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II. THE POLICY UNDERLYING THE ATTORNEY-CLIENT PRIVILEGE

Before examining the choice-of-law issues, we must briefly examine the attorney-client privilege itself. The attorney-client privilege is the oldest of the various legally recognized privileges for confidential communications. The rule that an advocate could not be called as a witness against his client existed in Roman times. It is unclear whether the Roman tradition influenced the Anglo-Saxon attorney-client privilege, but English recognition of the privilege goes back at least to Elizabethan times.

The policy justifications for the privilege have evolved over time. The Roman rule was designed to protect against perjury. The theory was that an advocate had a strong motive to misstate the facts in favor of his client; the advocate was not allowed to testify because his testimony could not be believed. The English attorney-client privilege was based originally on the oath and honor of attorneys as "gentlemen" not to betray confidences reposed in them. The attorney could not testify not because of any practical risks, but because it was his duty not to disclose his client's secrets.

By the late eighteenth century, the original English justification was repudiated and replaced by a new, more utilitarian argument, which survives today. The modern justification focuses on the needs of the adversary system if it is to produce just results. The attorney-client privilege is considered indispensable to the lawyer's function as advocate on the theory that the advocate can adequately prepare a case only if the client is free to disclose everything, bad as well as good. The privilege is also considered necessary to the lawyer's function as confidential counselor in law on the similar theory that the legal counselor can properly advise the client what to do only if the client is free to make full disclosure.

This justification, which has been "virtually unchallenged" in modern times, rests on three assumptions. First, it assumes that a client will communicate with counsel more fully and truthfully if attorney-client communications are protected from disclosure. Second, it assumes that an attorney can advise her client more effectively if the client is more forthcoming. Finally, it assumes that the value of the resulting improved legal representation exceeds the cost of undisclosed evidence.

The attorney-client privilege thus represents a tradeoff between effective legal representation and full disclosure of all pertinent facts. The privilege limits the available relevant evidence, seriously impeding the search for truth, but it does so in pursuit of what is perceived to be a higher value. "The proposition is that the detriment to justice from a power to shut off inquiry into pertinent facts in court will be outweighed by the benefits to justice . . . from a franker disclosure in the lawyer's office." The assumption that one outweighs the other is essentially unverifiable.
Other rationales have been offered to support the attorney-client privilege, but none fits particularly well. Several authors argue that the privilege is based on the public policy against self-incrimination, but this explanation is partial at best because the privilege is not limited to criminal defendants or those likely to be criminal defendants. It applies to all clients, civil and criminal, and may be used by plaintiffs as well as defendants. More importantly, the privilege against self-incrimination may be waived, and this rationale fails to explain why disclosure to the attorney is not itself a waiver. There is no waiver only if there is an expectation of privacy, and there is an expectation of privacy only because of the privilege. Thus, the self-incrimination rationale assumes its own conclusion.

Other authors have argued that the privilege is based on a right of privacy, but this explanation is also inadequate. The attorney-client relationship is not the intimate type of relationship that one would expect a right of privacy to protect; it is primarily a business relationship, and business relationships are not usually shielded from discovery. Other proffered rationales for the attorney-client privilege have also been repudiated. The best explanation for the attorney-client privilege is the desire to promote effective legal representation.

Referring Principles:

XII.6 - Attorney-client privilege