

Christopher Alan de Courcy Ryder

THE JUSTIFICATION FOR LEGAL PROFESSIONAL PRIVILEGE

LLM Research Paper

Law of Evidence

Law Facility

Victoria University of Wellington

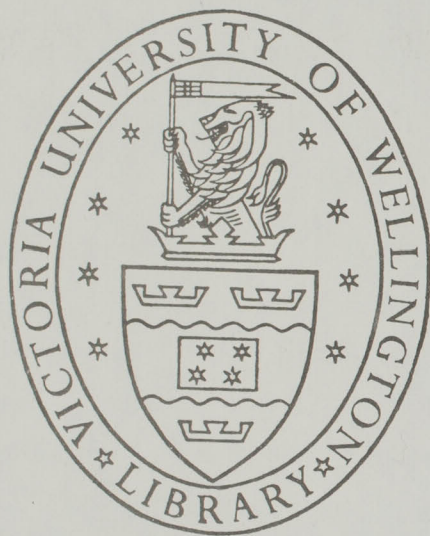
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1.4 The paper sets out to demonstrate the following. The early development of the privilege was justified on the basis that a client needed some guarantee from the law that communications with his legal adviser which he treated as confidential would remain confidential and neither client nor lawyer could be compelled to divulge the contents of those communications in evidence. This judicial guarantee was thought to be necessary because the legal process was a complex one and people might not be discouraged from using a lawyer when necessary or be deterred from divulging all relevant information to the legal adviser, whether embarrassing or not. It was thought further that, without this judicial guarantee, people would not feel safe in divulging all relevant information and possibly even in using a lawyer at all. This justification for the privilege will be called 'The Traditional Rationale'. The early development of the privilege concerned itself only with communications between the client and the legal adviser and only in the situation where litigation was pending. Since then the privilege has expanded to encompass lawyer/client communications in any situation (not just when litigation is pending), communications between lawyer and third parties, and between client and third parties, when litigation is pending or contemplated. The traditional rationale, although an adequate justification for the lawyer/client communication, is ill-suited to justify privilege attaching to these other communications, even though it was used to do just that. It will be demonstrated further that there are

1. INTRODUCTION

- 1.1 Legal professional privilege is a set of rules designed to protect from discovery certain confidential communications involving a legal adviser, her client and third parties in civil and criminal proceedings. The basic principle is that these communications need not be given in evidence in a judicial or administrative proceeding if they were originally made in confidence. They may, however, be disclosed if the client, whose privilege it is, waives it.
- 1.2 There are three categories of communication. First, all confidential communications for the purpose of giving or receiving legal advice, between the client or his agents and the client's professional legal adviser, are privileged. Note that this type of communication does not depend on the existence of pending or contemplated litigation for its protection. The second category, on the other hand, consists of those communications between the client's professional legal adviser and third parties, if made for the dominant purpose of pending or contemplated litigation. The third category consists of those communications between the client or his agent and third parties, if made for the dominant purpose of obtaining information in relation to pending or contemplated litigation.
- 1.3 As with any legal principle, there are a host of exceptions which creep in and some of these exceptions are complicated and unsettled. This paper is not directly concerned with these qualifications and exceptions to the principles of legal professional privilege. They will be used only as tools to develop a theory. The paper is concerned with the policy behind legal professional privilege, the justification or rationale for its existence. It is submitted that these rationales form an important role in the continuing development of the privilege.
- 1.4 The paper sets out to demonstrate the following. The early development of the privilege was justified on the basis that a client needed some guarantee from the law that communications with his legal adviser which he treated as confidential would remain confidential and neither client nor lawyer could be compelled to divulge the contents of those communications in evidence. This judicial guarantee was thought to be necessary because the legal process was a complex one and people ought not be discouraged from using a lawyer when necessary nor be discouraged from divulging all relevant information to the legal adviser, whether embarrassing or not. It was thought further that, without this judicial guarantee, people would not feel safe in divulging all relevant information and possibly even in using a lawyer at all. This justification for the privilege will be called "The Traditional Rationale". The early development of the privilege concerned itself only with communications between the client and the legal adviser and only in the situation where litigation was pending. Since then the privilege has expanded to encompass lawyer/client communications in any situation (not just when litigation is pending), communications between lawyer and third parties, and between client and third parties, when litigation is pending or contemplated. The traditional rationale, although an adequate justification for the lawyer/client communication, is ill-suited to justify privilege attaching to those other communications, even though it was used to do just that. It will be demonstrated further that there are

possible justifications for these other communications and that these rationales ought to be developed. Finally, it will be shown that the development of alternative justifications and therefore the acceptance of more than one rationale for the privilege will serve to simplify the law in that difficult questions of principle can be best resolved with reference to the policy or rationale behind the privilege. In summary, the paper sets out to prove these propositions:

1. Legal professional privilege was originally developed using the traditional rationale as justification.
2. As a justification for the early rule, it is useful.
3. This traditional rationale is inadequate to justify further developments in the privilege.
4. There are other possible rationales which are better suited to justify privilege extending to communications other than those between lawyer and client.
5. The application of separate rationales to separate heads of the privilege serves to simplify rather than complicate the law in that it helps to clarify and structure the thought process in the analysis of the principles by providing a policy base against which complex questions may be tested.

2. THE TRADITIONAL RATIONALE FOR LEGAL PROFESSIONAL PRIVILEGE

- 2.1 Legal professional privilege is an ancient area of the common law. It is thought to extend as far back as the 16th and 17th centuries when barristers were honour bound not to betray a confidence reposed in them¹. This dignity or honour enjoyed by the lawyer became a duty owed to the client during the 18th century and the rule developed as a privilege enjoyed by the client, rather than the lawyer. An early and useful statement of the justification for the privilege appears in the judgment of Brougham LC in Greenough v. Gaskell²;

The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection ...

But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters effecting rights and obligations which form the subject of all judicial proceedings. If the privilege

¹ Dennis v. Codrington (1580) 21 ER 53

² (1833) 1 My K 98, 103 (39 ER 618,620)

did not exist at all, everyone would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.

- 2.2 The claim (which failed) was against a solicitor, for fraud against the plaintiffs in the course of proceedings and the court refused to order the production of entries and memoranda contained in the defendants book, or of written communications made or received by him, relating to those proceedings. The case went on to hold that a solicitor cannot be compelled to disclose information which has come to her knowledge in the conduct of her professional business for a client, even though such business had no reference to legal proceedings. Thus, it is clear that Brougham LC was justifying the existence of the privilege to protect lawyer/client communications and that the justification used was the traditional rationale.
- 2.3 A leading New Zealand case which confirms this rule and gives a clear statement of the rationale is Commissioner of Inland Revenue v. West-Walker³. The Court of Appeal cites with approval Greenough v. Gaskell⁴ and Pearce v. Foster⁵ where Sir William Brett held that privilege "ought to be preserved, and not frittered away ... that there must be that free and confident communication between solicitor and client which lies at the foundation of the use and service of the solicitor by the client".
- 2.4 Basically, these cases recognise a conflict in two desirable policy goals. The first is the desire to find the truth. This requires that all material held by any party to a proceeding be produced. The second is the desire to foster the free and total communication between lawyer and client. This requires that material relating to that communication be exempt from production because if it were not, then clients would be afraid to open their minds to their lawyer. These two policies cannot be achieved simultaneously and the history of the law of privilege demonstrates the view that the latter policy is more important.
- 2.5 It is submitted that this rationale for the privilege is appropriate as applied in these cases; that is, as applied to the lawyer/client communications. However, before taking the rationale as acceptable, two questions can be asked to test whether it is an appropriate justification. First, it is true that the existence of the rule encourages clients to use lawyers and to divulge all relevant information, however embarrassing or destructive? Second, has history made the correct choice in sacrificing the desire to have all relevant material available in the search for truth and promoting as more important the desire that people use lawyers and tell them everything? It is worth asking these questions now because there is a real possibility that they have never been seriously considered by the highest courts, given that the privilege is so ancient.

³ [1954] NZLR 191

⁴ Above n.2

⁵ (1885) 15 QBD 114,119

2.6 As to the first question; an empirical test, if it were possible to perform may arguably demonstrate that ordinary inexperienced clients:

- (1) do not tell their lawyers everything; or
- (2) tell their lawyer everything but do not know of the existence of the privilege; or
- (3) do not tell their lawyer everything and do not know of the existence of the privilege.

If any of these propositions are true, then the privilege does not work. The rationale presumes that clients tell their lawyers everything because they know the privilege exists. Now, there is a very real possibility that clients do not tell their lawyers everything (whether they know of the privilege or not). Indeed this is a common experience in the profession. If this is so, then the privilege does not perform its task and therefore should be abolished to make way for the other desirable public policy - that of allowing all material to be available in the search for truth. So the argument runs. It is submitted in answer that even if clients frequently do not tell their lawyers everything, this is not sufficient reason to abolish the privilege. First, as a matter of logic, abolishing the privilege will not solve the problem of clients not telling lawyers everything and may well aggravate it.

2.7 The second argument is best expressed by focusing on the lawyer rather than the client. Abolishing the privilege will not necessarily aid the courts search for truth, for the following reason. In a particular litigation, the only information the lawyer will seek to protect from discovery is destructive or embarrassing information. All other information is either discovered by the lawyer or is obtained from another source or simply does not figure in the search for the truth. If the privilege did not exist, it is unlikely that the lawyer would ask for embarrassing information (because to do so would not be in the client's best interests and it is equally unlikely that the client would wish to divulge it if he knew the privilege did not exist, which he would know if the lawyer had his best interests in mind). In any case it is submitted that clients generally do know of the existence of the privilege when the embarrassing information is important because the lawyer is almost certainly going to do everything in her power to coax that information from the client. Indeed, one such technique is to assure the client of confidentiality, and explain the rules of legal professional privilege.

2.8 These arguments urge that the lawyer/client privilege is desirable because the traditional rationale is acceptable. If any communication is susceptible to the argument against this rationale, it would be lawyer/client communication before litigation is contemplated. It is here that clients are most likely not to know of the privilege and yet still often tell the lawyer embarrassing information. In this case, it is submitted that the privilege should remain, and the traditional rationale is adequate justification, until there is a solid empirical basis for believing that clients will tell their lawyer all relevant information even when they know that no privilege exists. Common sense would indicate that this situation is most unlikely.

- 2.9 The second question to consider in defending the traditional rationale is whether it is actually desirable to restrict the flow of information to court in order to foster the openness between lawyer and client.
- 2.10 A useful starting point for this question is the opinion of Jeremy Bentham. He argued in his "Rationale of Judicial Evidence" that legal professional privilege (as it existed in 1827) was an unnecessary and therefore undesirable exception to the general rule that all relevant evidence is admissible.
- 2.11 His argument runs as follows. If a client is guilty, then the abolition of legal professional privilege will mean the lawyer will be required to disclose anything the client said which supports his guilt. Bentham argues that this is a desirable goal because a guilty person is thereby convicted more quickly and efficiently. Conversely, if the client is innocent, then he will have no qualms about disclosing the facts to his lawyer and will not be affected by the lack of legal professional privilege. Bentham went so far as to suggest that a lawyer who withholds evidence which supports a guilty verdict should be considered an accomplice and punished as such.
- 2.12 It is submitted that this argument assumes, incorrectly, that the only communications which a client relies on legal professional privilege to protect are the communications which tend to support that client's guilt. Consider the client who wants to keep private his financial affairs which are entirely legitimate, even though he must go to trial and those affairs may become part of the evidence in some indirect way. Consider the client who has done an immoral act such as commit adultery but has done nothing illegal. Consider the client who must simply divulge delicate commercial information to his lawyer in order to be assured of proper advice. Assuming these people must divulge this information in order to receive the best possible professional assistance, and assuming that the information does nothing to support the clients guilt, legal professional privilege would protect their positions without hiding their guilt.
- 2.13 However, Bentham's argument still survives for that one situation where the client is guilty of illegal conduct and he divulges incriminating information to his lawyer. Why should legal professional privilege assist him? A flaw in this argument still remains. The law assumes that the client is innocent, not guilty. It is for the entire court system to ascertain whether he is guilty, not for the lawyer. We also assume that, being innocent at this pre-verdict stage, the client is entitled to the best possible legal assistance. The lawyer must know as much information as possible in order to provide that assistance. Therefore, even if the client is convicted at the end of the trial, it is necessary in the interests of justice to provide him with adequate legal assistance and legal professional privilege helps to ensure that adequacy.
- 2.14 Furthermore, in the extreme situation where a client's guilt is obvious, even to his counsel, the rules of ethics provide an acceptable compromise

whereby counsel must not mislead the court by leading a defence she knows is untrue⁶.

- 2.15 Bentham, inadvertently, provides another possible justification, or perhaps more accurately, an explanation for the existence of legal professional privilege. He argues that any sort of adviser/client communications should not be protected by rules of privilege and his only exception to this proposition is communications between Catholic priests and confessors. One of his reasons for protecting this communication from disclosure as evidence is that an order for a priest to give this evidence "would be an order to violate what by them is numbered amongst the most sacred of religious duties".
- 2.16 Therefore, the vexation in acquiring confessional evidence outweighs its usefulness. To protect it is consistent with his general proposition that all relevant evidence should be admissible unless it is expensive or vexatious to obtain.
- 2.17 It is submitted that confidentiality between lawyer and client is a duty as sacred to a lawyer as confessional confidence is to a priest. To violate it by giving evidence would be equally vexatious to a lawyer and so justifiably protected.
- 2.18 Even if this is not a strict justification for legal professional privilege, it is certainly a compelling explanation for why it exists. Almost all lawyers (and judges) believe in it. They cannot see how justice could be properly served or how they could provide the assistance they are expected to provide if legal professional privilege did not exist.
- 2.18a Finally, it may be worth making a distinction between Civil and Criminal litigation, a distinction which Bentham does not draw. There may be a public interest in finding and convicting a criminal. In Civil litigation, the public interest is served by ensuring fairness in the discovery process, not in finding a "guilty" party.
- 2.19 This section has concentrated on only one sort of communication when explaining and discussing the traditional rationale; the lawyer/client communication whether litigation is pending or contemplated, or not. The reason for this will become clear in the next section in which the case is put that the traditional rationale is only adequate in justifying this sort of communication and quite inadequate to justify lawyer/third party communications or client/third party communications.

⁶ NZ Law Society: Rules of Professional Conduct for Barristers and Solicitors (1989), Rule 10.04.

3. THE INADEQUACY OF THE TRADITIONAL RATIONALE

- 3.1 In the 1876 English Court of Appeal case of Anderson v. Bank of British Columbia⁷, the appellant sued the respondent bank for improperly transferring funds from one account to another. After litigation had become highly probable but before commencement of proceedings, the London Manager asked the branch concerned for full particulars of the whole proceedings. The then plaintiff applied for production of the letter from the branch in reply. The rule of law had been established by then whereby an agent's communication to the client is privileged if made for the purpose of submitting it to legal advice and so long as legal proceedings are pending or contemplated. Jessel MR decided the case at first instance and the Court of Appeal confirmed his finding that this communication was not made for that purpose and the appeal failed. However, for the purpose of this paper the case is interesting only because of the justification which the Court sites for this communication being privileged (when the requirements are satisfied). The rule of law that is confirmed is that any communication between a client or any agent of the client and the legal adviser is privileged if made "with a view to his prosecuting his claim, or of substantiating his defence"⁸. The justification for this privilege is clearly set out in the Master of the Rolls' famous passage (Jessel MR sat on the appeal as well):

The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights and to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make "a clean breast of it" to the gentlemen whom he consults with a view to the prosecution of his claim or substantiating his defence against the claim of others.⁹

- 3.2 As explained¹⁰ this justification is acceptable because the privilege's existence does encourage a client to use and openly consult a legal adviser. Furthermore, it is an acceptable justification when protecting a client's agent's communications because again, the client who controls and instructs the agent, will be encouraged to instruct the agent to "make a clean breast of it" to the legal adviser.
- 3.3 However, the Master of the Rolls (correctly) states the rule as going further. The solicitor can also employ agents to seek information or can ask third parties for that information (so long as it is sought in

⁷ (1876) 2 CH D 644

⁸ Ibid 649

⁹ Idem

¹⁰ paragraphs 2.6 and 2.7

preparation for pending litigation). It is submitted that this extension of the privilege rule cannot be justified using the traditional rationale because the client is neither directly, nor indirectly involved in these communications (which are between lawyer and third party). Thus, the fact that the client is encouraged to be frank because the privilege exists simply is not relevant. Therefore, the need to encourage the client to speak frankly is no justification for the rule to extend beyond lawyer/client communications. There must be some other reason why these communications ought to be privileged. The privilege will generally make no difference to the amount of information that the third party is prepared to divulge to the solicitor because the information which is being "coaxed out" is information embarrassing to the client, and not to the third party. Therefore the traditional rationale, if applied to encourage the third party, does not apply.

3.4 In summary therefore, the traditional rationale can only usefully justify communications between client and lawyer (on the basis that the client is encouraged to divulge all information to the lawyer including embarrassing information) or communications between the client's agent and the lawyer on the basis that the client is encouraged to instruct the agent to divulge all information, including embarrassing information. The traditional rationale is inadequate, however, to justify the rule extending to communications between third parties and the lawyer because the extent to which the client is encouraged to divulge embarrassing information is irrelevant to these lawyer/third party communications.

3.5 Unfortunately, Anderson does not address this issue because the Master of the Rolls (who was the only member of the bench to consider the wider issue of justification) set out the rationale for privilege of lawyer/client communications and then went on to state the extension of this rule without considering the justification for this extension. This portion of his judgment is more or less an obiter statement of the general principles and not vital to the finding of his case. It is also unfortunate that other early cases which state the rule that lawyer/third party communications are privileged (if made for the purpose of preparing for pending litigation) fail to consider the justification for this rule. In Wheeler v. Le Marchant, Jessel MR stated the rule quite clearly¹¹:

The cases, no doubt, establish, that such documents [documents communicated to the solicitors of the defendant by the third party though not communicated by such third parties as agents of the defendant clients] are protected where they have come into existence after litigation commenced or is in contemplation, and when they have been made with a view to such litigation.

3.6 He failed to provide a rationale for this rule.

3.7 The question therefore arises; how can privilege be justified which protects communications between lawyer and third parties. This new rationale will actually have to justify more than just lawyer/third party privilege. It

¹¹ (1881) 17 Ch D 675, 681

will have to justify the protection of all the lawyer does in preparation for her client's case including:

- selecting documents from third parties (lawyer/third party communications)
- selecting documents from previous lawyer/client communications
- designing strategy and generally preparing for the case.

3.8 It is submitted that there is a general rationale which adequately justifies privilege extending to these communications. A useful discussion of that rationale is in the United States Supreme Court case of Hickman v. Taylor and it is clearly described thus¹²:

Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy ...

Proper preparation of a client's case demands that he assemble information, accept what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference ...

This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs and countless other tangible and intangible ways ...

With such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten.

The effect on the legal profession would be demoralising. The interests of the clients and the cause of justice would be poorly served.

3.9 In other words, if legal professional privilege did not protect the client/third party communications, lawyer/third party communications or internal notes prepared by a client or lawyer once litigation is pending, then there is a danger that these documents would not be encouraged into existence (because they would be immediately available to opposition scrutiny) and the system of litigation would become ineffective.

3.10 This rationale, which will be called "The Work Product Rationale" in this paper, is similar to the traditional rationale in that it presupposes a conflict of public policy. On the one hand, it is desirable that each party be given access to as much information as possible and that the truth come out. On the other hand, it is vital that all parties conduct a thorough and detailed investigation of the facts and preparation of the case. The work

¹² 329 US 495, 510 (1947)

product rationale presupposes that in gathering information, a lawyer will stumble upon some embarrassing information as well as the desired favourable information. If all information, including that embarrassing information, had to be disclosed, the lawyer may make the conscious decision not to seek any information beyond documents and knowledge, already in her client's possession. This would hamper thorough preparation and go some way to hinder the search for truth, thus damaging both public policy goals.

- 3.11 As with the traditional rationale, it is necessary to analyse the work product theory to test its validity as a justification for privilege attaching to lawyer/third party communications and to client/third party communications.
- 3.12 The first criticism of the rationale is this. Documents and facts which are definitely discoverable are those which existed and were in the client's possession before litigation came into contemplation. The lawyer is under an ethical duty to make every effort to obtain and disclose this material. Indeed this is often an onerous task which takes up more of the lawyers time and effort than any other fact gathering exercise, especially in large commercial litigation. The work product rationale should logically apply to this process so that, in the absence of the lawyers ethical obligation to obtain this material, she would choose not to go to that effort for fear it would produce embarrassing material.
- 3.13 This problem has been easily overcome by imposing the rule in the code of ethics¹³. The argument therefore runs: why not impose a similar obligation to force lawyer and client to seek out information from easily recognisable other sources, and then disclose them to other parties.
- 3.14 Two points can be made in answer to this argument. First, the rule requiring a lawyer to make every effort in obtaining documents and information already in her clients possession is easy to impose by very reason of the fact that those documents exist and are accessible and identifiable. Any rules imposing further obligations would have difficulty anticipating sources of further information and would therefore have difficulty forcing the lawyer to make that further effort. This difficulty would naturally lead to a complicated body of rules which in turn would result in yet another privilege related line of cases. In any case, this argument is nothing more than an argument against the need for this rule of legal professional privilege. It does not attack the justification for the rule, given that it exists.
- 3.15 The second argument against the validity of the work product rationale is this. There are a number of rules which require the lawyer to disclose information which is the product of her fact finding and trial preparation efforts. Indeed the ethical rule referred to above¹⁴, requiring her to seek out and produce all her clients documents is one such rule. Another is the ethical obligation to draw the Court's attention to authorities against her client's case from the court. A third is the rule of privilege

¹³ Above n.6 Rule 8.01 and High Court Rules 293 and 294

¹⁴ Paragraph 3.13, see n.13

that any information in a criminal case which goes to support the innocence of the accused should not be kept from disclosure even if otherwise privileged. The existence of these three rules begs the question; if these rules exist and do not deter the lawyer from making every effort in seeking information and preparing for trial, is it not possible that a rule requiring full discovery of all information which is the product of the lawyers pre-trial effort, will also not deter the lawyer from making every effort in seeking that information and preparing for trial.

- 3.16 The answer lies in a brief analysis of the rules which do require disclosure of unfavourable information. The first (discovery of client's existing documents) has already been explained as being in a different category from information which must be sought out by lawyer and client effort. Existing documents and information are already in the client's possession and therefore not strictly in need of great effort to obtain. The second rule (requiring the lawyer to disclose unfavourable authorities) is a rule derived from her duty to the court and does not invalidate the work product rationale because it is only a tiny part of a pre-trial preparation. The bulk in such a case would be in preparing argument against such unfavourable authority. It is this work product which must be protected. The third rule (requiring prosecution to discover facts which go to show the defendant's innocence) does not invalidate the work product rationale because a criminal case is in a slightly different category. The prosecution makes her pre-trial efforts, not out of a desire to win her client's case (the Crown's case) but more out of a duty to assist the court in finding the truth.
- 3.17 The final argument against the validity of the work product rationale is that it appears at first glance to be a form of copyright enjoyed by the lawyer (with respect to lawyer/third party communications) and is therefore in conflict with the basic rule of legal professional privilege that the privilege belongs to the client, not the lawyer. This can be answered in two ways.
- 3.18 First, privilege is a form of copyright, as indicated by the work product rationale, but it is enjoyed by the client directly (in the case of client/third party communications) and by the client indirectly in the case of lawyer/third party communications. The lawyer enjoys the work product copyright only as agent to the client. The proof of this is in the waiving. Only the client can waive the privilege by instructing the lawyer to discover privileged information which was gathered from lawyer/third party communication. The lawyer has no power to unilaterally waive that privilege.
- 3.19 The second answer to the proposition that the work product rationale is no more than a lawyers copyright is actually an extension and slight variation of the traditional rationale.
- 3.20 Before accepting the need to protect a lawyers intellectual property from disclosure, it is necessary to identify why it must be protected.
- 3.21 If it were not protected by legal professional privilege, then there is a risk that clients would decide not to use lawyers in litigation, or perhaps a more likely result, the client would instruct the lawyer not to undertake much of the work necessary in the pre-trial process for fear it will uncover

embarrassing information which would then be disclosed. Furthermore, because litigation is a costly process, a client may instruct the lawyer not to undertake much of the work for the tactical reason that he does not want the other side to benefit from his expenditure. This result is more obvious in the civil litigation context.

- 3.22 Thus, the work product theory is not just a justification for legal professional privilege based on a lawyer's property right, it is a justification based on the justice systems objective to ensure adequate assistance to litigants and to prevent litigants risking unnecessary sacrifices which are likely to result in injustice.

4. STATEMENT OF THESIS

- 4.1 Now that the traditional rationale and the work product rationale have been explained and analysed, the thesis of this paper can now be proposed.
- 4.2 Because the law of legal professional privilege is so old and rooted in ancient legal history, the rules developed in an ad hoc fashion, were often justified only cursorily by reference to solid policy reasons and were mostly justified on the basis of preceding authority. This has resulted in a complex body of exceptions and qualifications to the basic principle of legal professional privilege. Analysis of difficult cases and conflicting cases can become very much more effective by reference to the traditional rationale or the work product rationale as appropriate. Therefore, when a difficult issue arises it can best be resolved by reference to either of these rationales rather than in reliance on precedent.
- 4.3 The effectiveness of this approach to difficult cases will be examined in sections 7 and 8. However, before considering the cases in any detail, it is necessary to consider a third rationale justifying the existence of legal professional privilege which is gaining judicial recognition in some jurisdictions.

5. LEGAL PROFESSIONAL PRIVILEGE AS A RIGHT

- 5.1 This third rationale, put simply, is that confidentiality of lawyer/client communications is a human right, perhaps a fundamental right which deserves protection in the form of legal professional privilege.
- 5.2 The question of whether confidentiality of lawyer/client communications is a human right was canvassed by the European Court of Justice in 1983 in Australian Mining & Smelting Europe Ltd v. Commission of European Communities¹⁵. It was held that the right to confidential communication between lawyer and client was not a fundamental human right but it was recognised as a "necessary corollary of fundamental, constitutional and human rights" and "a practical guarantee" and "a right that the law of civilised countries generally recognise, a right not likely to be denied". One such civilised country goes rather further. The Supreme Court of Canada appeared to recognise lawyer/client communication confidentiality as a

¹⁵ [1983] QB 878

fundamental human right. In 1979 Dickson J stated in Solosky v. Queen¹⁶ that:

One may depart from the current concept of privilege and approach the case on the broader basis that (i) the right to communicate in confidence with one's legal adviser is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client ...

5.3 This was affirmed in 1982 in Descoteaux v. Mierzwinski¹⁷ by Lamer J. Indeed the right is enshrined in some Canadian provincial charters of rights¹⁸.

5.4 The proposition that lawyer/client communications are privileged by right is supported in two ways. First, the rules of legal professional privilege and indeed other professional adviser/client privilege apply not only in court but also in non-judicial or quasi judicial tribunal hearings. In Commissioner of Inland Revenue v. West-Walker¹⁹, the Court of Appeal held that a solicitor was entitled to decline to furnish information and produce documents sought by the commissioner of Inland Revenue in the exercise of an administrative power given to him by statute. The 1983 Australian High Court case of Baker v. Campbell²⁰ also held that the doctrine of legal professional privilege is not confined to judicial and quasi judicial proceedings. That case was decided by a full court of seven judges and considered this very question in some detail (citing West-Walker with approval). Given that the rules of evidence need not be applied in non judicial situations, the fact that legal professional privilege is imposed suggests that it is something more than a mere rule of evidence and perhaps displays qualities of a human right.

5.5 The second support for this proposition is that the rules of legal professional privilege can only be overridden by statute if the statute is clear and express in its wording. This was the decision of the Court of Appeal in Commission of Inland Revenue v. West-Walker²¹. Fair J said,

It is, however, now established that it is definitely in the public interest that [legal professional privilege] should be maintained and that case [Newcastle v. Morris (1870) LR 4 HL 661] held that, in general, express words are necessary to nullify a privilege of this type.

¹⁶ (1979) 105 DLR (3d) 745,760

¹⁷ (1982) 141 DLR (3d) 590

¹⁸ Quebec Charter of Human Rights and Freedoms R 5 Q 1977 cl. C-12.9

¹⁹ [1954] NZLR 191

²⁰ (1976) 153 CLR 52

²¹ Above n.19

5.6 This statement suggests that Fair J was dealing with something more than a public interest, namely a right.

5.7 More recently, the New Zealand High Court in Rosenberg v. Jaine²² affirmed this. Davison CJ held:

The privilege is a special privilege and gives special protection to the relationship of solicitor and client. If such is intended to be abrogated or overridden, then the legislature should make specific references to the matter.

5.8 Furthermore, as noted by Cooke J in R v. Uljee²³, Section 27 Misuse of Drugs Act 1982 is an example of the legislature's clear recognition of legal professional privilege and it was at pains in that provision to ensure that if certain communications were intercepted, then the legal professional privilege would still be allowed to remain.

5.9 Thus, there is further indication that lawyer/client confidentiality is protected not only by the rules of evidence but by the existence of a more basic human right. Legal professional privilege has yet to gain full recognition as a human right. It is not commonly included in written human rights charters. Furthermore, any right that exists appears at present to be limited to lawyer/client communications. There is no case law indicating that lawyer/third party or client/third party communications are the subject of any human rights.

5.10 It may well be that lawyer/client confidentiality is a human right and given time both it and lawyer/third party and client/third party privilege will become fundamental rights worthy of expression in human rights documents. However, it is submitted that the fact that these communications are protected as of right is not of itself a justification for the existence of the rules of legal professional privilege.

5.11 The reason for this is straightforward. Although the existence of a right may justify the existence of a rule of law, it is unhelpful as a true justification because it begs the question; what justifies the existence of the right? For example, the right to unfettered enjoyment of property interests justifies the existence of rules restricting entry to private property. But the right to own property is justified on a number of practical grounds such as maintaining public and economic order. Thus, this justification for the right to enjoyment of property is actually the proper justification for the rules against trespass. In the same way, the justification for a rule of legal professional privilege is not that a right of legal professional privilege exists (if it does). The justification for the rule is the justification for the right. Indeed the rule is often a mere expression of the right.

6. ANALYSIS OF THE CASES

²² [1983] 1 NZLR 1,13

²³ [1982] 1 NZLR 561

6.1 Thus, there are two different rationales which justify two different areas of the rules of legal professional privilege. First, the traditional rationale justifies the rule that lawyer client communications are privileged, whether litigation is in contemplation or not. Secondly, when litigation is contemplated, the work product rationale justifies legal professional privilege attaching to the following:

1. Communications between lawyer and third parties;
2. Communications between client and third parties;
3. Other documents and information gathered by the lawyer or the client.
4. Even the lawyer's selection of documents from previous lawyer/client communications.

6.2 The basic principles of legal professional privilege can be stated and justified rather simply. The complication arises in the form of myriad exceptions to the general rules of legal professional privilege. It is these exceptions that give rise to difficult questions of whether or not they should apply. They therefore also give rise to conflicting and inconsistent decisions. It is to these exceptions that attention now turns. It is submitted that the well established exceptions can be justified by reference to either of the proposed rationales without compromising those rationales. And it is submitted further that the difficult exceptions can and should be settled by reference to the rationales. This proposition will be demonstrated as best as possible by analysing two exceptions to legal professional privilege.

7. THE FRAUD EXCEPTION

7.1 An exception to legal professional privilege exists, when the client consults his lawyer in the process of committing a crime or fraud. In such a case, the rules do not apply to protect communications from disclosure. This situation can take a number of forms. First the client can make it known to the lawyer that he is seeking advice to enable him to carry out a crime or fraud. This situation is clearly outside legal professional privilege and no protection would be available in respect of those communications. Indeed the rule of legal professional privilege simply would not apply to this situation because the lawyer would be guilty of fraud and therefore in breach of her ethical duties and thus the communications would not be between client and lawyer in her professional capacity (a prerequisite of legal professional privilege). It would be communications between one fraudulent person and another²⁴.

²⁴ See (a) obiter in Baker v. Campbell above n.19, pp 67,82,86,107,112,123,129

(b) Follet v. Jefferyes (1850) 1 Sim (NS) 1

(c) Russell v. Jackson (1851) 9 Hare 387 68 ER 558

- 7.2 The second situation is where the client consults his lawyer for advice with the intention of using the advice to commit a crime or fraud, but the client hides that intention from the lawyer who gives the advice innocently without being aware of the illegal purpose for which it is sought. Legal professional privilege does not apply to protect these communications. A very recent example of this situation is the English Court of Appeal case of Finers v. Miro²⁵. It was held that an innocent solicitor whose advice was used to cover up or stifle a fraud was not restricted by legal professional privilege because the fraud unravelled all obligations of confidence and he could therefore apply to the court for directions as to how to deal with assets held by him on the defendants behalf.
- 7.2a There is a third situation where a client approaches his lawyer to seek advice with respect to a pending charge of crime or fraud. These communications are privileged. However, the line may not be so clear between this situation and a client seeking to avoid that charge ever being laid.
- 7.3 An early case was R v. Cox & Railton²⁶. In that case, a client consulted his lawyer in preparation for a fraudulent dissolution of a partnership without the lawyer's knowledge of his intention. In the later criminal trial, the lawyers evidence was admitted. The question for the ten member Queens Bench Division Court was whether this evidence was rightly admitted. As a starting point, the Court quoted Lord Brougham in Greenhough v. Gaskill²⁷ where he sets out the traditional rationale for legal professional privilege. The Court then went on to say:

In order that the rule may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is averred, the client does not consult his adviser professionally, because it cannot be the solicitors business to further any criminal objects. If the client does not aver his object he reposes no confidence, for the state of facts which is the foundation of the supposed confidence, does not exist. The solicitors advice is obtained by fraud.

- 7.4 It is submitted that this is a rather curious and confusing rationale for this exception to the rule of legal professional privilege. It establishes that legal professional privilege only exists if a client consults his lawyer in confidence. However, the Court has already used the traditional rationale to justify legal professional privilege which exists in order to foster and encourage that very confidence. These two propositions are mutually inconsistent. They suggest that a client who fails to divulge all information (including embarrassing information) to his lawyer is not

²⁵ The Independent 27 July 1990

²⁶ (1884) 14 QBD 153

²⁷ Above n.2

protected by legal professional privilege because he failed to consult his lawyer in confidence. Admittedly, there is a difference between a client who fails to consult in confidence by virtue of failing to divulge embarrassing information and a client who fails to consult in confidence by virtue of harbouring a criminal or fraudulent intent. However, this distinction can be easily blurred; for example, when a client who is a murder suspect, hides vital evidence or lies to his lawyer.

- 7.5 It is submitted that the Court in R. v. Cox & Railton²⁸ need not have gone any further than considering the traditional rationale as set out in Greenhough v. Gaskill²⁹. That rationale provides within itself adequate justification for this exception to the rule of legal professional privilege.
- 7.6 As explained in paragraph 2.4, the traditional rationale anticipates a conflict between two desirable public policy goals. First is the objective to bring as much material as possible before the Court in order to aid it in the search for truth, and second is the objective that clients use lawyers and divulge all information to their lawyers. legal professional privilege exists because the Courts have decided that the second objective is more important than the first and even that the rule helps to promote the search for truth (the first goal).
- 7.7 Now, when the situation changes; that is, when the client consults a lawyer with a fraudulent or criminal purpose in mind, then the weight which the Court gives to these two public goals can justifiably change. That is what has happened. The search for truth becomes eminently more important than the desire to encourage a client to divulge information to his lawyer. This is the value judgment the Courts have made and the fraud exception to the rule of legal professional privilege is the result.
- 7.8 Unfortunately, the traditional rationale helps to identify a difficulty with the fraud exception. The difficulty was recognised in R. v. Cox & Railton³⁰:

We were greatly pressed in the argument that, speaking practically, the admission of any such exception to the privilege of legal advisers is that it is not to extend to communications made in furtherance of any criminal or fraudulent purpose which would greatly diminish the value of that privilege. The privilege must, it was argued, be violated in order to ascertain whether it exists. The secret must be told in order to see whether it ought to be kept.

- 7.9 In terms of the traditional rationale, the problem is this. A client will not be encouraged to use a lawyer and tell her everything if there is a chance in future proceedings that that information will be put in evidence because of a suspicion that he was involved in criminal activity or fraud.

²⁸ Above n.26

²⁹ Above n.2

³⁰ Above n.26

The totally innocent client will probably not be too worried about this (even if he knows about the exception) but then the client with nothing to hide will not hesitate in divulging all to his lawyer anyway. The client to whom the privilege is really directed, however, may well be very wary of this exception, even if he is not involved in crime or fraud simply because he will worry about the possibility of a Court suspecting he was involved and insisting on getting the lawyer's evidence to check.

- 7.10 This difficulty can be answered in two ways. On a practical level, how well do clients know of the crime and fraud exception anyway? If a client is about to divulge embarrassing information to his lawyer, he may well ask about confidentiality and will be told of the basic rule of legal professional privilege. It is unlikely that he will be told the details of the exceptions to the rules. If the client does know about the exception, then he must be informed further in an effort to encourage him to divulge all information. He must be told of the growing practice of Courts to check the client's communication for privilege without putting it in evidence and disclosing it to the opposition. If it is not privilege (for any reason including by virtue of the crime or fraud exception) then it is put in evidence. If it is privileged, it remains privileged and the Court will not take it into account as evidence. In Guardian Royal Assurance v. Stuart³¹, Cooke J said:

... Inspection of the documents by the judges has proved illuminating. High Court Judges now appear to be adopting this practice quite commonly in dispute of privilege claims. Experience suggests that its advantage in being likely to lead to a more just decision outweighs the disadvantage that only the judge and not the other side sees the documents if the claim to privilege is upheld³². Accordingly, in the field of legal professional privilege at least, I think that in general a judge who is in any real doubt and is asked by one of the parties to inspect should not hesitate to do so.

- 7.11 This practice would be entirely consistent with the traditional rationale. If only the bench reviews the confidential information to assess whether an exception to legal professional privilege applies (and if it does not then the privilege remains in tact) then a client will not be discouraged from using a lawyer and divulging all information to her.
- 7.12 A recent House of Lords decision has raised the possibility that the fraud exception is extended to an extent which at first glance is inconsistent with the traditional rationale. The case is Francis & Francis v. The Central Criminal Court³³. The police, while investigating the affairs of a person suspected of large scale drug trafficking, suspected that he laundered his money by providing it to members of his family to purchase property. The police wanted to view solicitors files of one of those family

³¹ [1985] 1 NZLR 596,602

³² This rather curious sentence is clear if we assume that the advantage and disadvantage is that of the party contesting the privilege.

³³ [1988] 3 All ER 775

members who had recently purchased property. They got access to the file under Section 27 Drug Trafficking Offences Act 1986 and the solicitors sought judicial review claiming that Section 10(1) Police and Criminal Evidence Act 1984 protected the files as privileged. However, Section 10(2) provides an exception to the protection of Section 10(1), if the files were "items held with the intention to further a criminal purpose".

- 7.13 The solicitors argued that their client had no criminal intent and even if her relative did, that would not come within the Section 10(2) exception. The Court was afraid to interpret this clause literally so that it would apply only if the solicitor (whose file it was) had criminal intent because it recognised both the general public policy behind the fraud exception and the public policy behind the Act which were in favour of the exception applying if the holder of a file or anyone else (not only the client) had criminal intent.
- 7.14 The concern with the Francis & Francis decision is twofold. First, the court came to an interpretation of Section 10(2) by going back to first principles and considering not only the words, but also the common law fraud exception and public policy. The result is the possibility that Francis & Francis will not be restricted to statutes similar to Section 10(2) but will be used as a basis for extending the common law fraud exception so that legal professional privilege will not apply if anyone connected with the communications is guilty of criminal intent.
- 7.15 The second concern is that this extension to the fraud exception (even if it is restricted to this or any similar statute) appears to be inconsistent with the traditional rationale. It has been suggested that the court approached the policy question "in a vacuum" and failed to consider the policy goal of encouraging open and frank disclosure. Instead, it considered in isolation the policy goal of efficiently prosecuting certain criminals. This may have led to an extension of the fraud exception which jeopardises the effectiveness of the privilege. As explained earlier, the traditional rationale is essentially a value judgment between two conflicting policy goals. If the court had assessed both of these goals in the light of its proposed extension of the fraud exception, possibly the extension would not have resulted.
- 7.16 However, it is submitted that a careful analysis of the two policy goals which make up the traditional rationale would have resulted in the same conclusion. Essentially the two questions are these:
1. If the fraud exception is extended so that privilege is lost if anyone is guilty of a criminal intent and that guilt can be exposed by removing the privilege, will this help the efficient investigation, prosecution and conviction of crime?
 2. If the fraud exception is extended as described, will a client still be encouraged to use a lawyer and disclose all information to her fully and frankly.
- 7.17 Clearly the answer to the first question is yes. The answer to the second question would appear at first glance to be no. If a client thought that his communications would be used in evidence in any public court, he may

well be discouraged from full and frank disclosure. He would be discouraged even if he did not know he was dealing with a criminal. If he was about to divulge any confidential information to his lawyer and he found out about Francis & Francis he may well decide not to risk giving that information in case it is later discovered that he was inadvertently dealing with a criminal and his confidential information must be used as evidence against that criminal. Thus, there appears to be a conflict of policy goals and a court must make a value judgment. The value judgment may well be different than that made when the criminal to be caught is the client himself.

- 7.18 It is submitted, however, that the answer to the second question may well be yes; if the exception is extended, a client will still be encouraged to full disclosure. The communications will not be used as evidence in any litigation involving that client. They will be used as evidence in a separate criminal trial involving a third party. The client's desire to see the efficient investigation and prosecution of criminals can be assumed to be the same as the public policy desire. Thus the exception could be extended without compromising the traditional rationale for privilege.
- 7.19 The only flaw in this theory was highlighted by the Francis & Francis situation. The criminal against whom the lawyer client communication is to be used as evidence is likely to be someone known to the client (and possibly related or close to him). Then, in reality, the client's desire to see that criminal convicted may not be the same as the public's. The question that must be answered accurately is; what will a clients behaviour be? Will the extension to the exception be enough to discourage him from full and frank disclosure? If it is, what is the courts value judgment as to the usefulness of this extension given its disadvantage? It has already been suggested that the client may not be discouraged from full and frank disclosure. To this can be added the practical argument that the client is unlikely to know of or enquire about this fraud exception or any extension to it. The prediction of what the courts value judgment would be is more difficult to make. It may well be no different from the judgment made by the House of Lords based on their consideration of just one public policy.
- 7.20 The traditional rationale has not provided a prediction as to what the answer would be. Nor has it helped to simplify the law at this rather difficult frontier. However, it is submitted that it has served half its purpose by providing a framework for clear thinking and by clarifying the issues in the public policy area where the energy ought to be expended, and has avoided the trap of complex analysis of authorities, rules and exceptions. This in itself may serve to simplify this area of the law.

8. THE COPIES OF DOCUMENT EXCEPTION

- 8.1 Another example of an exception to legal professional privilege which appears to be difficult to settle and one which is possibly more prevalent than the Francis & Francis fraud exception is this. Should a copy of a document be privileged if the original is not, assuming the copy is brought into existence either by virtue of a communication between lawyer and client or in preparation for pending litigation. This discussion will focus on copies of documents brought into existence as part of the preparation for pending litigation because it is these copies that are most likely to be the

subject of a privilege dispute and this will focus the discussion so as to demonstrate the use of the work product rationale in a difficult area of exceptions to legal professional privilege. There is a conflict of authority as to whether privilege should attach to copies of non-privileged documents. There have been no New Zealand cases on the subject so discussion will centre on English and Australian decisions, to establish that a conflict does exist and that this is a complex area which is difficult to clarify, and, on the application of the work product rationale, to propose a solution to the conflict.

- 8.2 Lord Denning supported the notion that copies of documents should not enjoy privilege if the originals do not, in the English Court of Appeal case of Buttes Oil Co v. Hammer (No.3)³⁴

If the original document is privileged (as having come originally into existence with the dominant purpose aforesaid), so also is any copy made by the solicitor. But, if the original is not privileged, a copy of it also is not privileged - even though it was made by a solicitor for the purpose of the litigation.

- 8.3 He cited Chadwick v. Bowman³⁵ as precedent and gave his reasons,

... The original, (not being privileged) can be brought into court under subpoena duces tecum and put in evidence at the trial. By making the copy discoverable, we only give accelerated production to the document itself.

The Master of the Rolls felt able to depart from an earlier Court of Appeal decision to the contrary following adverse comments by the Law Reform Commission³⁶. That earlier authority was Watson v. Cammell Laird & Co³⁷. In that case a copy was made of hospital records by a solicitor in preparing for the client's case. Lord Evershed MR held that the copy was privileged because it was brought into existence for the purpose of helping in the preparation of the Plaintiff's case. Indeed the then Master of the Rolls distinguished Chadwick v. Bowman because Mathew J had held in that case that the copy in question had not been brought into existence for the purpose of the action within the true meaning of the rule upon which defence counsel relied. In Watson, the copy had been made for the sole purpose of preparing the Plaintiff's case and Lord Evershed said "in so far as skill is involved, it was part of his (the solicitors) professional skill in assisting his client to go to the hospital to get it". Lord Evershed relied on the Palermo (No.2)³⁸, also a Court of Appeal decision. Interestingly, there are Australian cases to support both Buttes Oil Co and Watson. McGaskill

³⁴ [1981] QB 223,244

³⁵ (1866) 16 QBD 561, 562

³⁶ 16th Report on Privilege in Civil Proceedings (1967) Cmnd 3472

³⁷ [1959] 2 All ER 757

³⁸ (1883) 9 PD 6

v. Mirror Newspaper Ltd³⁹ held that copies of documents were not privileged, following Buttes Oil Co. Vardes v. South British Insurance Co [1984] 2 NSWLR 652 held the opposite, following Polermo (No.2) and Watson. Indeed there is now an indication that the English courts are returning to the Watson rule that copies of documents can be privileged.

8.4 Three recent English cases have added significantly to the confusion. R v. Board of Inland Revenue, ex parte Goldberg⁴⁰ was an application for judicial review by a barrister who was being forced to supply copy documents to the Inland Revenue Department under s.20(3) Taxes Management Act 1970. Those copies were given to him by an instructing solicitor for the purpose of obtaining an opinion in the light of pending litigation. The solicitor had parted with the originals on his client's instructions and their whereabouts were unknown. The applicant claimed legal professional privilege and therefore the protection of s.20B(8) of the Taxes Management Act 1970. The application for judicial review was granted and the privilege upheld because the copy documents had been brought into existence for the sole purpose of obtaining legal advice and were therefore privileged even if the originals were not.

8.5 That case was decided by Watkins LJ and Kennedy J, sitting in the Queens Bench Division, in April 1989. In August 1989, the Court of Appeal heard Dubai Bank Ltd v. Galadari⁴¹. That was an appeal from Vinelott J who held that a copy affidavit held by the appellant's solicitor was not privileged (again the original affidavit from a 1985 proceeding was unavailable). Dillon LJ held that the appellants had failed to discharge their onus to establish that the affidavit was in their solicitor's possession for the purpose of seeking legal advice and therefore the appeal was dismissed. He and Farquharson LJ went further to hold that copy documents could not be privileged in any case if the original document could not be privileged. They doubted the Goldberg decision in so far as it decided that copies would be privileged if supplied to counsel when the originals did not attract privilege.

8.5 Then in February 1990, the Commercial Court of the Queens Bench Division heard Ventuoris v. Mountain⁴². Saville J held:

It is also settled law that the privilege attaches to copies taken by solicitors of documents held by third parties, where the copying is done for the purpose of actual or contemplated litigation.

8.6 However, this decision may well be appealed and should not be considered as "settling the law".

³⁹ [1984] 2 NSWLR 652

⁴⁰ [1989] QB 270

⁴¹ [1989] 3 WLR 1044

⁴² [1990] New Law Journal

- 8.7 In Buttes Oil Co⁴³, although Lord Denning dismissed The Palermo⁴⁴ and Watson v. Cammell Laird⁴⁵ without any analysis whatsoever, it did at least provide justification for privilege not attaching to copies of documents. Documents in the possession of third parties can be inspected by either party to a dispute. If the third party in question is friendly to one party and not the other, it is possible to bring an application for particular discovery against the third party under Rule 307 High Court Rules (NZ). Thus, claiming privilege for a copy of a document, the original of which is in the possession of a third party is pointless because the document can be obtained, and therefore it is also unnecessarily expensive and frustrating to the court and other parties concerned. It is not so pedantic a tactic to claim this privilege however if the original has been destroyed or is in another jurisdiction. In such a case the argument against privilege attaching to the copy is that the original document was not brought into existence for any purpose which justifies privilege. Why then should privilege attach to a copy which is identical in every respect.
- 8.8 The answer to this is immediately obvious by reference to the work product rationale. As was said in Hickman v. Taylor⁴⁶, it is essential for a lawyer to be able to work with a certain degree of privacy and especially to be able to assemble information and sift what she considers to be the relevant from the irrelevant facts. Part of that preparation process is selecting and copying documents from third party sources. The work product rationale argues that if such copies of documents were to be disclosed to the other side, much of the copying that occurs would not get done. A lawyer may prefer to take notes, which are privileged, or not to inspect third party documents at all rather than disclose the source of those documents and her selection of what documents are relevant to her client's case.
- 8.9 Dubai Bank could be distinguished on this basis. When a lawyer studies a file and makes a selection of documents for copying, those copied documents should be privileged. This is consistent with Goldberg and the work product rationale. When a whole file is simply copied and sent to a lawyer, no privilege should attach because there has been no "work" done by the lawyer. This is closer to the Dubai Bank situation. By focusing on the work product theory, the grey area between a lawyer's selection and the whole file being copied can be clarified.
- 8.10 This work product argument has not been used to justify any of the decisions in support of copies of documents being privileged. In Ventouris v. Mountain, Saville J put forward the traditional rationale as a reason for his decision:

⁴³ Above n.34

⁴⁴ Above n.38

⁴⁵ Above n.37

⁴⁶ Above n.12

... The public interest requires full and frank exchange of confidence between solicitor and client to enable the later to receive necessary legal advice and assistance ...

To my mind this basic principle applies equally to the documents in question. If a party to actual or contemplated litigation had to disclose such documents [copies of documents obtained from third party], then in the nature of things such disclosure would be calculated to diminish or destroy the confidential relationship between solicitor and client ...

8.11 As explained earlier the traditional rationale cannot apply to justify privilege attaching to copies of third parties' documents, or any other documents brought into existence for the preparation of trial other than lawyer/client communications. At best, Saville's J explanation is only valid if it is varied slightly to focus on the public interest objective that a client instruct his lawyer to do everything possible to assist him rather than instruct her to do nothing for fear she discloses unfavourable or embarrassing information. But even then, it is only useful if it elaborates this objective to expose the work product rationale.

8.12 Watkins LJ touched on a point similar to the work product rationale in Goldberg⁴⁷. He recognised an argument by counsel for the applicant to the effect that legal advisers must be free to exercise their judgment and creativity in selecting copy documents from third parties:

The copy documents may be selected or marked by the solicitor to highlight the issue or issues, or they may be marked by counsel when he is considering them. If disclosed to the revenue, those copy documents might indicate both the advice sought and the advice given.

8.13 It is a pity that Goldberg was so quickly doubted by the Court of Appeal because it is submitted that the fact that the courts have failed to consider any rationale for extending privilege to copies of third parties documents or have considered inapplicable rationales, has contributed to the current situation where the law is unsettled in this area.

8.14 The work product rationale goes some way to clarify the issues and therefore raise the possibility of settling the law. It has already been argued that privilege attaches to third party/lawyer, and third party/client communications, and to documents brought into existence by lawyer or client in contemplation of litigation because the desire to aid the complete and thorough preparation of the case outweighs the desire for all information to flow freely in the search for the truth. That is the work product rationale. Therefore, the question to be addressed with respect to copies of third parties documents is this;

Which is more desirable;

⁴⁷ Above n.40

- (1) To save costs by requiring copies of documents to be discovered thereby avoiding the need for all parties to go to the trouble of finding, selecting and copying documents, or
- (2) To protect a lawyer's preparation process from interference thereby promoting a more thorough, detailed, and careful preparation.

8.15 It is submitted that this second objective throws a rather different light on the situation and takes some of the weight of the policy argument enunciated by Lord Denning in Buttes Oil Company (which is represented by the first question). The protection of a lawyer's preparation process is more important than the desire to save costs of each party and therefore copies of unprivileged documents would be privileged (if brought into existence in preparation for litigation) for this reason. Although protecting copies of documents from disclosure may increase the expense for some individual litigants in specific cases, the overall effect is to save costs. If copies of documents are not privileged, a lawyers approach to litigation may be unduly cautious. The lawyer may be afraid that collecting copies of documents will disclose too much about her strategy and substantive case and therefore choose to take her own notes or not to pursue a particular chain of enquiries. Alternatively, the lawyer may take a risk and do nothing until as late as possible in the pre-trial period in the hope that her job will be greatly assisted by the work product handed over to her by the other side. The long term effect of all this would be to create inefficiencies in the judicial process which in term would impose cost burdens on the community.

8.16 It may be a less straightforward analysis of these policy goals that occurs in court. But at least with the adoption of the work product rationale, the substantive issues about the desirability or otherwise of copies of documents being privileged is squarely addressed. In the authorities mentioned so far, only Lord Denning in Buttes Oil Company⁴⁸ and perhaps Watkins LJ in Goldberg attempt a justification for privilege not attaching to copies of otherwise unprivileged documents. Both Saville J. in Ventouris v. Mountain⁴⁹ and Hunt J. in McGaskill v. Mirror Newspaper Limited⁵⁰ apply the wrong rationale (the traditional rationale) to justify privilege attaching. This has resulted in an unclear area of the rules of legal professional privilege which really cannot be clarified without reference to public policy. Furthermore, the analysis of public policy would be flawed and incomplete if the work product rationale was not considered.

9. CONCLUSION

9.1 The law of legal professional privilege has its origins in the murky distant past. The original rule and its justification has survived for centuries and is repeated frequently in modern cases. However, the rule has expanded

⁴⁸ Above n.34

⁴⁹ Above n.42

⁵⁰ Above n.39

and developed to the extent that the justification cannot apply to these developments. As a justification, this traditional rationale still holds value. However, a new rationale or perhaps even new rationales must be developed to justify the expansions in the law of privilege. The most likely candidate for that role is the work product rationale, first explored in a 1947 United States case, Hickman v. Taylor. It is yet to be considered by a New Zealand Court.

- 9.2 The need for developing this second rationale goes further than just satisfying the judicial conscience that expansions in the rules of legal professional privilege were warranted. It is also needed in the fight against those confused areas of the law which give rise to constant litigation, inconsistent decisions and perhaps even plain wrong decisions. Perhaps because of the ancient origin of the rules of privilege, the cases tend to rely almost entirely on authority for their results. Seldom is the justification for the decision considered or, if it is considered, the justification is wrong. This is for the simple reason that only one rationale is used to serve a number of different rules. If two or more specific rationales for the rules of legal professional privilege were allowed to develop and used in judicial decision making, the process of that decision making would be greatly improved. Instead of relying on authority and precedent, the policy considerations for and against a particular rule or exception would be thoroughly analysed.
- 9.3 This has been demonstrated for two exceptions to the general rules of legal professional privilege. There is no reason why the process should not work equally well for an analysis of any rule or exception. The application of a rationale naturally steers the mind into a comparison between two or more conflicting policy goals. This process is consistent with the growing tendency to question all rules affecting admissibility of evidence. Its development is vital to the survival of a set of clear and settled rules of legal professional privilege.

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