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## Convenience vs. Confidentiality: An Evaluation of the Effects of Computer Technology on the Attorney-Client Privilege

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# Comments

## Convenience vs. Confidentiality: An Evaluation of the Effects of Computer Technology on the Attorney-Client Privilege

### I. INTRODUCTION

Since at least the reign of Elizabeth I, courts and judges have recognized a special relationship between an attorney and client.<sup>1</sup> This relationship has been characterized by the principle that the communications between an attorney and client are special and should be treated accordingly. The attorney-client privilege is the product of the exceptional nature of this communication. At first, the privilege was seen as a way to protect the attorney's honor,<sup>2</sup> but it has since been interpreted as belonging to the client.<sup>3</sup> Although the interpretation of the privilege has changed over the years, one thing has remained constant: Once the attorney-client relationship is established, communications between an attorney and client are privileged.<sup>4</sup>

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1. 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961); Commonwealth v. Sims, 521 A.2d 391, 394 (Pa. 1987).

2. *Sims*, 521 A.2d at 394.

3. 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961).

4. Commonwealth v. Mrozek, 657 A.2d 997, 998 (Pa. Super. Ct. 1995). The attorney-client relationship does not guarantee protection of all communications. *Id.* The generally accepted requirements for asserting the attorney-client privilege are:

1) The one seeking to assert the privilege is or has sought to become a client.

2) The person to whom the communication was made is a member of the bar of a court or his or her subordinate.

3) The communication relates to a fact which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort.

4) The privilege has been claimed and is not waived by the client.

The function of the privilege is to ensure that neither a client nor attorney can be compelled to testify as to the content of their communications.<sup>5</sup> The privilege has been extended to encompass those whom an attorney must employ to assist in rendering legal services to a client.<sup>6</sup>

In recent years, attorneys have increased their use of computers in an attempt to provide more efficient and affordable legal assistance to their clients.<sup>7</sup> Although this trend began with the use of word processing equipment for preparing documents, it has grown steadily more complex and sophisticated as technology has developed.<sup>8</sup> Today, attorneys are using high-tech computer imaging systems and data storage as well as retrieval systems to assist them in preparing documents for discovery, negotiations and litigation.<sup>9</sup>

Currently, there is no case law addressing the effects computer technology has on the attorney-client privilege.<sup>10</sup> As more law firms employ outside companies to store legal documents in computer-accessible form, however, it is only a matter of time until such litigation arises. This comment explores this issue and discusses the likely outcome of future litigation.

Part I of this comment discusses the role, purpose and limits of the attorney-client privilege as it is understood and applied in modern American law. Part II summarizes the new technology that attorneys are employing to assist them in preparing cases. Part III explores the problem that the application of this new technology to the practice of law poses for the attorney-client privilege.<sup>11</sup>

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*Mrozek*, 657 A.2d at 998 (citing *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950)).

5. *Mrozek*, 657 A.2d at 998. Every communication between an attorney and client will not warrant protection under the privilege. *Id.* The privilege has been interpreted to apply only to those communications that further the attorney-client relationship and are directly related to the attorney's representation of the client. See, e.g., *Mrozek*, 657 A.2d at 998; *United States v. Zolin*, 809 F.2d 1411, 1417-18 (9th Cir. 1987).

6. 8 J. WIGMORE, EVIDENCE § 2301 (McNaughton rev. 1961).

7. Robert A. Barbour, *High Speed Computing Improves Legal Services*, NAT'L L.J. D6-D7 (Nov. 20, 1995).

8. FRANK ARENTOWICZ, JR. & WARD BOWER, LAW OFFICE AUTOMATION AND TECHNOLOGY, §§ 5.04-6A.05. (Times Mirror Books 1992).

9. *Id.* See also Barbour, *supra* note 7.

10. As of the time this comment was written, no cases have been brought challenging the effects of the increased use of computer technology on the attorney-client privilege.

11. This comment only discusses the use of new computer technology and the effect it may have on the attorney-client privilege. It does not discuss the ramifications the technology may have on the work-product doctrine or possible concerns with respect to the Rules of Professional Conduct.

## II. THE ATTORNEY-CLIENT PRIVILEGE

### A. *The Role of the Privilege*

The role of the attorney-client privilege in both the federal and state systems is one of evidence.<sup>12</sup> It serves to “shut off inquiry to pertinent facts in court.”<sup>13</sup> This means that “attorneys at law or counsel are restrained from giving evidence of what they have had communicated and entrusted to them in that character.”<sup>14</sup> It also means that clients cannot be forced to disclose communications between themselves and their attorneys. The Pennsylvania Supreme Court has interpreted the attorney-client privilege, as codified, to mean that “[a]ll confidential communications and disclosures, made by a client to his legal adviser for the purpose of

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12. The attorney-client privilege is codified under both federal and state law. See FED. R. EVID. 501; 42 PA. CONS. STAT. §§ 5916, 5928 (1978). The modern federal attorney-client privilege is embodied in Rule 501 of the Federal Rules of Evidence. FED. R. EVID. 501 (1994 & Supp. 1997). Rule 501 provides that: “[T]he 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.” *Id.* This particular aspect of Rule 501 is intended to provide for the attorney-client privilege in cases “where a claim or defense is based upon federal law.” FED. R. EVID. 501 conference report.

Rule 501 does not specifically state that an attorney-client privilege exists. FED. R. EVID. 501. The Report of the House Committee on the Judiciary and the Report of the Senate Committee on the Judiciary explain, however, that the privilege was included in the original draft of Rule 501. FED. R. EVID. 501 reports of House and Senate Committees on the Judiciary. The reports state that the thirteen specific privileges originally included in Rule 501 were removed in order to allow for the law of privileges to continue to develop through the common law. *Id.*

In diversity cases, Rule 501 provides that the federal court must apply state privilege law. FED. R. EVID. 501. The rule states that “[i]n civil actions and proceedings, with respect to an element of a claim or 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.” *Id.*

This comment uses the Pennsylvania attorney-client privilege as a reference point from which to examine the attorney-client privilege in the context of state courts. The Pennsylvania attorney-client privilege is codified at 42 PA. CONS. STAT. §§ 5916 & 5928 (1978). Section 5916 deals with the attorney-client privilege in criminal proceedings and section 5928 deals with the privilege as it relates to civil proceedings. *Id.* The language of the two sections is substantially similar. *Id.* The pertinent portion of each section provides: “[C]ounsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.” *Id.* Because of the similarity of these sections, this comment refers to the Pennsylvania attorney-client privilege generally.

13. MCCORMICK ON EVIDENCE, § 87 at 204 (West 1972).

14. *Cohen v. Jenkinstown Cab Co.*, 357 A.2d 689, 692 (Pa. Super. Ct. 1976) (quoting *Hamilton v. Neel*, 7 Watts 517, 521 (1838)). While this is usually the case, there are situations when a court will deem it appropriate for an attorney to divulge privileged information. *Id.* One such situation is when “it is impossible that the rights or the interests of the client can be affected by the witness’s giving evidence.” *Id.*

obtaining his professional aid or advice, shall be strictly privileged."<sup>15</sup>

### B. *The Purpose of the Privilege*

The attorney-client privilege in both federal and state court is intended to promote the free exchange of information between an attorney and client.<sup>16</sup> As courts have noted, the privilege is designed to protect disclosures a client must make to an attorney in order to obtain informed legal advice.<sup>17</sup> The Pennsylvania Supreme Court in *Commonwealth v. Sims*<sup>18</sup> stated that "the privilege is not concerned with the better ascertainment of truth . . . [i]t's purpose is to foster a confidence between client and attorney that will lead to a trusting and open dialogue between them."<sup>19</sup> The privilege thus works to hinder the truth-finding process, but the hinderance is deemed a necessary compromise if clients are to be afforded the opportunity for complete openness with their attorneys. The privilege is strictly a "tool" of the client to ensure confidence between the client and attorney.

In order to promote this purpose, it is necessary that disclosures made to an attorney's agent be cloaked with the privilege. In today's society, the volume and complexity of cases require that attorneys employ secretaries, legal clerks and junior attorneys in order to fully and adequately represent their clients.<sup>20</sup> This invariably leads to situations in which these employees will be privy to confidential communications. The Pennsylvania Superior Court stated that the privilege extends to agents of the attorney "because clients have a reasonable expectation that such statements will be used solely for their benefit and remain confidential."<sup>21</sup> With this in mind, both federal and state courts have held that client disclosures to an attorney's agent are encompassed by the attorney-client privilege.<sup>22</sup> If the courts denied protection to disclosures made to an attorney's agent, the effect would be to nullify the privilege. Courts have long recog-

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15. *Sims*, 521 A.2d at 394 (citing 2 MECHAM, On Agency, § 2297 p. 1877 (2nd ed. 1914)).

16. See, e.g., *In re Grand Jury Proceedings*, 78 F.3d 251, 254 (6th Cir. 1996); *Sims*, 521 A.2d at 394.

17. See, e.g., *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1423-24 (3rd Cir. 1991); *Commonwealth v. Noll*, 662 A.2d 1123 (Pa. Super. Ct. 1995).

18. 521 A.2d 391 (Pa. 1987).

19. *Sims*, 521 A.2d at 394.

20. *United States v. Kovel*, 296 F.2d 918, 921 (2nd Cir. 1961).

21. *Kalenevitch v. Finger*, 595 A.2d 1224, 1228 (Pa. Super. Ct. 1991)(quoting *People v. Osorio*, 549 N.E.2d 1183, 1185-86 (N.Y. 1989)).

22. See, e.g., *Kovel*, 296 F.2d at 921; *Noll*, 662 A.2d at 1126.

nized the need for attorneys to seek nonlawyer assistants, and extending the privilege to those assistants is clearly necessary.<sup>23</sup>

### C. *The Limits of the Privilege*

As with any mechanism that operates to prevent courts from ascertaining all the relevant facts of a case, the attorney-client privilege is limited.<sup>24</sup> The limitation of the privilege is that it “protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege.”<sup>25</sup> In other words, not everything communicated between an attorney and client will have the benefit of the privilege.<sup>26</sup>

This limitation is not only applied to communications between attorneys and their clients, but also to communications made to the agents of the attorney.<sup>27</sup> Hence, only those communications made to the attorney’s agent that are necessary to obtain the attorney’s legal advice will be protected.<sup>28</sup>

In order to invoke the attorney-client privilege for a client’s disclosure to an attorney or an attorney’s agent, the disclosure must be necessary to obtain informed legal advice. The underlying rationale for this policy is that invocation of the privilege hinders the truth determining process and, therefore, the privilege should be strictly construed and not expanded.<sup>29</sup> One example of this necessity was expressed by Judge Friendly in *United States v. Kovel*.<sup>30</sup> In *Kovel*, Judge Friendly found that an accountant’s assistance in preparing tax information for a lawyer’s client rises to the level of necessity.<sup>31</sup> The judge’s decision was based on the complexity of the accounting principles involved and the type of assistance rendered by the accountant.<sup>32</sup> Judge Friendly’s opinion went on, however, to state that the attorney-client privilege would not extend to every outside professional hired by an attorney.<sup>33</sup>

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23. See, e.g., *Kovel*, 296 F.2d at 921; *Noll*, 662 A.2d at 1126.

24. *Kovel*, 296 F.2d at 921-23.

25. *Westinghouse*, 951 F.2d at 1423-24 (quoting *Fisher v. United States*, 425 U.S. 391, 403 (U.S. 1976)).

26. Some communications are specifically excluded from protection by the attorney-client privilege. For instance, communications between an attorney and client relating to the client’s intent to further a crime or fraud are not protected by the privilege. *Zolin*, 809 F.2d at 1417-18.

27. *Kovel*, 296 F.2d at 922-23.

28. *Id.*

29. *Id.* at 921 (quoting 8 J. WIGMORE, EVIDENCE § 2192 (McNaughton rev. 1961)).

30. *Id.* at 921-23.

31. *Id.*

32. *Kovel*, 296 F.2d at 921-23.

33. *Id.* at 922-23.

When Judge Friendly wrote his opinion in *Kovel*, he opined that future applications of attorney-client principles would be less difficult than earlier applications.<sup>34</sup> New technology, however, threatens to make application of the principles more difficult than ever. As the use of this new technology increases, courts will face the task of deciding if its use rises to the level of necessity or if it is merely a convenience.

### III. THE NEW TECHNOLOGY

In addition to secretaries, legal interns and junior attorneys, attorneys are increasingly using computer technology to assist them in their legal duties. Advances in computer technology have made drastic changes in the way attorneys and firms handle their cases. Computer technology is used by attorneys for keeping track of billable hours, communications, information access and a wide variety of other tasks.<sup>35</sup> More recently, firms have begun to use technology known as Optical Character Recognition ("OCR") and Imaging Systems.<sup>36</sup> These new technologies allow a law firm to have large amounts of material scanned into a computer and stored on a CD-ROM.<sup>37</sup> These documents can then be easily accessed, shared and duplicated in a more time efficient manner without risking damage to the originals.<sup>38</sup> This new technology allows attorneys to more easily manage the sometimes overwhelming amount of paperwork associated with complex cases. Additionally, the documents can be more easily used during litigation.<sup>39</sup>

This new technology has also created a new industry. Most attorneys and law firms cannot afford all of the equipment necessary to perform the scanning of documents on their own. For this reason, Imaging Service Bureaus ("ISB's") have developed.<sup>40</sup> ISB's are paid by attorneys or law firms to scan documents and store them on CD-ROMs.<sup>41</sup> The ISB's provide all of the needed equipment and personnel.<sup>42</sup> An attorney simply labels docu-

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34. *Id.* at 923.

35. Barbour, *supra* note 7.

36. This comment only discusses these new technologies briefly. For a more in depth and complete discussion of these techniques, see Barbour, *supra* note 7; ARENTOWICZ & BOWER, *supra* note 9.

37. ARENTOWICZ & BOWER, *supra* note 9; David S. Cochran, Address before the Pleadings and Discovery Skills class at Duquesne University School of Law (April 12, 1996).

38. Barbour, *supra* note 7; Cochran, *supra* note 38.

39. ARENTOWICZ & BOWER, *supra* note 9.

40. Barbour, *supra* note 7.

41. *Id.*; Cochran, *supra* note 38.

42. Barbour, *supra* note 7; Cochran, *supra* note 38.

ments into categories that include, among others, confidential and privileged communications.<sup>43</sup> These documents can take the form of correspondence as well as notes and transcripts of interviews with clients. If these documents are not scanned along with all the other documents associated with a case, an attorney would have to keep two sets of files; one set of paper files and one set of electronic files, negating the advantage of computer technology.

After an attorney has categorized the documents, an ISB can then scan and store the documents.<sup>44</sup> Once the ISB has scanned and stored the documents, employees of the ISB read the documents and compare them to the scanned image.<sup>45</sup> This ensures that the documents were completely and correctly scanned into the computer.<sup>46</sup> The original documents and CD-ROMs are then delivered to the attorney for use.<sup>47</sup>

#### IV. THE PROBLEM

New computer technology has undoubtedly improved the speed and efficiency of the attorneys and firms that use it. This benefit, however, does not remedy the problem that arises when the new technology is applied to the legal profession.

As discussed above, one of the defining characteristics of the legal profession is the protection afforded the communications between an attorney and client. This protection, however, is not absolute.<sup>48</sup> Great care must be taken to ensure that the attorney-client privilege is preserved.

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43. Cochran, *supra* note 38. In addition to categorizing the documents, an attorney or ISB will insert bar-coded slip sheets to separate the documents. *Id.* These slip sheets provide the computer with additional information concerning the scanned document. *Id.* This provides the attorney with the ability to reproduce the document exactly as the original. *Id.* For example, if an original document or collection of documents was stapled together, a bar-coded slip sheet will be scanned into the computer, which will provide that information. *Id.* Thereafter, when the originals are reassembled or copies are needed, the ISB or attorney will know that the particular collection of documents are to be stapled together. Cochran, *supra* note 38.

44. *Id.*

45. *Id.*

46. *Id.*

47. This is a very brief and simplified discussion of how scanning and Optical Character Recognition technology work are used. For more in depth and complete information, see ARENTOWICZ & BOWER, *supra* note 9.

48. As the Pennsylvania statute codifying the attorney-client privilege states, the privilege may be waived by the client. 42 PA. CONS. STAT. § 5916 and § 5928 (1978). Courts have also clarified that the attorney-client privilege may be waived. *See, e.g., Kovel*, 296 F.2d at 921; *Westinghouse*, 951 F.2d at 1424; *Noll*, 662 A.2d at 1126.



### A. *How the Problem Arises*

Courts have consistently held that the attorney-client privilege hinders the truth-finding process and must be narrowly construed.<sup>49</sup> As the court in *Kovel* stated, “[t]he investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges.”<sup>50</sup> In other words, while courts recognize the need for certain communications between an attorney and client to be privileged from compelled disclosure, this privilege is strictly construed against permitting invocation of the privilege.<sup>51</sup> Following this principle, it has historically been held that “[a]ny disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the privilege.”<sup>52</sup>

The problem that arises as a result of using new computer technology is one of waiver. When the information and communications between an attorney and client are transmitted to a third party, the attorney-client privilege is traditionally waived.<sup>53</sup> When attorneys or law firms send their documents, some of which are privileged, to an outside ISB to be scanned and stored on CD-ROMs, the attorney-client privilege is in danger of being waived.

As mentioned earlier, the attorney-client privilege belongs to the client, hence, it is only the client that can waive or assert the privilege.<sup>54</sup> When an attorney performs an act constituting a waiver with the consent of the client, however, the privilege can be waived.<sup>55</sup> This is the situation that arises when ISB's are employed by attorneys and law firms. The attorney or firm receives the client's permission to send the materials concerning the case to an ISB for scanning and electronic storage. The extent of the disclosure then leads to a finding that the privilege has been waived.<sup>56</sup> As the court in *United States v. Zolin*<sup>57</sup> recognized, “when the disclosure of a privileged communication

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49. See, e.g., *Grand Jury Proceedings*, 78 F.3d at 254; *Westinghouse*, 951 F.2d at 1423.

50. *Kovel*, 296 F.2d at 921 (quoting 8 J. WIGMORE, EVIDENCE § 2192 (McNaughton rev. 1961)).

51. *Id.*

52. *In Re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982).

53. See, e.g., *Westinghouse*, 951 F.2d at 1424.

54. See *supra* note 3.

55. See *Noll*, 662 A.2d at 1126; *Cohen*, 357 A.2d at 691.

56. When an attorney or firm hires an ISB to scan and store documents, there are numerous people who see the documents. In some instances, hundreds of people may see a document, as ISB's employ hundreds of people to scan, store and proof read the documents. As Mr. Cochran stated, ISB's receive documents from attorneys and firms and then send the documents to its scanning center (some of which are located in countries such as the Philippines and Taiwan) to be scanned and proof-read. See Cochran, *supra*

reaches a certain point, the privilege may become extinguished.<sup>58</sup> With the use of ISB's, documents that the client and attorney may wish to keep privileged are disclosed to numerous third parties.<sup>59</sup> This large scale disclosure is clearly inconsistent with any assertion of confidentiality.

### B. Analysis

Proponents of the use of this new technology do not acknowledge any problem.<sup>60</sup> A prerequisite to the protection of the privilege in cases of third party disclosure is the existence of an agency relationship, a fact that proponents apparently presume to exist.<sup>61</sup> The attorney and ISB must demonstrate the existence of an agency relationship, however, in order to cloak this process with the privilege.<sup>62</sup>

The three elements required to show such a relationship are: (1) a manifestation by the principal that the agent will act for him or her; (2) acceptance by the agent of the undertaking; and (3) an agreement between the parties that the principal will be in control of the undertaking.<sup>63</sup> Of these three elements, the first two are easily satisfied by the relationship between an attorney and ISB.<sup>64</sup> The third element is more difficult to establish. To prove this element, it must be shown that the attorney had "the right to control the work of the agent."<sup>65</sup> The relationship between an attorney and ISB fails in this respect.<sup>66</sup> An attorney

note 38. Only after many people have seen and read the document is it returned to the attorney or firm along with the CD-ROM. *Id.*

57. *Zolin*, 809 F.2d at 1415.

58. *Id.* In *Zolin*, the Criminal Investigation Division of the Internal Revenue Service served an administrative summons on the Clerk of the Los Angeles County Superior Court requesting the production of certain documents relating to the tax liability of a man the IRS was investigating. *Id.* at 1413. The requested documents had previously been provided to the court as the result of an unrelated lawsuit. *Id.* The Clerk provided many of the documents, but refused to produce thirteen documents that had been ordered sealed by the court. *Id.*

59. *See supra* note 57.

60. For purposes of this discussion, this author has drawn upon the lecture by David S. Cochran, *supra* note 38, in order to anticipate the proponents of this technology's unexplicated defense to this concern over its implications.

61. Cochran, *supra* note 38.

62. It has been held that the party asserting the attorney-client privilege has the burden of establishing its applicability. *Zolin*, 809 F.2d at 1415.

63. RESTATEMENT (SECOND) OF AGENCY, § 1(1) commt b (1958).

64. In the relationship between an attorney and ISB, the attorney clearly intends the ISB to work for him or her. Equally clear is that the ISB accepts this intention. Precisely because of this intention and acceptance does the situation arise wherein a waiver of the attorney-client privilege can occur.

65. *Lawrence v. Anheuser Busch, Inc.*, 523 A.2d 864, 867 (R.I. 1987).

66. The very nature of the relationship between an attorney and ISB contradicts any assertion that the attorney controls the ISB. It is precisely because an ISB provides a

has no control over when, where, how or by whom the scanning is done. In fact, an attorney merely categorizes the documents, delivers them to an ISB and awaits the return of the completed project. This is completely contrary to the requirements of element three.<sup>67</sup>

If the above argument is unpersuasive, there is an additional argument against finding ISB's to be agents of attorneys who employ them. The argument is founded on the principle that only those persons essential to the attorney's performance of legal services will be recognized as agents for purposes of the attorney-client privilege.<sup>68</sup> This principle is followed by both state and federal courts.<sup>69</sup> These courts have consistently held that an agency relationship will only be found when the assistance of an agent is indispensable to an attorney's work.<sup>70</sup>

The relationship between an attorney and ISB does not rise to this level. The service provided by an ISB is not necessary or indispensable. In fact, only a small number of firms currently use such services.<sup>71</sup> An ISB's services are a mere convenience for an attorney, and convenience will not support an attachment of the attorney-client privilege. An ISB's services are certainly useful, but that alone will not suffice to characterize an ISB as an agent and prevent a waiver of the attorney-client privilege.<sup>72</sup> If it

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service that an attorney is incapable of performing that the relationship is formed. An attorney does not have the time or expertise to perform the service, hence, it would be implausible to assert that an attorney would have the time or expertise to control an ISB in its performance of the same work.

67. It would appear, in fact, that once the documents are delivered to an ISB for scanning and storage, the ISB is actually in control of the attorney. An attorney must wait for an ISB to perform its service before the attorney does any more work on the case.

68. 8 J. WIGMORE, EVIDENCE § 2301 (McNaughton rev. 1961).

69. See *Kovel*, 296 F.2d at 921; *Mrozek*, 657 A.2d at 999.

70. *Kovel*, 296 F.2d at 921; *Mrozek*, 657 A.2d at 999.

71. Cochran, *supra* note 38; Barbour, *supra* note 7.

72. The best and most often cited example to clarify this point was expressed by Judge Friendly in *Kovel*. *Kovel*, 296 F.2d 918. In *Kovel*, Judge Friendly held the services of an accountant hired by an attorney to prepare tax information on behalf of a client to be within the scope of the attorney-client privilege. *Id.* at 921. In so doing, Judge Friendly analogized the accountant to a translator. *Id.* at 922.

Judge Friendly's opinion stated that when an attorney hires, refers a client to, or otherwise employs a translator to assist in the representation of a client who speaks a foreign language, any communication relating to the representation made to or in the presence of the translator would clearly be covered by the attorney-client privilege. *Id.* at 922-23. The translator's services are deemed necessary for adequate representation. *Id.*

In making the analogy between a translator and accountant, Judge Friendly wrote that "[a]ccounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases." *Kovel*, 296 F.2d at 922. Judge Friendly then concluded that the complexity of the situation necessitated the attorney's employment of the accountant in order to provide competent legal services. *Id.*

The *Kovel* opinion makes it clear that the attorney-client privilege is not confined to "menial or ministerial" employees, but also clear is that there are limits upon whom an

was sufficient, then as Judge McGowan once said, "the attorney-client privilege would engulf all manner of services performed for the lawyer that are not now, and should not be, summarily excluded from the adversary process."<sup>73</sup>

## V. CONCLUSION

Nothing in the policy of the [attorney-client] privilege suggests that attorneys, simply by placing accountants, scientists, or investigators on their payrolls and maintaining them in their offices, should be able to invest all communications by clients to such persons with a privilege the law has not seen fit to extend when the latter are operating under their own steam.<sup>74</sup>

This observation by Judge Friendly is equally applicable to the present topic. Courts have traditionally held that the attorney-client privilege should be construed narrowly. The privilege currently is not and never was intended to encompass every service that an attorney performs or every employee that an attorney has perform a service. Only those employees whose assistance is *essential* to an attorney's ability to adequately represent a client fall within the shield provided by the attorney-client privilege.

An attorney's use of an ISB is not of this essential nature. ISB's are doing nothing more than organizing documents for an attorney. It is not a situation, as in *Kovel*, where an attorney requires information to be "translated."<sup>75</sup> An attorney is quite capable of understanding all of the information contained in the documents. Using an ISB is simply a matter of convenience for an attorney and profit for the ISB. The advent of new technology should not work to expand a legal principle into areas it was not intended to reach.

To date, there have been no cases questioning the applicability of the attorney-client privilege to documents sent to an ISB for scanning and storage. This is due to the fact that the procedure is so costly and attorneys and firms on both sides of complex cases are sharing the cost and sending the documents to an ISB jointly. Hence, neither side is in a position to question the practice. Once the service becomes less expensive, however, and attorneys are able to afford the services on their own, there will

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attorney can employ and to whom the privilege may attach. *Id.* at 921. The *Kovel* opinion states that an attorney cannot simply hire outside professionals and allow clients to communicate with them and always maintain the attorney-client privilege. *Id.* There must be a showing that an employee's assistance is essential to the attorney-client relationship. *Id.*

73. *Federal Trade Commission v. TRW, Inc.*, 628 F.2d 207, 212 (D.C. Cir. 1980).

74. *Kovel*, 296 F.2d at 921.

75. See *supra* note 73 and accompanying text.

surely be litigation. When this issue is presented, a court would be wise to remember that the privilege exists to protect a client's interest in confidentiality, not an attorney's interest in convenience.

*William L. Stephens, Jr.*