit of their protection. The privileges' policies, not their source of creation, ought to determine the ambit of their protections.<sup>90</sup>

To determine whether the consequences of the fifth amendment privilege are inconsistent with its purposes, the Supreme Court has examined the impact on the policies of the privilege. In *McGautha v. California*, for instance, the Court addressed the constitutionality of a unitary trial procedure in which the defendant's guilt and sentence were determined in a single proceeding.<sup>91</sup> A defendant asserting his right to remain silent at such a trial necessarily gave up any chance to testify for a lenient sentence. Assessing the constitutional permissibility of attaching such a consequence to an assertion of the privilege, Justice Harlan asked "whether compelling the election

---

<sup>88</sup> *Braswell v. United States*, 487 U.S. 99, 120 (1988).

<sup>89</sup> *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

<sup>90</sup> See *McGautha v. California*, 402 U.S. 183, 213 (1971). To answer the question whether to permit an adverse inference from the claim of privilege, one must not saddle the attorney-client privilege with the rules applicable to the Fifth Amendment. When one examines the underlying policies of the attorney-client privilege, it becomes clear that no adverse inference should be permitted when a party claims the attorney-client privilege. See *Waterfront Comm'n*, 378 U.S. at 55.

<sup>91</sup> 402 U.S. 183, 213 (1971).

impairs to an appreciable extent any of the policies behind the rights involved."<sup>92</sup> The Court upheld the procedure because Justice Harlan found that permitting the adverse consequences that followed was not "compulsion of the sort forbidden by the privilege [against self-incrimination]."<sup>93</sup> Therefore, the policies behind the privilege were found not to have been significantly impaired.

The Court also has upheld jury instructions permitting an inference of guilty knowledge from a defendant's failure to explain his possession of stolen property.<sup>94</sup> This inference was considered consistent with the defendant's right to remain silent because if there is any pressure to testify, it comes from the force of the evidence and not from unconstitutional compulsion.<sup>95</sup> Thus, the privilege's policies were not significantly impeded. Similarly, the rationale behind permitting adverse inferences upon assertions of the right to remain silent in civil cases is based on the notion that attaching such consequences is not a "compulsion" forbidden by the Fifth Amendment.<sup>96</sup> Attaching penalties that do not amount to compulsion do not

---

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*; see *Williams v. Florida*, 399 U.S. 78, 83-85 (1970).

<sup>94</sup> See, e.g., *Barnes v. United States*, 412 U.S. 837, 846-47 (1973); *Turner v. United States* 396 U.S. 398, 417-18 n.35 (1970).

<sup>95</sup> See Donald B. Ayer, *The Fifth Amendment and the Inference of Guilt from Silence*, *Griffin v. California After Fifteen Years*, 78 MICH. L. REV. 841 (1980).

<sup>96</sup> See *Baxter v. Palmigiano*, 425 U.S. 308 (1976). The Court upheld the permissibility of a negative inference in a prison disciplinary proceeding upon claim of the privilege of self-incrimination where the defendant's silence was only one matter in a fact-filled record establishing defendant's misconduct. The Court explained:

[A] prison inmate in Rhode Island electing to remain silent during his disciplinary hearing . . . is not in consequence of his silence automatically found guilty of the infraction with which he has been charged. Under Rhode Island law, disciplinary decisions "must be based on substantial evidence manifested in the records of the disciplinary proceeding." It is thus undisputed that an inmate's silence in and of itself is insufficient to support an adverse decision by the Disciplinary Board. In this respect, this case is very different from the circumstances . . . where refusal to submit to interrogation and to waive the Fifth Amendment privilege, standing alone and without regard to the other evidence, resulted in loss of employment or opportunity to contract with the State. There, failure to respond to interrogation was treated as a final admission of guilt. Here *Palmigiano* remained silent at the hearing in the face of evidence that incriminated him; and, as far as this record reveals, his silence was given no more evidentiary value than was warranted by the facts surrounding his case.

*Id.* at 317-18.

abrogate the policies of the fifth amendment privilege.

The Supreme Court has long upheld the constitutional permissibility of an inference in a civil proceeding where the accused asserts his fifth amendment privilege. In *Baxter v. Palmigiano*, the Court upheld an instruction to a prisoner charged in a prison disciplinary proceeding that "he had a right to remain silent during the hearing but that if he remained silent his silence would be held against him."<sup>97</sup> The Supreme Court found no violation of the right to remain silent, in part, because the prisoner's silence was not conclusive on the issue of his liability for breach of prison rules. Rather "his silence was given no more evidentiary value than was warranted by the facts surrounding his case."<sup>98</sup> The inference was deemed "a realistic reflection of the evidentiary significance of the choice to remain silent."<sup>99</sup> In other words, the inference that the prisoner did not speak because he had nothing to offer in his defense was a logical evidentiary conclusion—not a "compulsion" to speak and incriminate himself.<sup>100</sup>

The decision in *Pamigliano* departed from the broader language used by the Court in *Griffin v. California*.<sup>101</sup> The Supreme Court had ruled in *Griffin* that to permit a negative inference from a claim of the privilege against self-incrimination asserted in a criminal case would violate constitutional guarantees. The negative inference was deemed a penalty that constituted compulsion forbidden by the Fifth Amendment.

Before *Griffin's* ban on negative inferences in criminal cases, when a defendant asserted her or his right to remain silent, traditional evidentiary doctrines frequently had been applied to a defendant's silence to permit a negative inference. One such principle applied was that of adoptive admissions.<sup>102</sup> This principle allowed a defendant's silence to be ad-

---

<sup>97</sup> *Id.* at 312.

<sup>98</sup> *Id.* at 318.

<sup>99</sup> *Id.*

<sup>100</sup> *Accord* *Brink's Inc. v. City of New York*, 717 F.2d 700 (2d Cir. 1983); see also *Heidt*, *supra* note 13, at 1062.

<sup>101</sup> 380 U.S. 609 (1965).

<sup>102</sup> See 4 WIGMORE, *supra* note 2, § 1072, at 118 n.11; *Confessions*, 79 HARV. L. REV. 935, 1038 (1966); *Silence as Evidence of Guilt*, 23 GEO. L.J. 331 (1935); Donald P. Barrett, *Admissibility of Accusatory Statements as Adoptive Admissions when Defendant is Under Arrest*, 35 CAL. L. REV. 128 (1947); Colvin A. Peterson, Jr., *Silence to Accusation While Under Arrest as Admission of Guilt*, 47 MICH. L.

mitted if a response in the face of a damaging accusation or statement made in the defendant's presence naturally would be expected.<sup>103</sup> That is, one ordinarily responds to accusations that are untrue and, therefore, silence where one naturally would speak amounts to acquiescence. Although such an inference at times may be a logical evidentiary conclusion, it appears inconsistent with a criminal defendant's right to have the prosecution shoulder the entire burden of proof. It may also impinge on the defendant's right to freedom from compulsion to speak. To effectuate these constitutional imperatives, a negative inference based upon the defendant's invocation of the privilege against self-incrimination may be intolerable in a criminal case.<sup>104</sup>

### III. THE DESIRABILITY OF PENALIZING INVOCATIONS OF THE ATTORNEY-CLIENT PRIVILEGE BY ALLOWING A NEGATIVE INFERENCE

Courts differ in their opinions on the evidentiary significance of an assertion of the attorney-client privilege.<sup>105</sup> Some allow negative inferences, others do not. Most of the case law analyzing the policy of the privilege, however, end up forbidding the inference.

#### A. Cases Allowing Negative Inference

There is considerable case law allowing a negative inference upon the claim of attorney-client privilege. Some cases allowing a negative inference from failure to waive the attorney-client privilege consider the attorney similar to a withheld witness and therefore apply the "missing-witness" rule of evi-

---

REV. 715 (1949); Melvin Schleuter, *Silence as an Admission in a Criminal Trial in Illinois*, 1951 U. ILL. L.F. 315.

<sup>103</sup> The Court has held that a defendant's silence following *Miranda* warnings cannot give rise to an adoptive admission because implicit in the warnings is a promise that silence will not be used against the defendant. *See, e.g., Dolye v. Ohio*, 426 U.S. 610 (1976); *United States v. Hale*, 422 U.S. 171 (1975).

<sup>104</sup> *But see* Office of Legal Policy, Dep't of Justice, *Adverse Inferences From Silence*, 22 U. MICH. J. L. REF. 1005 (1989).

<sup>105</sup> 8 WIGMORE, *supra* note 2, § 2322, at 630. Dean Wigmore believes the prevailing view, if not the better view, is to disallow a negative inference when the privilege is invoked. *Id.*

dence. The missing-witness rule provides that if a party knows of the existence of an available witness on a material issue and that witness is within the party's control, yet without satisfactory explanation the party fails to call this witness, an inference may arise that the testimony would not have been favorable.<sup>106</sup>

The second rationale relied upon by courts allowing a negative inference where the attorney-client privilege is claimed is an analogy to the privilege against self-incrimination. The privilege against self-incrimination shields from compelled disclosure information that might subject the privilege holder to criminal liability. As discussed above, a negative inference upon an assertion of that privilege has been held constitutionally intolerable in criminal cases but permissible in civil matters.<sup>107</sup> Where the attorney-client privilege has been claimed, some courts have allowed a negative inference in civil cases but not in criminal cases, thereby emphasizing the dichotomy between civil and criminal contexts.<sup>108</sup>

The adverse inference has been examined extensively in

---

<sup>106</sup> 29 AM. JUR. 2D *Evidence* § 180 (1967); see also 2 WIGMORE, *supra* note 2, § 286, at 199; accord *Graves v. United States*, 150 U.S. 118, 121 (1893) ("if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates a presumption that the testimony, if produced, would be unfavorable"); *People v. Smith*, 60 A.D.2d 963, 401 N.Y.S.2d 606 (4th Dep't 1978). Some courts not only appear willing to receive relevant testimony from a party's lawyer, but are inclined to allow an adverse inference if the attorney's testimony is absent, so long as the criteria of the missing-witness rule are satisfied. See, e.g., *McCooe v. Dighton*, 53 N.E. 133, 134 (Mass. 1899) (Holmes, J.). In some of these cases, the client has waived the privilege, although perhaps not intentionally, by his testimony or by asserting a claim or defense that relies on the attorney's advice as one of its elements. See Alan Stephens, Annotation, *Adverse Presumption or Inference Based on Party's Failure to Produce or Examine that Party's Attorney*, 78 A.L.R.4th 571 (1990). Cases where the privilege has been waived are irrelevant to the discussion herein. This Article addresses the propriety of an adverse inference in those instances where the confidential attorney-client communications are not relied on by the privilege holder as an element of her claim or defense and where the privilege has not otherwise been waived. See Donald E. Evins, Annotation, *Propriety and Prejudicial Refusal to Permit Introduction of Privileged Testimony*, 32 A.L.R.3d 906, 913 n.17 (1970). Some courts exclude privileged communications from the missing-witness doctrine altogether. See, e.g., *State v. Smith*, 238 N.W.2d 662 (N.D. 1976).

<sup>107</sup> See *supra* notes 97-100.

<sup>108</sup> See, e.g., *Electro Med. Sys. v. Cooper Life Sciences, Inc.*, 34 F.3d 1048, 1057 (fed. Cir. 1994) (allowing negative inference in civil case); *United States v. Waldman*, 941 F.2d 1544, 1550 (11th Cir. 1991) (disallowing negative inference in criminal case).



the area of patent infringement. Some courts have held that an alleged infringer's failure to waive the attorney-client privilege and disclose the attorney's advice bears on the state of mind of the alleged infringer, thereby permitting an inference that the lawyer's advice was unfavorable.<sup>109</sup> This rationale seems modeled on the missing-witness doctrine. In such cases the negative inference allowed is so strong that it has been held dispositive on the issue of the alleged infringer's willfulness of infringement,<sup>110</sup> an element of a patent infringement damages claim.

Outside of the subject area of patent infringement, other cases also have permitted negative inferences upon a claim of attorney-client privilege, again apparently relying on the missing-witness doctrine. For example, in *Chromalloy Mining & Minerals v. NLRB*, the NLRB found an employer liable for unfair labor practices in discharging employees.<sup>111</sup> The NLRB's finding was grounded in part on an adverse inference drawn by the administrative law judge from the employer's refusal to produce certain documents and files it had compiled on the discharged employees.<sup>112</sup> The employer withheld production of the requested files on the grounds of attorney-client privilege. Without disputing the validity of the privilege claim, the administrative law judge drew a negative inference that the files contained unfavorable information to the employer.

---

<sup>109</sup> *Kloster Speedsteel AB v. Crucible, Inc.*, 793 F.2d 1565, 1580 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987). For a discussion of the appropriateness of permitting adverse inferences on the issue of willfulness of infringement from the failure to waive the attorney-client privilege, see Timothy N. Trop, *Negative Inferences from the Absence of Attorney Testimony in Patent Cases*, 15 AIPLA Q.J. 50 (1987).

<sup>110</sup> See, e.g., *ALM Surgical Equip., Inc. v. Kirschner Med. Corp.*, 15 U.S.P.Q.2d 1241, 1251 n.6. *ALM Surgical* held that Kirschner's failure to produce any of its lawyers' opinions, none of which had been relied on by Kirschner and all of which remained privileged on the issues of infringement, validity and enforceability of the patent, permitted the jury to draw the inference that the lawyers' advice was unfavorable to Kirschner. "The conclusion is inescapable that had Kirschner considered these opinions evidence of their good faith they would have produced them at trial." This conclusion reduces the attorney's status to that of an ordinary missing-witness. See Trop, *supra* note 109, at 111.

<sup>111</sup> 620 F.2d 1120, 1127 (5th Cir. 1980) (in affirming the NLRB finding of unfair labor practices, the Fifth Circuit did not reach the issue of the permissibility of allowing a negative inference for failure to produce documents shielded by the attorney-client privilege from disclosure).

<sup>112</sup> *Id.*

A number of state court cases similarly have allowed adverse inferences. Arizona implicitly relies on the rationale of the missing-witness doctrine allowing an assertion of the attorney-client privilege to be considered by the fact-finder in its determination of disputed facts. In one such case, *United California Bank v. Prudential Insurance Co. of America*, a hotel developer and construction lender sued Prudential, the intended permanent lender, in Arizona state court for breach of contract.<sup>113</sup> In its defense, Prudential called its lawyers to testify about non-privileged conversations with plaintiffs during the negotiations. On cross-examination, the plaintiff inquired into privileged communications between the defendant's lawyers and Prudential during the negotiations. The trial court allowed the plaintiff to inquire as to the privileged conversations, thus requiring Prudential's attorneys to invoke the attorney-client privilege repeatedly before the jury. Although the court upheld every one of defendant Prudential's invocations of the attorney-client privilege, it gave the following explanation for requiring the defendant to invoke the privilege repeatedly before the jury: "[I]f [the plaintiff] can't get the evidence in, . . . the jury has a right to know why they can't get the evidence in."<sup>114</sup>

The Arizona court's procedure was designed to inform the jury that the defendant was to blame for withholding evidence. The trial court's ruling required the lawyer testifying for the defense to assert the attorney-client privilege over 100 times in front of the jury. This could have no effect other than to prejudice the privilege holder for invoking its privilege since it inevitably would cause the jury to wonder whether the defense was withholding damaging evidence. Even without jury instruction on the matter, the court virtually assured that the jury would consider the assertion of the privilege in evaluating the strength of the evidence and credibility of the witnesses.<sup>115</sup>

---

<sup>113</sup> 681 P.2d 390 (Ariz. Ct. App. 1983).

<sup>114</sup> *Id.* at 445.

<sup>115</sup> The court refused to give a jury instruction requested by Prudential that no adverse inference could be drawn from its attorney's claims of privilege. It also refused a jury instruction affirmatively allowing a negative inference to be drawn. Instead, the court remained silent on the propriety of drawing an adverse inference, leaving the jury to its own devices, unfettered by judicial supervision. The court obliquely instructed the jury not to guess at the answers to questions that had been objected to where the objection was sustained. This instruction did not rehabilitate any damage to the credibility of the witnesses arising from their being

No other purpose could have been served, especially as the court had advance notice of the questions and of the defendant's valid claims of the attorney-client privilege from the pretrial discovery.<sup>116</sup> The court's ruling was made without reference to the policies of the attorney-client privilege and without an assessment of whether the privilege's policies were impeded or advanced by requiring invocation of the privilege repeatedly in front of the jury.

Another example of a state court rejecting the negative inference but allowing the jury to hear the assertion of the privilege occurred in a Pennsylvania criminal case. In *Pennsylvania v. Sims*, a non-party accomplice witness called by the prosecution invoked the attorney-client privilege during cross-examination outside the jury's presence.<sup>117</sup> The defense appealed to the Supreme Court of Pennsylvania, which ruled that this claim of attorney-client privilege should not be insulated from disclosure to the jury. The *Sims* court reasoned that requiring the invocation of the privilege to occur in front of the jury properly allowed the jury a basis for questioning the testi-

---

forced to assert repeatedly the privilege in front of the jury. Such a scenario of events undoubtedly depicted Prudential as someone who wrongly had withheld relevant evidence from the trial record. On appeal, the Arizona Court of Appeals affirmed the trial court, holding either that there was no prejudice or, alternatively, that it was harmless error. *Id.* at 447.

<sup>116</sup> Other cases have permitted a negative inference to arise by a client's not calling or not allowing his lawyer to testify about privileged communications. *See, e.g., Harris v. C.I.R.*, 461 F.2d 554 (5th Cir. 1972) (permitting negative inference where drafting attorney did not testify regarding the omission of critical language in gifts transferred to trusts; the tax court inferred the testimony would have been unfavorable and disallowed the transfer as gifts); *Marcus v. Marcus*, 394 A.2d 727 (Conn. 1978) (in an action where a husband's lawyer did not testify to the definition of "income" in an action to enforce a separation agreement, the court allowed a negative inference holding the lawyer should have withdrawn and testified); *Fried v. Bradley*, 52 So. 2d 247 (La. 1950) (negative inference allowed where the heirs contesting the deed conveying estate property failed to call attorneys who prepared the deed; the suit was dismissed on statute-of-limitations grounds); *In re McFadden*, 108 A.2d 247 (Pa. Super. Ct. 1954) (a negative inference was allowed in a will contest, where although the attorney was the will's scribe and executing witness, he did not testify); *Bayou Drilling Co. v. Baillio*, 312 S.W.2d 705 (Tex. Ct. App. 1958) (court allowed negative inference where creditor sued to collect debt and foreclose on chattel and an attorney testified to some matters but not others). *But see Lipton Realty, Inc. v. St. Louis Housing Auth.*, 705 S.W.2d 565 (Mo. App. 1986) (the court refused to draw a negative inference, reasoning that the attorney-client privilege barred the testimony).

<sup>117</sup> 521 A.2d 391, 395 (Pa. 1987).

mony of the government witness<sup>118</sup> and reflected upon the witness' credibility and reliability. By insulating the witness from invoking his privilege in the jury's presence, the trial court unfairly bolstered the credibility of a witness whose testimony was crucial to the success of the prosecution.<sup>119</sup>

Without even a cursory examination of the goals of the attorney-client privilege, the Pennsylvania Supreme Court declared "[t]here is nothing in the privilege or its purposes which militates against allowing the jury to at least know that a claimant of the privilege, while testifying as a witness, has elected to withhold from the jury's consideration possible previous statements made by him concerning the matter on trial."<sup>120</sup> The basis of the court's ruling that the jury should be allowed to hear and consider a prosecution witness's claim of attorney-client privilege appeared to be the concern for a defendant's confrontation clause rights rather than an evaluation of the impact of a negative inference on the policies of the attorney-client privilege.<sup>121</sup>

Similarly, in a criminal case for murder in Mississippi, *Stringer v. State*, an accomplice witness called by the prosecutor also asserted his attorney-client privilege on cross-examination.<sup>122</sup> In closing argument, the defense lawyer argued to the jury that, although the accomplice had the right to claim the privilege, he would not have claimed the privilege if he had nothing to hide.<sup>123</sup> Defense counsel was permitted to urge the jury to draw an adverse inference without the court's interference.

In addition to the missing-witness rationale, courts have relied on an analogy to the privilege against self-incrimination to allow an adverse inference upon a claim of attorney-client privilege. In criminal cases no adverse inference may be drawn from an assertion of the privilege against self-incrimina-

---

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 396.

<sup>120</sup> *Id.* at 397.

<sup>121</sup> Concern for a criminal defendant's guarantees under the Confrontation Clause properly outweigh concern for the policies of the attorney-client privilege. See *infra* text accompanying notes 228.

<sup>122</sup> 500 So. 2d 928 (Miss. 1986).

<sup>123</sup> *Id.* at 940.

tion.<sup>124</sup> But in civil cases an adverse inference has been held constitutionally permissible when the privilege against self-incrimination is asserted.<sup>125</sup> For example, in an Illinois case, *Monco v. Janus Enterprises*, a negative inference was allowed upon assertion of the attorney-client privilege where the plaintiff, a shareholder in a privately held corporation, sued to dissolve the corporation and the defendant counterclaimed to void an assignment of intellectual property to the corporation.<sup>126</sup> The plaintiff defended against the counterclaims by arguing that the defendant had ratified the transactions.<sup>127</sup> To demonstrate the defendant's knowledge, an element of the claim, the plaintiff questioned the defendant about what he had told his lawyer and when. In response, the defendant properly asserted his attorney-client privilege.<sup>128</sup> Since the defendant had not put his attorney communications or his state of mind in issue—only the plaintiff had—there was no dispute over whether the claim of privilege had been waived. Nonetheless, the Illinois circuit court ruled that defendant's "repeated assertions of the attorney-client privilege required a negative inference to be drawn" with respect to defendant's knowledge.<sup>129</sup> The Illinois circuit court merely asserted that the negative inference was appropriate because a similar inference was permissible upon claims of the privilege against self-incrimination in civil matters.<sup>130</sup> Yet in transposing the permissibility of a negative inference from one privilege to another, the court failed to compare the underlying policies of the two privileges to determine whether they were sufficiently similar to warrant the same evidentiary consequences.

Like Illinois, Massachusetts also has permitted both summation comment and an adverse inference to be drawn upon an assertion of the attorney-client privilege in civil cases. In *Phillips v. Chase*, an action to set aside an adoption decree, the

---

<sup>124</sup> *Griffin v. California*, 380 U.S. 609, 613 (1965).

<sup>125</sup> *Brink's Inc. v. City of New York*, 717 F.2d 700, 708 (2d Cir. 1983); see *supra* text accompanying notes 98-101.

<sup>126</sup> 583 N.E.2d 575, 577 (Ill. App. Ct. 1991).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 584.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 584-85. On appeal, the appellate court declined to express any opinion on the permissibility of the negative inference. *Id.* at 585.

Supreme Judicial Court of Massachusetts allowed comment upon and a negative inference from an assertion of the attorney-client privilege.<sup>131</sup> Both the plaintiff and defendant were successors to the estate that held the attorney-client privilege and, thus, both were privilege holders who could waive or assert the privilege. The defendant claimed the privilege and refused to waive it, while the plaintiff willingly waived the privilege. The court held, in this context, that the refusal to waive was properly the subject of comment to the jury.<sup>132</sup> In allowing an adverse inference upon claim of attorney-client privilege the court analogized to the privilege against self-incrimination: "[I]f evidence is material and competent except for a personal privilege of one of the parties to have it excluded under the law, his claim of the privilege may be referred to in argument and considered by the jury, as indicating his opinion that the evidence, if received, would be prejudicial to him."<sup>133</sup>

*Phillips* involves very unusual facts because both parties to the lawsuit held the same privilege. Where one party was willing to offer the evidence into the record and the other party fought against its introduction, the logic is overwhelming that the information helped the one party's position in the lawsuit to the detriment of the other. This unusual set of facts gives rise to an inference, but it does not spring purely from the bare assertion of the attorney-client privilege.

As demonstrated by the cases discussed above, courts allowing the negative inference have failed to consider the justifications or goals of the attorney-client privilege. These courts have ignored whether the inference promotes or at least does not substantially impede the underlying principles of the privilege. The courts' conclusory statements—for example, in *Sims*—hardly amount to an evaluation of the impact of an

---

<sup>131</sup> 87 N.E. 755 (Mass. 1909); see also *McCooe v. Dighton*, 53 N.E. 133 (Mass. 1899) (Holmes, J.). In *McCooe*, a case involving a waiver of the attorney-client privilege, the court asserted: "In a civil case, if one of the parties insists upon his privilege to exclude testimony that would throw light upon the merits of the case and the truth of his testimony, we are of opinion that it is a proper subject for comment." *Id.* at 134. Although the court used the term "comment," it was referring to argument in summation where one party asks the jury to add up the evidence and draw inferences. Thus, the court permitted an inference to follow upon the claim of the privilege.

<sup>132</sup> *Phillips*, 87 N.E. at 758.

<sup>133</sup> *Id.*

inference on the goals of the privilege. The decisions allowing negative inference thus appear to have been made without considering the impact this evidentiary consequence will have on the attorney-client privilege. The result in *Sims* may be correct, but not because the policies of the attorney-client privilege are not impeded, but because they are outweighed by the interests of justice in a criminal case.

### B. *Cases Prohibiting Negative Inference*

A number of cases have not allowed a negative inference when the attorney-client privilege is asserted.<sup>134</sup> One decision by the appellate court of Illinois, *Regan v. Garfield Ridge Trust & Savings Bank*,<sup>135</sup> apparently conflicts with other Illinois authority on this question.<sup>136</sup> The plaintiffs in *Regan* purchased real property and brought an action for specific performance and tortious interference with contract when the deal fell through.<sup>137</sup> The plaintiffs called the two lawyers who had represented them during the transaction to testify about dealings and non-privileged conversations the lawyers had had with the defendants. Recognizing that selective disclosure of privileged communications would waive the privilege, the court ruled that the attorney's testimony did not constitute a waiver of the privilege. The court based its distinction on the fact that the plaintiffs had called their lawyers to testify only about non-privileged conversations with the defendants and no privileged information had been elicited on direct examination. The *Regan* court therefore affirmed the jury instruction that an assertion of the privilege during cross-examination should not result in an adverse inference against plaintiffs.<sup>138</sup>

---

<sup>134</sup> See, e.g., *A.B. Dick Co. v. Marr*, 95 F. Supp. 83 (S.D.N.Y. 1950), *appeal dismissed*, 197 F.2d 498 (2d Cir.), *cert. denied*, 334 U.S. 878 (1952); *Wentworth v. Lloyd*, 10 H.L. Cas. 591 (1864).

<sup>135</sup> 581 N.E.2d 759 (Ill. App. Ct. 1991). *Regan* also is almost factually identical to *United California Bank v. Prudential Ins. Co. of America*, 681 P.2d 390 (Ariz. Ct. App. 1983), but reached the opposite result. See *supra* text accompanying notes 114-15.

<sup>136</sup> See *Monco v. Janus Enters.*, 583 N.E.2d 575 (Ill. App. Ct. 1991); see also *supra* text accompanying notes 125-31 (discussing the rationale of allowing a negative inference upon the assertion of the attorney-client privilege in civil matters).

<sup>137</sup> *Regan*, 581 N.E.2d at 761.

<sup>138</sup> *Id.* at 768.

The *Regan* court reasoned that to permit a negative inference would undermine one of the primary goals of the attorney-client privilege: candor in communications between client and lawyer. The court explained that "[a]llowing such an inference to be drawn could inhibit communications between attorney and client especially with respect to contractual transactions where there is often a possibility that the attorney will be called to testify if there is a contractual breach and litigation ensues."<sup>139</sup>

In a similar recognition of the policy behind the attorney-client privilege, the court in *A.B. Dick Co. v. Marr* rejected the adverse inference.<sup>140</sup> The A.B. Dick Company brought an action alleging patent infringement but refused to produce the documents at issue. At this stage of the proceedings, A.B. Dick itself was being investigated for fabrication of evidence. A.B. Dick withheld documents that the court had demanded by asserting the attorney-client privilege. The question arose whether the court should allow a negative inference from the invocation of the privilege. Despite the court's strong interest in investigating whether a fraud had been perpetrated upon it, the court ruled that this assertion of the privilege "can give rise to no adverse inferences."<sup>141</sup>

The *A.B. Dick* court recognized the importance of the attorney-client privilege to the proper administration of justice.<sup>142</sup> Examining the history of the attorney-client privilege, the court gave the following explanation for protecting communications between lawyer and client:

[F]ormerly persons appeared in court themselves; but as business multiplied and became more intricate . . . both the distance of places and the multiplicity of business made it absolutely necessary that there should be a set of people who should stand in the place of suitors, and these persons are called attorneys. Since this has been thought necessary, all people and all courts have looked upon that confidence between the party and the attorney to be so great that it would be destructive to all business if attorneys were to disclose the business of their clients. . . . The reason why attorneys are not to be examined to anything relating to their clients or their affairs is

---

<sup>139</sup> *Id.*

<sup>140</sup> 95 F. Supp. 83, 101 (S.D.N.Y. 1950), *appeal dismissed*, 197 F.2d 498 (2d Cir.), *cert. denied*, 344 U.S. 878 (1952).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*



because they would destroy the confidence that is necessary to be preserved between them.<sup>143</sup>

After acknowledging the early foundations of the privilege, the court observed that the

necessity of protecting the attorney-client relationship has become even more apparent; the legal rights and duties of large corporations and those who dispute with them would not be susceptible of judicial administration in the absence of lawyers, nor, in the absence of the privilege could lawyers properly represent their clients.<sup>144</sup>

The court refused to draw an adverse inference from a claim of the attorney-client privilege because it "would contribute to the undermining" of the privilege.<sup>145</sup>

Although the *A.B. Dick* court concluded that allowing an adverse inference would contribute to undermining the privilege's policies, it failed to explain explicitly how a negative inference—without disclosure of the confidential communications—compromised the privilege.<sup>146</sup> The court offered conclusory explanations, stating that its ruling was necessary to protect the attorney-client relationship to enable "lawyers to properly represent their clients"<sup>147</sup> and to aid in the judicial administration of disputes between corporations.<sup>148</sup>

A more recent case denying a negative inference upon claim of attorney-client privilege arose in federal court in Minnesota. In *Ardito v. Johnson & Johnson*, the scope of a release that was asserted as a defense was in issue on a motion for summary judgment.<sup>149</sup> The defendant, Johnson & Johnson, refused to produce files that were relevant to the release as within the ambit of the attorney-client privilege. The *Ardito* court relied on the rule developed in the *A.B. Dick* decision to find that "[n]o adverse inference may be drawn as a matter of law from the legitimate assertion of the attorney-client privilege."<sup>150</sup>

---

<sup>143</sup> *Id.* (quoting *Annesley v. Earl of Angeales*, 17 How. St. Tr. 1225 (1743)).

<sup>144</sup> *Id.* at 102.

<sup>145</sup> *Id.*

<sup>146</sup> For the *A.B. Dick* court, the privilege appears absolute, arising from utilitarian roots.

<sup>147</sup> *A.B. Dick*, 95 F. Supp. at 102.

<sup>148</sup> *Id.*

<sup>149</sup> CIV. No. 4-81-922, 1985 WL 2461 (D. Minn. July 22, 1985).

<sup>150</sup> *Id.* at \*5-6. Similarly, a California state court in *Metzger v. Silverman*, 133

The Iowa Supreme Court, in *Lauer v. Banning*, recognized that the adverse inference nullified the policy goals of the privilege.<sup>151</sup> *Lauer* involved an action for breach of the promise to marry in which the plaintiff refused to testify about communications with her lawyer. The Iowa Supreme Court upheld the trial court's instruction to the jury prohibiting speculation about withheld testimony. The court emphasized: "If one must, upon penalty of having a presumption raised against him, introduce his lawyer or physician, the statutes prohibiting them from testifying are of no significance."<sup>152</sup> In prohibiting a negative inference, the *Lauer* court specifically rejected the analogy of the missing-witness doctrine:

Of course the ordinary rule is that if one does not produce testimony within his control, or prevents the use of such testimony, the presumption arises that such testimony, if produced would be adverse to them. But this rule does not apply to privileged communications for reasons too obvious to mention.<sup>153</sup>

Some courts have upheld the right of the party invoking the privilege to not be required to assert the privilege repeatedly in the presence of the jury.<sup>154</sup> For example, in *Stanger v. Gordon*, the Minnesota Supreme Court ruled that it was improper to permit continued cross-examination of a witness that was designed solely to require the witness repeatedly to assert the attorney-client privilege before the jury.<sup>155</sup> In this action by a former employee for fraud against his employer, the court

---

Cal. Rptr. 355 (App. Dep't Super. Ct. 1976), forbade the inference in a case where a lawyer's motivation for filing a civil suit in the wrong jurisdiction was at issue. After the suit was dismissed, the lawyer was personally sued for costs by the aggrieved party. To determine liability, the court had to inquire into the attorney's factual basis and good faith in bringing the suit in the wrong jurisdiction. The lawyer's factual basis for his actions arose from confidential communications with his client that the attorney-client privilege prohibited him from disclosing. The court ruled that it could draw no adverse inference from an assertion of the privilege, relying on the California Code of Evidence. For a discussion of state statutes governing adverse inferences upon claim of privilege, see *infra* text accompanying notes 174-78.

<sup>151</sup> 131 N.W. 783 (Iowa 1911).

<sup>152</sup> *Id.* at 785.

<sup>153</sup> *Id.*

<sup>154</sup> See, e.g., *Lipton Realty, Inc. v. St. Louis Housing Auth.*, 705 S.W.2d 565, 570-71 (Mo. Ct. App. 1986) (refusing to draw a negative inference and reasoning that the attorney-client privilege barred the testimony).

<sup>155</sup> 244 N.W.2d 628, 632 (Minn. 1976).

also ruled that it was improper to permit counsel to comment adversely in summation on the exercise of the privilege.<sup>156</sup>

A review of the civil cases disallowing a negative inference upon a claim of attorney-client privilege reveals that courts typically reach this conclusion after consideration of the privilege's purposes and goals. Occasionally, in criminal cases, a court without explanation disallows a negative inference upon claim of the attorney-client privilege, leading one to suspect that its decision is based on an analogy to the ban on such inferences when the privilege against self-incrimination is asserted in criminal cases. The Michigan case of *People v. Parks*, which rejected the permissibility of an adverse inference against the defendant in a criminal case, provides an example of a court using an analogy of this type.<sup>157</sup>

In *Parks*, the Michigan Court of Appeals reversed a conviction because of an improper cross-examination of the defendant about notes governed by the attorney-client privilege. On redirect, defense counsel attempted to mitigate the damage to the defendant from the cross-examination into the privileged notes. Defense counsel asked the defendant questions to establish that the notes were the product of the attorney-client relationship. The prosecutor, however, apparently in the presence of the jury, insisted on the right to inspect the notes that the defense argued were shielded by the attorney-client privilege. In the jury's presence, the court suggested that the prosecutor should be permitted to see the notes, yet after the jury was excused all parties agreed the notes were privileged.

The Michigan Court of Appeals ruled that it was improper for the prosecutor to pursue the privileged notes in order to force the defendant to claim the attorney-client privilege in the jury's presence as the protection of the attorney-client privilege is "destroyed if improper inference can be drawn from its exercise."<sup>158</sup> The Michigan appellate court assumed that improper inference would follow automatically from the jury observing the defendant assert the privilege. Whether the court reasoned from the policies of the attorney-client privilege or intuitively

---

<sup>156</sup> *Id.* at 631-32.

<sup>157</sup> 296 N.W.2d 195 (Mich. Ct. App. 1980).

<sup>158</sup> *Id.* at 197 (quoting *People v. Brocato*, 169 N.W.2d 483 (Mich. Ct. App. 1969)).

applied the approach required in the fifth amendment context is unclear.

Similarly, in *State v. Thomas*, a Connecticut murder trial, part of the state's proof consisted of the defendant's lack of action, which allegedly evinced his consciousness of guilt.<sup>159</sup> This non-action included the defendant's unwillingness to communicate and cooperate with his murdered girlfriend's family in the family's attempts to locate their unexplainedly absent daughter.<sup>160</sup> To rebut the prosecution's evidence of non-action and to explain his uncooperativeness, Thomas called his former lawyer as a defense witness to testify that counsel had advised Thomas not to make any statements or talk to anyone.<sup>161</sup>

Outside the jury's presence, the defense sought a ruling to minimize cross-examination questions from the prosecutor which would require the defense to invoke the attorney-client privilege.<sup>162</sup> Although apparently not unsympathetic to the defense request, the judge saw no practical way to avoid having the defendant assert the privilege before the jury.<sup>163</sup> Unlike in civil cases,<sup>164</sup> there had been no pretrial discovery of the defendant in this criminal case, thus the questions to be asked and the objections based on privilege could only be speculative. Although the court refused to tie the prosecution's hands during cross-examination it did request that the prosecutor minimize defendant's need to invoke the privilege before the jury.<sup>165</sup>

To protect the defendant further, the *Thomas* court instructed the jury that "[t]he defendant has a right to assert the attorney-client privilege . . . and the fact that objection was made on that ground shall not be held against the defendant in any way."<sup>166</sup> The court did not explain its reasons for protecting a claim of the attorney-client privilege from negative inference and did not expressly or implicitly examine the ef-

---

<sup>159</sup> 533 A.2d 553 (Conn. 1987).

<sup>160</sup> *Id.* at 557-58.

<sup>161</sup> *Id.* at 558.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 559.

<sup>164</sup> See *United Cal. Bank v. Prudential Ins. Co. of Am.*, 681 P.2d 390 (Ariz. Ct. App. 1983), where pretrial discovery had alerted the court and parties that the lawyers would assert the privilege in response to numerous questions.

<sup>165</sup> See *Thomas*, 533 A.2d at 559 n.7.

<sup>166</sup> *Id.* at 559 n.9.

facts of a negative inference on purposes of the attorney-client privilege. Again, it is likely the court forbade any negative inference upon this criminal defendant's claim of attorney-client privilege because it failed to distinguish the attorney-client privilege from the constitutional privilege against self-incrimination.<sup>167</sup> On appeal, the Connecticut Supreme Court upheld the jury instruction. The court rejected the defendant's claim and found that the jury instruction prohibiting adverse inference cured any harm that may have resulted from defendant's having to assert his attorney-client privilege in front of the jury.<sup>168</sup>

In a criminal case that involved this issue, the Arizona Supreme Court, in *State v. Holsinger*, found that cross-examination questions that required the defendant to assert her attorney-client privilege before the jury prejudiced her and constituted error.<sup>169</sup> The court explained that forcing the defendant to assert the privilege in the presence of the jury automatically created an impermissible inference that could "lead the jury to believe she had something to hide."<sup>170</sup> The *Holsinger* court sought to avoid the prejudice to the defendant that it believed arose inevitably from an assertion of the attorney-client privilege before the jury.<sup>171</sup> The court's decision ex-

---

<sup>167</sup> See *Griffin v. California*, 380 U.S. 609 (1965) (forbidding adverse inference in criminal cases where privilege against self-incrimination is invoked by defendant).

<sup>168</sup> *Thomas*, 533 A.2d at 559. *People v. Quesada*, 281 Cal. Rptr. 426 (Ct. App. 1991), is another criminal case where a court refused to draw an adverse inference upon assertion of the attorney-client privilege. In *Quesada*, the defendant challenged his guilty plea on the ground that he had not been advised he could be deported as a consequence of a felony narcotics conviction. At the hearing to set aside the conviction, the defendant testified that his former lawyer did not advise him about possible immigration consequences. The court granted the defendant's request for a continuance to secure his former lawyer's testimony. The former lawyer declined to testify pursuant to the attorney-client privilege. Despite what appears to be a clear waiver of the attorney-client privilege involving the lawyer's advice about the possibility of immigration consequences arising out of the defendant's testimony on this subject, the court declined to draw any inference from the assertion of the attorney-client privilege. *Id.* at 532 n.3. By testifying to the substance of the attorney's advice, the defendant placed the content of the advice at issue. The privilege was waived by defendant's litigation position. Therefore, application of the missing-witness rule could have permitted the court to draw an adverse inference, although no such inference would have been compelled by the missing-witness rule. See *supra* note 106.

<sup>169</sup> 601 P.2d 1054 (Ariz. 1979).

<sup>170</sup> *Id.* at 1058-59.

<sup>171</sup> *Id.* at 1059.

pressly relied on the policies underlying the attorney-client privilege:

When the client, especially one accused of crimes, asks for advice and guidance in the premises, he should be able to speak freely without any fear and in full confidence that what is said by him or to him by his attorney will not be subsequently subject to disclosure if he takes the witness stand during the trial of his case. Any other policy than strict inviolability . . . would seriously hamper the administration of justice, for the client would perhaps refrain from telling the truth or withhold the truth, while the lawyer would be reluctant to give the correct advice and counsel if he thought it would be subject to disclosure in the event his client took the stand to testify in his own behalf.<sup>172</sup>

None of the criminal cases discussed here and observed in additional research forbid a negative inference upon a claim of attorney-client privilege on the basis of the impact a negative inference might have on a criminal defendant's sixth amendment right to counsel. Yet, if a criminal defendant's refusal to disclose attorney-client communications is allowed to assist in conviction of the defendant, then consulting with counsel becomes a detriment to a person accused of crime. Although the cases have neglected this possibility, a negative inference upon a claim of attorney-client privilege may be incompatible with

---

In the instant case, it is clear that the effect if not the intent of the question was to force the defendant either to waive the attorney-client privilege or to invoke the privilege before the jury. She was thus on the horns of a dilemma—she could waive the privilege which might have resulted in testimony damaging to her, or she could invoke the privilege and lead the jury to believe she had something to hide.

. . . .  
... "[A] party should not be put upon such onerous horns of a dilemma during a jury trial. In the forensic battlefield of a contested trial, the contrast is striking in the effect on a jury between a witness whose answers are full and frank and a witness who refuses to answer . . . whatever the merit . . . for such refusal or objection. There is an understandable rapport begotten between witness and the jury in the one case, while in the other there is a recognizably devastating adverse effect upon the witness' standing before the jury."

*Id.* (quoting *Vilardi v. Vilardi*, 200 Misc. 1043, 1045-46, 107 N.Y.S.2d 342, 344-45 (Sup. Ct. New York County 1951)). *Holsinger*, with the defendant testifying as to the substance of the attorney's advice and putting the content of the advice in issue, could properly have been analyzed under the missing-witness rule. The privilege was waived therefore application of the missing-witness rule could have permitted the court to draw an adverse inference.

<sup>172</sup> *Id.* at 1058-59.

more than just the policies of the attorney-client privilege; it also may be inconsistent with the sixth amendment guarantee of competent counsel.

#### IV. LEGISLATIVE APPROACHES TO NEGATIVE INFERENCES UPON CLAIMS OF ATTORNEY-CLIENT PRIVILEGE

Model codes of evidence conflict about the appropriateness of an adverse inference upon a claim of privilege. The Model Code of Evidence allows the inference while the Uniform Rules of Evidence do not.<sup>173</sup> Codes of evidence that have questioned the appropriateness of an adverse inference upon claims of privilege have not distinguished between different privileges. Instead, they typically adopt one rule and apply it to all privileges.

The Federal Rules of Evidence ("FRE"), enacted in 1976, are silent on the permissibility of an inference arising from claims of privilege.<sup>174</sup> Congress deleted a proposed rule that would have banned any adverse inference for all claims of privilege and instead adopted Rule 501. FRE 501 recognizes and implements a federal common law of privilege to be developed and interpreted by the federal courts in the light of "rea-

---

<sup>173</sup> Compare MODEL CODE OF EVIDENCE Rule 233 (1942) (allowing inference) with UNIF. R. EVID. 39 (1953) (amended 1974) (banning inference). There may be diversity cases, however, where a claim or defense is based upon federal law. In those cases, federal privilege law will apply to a claim or defense based upon federal law. In most nondiverse jurisdiction cases, federal privilege law will apply. See Notes of the Committee on the Judiciary No. 93-650, FED. R. EVID. 501.

<sup>174</sup> The Federal Rules of Evidence, as originally proposed to Congress, contained 13 privilege rules including Proposed Rule 513, which banned an inference, regulated comment upon an inference from a claim of privilege, and governed jury instructions related to such a claim. The Advisory Committee amended Article V of the proposed Federal Rules to eliminate all of the rules related to privilege, and instead adopted the current Rule 501, which provides:

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

FED. R. EVID. 501.

son and experience."<sup>175</sup> The Federal Rules of Evidence are silent on the question of a negative inference upon claims of privilege.

State evidence codes conflict about the permissibility of a negative inference arising from claims of attorney-client privilege.<sup>176</sup> States have adopted various approaches. Fourteen states have adopted codes of evidence that govern privilege law along the lines of FRE 501.<sup>177</sup> These states continue to implement a common law of privilege and, like the Federal Rules of Evidence, their state evidence codes themselves take no position on negative inferences arising from claims of any privilege. Such state codes leave the question of negative inference to be decided by the courts on a case-by-case basis. Many states have not yet considered the issue.

Five state evidence codes contain more specific and descriptive provisions regarding state privilege law.<sup>178</sup> These states have codified recognition of the attorney-client privilege and various other privileges. These codes, however, remain silent on the permissibility of a negative inference arising from

---

<sup>175</sup> An exception exists in some civil actions, principally diversity jurisdiction cases, where state privilege law will typically govern. The Federal Rules allow the use of both the federal common law of privilege and state privilege law, depending on the whether a federal or state rule of law is applicable. Thus, as the commentary to FED. R. EVID. 501 explains, state privilege law applies in diversity cases in federal court, in nondiversity federal questions in civil cases where an issue governed by state substantive law is the object of the evidence, and in those instances where state privilege law is to be applied—for example in proof of a state issue in a nondiversity case where a close reading discloses that state privilege law is not to be applied unless the matter to be proved is an element of that state claim or defense as distinguished from a step along the way in its proof. FED. R. EVID. 501, Conference Comm. Notes, H. REP. NO. 93-1597.

<sup>176</sup> Forty-three states have enacted codes of evidence. The seven states having no code of evidence are Connecticut, Illinois, Indiana, Maryland, Michigan, New York and Virginia.

<sup>177</sup> See 17A ARIZ. REV. ANN. 501 (West 1956); COLO. REV. STAT. ANN. § 501 (Bradford Pub. Co. 1994); 6B FLA. STAT. ANN. § 90.501 (West 1979); IOWA CODE ANN. § 501 (West 1989); MICH. COMP. L. ANN. § 501 (West 1983); MINN. STAT. ANN. § 501 (West 1979); MISS. CODE ANN. 501 (West 1984) N.C. GEN. STAT. § 501 (Michie Co. 1994); OHIO REV. CODE ANN. § 501 (Anderson 1994); R.I. CT. R. ANN. § 501 (Michie Co. 1991); TENN. COURT R. 501 (Michie Co. 1992); WASH. REV. CODE ANN. § 9.58.070 (West 1988); W. VA. COURT R. 501 (Michie Co. 1992); WYO. STAT. § 501 (Michie Co. 1994).

<sup>178</sup> See ALA. CODE § 12-21-161 (Michie Co. 1986); GA. CODE ANN. § 24-9-21 (Michie Co. 1982); PENN. S.S.A. § 5916; S.C. CODE ANN. § 19-11-10 (Law. Co-op 1985); MO. REV. STAT. § 491-060 (West 1994).



claims of the attorney-client privilege, thereby leaving the permissibility of a negative inference for the courts.

Twenty-two states have codes of evidence that accept reasoning similar to that rejected by Congress in the Federal Rules of Evidence.<sup>179</sup> These state evidence codes adopt the position rejected in Proposed Federal Rule of Evidence 513. That is, they specifically prohibit the drawing of a negative inference upon a claim of *any* privilege,<sup>180</sup> without distinguishing between the different evidentiary privileges.<sup>181</sup> By so doing, these state evidence codes neglect the individual policies behind the various privileges. These codes typically ban not only adverse inferences from all claims of privilege, but even prohibit comment on claims of privilege, and require to the extent practical that claims of privilege occur outside of the jury's knowledge. A party who invoked a claim of privilege before the jury may opt for a jury instruction against an ad-

---

<sup>179</sup> ALASKA R. EVID. 512; ARK. R. EVID. 512; CAL. EVID. CODE § 913; DEL. CODE. ANN. § 512; HAW. R. EVID. 513; IDAHO R. EVID. 512; KAN. STAT. ANN. § 60-439; KY. R. EVID. 511; MONT. R. EVID. 505; NEB. R. EVID. 27-513; NEV. REV. STAT. §49.405; N.H. R. EVID. 512; N.J. R. EVID. 532; N.M. R. EVID. 11-513; N.D. R. EVID. 512; OKLA. STAT. tit. 12, § 2513; OR. R. EVID. 513; S.D. CODIFIED LAWS ANN. § 109-13; TEX. R. CRIM. EVID. 513, TEX. R. EVID. 513; UTAH R. EVID. 507(c); VT. R. EVID. 512; WIS. STAT. ANN. § 905.13.

<sup>180</sup> Proposed Federal Rule of Evidence 513 provides:

(a) *Comment or inference not permitted.* The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(b) *Claiming privilege without knowledge of jury.* In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) *Jury Instruction.* Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

20 U.S. DIG. FED. RULES EVID. 493 (Law. ed. 1975).

<sup>181</sup> The common law of privilege may recognize many different privileges. To name just a few codified by California, there are interpersonal testimonial privileges, such as the attorney-client privilege, CAL. EVID. CODE § 954 (West 1966), the physician-patient privilege, CAL. EVID. CODE § 994, the psychotherapist-patient privilege, CAL. EVID. CODE § 1014, the husband-wife privilege, CAL. EVID. CODE § 970, the reporter-confidential source privilege, CAL. EVID. CODE § 1041, and the clergy privilege, CAL. EVID. CODE § 1034. In addition, there also are numerous other possible privileges of a non-interpersonal communication nature, such as the privilege against self-incrimination, CAL. EVID. CODE § 940, the trade-secrets privilege, CAL. EVID. CODE § 1060, the state-secrets privilege, CAL. EVID. CODE § 1040, the government-informer privilege, CAL. EVID. CODE § 1041, and the political-vote privilege, CAL. EVID. CODE § 1050.

verse inference.

State evidence codes modeled after Proposed Federal Rule of Evidence 513 rely on the rationale derived from the law applicable to claims of the constitutional privilege against self-incrimination as it stood in the early 1970s. The Advisory Committee Notes to Proposed Rule 513 acknowledge the Committee's reliance on *Griffin v. California*, a criminal case involving a claim of the fifth amendment privilege.<sup>182</sup> The Committee's note quotes the Supreme Court's rationale at that time, which stated that allowing comment upon the claim of privilege "cuts down on the privilege by making its assertion costly."<sup>183</sup> The Advisory Committee then offered its own rationale for extending the ban to privileges other than the privilege against self-incrimination: "While the privileges governed by these rules are not constitutionally based, they are nevertheless founded upon important policies and are entitled to maximum effect. Hence [513(a)] forbids comment upon the exercise of a privilege, in accord with the weight of authority."<sup>184</sup>

After Proposed Federal Rule of Evidence 513 was drafted, however, the Supreme Court undercut the Advisory Committee's rationale when it modified the law of adverse inference applicable to claims of the fifth amendment privilege and permitted the negative inference in civil cases.<sup>185</sup> The result is that those state evidence codes formulated on Rule 513 rely on outdated law. Furthermore, the Advisory Committee note to Rule 513, which claimed that a rule banning adverse inferences from a claim of privilege accorded with the weight of authority, was incorrect as applied to the attorney-client privilege. In fact, the case law discussing negative inferences that arise from claims of attorney-client privilege was divided at the time Rule 513 was proposed.<sup>186</sup>

---

<sup>182</sup> 380 U.S. 609 (1965). Historically, although not uniformly, case law had not allowed adverse inference upon claims of the privilege against self-incrimination. See 8 WIGMORE, *supra* note 2, § 2272, at 425-26.

<sup>183</sup> *Griffin*, 380 U.S. at 613.

<sup>184</sup> SUPREME COURT STANDARD 513 Advisory Comm. Note quoted in WEINSTEIN & BERGER, *supra* note 58, at 513-1.

<sup>185</sup> See *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *Brink's Inc. v. City of New York*, 717 F.2d 700, 708-10 (2d Cir. 1983).

<sup>186</sup> See *supra* text accompanying notes 106-72.

The Advisory Committee's note was correct, nevertheless, in its conclusion that privileges, such as the attorney-client privilege, while not constitutionally based, are founded upon important policies and should be given maximum effect. To determine the limits of the privilege, one must evaluate the social policies behind the particular privilege and weigh them against the competing social policy for truth seeking in the context of litigation. This evaluation should be conducted on a privilege-by-privilege basis because the balancing test may sometimes call for a very strong privilege, while other times the privilege may be weaker and the competing truth-seeking policy relatively stronger.<sup>187</sup> Similarly, with a negative inference, some privileges may be so strong that the underlying social policies should not be impeded by a negative inference while other privileges may be weaker and the balancing test might allow a negative inference because the competing social policy of truth-seeking is relatively more important to society. One problem with state evidence codes is that typically they treat all privileges identically with respect to negative inference and do not require a privilege-by-privilege determination of an inference's appropriateness.

Furthermore, state evidence codes normally follow the law of the privilege against self-incrimination. Many codes are modeled on the outdated case law protecting the privilege against self-incrimination from any negative inference. As a result, there is a high risk that state evidence codes will be amended—thereby affecting all privileges, including the attorney-client privilege—to reflect the subsequent case law developments that have stripped the privilege against self-incrimination of its protection from negative inference in civil cases. In fact, this process already has begun.

Two states, Maine and Louisiana, have reacted to the more limited protection now given the privilege against self-incrimination by amending their evidence codes to curtail protection for all privileges. Both states have enacted legislation that allows a negative inference in civil cases,<sup>188</sup> but not in

---

<sup>187</sup> For example, the attorney-client privilege, when validly asserted, cannot be overcome. The work-product privilege may be overcome, at least to the extent it seeks work product, if there is substantial need and an inability to obtain equivalent materials otherwise. See FED. R. CIV. P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495 (1947).

<sup>188</sup> ME. R. EVID. 513 (West 1994); LA. CODE EVID. ANN. art. 503 (West 1995).

criminal cases.<sup>189</sup> In doing so, both states have blindly transposed the law governing inferences from claims of the fifth amendment privilege to the attorney-client privilege and all other privileges. As discussed earlier, the different underlying policies of the privileges makes identical evidentiary treatment inappropriate.<sup>190</sup>

The legislative actions of Maine and Louisiana eviscerate the attorney-client privilege in the civil context without reason. This legislation exemplifies the threat to the attorney-client privilege unless its evidentiary consequences are separately evaluated and severed from the fate of the fifth amendment

---

The claim of privilege by a party in a civil action or proceeding, whether in the present proceeding or upon a prior occasion, is a proper subject of comment by judge or counsel. An appropriate inference may be drawn therefrom. *Compare* CAL. EVID. CODE § 913 (West 1994).

<sup>189</sup> Maine Rule of Evidence 512 states:

Comment Upon or Inference from Claim of Privilege in Criminal Cases;  
Instruction.

- a) Comment or Inference Not Permitted. The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel in a criminal case. No inference may be drawn therefrom.
- b) Claiming Privilege Without Knowledge of Jury. In criminal cases tried to a jury, proceedings shall be conducted, to the extent practicable, so as to facilitate the making or claims of privilege without the knowledge of the jury.
- c) Jury Instruction. Upon request, any accused in a *criminal* case against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

Louisiana Code of Evidence article 503 states:

A. Comment, inference, and instructions.

- (1) The claim of privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inferences may be drawn therefrom.
- (2) In jury cases, proceedings shall be conducted . . . so as to facilitate the making of claims of privilege without the knowledge of the jury.
- (3) Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

B. Exception in non-criminal proceedings. In noncriminal proceedings, under exceptional circumstances in the interest of justice, if a claim of privilege is sustained counsel may comment thereon, and, upon request, the court shall instruct the trier of fact that it may draw all reasonable inferences therefrom.

See also CAL. EVID. CODE § 913.

<sup>190</sup> See *supra* text accompanying notes 81-90.

privilege. The evidentiary consequences of the attorney-client privilege, like the scope of the privilege, must grow out of its own theoretical foundations and serve its own policies, not those of a different privilege.

To determine whether a negative inference is appropriate requires careful and thorough consideration of its impact upon the policies of the attorney-client privilege. Unless courts and legislatures consider these effects, the evidentiary consequences may undermine the privilege entirely. Without a separate analysis distinct from that of the privilege against self-incrimination, the protection given the attorney-client privilege will continue to diminish as has the privilege against self-incrimination, regardless of whether the policies of the attorney-client privilege are impeded.

#### V. UNDERSTANDING THE RELATIONSHIP BETWEEN AN INFERENCE AND A CLAIM OF ATTORNEY-CLIENT PRIVILEGE

Before determining whether a negative inference is consistent with the policies justifying the attorney-client privilege, it is useful to know what the phrase "negative inference" means. The case law permitting negative inferences typically is vague about what is being permitted when allowing a negative inference upon a claim of attorney-client privilege. Ordinarily, an inference is a reasonable deduction the fact-finder draws from proven or absent facts.<sup>191</sup> An inference can arise from evi-

---

<sup>191</sup> *Atchison, Topeka & Santa Fe Rwy. v. Hicks*, 165 P.2d 167, 171 (Ariz. 1946); *Braycovich v. Braycovich*, 314 P.2d 767, 771 (Cal. Ct. App. 1957); *Corcoran v. Teamsters & Chauffeurs, Joint Council No. 32*, 297 N.W. 4, 7 (Minn. 1941). For examples of cases discussing an inference arising from proof of fact, see *Interlake Iron Corp. v. NLRB*, 131 F.2d 129, 133 (7th Cir. 1942) (NLRB's inference that laid off employees were refused rehire because of their union membership and activities was supported by substantial evidence); *Waldman v. Shipyard Marina*, 230 A.2d 841, 845-46 (R.I. 1967) (action for negligence to recover damages to boat from fire occurring while the boat was docked at a marina). Proof of a relevant state of mind can only be proved by inference arising from proved facts. See, e.g., *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950), in which the court observed:

the state of a man's mind must be inferred from things he says or does. Of course we agree that courts cannot "ascertain the thought that has had no outward manifestation." But courts and juries everyday pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred.

dence that is circumstantial of the fact to be deduced,<sup>192</sup> but it is more than surmise, possibility or conjecture.<sup>193</sup> An inference is a permissible, not mandatory, conclusion.<sup>194</sup>

An inference is a logical deduction, not unlike the type of factual leap or conclusion that ordinary and reasonable people frequently draw from available information. The classic example of an inference is where someone observes ten people walking outdoors and carrying umbrellas. Although rain is unseen, it is logical for a person seeing others carrying open umbrellas to infer on the basis of her observation and experience that it is raining. Such an ordinary observation, however, cannot as a matter of common experience support an inference of a conspiracy among those persons who are observed carrying umbrellas. Such a factual leap or conclusion would be unreasonable in the absence of more facts.

Similarly, to observe ten persons without umbrellas allows an inference that it is not raining. An inference that something does not exist is a negative inference. That is, the observation of empty-handed pedestrians offers no evidence of rain and allows one logically to draw a negative inference that there is no rain from the absence of proof. This inference is a reasoned deduction from the observed fact of the absence of umbrellas combined with reason, logic and experience.<sup>195</sup> Only reasoned inferences, from proven facts or their absence, based on common experience, are permissible.<sup>196</sup> Frequently when courts use the terms "negative inference" or "adverse inference," they do not mean to suggest that there is an absence of information. Rather, the phrase is used to denote an inference that is adverse or damaging to the legal position of the party against

---

*Id.* at 411.

<sup>192</sup> *Scott v. Burke*, 247 P.2d 313, 319 (Cal. 1952).

<sup>193</sup> *In re Woehr's Estate*, 332 P.2d 818, 826 (Cal. 1958); *Braycovich*, 314 P.2d at 771.

<sup>194</sup> *Sowers v. Marley*, 70 S.E.2d 670, 672 (N.C. 1952).

<sup>195</sup> Again, the observation that no pedestrians are carrying umbrellas does not reasonably support an inference of a conspiracy to explain the parallel behavior of 10 people not carrying umbrellas, unless there is more information. Such an inference is ordinarily unreasonable and simply would not be supported as a matter of logic and common experience. Consequently, a fact-finder should not be allowed to draw that inference.

<sup>196</sup> Joel S. Hjelmaas, *Stepping Back from the Thicket: A Proposal for the Treatment of Rebuttable Presumptions and Inferences*, 42 *DRAKE L. REV.* 427, 431 (1993).

whom it is permitted. In this respect, the evidentiary significance of an adverse or negative inference is much more vague and less anchored in reason, logic and experience.

When the negative inference is triggered by a claim of attorney-client privilege rather than by proof of fact or the absence of proof of fact, the question raised is why should this non-evidentiary event, this procedural response, give rise to any evidentiary consequence at all? Assuming there is to be an inference, what should be the scope of the permissible inference? In this context, is it reasonable, logical or a matter of common experience to conclude that information unfavorable to the privilege holder has been withheld? Or is the inference that unfavorable information has been withheld on account of attorney-client privilege one of conjecture and speculation that should not be permitted?

The attorney-client privilege shields favorable, damning, and even irrelevant information. In this way, it differs dramatically from the fifth amendment privilege, which exists only if the shielded information is unfavorable and would damage the criminal legal position of the privilege holder. Thus, as a matter of logic, one can infer that unfavorable information has been withheld upon a claim of the fifth amendment privilege. But no parallel logical deduction arises upon a claim of attorney-client privilege. Since the attorney-client privilege operates to shield more than unfavorable information, it is not logical to infer that unfavorable information has been withheld when the attorney-client privilege is claimed.<sup>197</sup> This is particularly true because there are reasons to assert the privilege in response to a demand for disclosure, even where the communication contains favorable information to the client.

In addition, inferences ought to arise only from proof of fact. The assertion of a claim of privilege, however, is a proce-

---

<sup>197</sup> One commentator, who urges that the privilege against self-incrimination should give rise to a negative inference, also agrees that refusal to respond to questioning on the ground of attorney-client privilege does not imply anything about the content of the withheld response. The latter suggests only that the information was revealed under certain circumstances by the client. In contrast, a refusal to respond on the ground that the response might incriminate oneself connotes something about the content of the response—that there is damaging information—so that depending on the question and surrounding circumstances, claim of this privilege may tend to prove relevant facts in the civil case. Heidt, *supra* note 13, at 1117.

dural event, not a proof of fact. It either says nothing about the facts in dispute or suggests rather weakly that some information may be withheld. It is not reasonable to infer that the withheld information is unfavorable. The attorney-client privilege claim reveals only that information was communicated to a legal advisor. The fact that communication occurred does not tell us whether the communication consisted of favorable, unfavorable or irrelevant information. A claim of the attorney-client privilege reveals little, if any, relevant information.

Silence sometimes may constitute an admission in the law of evidence. The rule of evidence that "[f]ailure to contest an assertion . . . is considered evidence of acquiescence," however, only applies if "it would have been natural under the circumstances to object to the assertion in question."<sup>198</sup> Applying the doctrine of silence as an admission is inappropriate in a claim of the attorney-client privilege. In asserting the attorney-client privilege, often the party is not failing to contest an assertion of fact but merely wishes to keep communications confidential. In addition, it is not "natural" to answer a question about confidential communications to one's legal advisor in a situation where normally the confidentiality is preserved forever at the client's option. Thus, the "silence" arising from assertion of the attorney-client privilege does not suggest the lack of any available favorable response.

Assertion of the attorney-client privilege signals that the privilege holder will not disclose confidential communications with her lawyer. A privilege claim does not indicate that the privilege holder will not respond to questions or assertions of fact involving the underlying facts in the dispute. An inference based on the rule of silence constituting acquiescence should arise only when a party refuses to respond to a question calling for underlying facts, not for a refusal to disclose confidential communications to a lawyer.

Similarly, the missing-witness doctrine is an inappropriate analogy for a claim of attorney-client privilege.<sup>199</sup> The miss-

---

<sup>198</sup> *United States v. Hale*, 422 U.S. 171, 176 (1975); see also 3A WIGMORE, *supra* note 2, § 1042, at 1056 ("A failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact.").

<sup>199</sup> The withheld-evidence doctrine also is an inappropriate analogy. Withheld evidence can consist of tangible evidence, documentary evidence or testimonial



ing-witness doctrine allows an inference that unfavorable information has been withheld when a party inexplicably fails to supply evidence within her control. Because a number of valid reasons exist for why a party may choose to withhold attorney-client communications, it is unreliable to infer that refusal to waive the privilege is based solely on the claimant's belief that the communications contain unfavorable information. Waiver presents many pitfalls and a response to a particular question may result in a waiver of the privilege for information well beyond that sought by the particular question. Additionally, the information contained in the communications may be cumulative of already admitted favorable proof on the issue, thereby giving the privilege holder even less incentive to risk waiver as to other aspects of the communications. Finally, some privilege-holders may refuse to waive the privilege because they value their privacy and invoking the privilege allows them to maintain that privacy.

In addition, the missing-witness doctrine presupposes that a party has some duty to respond or to refute or offer proof in support of a claim or defense. In such circumstances, it is "natural to speak" to the issue at hand and, therefore, it is logical to assume that the reason people choose silence is that they have nothing favorable to offer in response. But sometimes the privilege holder will bear no burden of proof on the issue to which the privileged communication relates and, therefore, it is not natural to speak. This reasoning also is inapplicable where a privilege is asserted since, if a privilege means anything, it eliminates, *ipso facto*, any duty to speak or adduce the information. It is not natural, therefore, to produce the privileged information, particularly where it is cumulative of evidence already contained in the record. Since the privilege bars disclosure, the fact-finder never learns whether the privileged communication actually contains cumulative information, yet a negative inference assumes the withheld information is not cumulative. Such an assumption is unwarranted because it is speculative.

---

evidence. An unexplained failure or refusal to adduce evidence sought, where it would be natural to offer it to rebut contrary evidence, logically may suggest that the evidence is unhelpful or even damaging to the withholding party's legal position.

Another problem with allowing a negative inference is that frequently the question for which the privilege is asserted is too vague to elicit the substantive content of the undisclosed information. Thus, any inference from a claim of privilege may be ambiguous.<sup>200</sup> For example, in an antitrust price-fixing conspiracy case, a defendant may be asked in pretrial discovery to produce all documents related to pricing policy. If some documents are withheld on account of the attorney-client privilege, it is difficult to infer reasonably that the withheld documents contain evidence of an agreement to fix prices. The discovery question is so broad it cannot fairly support the inference that the information was withheld because it was unfavorable.<sup>201</sup> To allow a negative inference upon the claim of privilege in response to this type of question is to allow conjecture, pure and simple.<sup>202</sup>

The procedural event of a claim of attorney-client privilege should not be considered an event of evidentiary significance. The attorney-client privilege exists to deny disclosure of the communications between client and lawyer from the fact-finder. In other words, the purpose of the attorney-client privilege is to foreclose evidence in response to questions about a client's and lawyer's communications. In this respect, the attorney-client privilege differs from the constitutional privilege against self-incrimination. The policy behind the privilege against self-

---

<sup>200</sup> See MCCORMICK ON EVIDENCE § 270 (Edward W. Cleary ed., 3d ed. 1984).

<sup>201</sup> Of course, there will be some questions that are not overly vague and a claim of privilege may reveal the specific content of the non-disclosed information. Suppose a defendant on trial for murder takes the stand and, without assistance from his lawyer, tells the jury he thought he saw a gun in the victim's hand. Accordingly, his defense was one of self-defense. On cross-examination, the prosecutor might try to prove that this statement is inconsistent with prior versions of the events recounted by the defendant. The prosecutor might ask questions such as: "Before testifying here today, you didn't tell anyone that the victim had a gun, did you?" or "You didn't tell your lawyer that the victim had a gun, did you?" A claim of attorney-client privilege may be appropriate in response to these questions. These questions are sufficiently specific to inform the fact-finder that the information withheld is either that the defendant did or did not tell this fact to his lawyer. To this narrow question accusing the defendant of fabrication, the content of the withheld information is narrowed down to one of two choices. A negative inference, therefore, logically would follow.

<sup>202</sup> In addition, to change the valid non-response of a claim of attorney-client privilege into something akin to proof of unfavorable information to the privilege holder strays afar from the goal of the American adversarial process—to ascertain truth by competent proof of relevant facts, not innuendo.

incrimination is to forbid compulsion, not to limit access to information from the accused. In fact, the criminal justice system welcomes information stemming from self-incrimination and often rewards it in the form of more lenient sentences and plea bargains for those who plead guilty or are willing to incriminate themselves. Shielding this damaging information from disclosure is not the policy of the fifth amendment privilege. The policy is to forbid compulsion, not the revelation of self-incriminating evidence itself.<sup>203</sup>

Allowing an adverse inference to arise from a claim of the attorney-client privilege also is problematic because the attorney-client privilege claim suggests no logical connection with the existence of any fact in dispute. A claimant asserts the attorney-client privilege to protect confidential communications from disclosure, regardless of their content. Since an inference is said to arise from certain proof of facts,<sup>204</sup> it is difficult to understand how an inference can arise when the attorney-client privilege is claimed.<sup>205</sup> No facts are established or suggested by such a claim. A client's or lawyer's refusal to answer a question seeking disclosure of privileged communication contains no factual response. If an inference arises, it is erected without foundation since the facts protected by the privilege may be either good, bad or indifferent to the legal position of the privilege-holder.

The privilege's rationale of protecting disclosures made to an attorney on the premise of absolute confidentiality does not

---

<sup>203</sup> 18 U.S.C. § 3501 (1988); *People v. Anderson*, 46 Cal. Rptr. 1, 5-7 (Ct. App. 1965).

<sup>204</sup> *State v. Corby*, 145 A.2d 289 (N.J. 1958), *overruled on other grounds*, *State v. Taylor*, 217 A.2d 1 (1966), *cert. denied*, 385 U.S. 855 (1966). The court in *Corby* distinguished presumptions from inferences thus:

[A] presumption is an assumption of fact . . . which requires such fact to be assumed from another fact or set of facts. An inference is a deduction which may or may not be made from certain proven facts. . . . A presumption . . . prima facie establishes the fact to be true; it remains compulsory if it is not disproved. A presumption cannot be disregarded by the jury while an inference may or may not be. . . . (With an) inference . . . [t]he jury is at liberty to find the ultimate fact one way or the other as they may be convinced by the testimony. . . . [T]he jury may draw the conclusion, depending upon how they view the impact of the proof. . . . [A]n inference is a permissive deduction which the reason of the jury may or may not reach without express direction of the law.

*Id.* at 293.

<sup>205</sup> *Id.*

suggest a greater likelihood that what was revealed was information unfavorable to the speaker. Indeed, one must invoke the attorney-client privilege simply to prevent the waiver of all confidential conversations between lawyer and client on an issue. A waiver, resulting in opening the door to reveal still more communications, could lead directly to confusion of the issues.

Allowing an adverse inference to arise from claims of attorney-client privilege presents other logical problems. Typically, no party to a lawsuit waives the attorney-client privilege. In such a case, is it permissible to allow the jury to draw an adverse inference against either or both parties for failing to waive the privilege and reveal privileged discussions? No one has suggested this and for good reason. Such an inference would be conjectural, not reasoned. The inference is inappropriate because it lacks roots in the proof properly admitted in the trial record and allows the fact-finder to act irrationally in holding a failure to waive the privilege against a party.

If a permissible negative inference is nonsensical where neither party waives the privilege, it also follows that an inference should not be permitted where only one party is asked to waive the privilege and refuses. Because although only one party has been subjected to questioning in which he expressly refused to waive the privilege, in fact, the other party also failed to waive the privilege. Since in this case neither party waives the privilege, it is illogical to allow an adverse inference against only one party who expressly asserts it during questioning. The conduct of expressly refusing to waive is not substantially different from passive non-waiver of the attorney-client privilege. In both instances, neither party "told all."

As a practical matter, there is still another problem with allowing an adverse inference upon a claim of attorney-client privilege. Lawyers may seize this line of questioning to gain a tactical advantage. If a client must allow his lawyer to testify to attorney-client communications or face an adverse inference, the client may yield the privilege. The result is that client's lawyer then becomes a witness, not just an advocate. As a witness, the lawyer's credibility can be impeached. Such a situation can seriously impede the lawyer's effectiveness as an advocate. The lawyer also risks disqualification under the ethical rules prohibiting the lawyer from acting as a witness in

his own case.<sup>206</sup> Inviting such a motion also burdens courts' scarce resources. Thus, to permit counsel to seek attorney-client communications under threat of adverse inference leaves a party exposed to the risk of being subjected to unfair tactics that result in the disqualification of his lawyer, the weakening of the effectiveness of representation, or being exposed to the difficulties and costs of obtaining new counsel. Turning the lawyer into a witness or threatening an adverse inference if the communication is withheld also threatens the right to choose one's own counsel<sup>207</sup> and the right to effective assistance.<sup>208</sup>

A claim of privilege is no substitute for proof. An assertion of the attorney-client privilege is not akin to sworn testimony, competent documentary proof, physical evidence or silence in the face of evidence. A negative inference is a shadow, devoid of substance in this context and cannot as a logical, reasonable proposition be inferred.<sup>209</sup> To allow a jury to speculate as to the facts shielded by a claim of attorney-client privilege and then to infer that the speculative deduction involves information unfavorable to the privilege holder is, as described by Abraham Lincoln, akin to the soup "made by boiling the shadow of a pigeon that had starved to death."<sup>210</sup> Jurors should not be allowed to dine upon such insubstantial fare.

Since an inference is a deduction that should arise from the reasoning of the jury,<sup>211</sup> it should not be allowed from a

---

<sup>206</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.9, 3.7 (1993).

<sup>207</sup> The right to choose one's own counsel may have been resolved by *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983). In *Morris*, the Court held that the Sixth Amendment did not guarantee a "meaningful relationship" between attorney and client. *Id.* at 13.

<sup>208</sup> Effective assistance of counsel is a conscientious, meaningful representation wherein the accused is advised of his rights and an honest, learned and able counsel is given a reasonable opportunity to perform the assigned task. *State v. Williams*, 207 N.W.2d 98, 104 (Iowa 1984). The benchmark for judging a claim of ineffectiveness of counsel is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

<sup>209</sup> *Interlake Iron Corp. v. NLRB*, 131 F.2d 129, 133 (7th Cir. 1942).

<sup>210</sup> *Id.*

<sup>211</sup> Some scholars contrast the fifth amendment privilege with the attorney-client privilege, arguing that the former, but not the latter, has some logical bearing on the underlying facts in dispute. See generally Heidt, *supra* note 13, at 1117. In other words, a claim of the privilege against self-incrimination is logically connected to a material fact in dispute and logically can support an inference against the

claim of attorney-client privilege. Mere suspicion connects the claim of privilege to an inference of damaging information. The path of reason does not lead to an adverse inference when there are no facts from which to reason.

The probative value of an inference arising from a claim of attorney-client privilege is slight at best. The prejudice to the truth-seeking goal of the litigation process and to the privilege holder, however, may be great. The danger exists that the inference may be unjustified or vague, that the privilege holder's lawyer may be reduced to a witness, impeding the lawyer's ability to be effective in his role as advocate. A negative inference is so speculative that it may confuse the issues of a case. On any balancing test, the advantage gained by allowing a negative inference is far outweighed by the disadvantages.

An inference does not arise logically from a claim of attorney-client privilege. If courts permit an inference, the evidentiary consequence allowed should be defined as no more severe than the casting of a shadow or illumination on the evidence properly admitted into the trial record. In other words, if there must be an inference, despite all its evidentiary problems, the contours of an inference drawn from the attorney-client privilege should amount only to an adverse gloss on properly admitted proof. As discussed in the next section, even a minor inference acts to undermine the policies of the privilege. If courts and legislatures permit a negative inference upon a claim of attorney-client privilege, they must be alert to the detrimental impact on the policies justifying the privilege.

## VI. A NEGATIVE INFERENCE THWARTS THE POLICIES OF THE ATTORNEY-CLIENT PRIVILEGE

Courts and legislatures should strive to implement a privilege only if it is justified by a valid social purpose. Before attaching an evidentiary consequence to a claim of privilege,

---

claimant because the privilege would not exist except to shield some fact that tends to suggest criminal misconduct. See REPORT TO ATTORNEY GENERAL, *supra* note 14. There is no logical link, however, between the information protected by the attorney-client privilege and the existence of unfavorable information to the client. A failure to waive the privilege is not unexplained or unexplainable and that act is also not logically connected to the existence of unfavorable information.

courts and legislatures should evaluate the consequences to determine whether they have substantially undercut the privilege. Imposing an evidentiary consequence unintentionally may become a backdoor for eliminating the privilege. Because the policies supporting the attorney-client privilege remain an important part of our adversary system, courts and legislatures ought to be wary of doing anything that undercuts the privilege. An adverse inference that curtails the protection of the attorney-client privilege may thwart its effectiveness.

The preceding sections have examined the numerous beneficial policies underlying the attorney-client privilege. These include encouraging full and frank communications between attorneys and their clients; promoting consultation with lawyers, resulting in greater conformity to the law; helping attorneys to be more effective because they are better prepared; facilitating greater accuracy in discovering facts leading to the elimination of meritless lawsuits and ill-conceived defenses, and the efficient settlement of claims; and generally leading to a conservation of judicial resources and a more efficient administration of justice.<sup>212</sup> The privilege against self-incrimination, with its evidentiary rule allowing an adverse inference in civil cases but not in criminal cases, also was considered above.

One might erroneously assume, as have the legislatures of Maine and Louisiana,<sup>213</sup> as well as some courts,<sup>214</sup> that the evidentiary consequence drawn from invocation of the privilege against self-incrimination is equally appropriate for the attorney-client privilege. But an evidentiary consequence born of the policies of the fifth amendment privilege may be an inappropriate model for the attorney-client privilege. As discussed above, the goals of the attorney-client privilege are sufficiently different from those of the Fifth Amendment that to transpose the fifth amendment evidentiary rules on the attorney-client privilege would be an error, compromising the effectiveness of the attorney-client privilege. The fifth amendment privilege protects a person against compulsion to incriminate himself in any criminal case. In criminal cases the policy of the Fifth

---

<sup>212</sup> See *supra* text accompanying notes 77-78.

<sup>213</sup> See *supra* notes 189-90 and accompanying text.

<sup>214</sup> See *supra* text accompanying notes 106-33.

Amendment prohibits compulsion, not self-incrimination or disclosure of self-incriminating evidence. In civil cases, however, one has the legal obligation to speak truthfully despite the adverse impact that would occur to one's civil liability, so long as these admissions do not create criminal responsibility.

Perhaps intuitively it may seem that a privilege of statutory or common-law dimension—such as the attorney-client privilege—should not be granted a greater scope of insulation from evidentiary consequences than a privilege born of constitutional dimension. One might reason, therefore, that if the fifth amendment privilege cannot escape adverse inference in the civil case, neither should the attorney-client privilege. But this reasoning is wrong. Just as the Supreme Court, in fashioning the appropriate scope of the evidentiary consequences of the fifth amendment privilege, made reference to the policies of that privilege,<sup>215</sup> so must any rule concerning the evidentiary consequences of a claim of the attorney-client privilege anchor itself in the policies of that particular privilege.

There are several reasons why the attorney-client privilege should escape adverse inference in civil cases even when the fifth amendment privilege does not. First, the attorney-client privilege differs from the fifth amendment privilege in that its policies apply with equal force to civil and criminal cases alike. The nature of the proceeding, therefore, does not provide any basis for distinction in the appropriate evidentiary consequences. An adverse inference is as repugnant to the policies of the attorney-client privilege in civil cases as in criminal. In contrast, the Fifth Amendment seeks only to avert compelled self-incrimination to the detriment of one accused in the criminal case.

An adverse inference upon claim of attorney-client privilege would supply a client with three self-destructive choices: (1) waive the privilege and contribute to one's demise because he had disclosed everything—good and bad—to the lawyer; (2) waive the privilege, having disclosed only favorable facts to the lawyer which therefore contribute nothing adverse to the trial evidence (but requires the client to suffer from an unprepared legal advocate); or (3) assert the privilege and be destroyed by

---

<sup>215</sup> See *Baxter v. Palmigiano*, 425 U.S. 308, 316-20 (1976); *McGautha v. California*, 402 U.S. 183, 213-17 (1971).



innuendo from negative inference. This new cruel trilemma hinders both the attorney-client privilege and the truth-seeking mission of litigation.

The purpose of the attorney-client privilege most often identified by utilitarians is to encourage full and frank communications between clients and legal advisors.<sup>216</sup> Permitting a negative inference would undermine this goal. If a negative inference is permitted, lawyers consulting with clients will have to advise them up front that the client could be asked to waive the privilege and that failure to waive could result in the fact-finder holding this against the client in resulting litigation. If clients know that being frank, revealing both favorable and damaging information, could be used to their detriment they are likely to shape what they tell the lawyer. Thus the clients are likely to omit unfavorable information so that they will be able to waive the privilege if asked because the lawyer's testimony at trial will not harm their case. A rule allowing a negative inference upon a privilege claim, coupled with a lawyer's informing the client of this prospect, produces a strong disincentive for the client to reveal unfavorable information to the lawyer.

In addition, if clients are advised that they can be asked to waive the privilege under the threat of adverse inference, this creates an incentive for clients to provide favorable information to the lawyer. The incentive may be so strong that it provides a motive for fabricating or shading the facts. Clients may provide favorable information that is not wholly accurate so that the lawyer can testify to this information if waiver is sought. No stronger disincentive to full and frank communications exists than such an inference.

Allowing a negative inference upon claim of privilege pressures the client to waive the privilege. Although that may be the underlying purpose of allowing a negative inference, it is contrary to the policy behind this privilege protecting the confidentiality of communications. It is questionable whether an evidentiary consequence designed to compel disclosure can be understood as consistent with the privilege's design. Since the privilege promises absolute confidentiality, penalizing the decision of the privilege holder to preserve the confidentiality

---

<sup>216</sup> See *supra* text accompanying notes 50-54.

of the communications is anomalous. It is inconsistent for the law to penalize both the preservation of confidentiality and the failure to preserve the confidentiality of the privilege. This leaves the client with a choice between Scylla and Charybdis—preserve the confidentiality of the communication and suffer an inference or waive confidentiality and lose the privilege's protection on the subject. The client loses no matter which route is chosen. The attorney-client privilege becomes a weapon against, not a refuge for, clients.

A client who waives the privilege in response to one question risks losing the privilege in respect to other questions. If the client does not waive the privilege, however, she risks the fact-finder being permitted to conclude that the privilege is being invoked to conceal unfavorable information. This renders the promise of protection for attorney-client communications meaningless. If nullifying the privilege is the goal of the law, it would be simpler, more direct and more honest to eliminate the privilege outright. If privilege nullification is not the goal of the law, however, then clients should not be penalized for their decision to maintain confidentiality.

Another justification for the attorney-client privilege discussed above and as advanced by utilitarians is the lawyer's role as effective advocate. Without full disclosure, utilitarians argue, the lawyer cannot be properly prepared to defend or promote the client's cause.<sup>217</sup> This will damage both the client and the administration of justice. If the lawyer becomes a witness, the lawyer will face impeachment and credibility problems typical of any witness. Where a client is pressured to waive the privilege to permit the lawyer to testify, the effectiveness of the lawyer as an advocate is undermined before the jury.<sup>218</sup>

In addition, where an adverse inference threatens a client who refuses to waive the privilege, lawyers will be loathe to seek more information than that volunteered by the client.

---

<sup>217</sup> See *supra* text accompanying notes 57-59.

<sup>218</sup> If the client can be pressured into waiving the privilege to permit the lawyer to testify, an adversary may use this stratagem to turn the legal advocate into a witness and thereby force the lawyer's withdrawal from representation of the client. This not only would unnecessarily deny a client his choice of lawyer, but would increase the client's legal costs in the litigation and undermine the right to counsel in criminal cases.

Lawyers know that to prepare themselves to give advice about a transaction or for litigation requires prying a great deal of information from the client in addition to that volunteered. Lawyers will not be anxious to pursue unfavorable information from a client if they know there is a risk that they will be required either to disclose that information to their clients' ultimate detriment or have them suffer an adverse inference.

Ultimately, both the disincentive to the client to be frank and the disincentive to the lawyer to obtain further information from the client are created by threat of negative inference. This inexorably must result in lawyers learning less information from their client, and being less effective advocates. No longer will the attorney-client privilege help to develop well-prepared lawyers who will effectively defend or promote the causes of their client.

The threat of a negative inference necessarily will lead to a tremendous waste of court time. Courts, already overburdened with crowded dockets, will endure many more weak claims, weak defenses and poorly prepared cases. Cases that should be settled will end up in trial because of the lawyer's loss of information from the client. Trial strategy, resting on incomplete information, more frequently will prove futile, misleading and inadequate. As such, another goal of the attorney-client privilege will be sacrificed: promotion of the efficient administration of justice.

The negative inference would compromise yet another goal of the attorney-client privilege, that of achieving justice. "[T]he purpose of the attorney-client privilege is inextricably linked to the very integrity and accuracy of the fact finding process itself."<sup>219</sup> Yet an evidentiary consequence that serves to undermine a client's incentive to disclose and an attorney's willingness to seek information necessarily must have an adverse effect upon the facts developed before and during trial. This compromise further harms the integrity and accuracy of the fact-finding process.

In addition to the goals recognized by utilitarians, other justifications advanced by full utilitarians and non-utilitarians will be compromised. For example, the goal of encouraging more people to consult with lawyers, which fosters greater

---

<sup>219</sup> *United States v. Levy*, 577 F.2d 200, 209 (3d Cir. 1978).

conformity of conduct to law, will suffer because a negative inference will not only be a disincentive to full disclosure, but also may dissuade people from seeking a lawyer's advice in the first place. Since one cannot disclose the problematic issues or facts to the lawyer without risk of legal liability, there is less reason for a prospective client to undergo the expense and trouble of consulting the lawyer for advice. Even when a lawyer's advice is sought, the lawyer will know less than the client and the client will be less likely to trust and follow the lawyer's advice.

An adverse inference impedes another purpose of the privilege espoused by non-utilitarian supporters of the privileges: the goal of privacy. To allow an adverse inference to arise from a person's claim of attorney-client privilege stigmatizes her for keeping confidential that which she is entitled to keep private by law. Privacy is cherished as a value of our society. It seems cruel to cast a shadow on those who value their privacy and who, within the ambit of the law, rightfully seek to maintain it.

Because an adverse inference provides a disincentive to seeking a lawyer's advice before one embarks on a course of action, another goal of the attorney-client privilege advanced by full-utilitarian theorists will be sacrificed: the goal of individuals' maximizing their autonomy within the confines of a system of laws. To be sure, individuals will continue to seek to maximize their autonomy. Individuals will do so, however, without legal guidance about how to achieve their goals in a lawful manner. Seeking to achieve their goals without the advice of lawyers, they will end up more frequently outside of the law's parameters.

Not only does a negative inference substantially impede many important goals of the privilege, but the goals are sacrificed for little reward. On any balancing test, what society loses from allowing an adverse reference far exceeds what is presumed to be gained.

Allowing a negative inference fails to achieve greater accuracy in the truth-seeking contest of litigation. More is lost than simply the information confided to the lawyer. Inaccuracy in fact-finding is more likely because an adverse inference from a claim of attorney-client privilege is by its nature speculative. It is not a reasoned and logical deduction springing from fact.

Such speculation is hardly the bulwark of accuracy. Unfortunately, allowing an adverse inference to arise from a claim of attorney-client privilege may result in more instances of injustice by contributing to greater inaccuracy in the truth-seeking process and creating prejudice against the claimant.

In addition, the attorney-client privilege does not deprive a fact-finder of any information that would exist absent the privilege.<sup>220</sup> Similarly, to forbid a negative inference does not deprive the fact-finder of any information. The evidence as to the underlying events in dispute—in the form of sworn testimony, documents and tangible evidence—exists and is available independent of communications between lawyer and client. A negative inference does not multiply the accessible facts and the claim of privilege does not deny access to the underlying facts. A negative inference also reveals next to nothing about any claimant's credibility.

Thus, the total sum of information available to the fact-finder will not increase from a rule providing disincentive for communications between lawyer and client. Threat of adverse inference may impel more clients to waive the privilege and testify, or permit their lawyers to testify, about their confidential communications. But to avoid disclosure at trial of communications disclosing information of an unfavorable nature, clients will cease making full disclosure when they consult their lawyers and lawyers will cease insisting on frank discussion. Since a threat of negative inference creates less information between lawyer and client (eliminating unfavorable disclosure), waiver of the privilege will not add to the fact-finder's store of knowledge. Instead, it will contribute to a loss of information.

Another serious problem with allowing an adverse inference is that it may transform one's attorney from protector to destroyer, completely undermining the privilege and the attorney-client relationship in the process. Consider the following hypothetical. A defendant is on trial for murder and the circumstantial evidence is not overwhelming. The state has proved no motive. The prosecutor calls the defendant's lawyer and asks whether she showed the defendant a police report

---

<sup>220</sup> See Saltzburg, *supra* note 47, at 610; see also *supra* text accompanying notes 58-59.

indicating the murder victim was a government informant.<sup>221</sup> This question goes to motive. Any response is barred by the protection of the attorney-client privilege. If the client does not waive the privilege, the jury will not learn the answer. But if a negative inference is allowed from a failure to waive the privilege, the position of the client is undermined. The jury can now speculate on a motive, supplied only by invocation of the claim of privilege. This turns the attorney-client relationship upside down. Such a result is irreconcilable with the very existence of the privilege. To protect the policies of the attorney-client privilege when the privilege holder is a party, no adverse inference should be permitted.<sup>222</sup> To allow the inference is to exact a penalty for the exercise of the privilege.<sup>223</sup>

Since a negative inference is inconsistent with the policies of the privilege, neither counsel nor the court should be permitted to comment on a claim of attorney-client privilege to the jury. There would be no valid reason to comment if the act of claiming the privilege is bereft of evidentiary significance. It would be improper to draw the fact-finder's attention to a matter irrelevant to the task of finding the facts. In addition, since a claim of privilege is extraneous to the underlying disputed facts, a party's claim of privilege ought to occur without the knowledge of the jury.<sup>224</sup> In civil cases where extensive pretrial discovery is the norm, a claim of privilege at trial can be anticipated. In those circumstances, a procedure for avoiding

---

<sup>221</sup> The hypothetical is drawn from the facts of *In re Navarro*, 155 Cal. Rptr. 522 (Ct. App. 1979).

<sup>222</sup> This is the approach taken by proposed Federal Rule of Evidence 513(a). See *supra* note 180. A number of state jurisdictions have adopted this rule. See *supra* note 179. The Proposed Federal Rule was not enacted by Congress to prevent freezing the law of privilege. See Advisory Comm. Notes to FED. R. EVID. 501. This decision showed foresight on the part of Congress. Reliance on the Proposed Federal Rule of Evidence 513(a) is inadequate support for prohibiting a negative inference from the claim of attorney-client privilege because that rule relied on the draftsmen's outdated, expansive interpretation of a 1965 case involving assertion of the fifth amendment privilege by a defendant in a criminal proceeding. See *Griffin v. California*, 380 U.S. 609, 616 (1965). The Supreme Court's interpretation of the constitutionality of a negative inference arising from a claim of the privilege against self-incrimination in a civil case subsequently found the inference to be consistent with the Fifth Amendment's goals and, hence, permissible.

<sup>223</sup> See *Griffin*, 380 U.S. at 613-15 (discussing the permissibility of an adverse inference in civil cases from claim of fifth amendment privilege).

<sup>224</sup> This is the approach taken by Proposed Federal Rule of Evidence 513(b) and the Uniform Rules of Evidence. See *supra* note 180.

claims of privilege occurring in front of the jury can be fashioned.

In criminal cases where there is little pretrial discovery, it will not always be possible to anticipate a claim of privilege. Prosecutors should not be permitted, however, to ask questions where the response obviously seeks privileged attorney-client information, unless the prosecutor has obtained a ruling in advance from the court either that no valid attorney-client privilege exists, perhaps because of the crime/fraud exception, or that the privilege has been waived.

Furthermore, it should be incumbent upon the criminal defense lawyer to raise foreseeable attorney-client privilege claims by defense witnesses with the court in advance in a motion *in limine*. Where the claim cannot be anticipated, a procedure—such as making a non-speaking objection, i.e., without identifying the claim of privilege—can avoid invocation of the privilege in front of the jury, while permitting the cross-examination to continue. Such precautions, coupled with a jury instruction cautioning the jury not to guess at the answers to questions where an objection has been sustained, should protect a party who, in the rare, unforeseeable case, must claim the privilege before the fact-finder.

Despite these precautions, sometimes it may be impossible to avoid an assertion of the attorney-client privilege in front of the jury. In such cases, the aggrieved party may wish to have the jury instructed that all parties enjoy protection of the attorney-client privilege and that no inference should be drawn from any party's claim of the privilege.<sup>225</sup> A party who perceives its interest as damaged by its assertion of the privilege should be entitled to such an instruction as a matter of right.<sup>226</sup> That party, as part of its trial strategy also may wish to avoid drawing attention to the claim of privilege and therefore may wish to forego any such jury instruction. The election should be made by the party who claimed the privilege.

Where a non-party asserts a claim of attorney-client privilege, a negative inference does not make the assertion of the

---

<sup>225</sup> See SUPREME COURT STANDARD 513(c).

<sup>226</sup> See Advisory Committee Notes to proposed SUPREME COURT STANDARD 513(c), *supra* note 180 (Proposed Official Draft 1975).

privilege costly to the privilege holder. A negative inference arising out of a non-party's invocation costs the non-party privilege holder nothing since a non-party has nothing at stake in the lawsuit. Therefore, because a negative inference does not pressure a non-party privilege holder, it does not result in a likelihood of waiver and has not served the supposed purpose of making the information sought more available. In addition, since no one can anticipate whether he will be asked to waive the privilege as a non-party or as a party, to allow a negative inference when non-parties claim the privilege results in the same chill on communications between lawyer and client. To permit a negative inference on claims by non-parties thwarts the policies of the attorney-client privilege as discussed above. It is not logical to assume that the non-party witness' claim of privilege reflects the existence of information unfavorable to the party who called the non-party to testify, making a negative inference still less appropriate.

Perhaps one exception is required to a rule forbidding negative inference and requiring invocation of the attorney-client privilege outside a jury's presence. The exceptional case might involve an accomplice witness for the prosecution in a criminal case. In cases where the prosecution calls a witness, by definition a non-party witness, that witness may refuse on direct or cross-examination to respond to a question that calls for privileged attorney-client communication. In such a case, the guarantees of the Sixth Amendment's Confrontation Clause may be implicated where a jury is not permitted to learn that a prosecution witness had claimed the attorney-client privilege in response to specific questions.<sup>227</sup>

It is not that the claim of privilege in this context logically gives rise to a reasoned deduction that provides "gloss on the evidence." Rather, a fact-finder's knowledge that a witness in a criminal case has invoked the privilege may contribute to a jury's finding that reasonable doubt exists or that the prosecution failed to adduce sufficient evidence to meet its high burden of proof. A jury also may be reluctant to rely on the credibility of a non-party witness in a criminal case where that witness invokes the attorney-client privilege. In this instance, courts may require the flexibility of a rule allowing the jury to

---

<sup>227</sup> *Commonwealth v. Sims*, 521 A.2d 391, 395 (Pa. 1987).



learn of and consider the witness's claim of privilege in order to preserve a defendant's confrontation clause guarantees, the right to have the prosecution satisfy its strict burden of proof, or to serve the interests of justice.

Courts need the flexibility of a rule that would allow the claim of privilege to occur in front of the jury in a criminal case involving invocation of the privilege by a non-party witness for the prosecution. The inflexibility of proposed Federal Rule of Evidence 513 and of the state legislation following its path—prohibiting adverse inference in all instances—may seriously impinge upon the exercise of defendant's confrontation clause rights and the interests of justice. Any rule prohibiting adverse inference upon claim of attorney-client privilege in some circumstances may have to be balanced against a criminal defendant's rights, to best serve the interests of justice. What is needed is a rule of evidence that balances the desirability of maximizing the effectiveness of the policies underlying the attorney-client privilege yet protects a criminal defendant's constitutional rights and the interests of justice.

To achieve this end, I propose the following as a new rule of evidence:

*Comment Upon, Inference from, Jury Instruction about, Claim of Attorney-Client Privilege.*

(a) Except as provided in subparagraph (b), a claim of attorney-client privilege, in civil and criminal cases, whether in the present proceeding or upon a prior occasion, shall give rise to no inference and shall not be a proper subject for comment by court or counsel.

(b) In criminal proceedings, where a court first finds that the interests of justice require, a claim of attorney-client privilege by a non-party witness may occur in the presence of the jury, may be commented upon by defense counsel and, upon request by the defense, the court may instruct the jury that it may draw all reasonable inferences therefrom as to the sufficiency of the evidence and the credibility of the witness.

(c) Except as provided in subparagraph (b), in jury cases, proceedings shall be conducted to the extent practicable, so as to facilitate the making of claims of attorney-client privilege without the knowledge of the jury.

(d) Except as provided in subparagraph (b), upon request, any party against whom the jury might draw an adverse inference from a claim of attorney-client privilege is entitled to an instruction that no inference may be drawn therefrom.

## CONCLUSION

A negative inference upon a claim of attorney-client privilege should be disallowed because it is speculative and because any possible probative value is outweighed by prejudice and confusion of issues. Further, the penalty of a negative inference substantially undermines goals of the attorney-client privilege by encouraging less than full and frank attorney-client communications and less frequent consultations with legal advisors. This will lead to lawyers having less information and being less-effective legal advisors, weaker cases being brought and, inevitably, a tremendous waste of valuable court time. It also may lead to more frequent transgressions of the law and consequently to greater injury to the public. Allowing an inference provides an incentive to seek attorney-client privileged communications for unfair tactical reasons. These tactics may be designed to turn the lawyer into a witness. This strategy can undermine the lawyer's effectiveness as an advocate or result in her disqualification which in turn interrupts the litigation process and adds considerable expense. It is irrelevant whether the privilege claim is made in a civil or criminal case, since the goals of the attorney-client privilege apply equally to each. In neither case should a negative inference be allowed. One exception, however, should be rejected. Because protecting a criminal defendant's constitutional right to confrontation is paramount, at times the interests of justice may require that a fact-finder be allowed to consider a claim of privilege made by a prosecution witness.

