POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION, Appellant, v. DEPARTMENT OF ECOLOGY and THE PORT OF SEATTLE, Respondents.	PCHB No. 01-160 ACC'S STATEMENT OF SUPPLEMENTAL AUTHORITIES IN REPLY ON ACC'S MOTION FOR RECONSIDERATION

ACC submits the following supplemental authorities in reply on ACC's Motion for Reconsideration and in response to new arguments in Ecology's October 22 submission.[1]

A. The Statements at Issue Are by Their Very Nature Outside of the Realm of the Attorney-Client Privilege

The definitive West two-volume treatise on attorney-client privilege, Paul R. Rice, Attorney-Client Privilege In the United States, West Group (1999), § 5:1 pp. 35-36, states:[2]

> The purpose of the attorney client privilege is to encourage more open and complete communications from the client to the attorney. [Citing *Upjohn Co. v. United States*, 449 U.S. 384, 389 (1981).] The privilege, therefore, provides a direct protection for confidential communications *from* the *client* to the attorney and a derivative protection for communications *from* the *attorney* to the client, to the extent that the responsive attorney communications reveal the substance of protected client communications. [Emphasis added.]

The statements made by the AAG, as set forth in the document and as Ecology now admits, were not factual, but on a "purely legal question." Ecology Br. at 2. Such statements are not protected

[1] ACC was not able to include these materials in its Motion for Reconsideration, which had to be rushed out in light of the Board's initial order on the Motion to Strike.

[2] This treatise was only available to ACC in the University of Washington law library and thus only recently obtained. Copies of the pages cited are attached.

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client communications, nor are they protected under attorney-client privilege here because they do not allude to any such communications. As Rice observes:

> ...attorney's communications summarizing the state of the law on a particular area, or based upon information from third parties (including public records) and other nonprivileged sources, or acquired by the attorneys from public records, are not protected.[3]

What basis can Ecology have for its claim of reasonable assurance on the "purely legal question" presented by the low flow plan other than the AAG's legal opinion? Ecology cannot claim reasonable assurance and at the same time assert privilege for its attorney's opinion on what Ecology has acknowledged "is a purely legal question." Ecology Br. at 2. The case might be different if Ecology were asserting privilege for documents relating to post-401 decision legal opinions on defense matters, but a prior opinion from the AG on a "purely legal question" on which reasonable assurance turns is not protected.

B. Ecology's Attempt to Limit the *Hearn* Principles to Malpractice Cases Is Misplaced.

Although Ecology does not acknowledge it, *Hearn v. Ray,* 68 F.R.D. 574 (E.D. Wash. 1975), relied upon by the Washington Supreme Court in *Pappas v. Holloway,* 114 Wn.2d 198, 787 P.2d 30, was not a malpractice case: it was a civil rights action. Neither case limits the principles enunciated in *Hearn* to particular causes of action or just to circumstances where it is plaintiffs who assert attorney-client privilege. As *Hearn* itself explained:

> The instant case is distinguishable from those discussed above in that the parties asserting the attorney-client privilege are defendants in this civil rights action and, therefore, they have not engaged in the affirmative conduct of instigating this lawsuit. However, defendants assert the privilege in aid of the affirmative defense that they are protected from liability by a qualified immunity. Therefore, all the elements common to a finding of waiver are present in this case ...

[3] Rice, § 5:2, pp. 55-56.

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Hearn, 68 F.R.D. at 581. Here, where Ecology has asserted that it had a basis for reasonable assurance for its decision and where it has now stated the obvious, that the issue concerning a water right for the low flow plan is "purely a legal question" (Ecology Br. at 2), the statement of the AAG to Ecology that a water right is required is directly at issue on the reasonable assurance question. Clearly, Ecology now regrets labeling as "creative" ACC's position that a water right is required (unless "creative" is now a synonym for consistent with the advice of the Attorney General on what Ecology itself concedes "is a purely legal question"). That regret, however, comes too late to protect Ecology from its own disclosure, which is directly probative on the issue of reasonable assurance.[4]

C. Ecology Has Failed to Sustain Its Burden of Proof.

> First and foremost and it goes perhaps without saying, the proponent of the privilege or the protection has the burden of sustaining the proposition that what is sought to be protected from compelled disclosure is in fact subject to either the privilege or the protection.

Epstein, The Attorney-Client Privilege and the Work-Product Doctrine, 4th Ed. at p. 647.

Ecology originally claimed no waiver and asserted inadvertent disclosure on the basis of the Declaration of Ray Hellwig. However, Mr. Hellwig's account of how the disclosure was made turned out to be incomplete in light of the Declaration of Andrea Grad, the Helsell Fetterman paralegal who described the process by which the disclosure came about. Ecology's attorneys in their October 22, 2001, Memorandum at p. 3 in effect rewrite Mr. Hellwig's Declaration, in silent recognition of his failure to

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[4] The State Water Code provides that:

> RCW 90.03.400 Crimes against water code -- Unauthorized use of water
> The unauthorized use of water to which another person is entitled or the willful or negligent waste of water to the detriment of another, shall be a misdemeanor. The possession or use of water without legal right shall be prima facie evidence of the guilt of the person using it. It shall also be a misdemeanor to use, store or divert any water until after the issuance of permit to appropriate such water. [emphasis added]

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acknowledge in his actual Declaration that the document disclosure came in response to a specific request by Ms. Grad for previously withheld documents (Mr. Hellwig's declaration to the Board submitted earlier glossed over this fact and implied a different story). The after-the-fact factual explanations by Ecology's attorneys, coming in the form of assertions in a brief, rather than in a sworn factual declaration, are not evidence and may not be considered as evidence of inadvertent disclosure. Ecology has failed to meet its burden of proving inadvertence.

Further, and critically, Ecology has not responded at all to ACC's quotation of the updated version of the very treatise upon which Ecology previously relied (in its outdated form), Epstein, Attorney-Client Privilege and the Work-Product Doctrine. As ACC noted previously, the current edition of that treatise explicitly states that inadvertent disclosure by a client (assuming, for the moment, that Ecology's disclosure here was inadvertent) is treated differently from inadvertent disclosure by an attorney. Ecology has always acknowledged that Ecology itself -- not the AAG -- made the disclosure. Ecology's failure to offer any authority to the effect that inadvertent disclosure by the client itself (waiving the privilege) is protected is conclusive here.

D. Supplemental Authorities on the Board's Limited Jurisdiction.

a. *Skagit Surveyors and Engineers v. Friends of Skagit County,* 135 Wn.2d 542, 558, 958 P.2d 962 (1998) ("Administrative agencies are creatures of the Legislature, without inherent or common-law powers and, as such, may exercise only those powers conferred by statute, either expressly or by necessary implication.");

b. *U-Haul v. Department of Ecology,* PCHB No. 91-242 (April 9, 1992), Conclusion of Law I ("The Board is not a court of general jurisdiction.");

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c. *Eagles Roost v. San Juan County,* SHB No. 96-47 (February 19, 1997) ("As an administrative agency the Board may only exercise those powers conferred expressly or by necessary implication by its authorizing statute.").

CONCLUSION

Ecology's Motion should be denied in all respects, and ACC's Motion for Reconsideration should be granted.

DATED this 23 day of October, 2001.

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*68 F.R.D. 574, *; 1975 U.S. Dist. LEXIS 15997, **;*
33 Fed. R. Serv. 2d (Callaghan) 704; 2 Fed. R. Evid. Serv. (Callaghan) 523

James HEARN, Plaintiff, v. B. J. RHAY, Superintendent of the Washington State Penitentiary, and Dr. William Hunter, Superintendent of the Washington State Penitentiary Third Floor Mental Health Ward, Defendants

No. 3971

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

68 F.R.D. 574; 1975 U.S. Dist. LEXIS 15997; 33 Fed. R. Serv. 2d (Callaghan) 704; 2 Fed. R. Evid. Serv. (Callaghan) 523

September 26, 1975

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff inmate filed a motion in the United States District Court for the Eastern District of Washington for an order compelling defendant penitentiary superintendents to produce certain documents and answer deposition questions pursuant to plaintiff's action under 42 U.S.C.S. § 1983.

OVERVIEW: Plaintiff inmate filed an action under 42 U.S.C.S. § 1983, alleging that his confinement in the mental health unit violated his right to due process of law and infringed his U.S. Const. amend. VIII right to be protected from cruel and unusual punishment. Defendant raised the affirmative defense of immunity, arguing that they acted in good faith. In order to respond to this defense, plaintiff sought information concerning legal advice provided defendant. Defendant asserted the attorney-client privilege and plaintiff moved for an order compelling production of documents and answers to deposition questions. The court held that all the elements of an implied waiver existed because defendants invoked the privilege in furtherance of an affirmative defense they asserted for their own benefit; through this affirmative act they placed the protected information at issue, and one result of asserting the privilege has been to deprive plaintiff of information necessary to defend against defendants' affirmative defense. The court held that the privilege should not apply and granted plaintiff's motions to compel.

OUTCOME: The court granted plaintiff inmate's motions to compel production of documents and to compel defendant penitentiary superintendents to answer interrogatories and deposition questions because by asserting their qualified immunity as an affirmative defense, defendant impliedly waived the right to assert the attorney-client privilege.

CORE TERMS: attorney-client, discovery, constitutional rights, legal advice, immunity, affirmative defense, qualified immunity, confidentiality, mental health, asserting, prison, third persons, civil rights, disclosure, duty, deposition, inmate, waived, malice, confinement, lawsuit, administrative segregation, affirmative act, state official, common law, segregation, confidential communications, implied waiver, confidential, impliedly

CORE CONCEPTS - ◆ Hide Concepts

Constitutional Law : Civil Rights Enforcement : Official Immunities

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Legislators acting within the sphere of their legislative roles enjoy an absolute immunity from suit under the Civil Rights Act, 42 U.S.C.S. § 1983.

Constitutional Law : Civil Rights Enforcement : Official Immunities

This qualified immunity varies in relation to the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.

Constitutional Law : Civil Rights Enforcement : Official Immunities

The scope of discretion and responsibilities merely defines the standard against which the action complained of is to be evaluated, and the ultimate inquiry is always whether the defendant state official acted in good faith, i.e., whether he acted reasonably, in light of all the circumstances, and without malice.

Constitutional Law : Civil Rights Enforcement : Official Immunities

A constitutional violation is actionable if the state official who caused it knew or reasonably should have known that the action he took would violate the constitutional rights of the plaintiff, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury.

Constitutional Law : Civil Rights Enforcement : Official Immunities

The defense of good faith has both subjective and objective requirements, for it is not available if the defendant state official acted with either actual malice or with subjective good faith but with such disregard of the plaintiff's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.

Evidence : Privileges

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim 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. Fed. R. Evid. 501.

Evidence : Privileges : Attorney-Client Privilege

Federal courts have uniformly held that the attorney-client privilege can arise with respect to attorneys representing a state.

Evidence : Privileges : Attorney-Client Privilege

Fed. R. Evid. 501 makes it clear that clients who may assert the privilege include a government, state, or political subdivision thereof.

Evidence : Privileges : Attorney-Client Privilege

The attorney-client privilege applies to communications from the attorney to the client as well as the reverse. However, the privilege is limited to communications expressly intended to be confidential, and some showing of an intention of secrecy must be made; the mere relation of attorney and client does not raise a presumption of confidentiality. Hence, the presence of third persons who are not essential to the transmittal of information will belie the necessary element of confidentiality and vitiate the privilege.

Civil Procedure : State & Federal Interrelationships : Amendment 11

Constitutional Law : State Autonomy

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U.S. Const. amend. XXI prohibits suits by private citizens against the states.

Civil Procedure : Disclosure & Discovery : Work Product
Material compiled by counsel in preparation for a lawsuit is protected from discovery by the work product doctrine, which exists independently of the attorney-client privilege. Fed. R. Civ. P. 26(b)(3).

Criminal Law & Procedure : Evidence : Privileges
When a party asserts an established exception to the rules of privilege, a reasonable showing that the exception applies is sufficient to apply it for discovery purposes without the necessity of a preliminary hearing.

Criminal Law & Procedure : Evidence : Privileges : Attorney-Client Privilege
Criminal Law & Procedure : Evidence : Privileges : Waiver of Privilege
An implied waiver of the attorney-client privilege exists where the attorney and client are themselves adverse parties in a lawsuit arising out of the relationship.

Criminal Law & Procedure : Evidence : Privileges : Waiver of Privilege
Where these three conditions exist: (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense; a court should find that the party asserting a privilege has impliedly waived it through his own affirmative conduct.

Criminal Law & Procedure : Evidence : Privileges : Attorney-Client Privilege
The policy of the privilege is to protect confidential attorney-client relationships only to the extent that the injury the relationship would suffer from disclosure is greater than the benefit to be gained thereby.

Criminal Law & Procedure : Evidence : Privileges : Attorney-Client Privilege
A substantial showing of merit to plaintiff's case must be made before a court should apply the exception to the attorney-client privilege.

COUNSEL: [1]**

Allen Ressler and Richard D. Emery, Prison Legal Services Project, Seattle, Washington, for plaintiff.

Slade Gorton, Atty. Gen., Earl R. McGimpsey, Asst. Atty. Gen., Olympia, Washington, for defendants.

JUDGES: Neill, Chief Judge.

OPINIONBY: NEILL

OPINION: [*576] MEMORANDUM AND ORDER

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NEILL, Chief Judge.

Plaintiff in this action is an inmate at the Washington State Penitentiary at Walla Walla. He was returned to the Walla Walla penitentiary in April of 1971 following his escape the previous year. A disciplinary hearing on the escape charge resulted in a sentence of twenty days isolation in the punitive segregation unit of the penitentiary. Two days after his release from segregation, he assaulted another inmate and, following another disciplinary hearing, he was

sentenced to serve an additional twenty days in segregation.

In May of 1972, an initial adjustment committee hearing resulted in plaintiff's transfer to an administrative segregation unit. The alleged purpose of the transfer was for reasons of classification and security rather than discipline because plaintiff allegedly posed a danger to the general population and was himself in danger of reprisals from other prisoners. **[**2]**

On June 14, 1972, plaintiff was admitted to the mental health unit of the prison **[*577]** without a hearing, but was returned to administrative segregation June 21. On July 13 he was admitted to the prison hospital because of his weakened condition following a hunger strike, and was returned briefly to administrative segregation July 31, then transferred again to the mental health unit where he remained until August 7, when he was sent back to administrative segregation. After approximately one day in segregation, plaintiff allegedly attempted suicide and was confined again to the mental health unit where he remained until March of 1974.

It is plaintiff's contention that his confinement in the mental health unit, accomplished in each instance without a hearing or other review, violated his right to due process of law and infringed his Eighth Amendment right to be protected from cruel and unusual punishment. He alleges in support of his claim that the mental health unit, or "third floor" as it is called within the institution, is a euphemism for a punitive isolation tier where prisoners with behavior problems are kept in filthy, double lock cells without adequate heat, hygienic **[**3]** materials, exercise, reading materials, and occasionally without clothing or bedding. Plaintiff further alleges that treatment is not available in the mental health unit. These allegations form the basis of plaintiff's civil rights suit for damages and injunctive and declaratory relief under 42 U.S.C. § 1983, and his pendent claim based on alleged violations of his right to treatment.

Defendants deny most of plaintiff's allegations and assert six affirmative defenses, including the defense that defendants acted in good faith and are therefore immune from suit for damages. Plaintiff contests defendants' assertions of good faith and immunity and seeks discovery of information to negate this defense.

Much of the information plaintiff seeks via depositions and motions for production of documents concerns legal advice provided defendants by the state attorney general. Defendants assert the attorney-client privilege with respect to all such information and plaintiff has moved for an order compelling production of documents and answers to deposition questions. n1 Plaintiff seeks discovery of all legal advice defendants received on the legality of plaintiff's confinement in the mental **[**4]** health unit on the ground that the attorney-client privilege is not available to protect such information in the context of this case, and that if the privilege did exist it has now been waived by defendants' assertion of the good faith defense.

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n1 If the information plaintiff seeks is privileged, it would be protected from discovery by Federal Rule of Civil Procedure 26(b)(1).

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It is necessary at the outset to consider recent decisions of the Supreme Court dealing with the qualified immunity that defendants have asserted as an affirmative defense. The genesis of the immunity in its present-day form can be found in *Tenney v. Brandhove,* 341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019 (1951), which held that ↑legislators acting within the sphere of their legislative roles enjoy an absolute immunity from suit under the Civil Rights Act, 42 U.S.C. § 1983. In *Pierson v. Ray,* 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967), the Court extended this absolute immunity to judicial officers and defined the general **[**5]** parameters of a qualified immunity for other state officials acting in their official capacities. ↑This qualified immunity was later held to vary in relation to "the scope of discretion and

responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." *Scheuer v. Rhodes,* 416 U.S. 232, 247, 94 S. Ct. 1683, 1692, 40 L. Ed. 2d 90 (1974). Since the purpose of such immunity is to encourage officials to assume the full **[*578]** responsibility of their offices without fear of liability, the scope of the protection tends to increase with the range of duties and responsibilities incumbent on the public official. *Scheuer, supra,* at 241-242, 94 S. Ct. 1683, *Pierson, supra,* 386 U.S. at 554, 87 S. Ct. 1213.

However, the scope of discretion and responsibilities merely defines the standard against which the action complained of is to be evaluated, and the ultimate inquiry is always whether the defendant state official acted in good faith, *i.e.,* whether he acted reasonably, in light of all the circumstances, and without malice.

In *Wood v. Strickland,* 420 U.S. 308, 95 S. Ct. 992, 43 **[**6]** L. Ed. 2d 214 (1975), the Supreme Court further clarified the good faith defense by holding that a constitutional violation is actionable if the state official who caused it

> . . . . knew or reasonably should have known that the action he took . . . . would violate the constitutional rights of the [plaintiff] . . . . or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury . . . ..

420 U.S. at 322, 95 S. Ct. at 1001. Therefore, the defense of good faith has both subjective and objective requirements, for it is not available if the defendant state official acted with either actual malice or with subjective good faith but "with such disregard of the [plaintiff's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." *Ibid.* "Any lesser standard would deny much of the promise of § 1983". *Ibid.*

Defendants in this case assert in their answer that they "have acted in good faith" and "that the decisions made by them regarding plaintiff's custody were discretionary acts of public officials for which they are immune from suit for damages". **[**7]** In order to counter this defense, plaintiff seeks discovery of legal advice rendered defendants by the Washington Attorney General insofar as such advice related to plaintiff's confinement and tends to prove defendants' bad faith. It is in this context that defendants assert the attorney-client privilege and plaintiff moves the court for an order compelling discovery.

The issues thus raised require a close examination of the attorney-client privilege which, for purposes of this case, is set forth in Federal Rule of Evidence 501 (effective July 1, 1975): n2

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political **[**8]** subdivision thereof shall be determined in accordance with State law.

Fed.Rules Evid.Rule 501, 28 U.S.C. Hence, it is the common law of privilege as interpreted by the courts of the United States that governs in this case.

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n2 Although plaintiff has asserted a pendent tort claim under state law, and Rule 501 would require application of state privilege law with respect to it, the attorney-client privilege will be construed in the same manner for all claims asserted since both Washington law and Rule 501 adopt the common law of privilege. *Cf.* Rule 501 with R.C.W. 5.60.060(2) as construed in *Dike v. Dike,* 75 Wash.2d 1, 10, 448 P.2d 490 (1968) and *State v. Emmanuel,* 42 Wash.2d 799, 259 P.2d 845 (1953) (holding that R.C.W. 5.60.060(2) adopts the common law of privilege.)

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[*579] Federal courts have uniformly held that the attorney-client privilege can arise with respect to attorneys representing a state, *United States v. Alu,* 246 F.2d 29 (2d Cir. 1957), Cleary, *McCormick on Evidence,* **[**9]** § 88 at 181 (2d Ed. 1972). Further, Rule 501 makes it clear that clients who may assert the privilege include a "government, State, or political subdivision thereof". *See also, Connecticut Mutual Life Insurance Co. v. Shields,* 18 F.R.D. 448-450 (S.D.N.Y.1955). Therefore, it is proper for this court to find that defendants are clients of the Washington State Attorney General and that the attorney-client privilege can be asserted with respect to confidential communications, insofar as the privilege would otherwise be applicable.

Although state courts are divided on the issue, federal courts have uniformly applied the privilege to communications from the attorney to the client as well as the reverse. *Garner v. Wolfinbarger,* 430 F.2d 1093, 1096 n. 7 (5th Cir. 1970); *Schwimmer v. United* States, 232 F.2d 855 (8th Cir. 1956); *8 in 1 Pet Products, Inc. v. Swift & Co.,* 218 F. Supp. 253 (S.D.N.Y.1963), 8 Wigmore, *Evidence,* § 2320 at 630-631 (McNaughten Rev.1961); Cleary, *McCormick on Evidence,* § 89 at pp. 182-183. However, the privilege is limited to communications expressly intended to be confidential, and some showing of an intention of secrecy must be made; **[**10]** the mere relation of attorney and client does not raise a presumption of confidentiality. 8 Wigmore, § 2311 at pp. 599-603, *McCormick,* § 91 at pp. 187-188. Hence, the presence of third persons who are not essential to the transmittal of information will belie the necessary element of confidentiality and vitiate the privilege. *Ibid.*

In the instant case, it is important to determine the precise nature of the "client" who, for purposes of this discovery motion, maintained the attorney-client relationship with the attorney general. If the client were the Department of Social and Health Services, which is responsible for supervision of the Washington State Penitentiary, then, as in the analogous situation of the corporate client, the attorney-client privilege would extend to the confidential communications of all persons who "speak for" or are part of the "control group" of the Department. *McCormick,* § 87 at p. 178; 8 Wigmore, § 2317 at pp. 618-619; Annot., 98 A.L.R.2d 241, 245-247 (1964).

On the other hand, if the attorney-client relationship encompassed defendants only in their individual capacities, the privilege would not apply to defendants' communications made **[**11]** in the presence of third persons, including Department of Social and Health Services personnel. The presence of such third persons would preclude a finding of confidentiality.

The court finds that the corporate analogy does not apply to this case for inherent in the theory of civil rights suits against the state is the basic premise that the state officials named as defendants are "stripped of [their] official or representative character" and "the State has no power to impart to [them] any immunity" for acts committed under color of state law in violation of plaintiff's constitutional rights. *Ex Parte Young,* 209 U.S. 123, 160, 28 S. Ct. 441, 454, 52 L. Ed. 714 (1908). Were this not the case, recovery would be barred by the Eleventh Amendment, which prohibits suits by private citizens against the states.

Therefore, due to the nature of the case, which proceeds on the theory that defendants acted

in their individual capacities in allegedly violating plaintiff's constitutional rights, defendants are stripped of their immunity as state officers and will be treated as individuals for purposes of evaluating the **[*580]** breadth of the attorney-client privilege. n3 As a result, **[**12]** all communications between the individual defendants and the attorney general, which were shared with third persons, whether communicated in the presence of such persons or lodged in files that were accessible to others, cannot be deemed confidential for purposes of the attorney-client privilege and are not protected from discovery. *Leathers v. United States,* 250 F.2d 159, 165-166 (9th Cir. 1957); *Himmelfarb v. United States,* 175 F.2d 924, 938-939 (9th Cir. 1949), *cert. denied* 338 U.S. 860, 70 S. Ct. 103, 94 L. Ed. 527 (1949); McCormick, § 95 at 189-191; 8 Wigmore § 2311 at 599-603; *see also, United States v. Simpson,* 154 U.S.App.D.C. 350, 475 F.2d 934, 936 (1973), *cert. denied* 414 U.S. 873, 94 S. Ct. 140, 38 L.E.d.2d 91 (1973); *United States v. Blackburn,* 446 F.2d 1089, 1091 (5th Cir. 1971), *cert. denied* 404 U.S. 1017, 92 S. Ct. 679, 30 L. Ed. 2d 665 (1972); *Wilcoxon v. United States,* 231 F.2d 384, 385-386 (10th Cir. 1956), *cert. denied* 351 U.S. 943, 76 S. Ct. 834, 100 L. Ed. 1469 (1956); *Cafritz v. Koslow,* 83 U.S.App. D.C. 212, 167 F.2d 749, 751 (1948). ☨However, material compiled by counsel in preparation for this lawsuit would be protected **[**13]** from discovery by the "work product" doctrine, which exists independently of the attorney-client privilege. *See* Federal Rule of Civil Procedure 26(b)(3); *Hickman v. Taylor,* 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947); *Radiant Burners, Inc. v. American Gas Association,* 320 F.2d 314, 323 (7th Cir. 1963).

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n3 The fact that the allegations of civil rights violations have not yet been proven does not preclude the court from finding, for discovery purposes, that defendants acted in their individual capacities. ☨When a party asserts an established exception to the rules of privilege, a reasonable showing that the exception applies is sufficient to apply it for discovery purposes without the necessity of a preliminary hearing. *Clark v. United States,* 289 U.S. 1, 15-16, 53 S. Ct. 465, 77 L. Ed. 993 (1933), McCormick § 95 at 200-201. Plaintiff's affidavits in support of the allegations of the complaint meet this burden. *But see,* discussion of what constitutes a "reasonable showing" in the context of this case, *infra* 289 U.S. 1 at 13-14, 53 S. Ct. 465, 77 L. Ed. 993.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[**14]**

The question remains whether defendants should be compelled to answer questions and produce documents concerning legal advice they received from the attorney general in confidence, *i. e.,* without the participation of third persons whose presence negated the confidentiality necessary for the privilege. This appears to be an issue of first impression, spawned by the evolution of the qualified immunity defense defined in *Wood v. Strickland, supra.* Based on the holding in that case, this court is compelled to recognize a new and narrowly limited exception to the attorney-client privilege, which applies to civil rights suits against state officials under 42 U.S.C. § 1983, wherein the defendant asserts the affirmative defense of good faith immunity.

Plaintiff argues that, by asserting the good faith immunity defense, defendants have ipso facto waived the attorney-client privilege to protect information relevant to that defense from disclosure. In support of this argument, plaintiff analogizes between this case and other cases where courts have found a waiver of privilege, as where a plaintiff waives the physician-patient privilege by filing a suit that places his physical condition **[**15]** in controversy. *See* Federal Rule of Civil Procedure 35; Annot. 36 A.L.R.2d 946 (1954); 8 Wigmore § 2389 at 855-861. ☨An implied waiver of the attorney-client privilege has also been found where the attorney and client are themselves adverse parties in a lawsuit arising out of the relationship, McCormick, § 91 at 191, and at least one court has found such a waiver where a plaintiff in a patent infringement suit put the validity of the patent at issue. *Honeywell, Inc. v. Piper Aircraft Corp.,* 50 F.R.D. 117 (M.D.Pa.1970) (*but see Burlington* **[*581]** *Industries v. Exxon Corp.,* 65 F.R.D. 26, 35 (D.Md.1974), for a contrary result). n4

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n4 Plaintiff also relies on *Garner v. Wolfinbarger, supra,* in support of his argument that the privilege is unavailable to defendants in this case. *Garner* held that the attorney-client privilege could not be asserted by corporate officers against stockholders in their class action suit alleging fraud and security law violations. However, the court is not persuaded by plaintiff's analogy to *Garner,* which emphasized that the position of corporate management is one of a trustee or fiduciary with attendant duties and obligations to the shareholders. 430 F.2d at 1101-1102. In the instant case, defendants' duties and obligations run primarily to society, to the extent that defendants are "trustees" toward the inmates of the Washington State Penitentiary their duties and responsibilities certainly are not analogous to the duties corporate management owes to its stockholders.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - **[**16]**

Plaintiff's most persuasive analogy involves cases holding that a habeas corpus petitioner impliedly waives the attorney-client privilege by contesting the constitutionality of his state court conviction. Courts have found an implied waiver in this context in order to allow inquiry of the petitioner's attorney concerning deliberate bypass of the right to confidential communication. The purpose of the waiver being that privileged communications were the sole source of evidence on the issue of deliberate bypass. *Henderson v. Heinze,* 349 F.2d 67, 71 (9th Cir. 1965); *Laughner v. United States,* 373 F.2d 326, 327 (5th Cir. 1967).

All of these established exceptions to the rules of privilege have a common denominator; in each instance, the party asserting the privilege placed information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would have been manifestly unfair to the opposing party. The factors common to each exception may be summarized as follows: (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through **[**17]** this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense. Thus, where these three conditions exist, a court should find that the party asserting a privilege has impliedly waived it through his own affirmative conduct.

The instant case is distinguishable from those discussed above in that the parties asserting the attorney-client privilege are defendants in this civil rights action and, therefore, they have not engaged in the affirmative conduct of instigating this lawsuit. However, defendants assert the privilege in aid of the affirmative defense that they are protected from liability by a qualified immunity. Therefore, all the elements common to a finding of waiver are present in this case: defendants invoked the privilege in furtherance of an affirmative defense they asserted for their own benefit; through this affirmative act they placed the protected information at issue, for the legal advice they received is germane to the qualified immunity defense they raised; and one result of asserting the privilege **[**18]** has been to deprive plaintiff of information necessary to "defend" against defendants' affirmative defense, for the protected information is also germane to plaintiff's burden of proving malice or unreasonable disregard of his clearly established constitutional rights. Since all the elements of an implied waiver exist, defendants must be found to have waived their right to assert the attorney-client privilege by virtue of having raised the affirmative defense of immunity. n5

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- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n5 Defendants argue that they seek immunity on the narrow basis of the extent of plaintiff's "clearly established constitutional rights" at the time of the alleged civil rights violations and not on the basis of legal advice they received. They conclude that, since their defense is not based on advice of counsel, there has been no waiver of the attorney-client privilege.

However, defendants' distinction misconstrues the qualified immunity defense, which has both subjective and objective aspects, as discussed above. By asserting the defense in any manner, defendants impose on plaintiff the burden of proving malice or disregard of settled, undisputable law. *Wood v. Strickland,* 420 U.S. 308 at 321-322, 95 S. Ct. 992, 43 L. Ed. 2d 214. Since legal advice received by defendants is highly probative of whether they acted with malice, plaintiff is entitled to discovery of such information to aid him in rebutting the defense defendants have raised.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[**19]**

[*582] Finally, it would be contrary to the purpose of the attorney-client privilege to allow assertion of it under the circumstances in this case. The privilege is an exception to the general duty to disclose and "its obstruction is plain and concrete . . . . it is nonetheless an obstacle to the investigation of the truth". 8 Wigmore, § 2291 at 554. Therefore, "the policy of the privilege is to protect confidential attorney-client relationships only to the extent that the injury the relationship would suffer from disclosure is greater than the benefit to be gained thereby. 8 Wigmore, § 2285 at 527.

In an ordinary case the obstruction is not likely to be great, for attorney-client communications are usually incidental to the lawsuit, notwithstanding their possible relevance, and other means of proof are normally available. In this case, however, the content of defendant's communications with their attorney is inextricably merged with the elements of plaintiff's case and defendants' affirmative defense. These communications are not incidental to the case; they inhere in the controversy itself, and to deny access to them would preclude the court from a fair and just determination **[**20]** of the issues. To allow assertion of the privilege in this manner would pervert its essential purpose and transform it into a potential tool for concealment of unconstitutional conduct behind a veil of confidentiality. Under these circumstances, the benefit to be gained from disclosure far outweighs the resulting injury to the attorney-client relationship. The privilege should not apply.

However, a major limitation on this exception must be emphasized. "A substantial showing of merit to plaintiff's case must be made before a court should apply the exception to the attorney-client privilege defined herein. A high threshold requirement is essential to ensure the successful operation of a state's penal institutions, which requires some degree of confidentiality in the discretionary acts of prison administrators and personnel. The court recognizes that this confidentiality must give way, in the interests of justice, when an inmate's rights have been violated, but the court is also aware of the avalanche of prison litigation its ruling could trigger, absent some strict limitations.

The competing interest of protecting the constitutional rights of prison inmates and protecting institutional **[**21]** personnel from harassment are best accommodated by allowing discovery of legal advice only within the narrow confines outlined above, subject to the requirement that plaintiff affirmatively demonstrate the merit of his case before a court will order the defendant state official to lay bare his legal files.

Such a demonstration has been made in this case. Plaintiff has submitted affidavits and numerous depositions of reliable persons who state, under oath, that defendant Rhay harbored ill feelings toward plaintiff and that he persisted in his allegedly illegal conduct toward plaintiff after being put on notice by the attorney general that such conduct violated plaintiff's constitutional rights. These affidavits and depositions also corroborate the allegations in the complaint that the conditions of plaintiff's confinement were deplorable and that plaintiff was accorded no due process in his transfer to an isolation cell in the prison's mental health unit. Although the court does not accept these **[*583]** allegations as true, it must consider them in a light favorable to plaintiff at the discovery stage of the litigation. Under these circumstances, the court is satisfied that **[**22]** the need for confidentiality must give way to plaintiff's need to have access to his proof. However, the court does not draw this conclusion lightly.

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Therefore, the court finds that, by asserting their qualified immunity as an affirmative defense, defendants impliedly waived the right to assert the attorney-client privilege with respect to any legal advice or confidential communications with the Washington Attorney General that relate to the issues of malice toward plaintiff or knowledge of plaintiff's constitutional rights. Further, the court finds that, due to the nature of this suit, which puts the legal advice defendants received directly in issue, the policy behind the privilege is outweighed by the necessity of disclosure and the privilege is inapplicable.

Wherefore, plaintiff's motions to compel production of documents and to compel defendants to answer interrogatories and deposition questions is hereby granted.

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ATTORNEY-CLIENT PRIVILEGE
IN THE UNITED STATES

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client tells the attorney where evidence is,[52] or where the fruits of the crime are stored,[53] the attorney or his agent retrieves them. The attorney is legally and ethically obligated to turn the wallet and other evidence over to the police. The attorney-client privilege protects only the fact that the criminal defendant communicated information about the location of the evidence to his attorney. Who found the evidence, where it was found, and its condition when found is not protected. Only the relationship of those who found the evidence to the client is protected by the privilege because revealing the relationship necessarily reveals the source and content of the client's communications. The attorney-client privilege will not protect defense efforts at moving incriminating evidence. The privilege does not authorize a defense attorney "to seize critical evidence subject only to the government's ability to show that it would have discovered the evidence through its own efforts."[54]

As the privilege protects only communications, theoretically the *knowledge* of facts that the client or attorney may have acquired from the other is *not protected*, even though the attorney-client privilege protects the communications through which the knowledge was acquired.[55] Therefore, it has been held that even though a client may not be compelled to reveal the advice the attorney,[56] the client may be asked to reveal a "belief or understanding" about the matter upon which advice was

52. Clutchette v. Rushen, 770 F.2d 1469, 1472, 3 Fed. R. Serv. 3d (LCP) 265 (9th Cir. 1985) (attorney sent investigator to retrieve receipts); In re Ryder, 263 F. Supp. 360 (E.D. Va. 1967), judgment aff'd, 381 F.2d 713 (4th Cir. 1967) (lawyer moved money and weapon from client's safety deposit box to his own).

53. U.S. v. Hunter, 1995 WL 12513 (N.D. Ill. 1995), aff'd, 86 F.3d 679 (7th Cir. 1996) (Boxes of currency were taken from defendant's attic. The court held that the government "is entitled to call the secretary as a witness and ask her where she found the boxes of currency. In order to establish a chain of custody, the prosecution may also ask whether the boxes were taken by either Belz or Asher, so long as it does not establish that Belz or Asher were attorneys or were representing the defendants. Finally, without discussing any information learned during the proffer, the government may call an FBI agent to establish that he took the boxes from Asher, again without identifying Asher's relationship with defendants.").

54. U.S. v. Hunter, 1995 WL 12513 (N.D. Ill. 1995), aff'd, 86 F.3d 679 (7th Cir. 1996).

55. See also § 5:14, infra.

56. See § 5:2, infra.

sought that was held after receiving that advice.[57] While this makes a nice theoretical point, it is a line too finely drawn, cutting too close to the quick of the attorney-client privilege because it allows the indirect discovery of the substance of privileged communications. As a consequence, it is a line that litigants will constantly push in an effort to gain advantages over their adversaries. Therefore, inquiries into knowledge should not be permitted when that knowledge *appears* to be the direct product of privileged communications.

B. WHOSE COMMUNICATIONS ARE PROTECTED?

§ 5:2. Direct Protection for Client to Attorney Communications; Derivative Protection for Attorney to Client Communications

The purpose of the attorney-client privilege is to encourage more open and complete communications from the client to the attorney,[58] or the attorney's agent.[59] The privilege, therefore, provides a direct protection for confidential communications *from* the *client* to the attorney and a derivative protection for com-

57. Allen v. West Point-Pepperell Inc., 848 F. Supp. 423, 431 (S.D.N.Y. 1994); Standard Chartered Bank PLC v. Ayala Intern. Holdings (U.S.) Inc., 111 F.R.D. 76, 83, 22 Fed. R. Evid. Serv. (LCP) 1526 (S.D.N.Y. 1986) ("a party's knowledge of facts, from whatever source, is not privileged.").

58. See Upjohn Co. v. United States, 449 U.S. 384, 389 (1981). See generally § 2:3, supra.

The communications can be either oral or written. If written, it is not necessary that the notes be contemporaneously conveyed or read to the attorney. Bernbach v. Timex Corp., 174 F.R.D. 9 (D. Conn. 1997) ("The court finds that Mrs. Sundholm's notebooks satisfy the elements of the attorney-client privilege. The notes contained in the notebooks were made for the purpose of informing Mrs. Sundholm's attorneys about events and conditions Mrs. Sundholm felt her attorney needed to know in order to represent her in this action. The notes were therefore made by Mrs. Sundholm for the purpose of seeking legal advice for her attorney. The notes also constitute a communication from Mrs. Sundholm to her attorney. The fact that Attorney Renehan did not read the notes contemporaneously with their creation does not change the fact that the notes were created by the client to communicate with her attorney to get legal advice.").

59. See Daniels v. Hadley Memorial Hospital, 68 F.R.D. 583, 588 (D.D.C. 1975) ("Statements of a party to an agent or representative of the attorney are afforded protection by the attorney-client privilege. Thus, the agent or representative stands in the shoes of the attorney, and should be deposed only if the attorney may, in the same situation, be deposed.").

munications *from* the *attorney* to the client, to the extent that the responsive attorney communications reveal the substance of protected client communications.[60]

60. See In re Six Grand Jury Witnesses, 979 F.2d 939, 944, 36 Fed. R. Evid. Serv. (LCP) 1010, 24 Fed. R. Serv. 3d (LCP) 520 (2d Cir. 1992) (privilege protects "both information provided to the lawyer by the client and professional advice given by an attorney that discloses such information."); Tax Analysts v. I.R.S., 117 F.3d 607, 38 Fed. R. Serv. 3d (LCP) 849 (D.C. Cir. 1997) (advice from the attorney was not protected because it did not reveal information that was confidentially communicated by the client); In re Sealed Case, 877 F.2d 976, 979, 28 Fed. R. Evid. Serv. (LCP) 358 (D.C. Cir. 1989) ("The raison d'etre of the hallowed attorney-client privilege is the protection of a client's communications to counsel so that persons, including organizations, will be induced to consult counsel when needed. The *attorney's* communications (his advice) to the client must also be protected, because otherwise it is rather easy to deduce the client's communications to counsel. The documents sought in this case reveal directly the attorney's confidential advice, and their disclosure thereby invades the core of the privilege; it permits an inference to be drawn as to the nature of the client's communications with his lawyer, and, perhaps, as to their motivation (e.g., guilty knowledge) for consulting counsel as well."); Brinton v. Department of State, 636 F.2d 600, 604 (D.C. Cir. 1980); ConAgra, Inc. v. Arkwright Mutual Ins. Co., 32 F. Supp. 2d 1015 (N.D. Ill. 1999); Midwestern University v. HBO & Co., 1999 WL 32928 (N.D. Ill. 1999) ("When a lawyer gives legal advice to the client it does not automatically trigger the attorney-client privilege. Rather, statements which would reveal the substance of the confidential are protected. . . . Thus, this court will not protect documents based solely on the assertion that they reflect legal advice. Instead, the court will look to the elements [of the privilege delineated] in [U.S. v. White, 950 F.2d 426, 430, 34 Fed. R. Evid. Serv. (LCP) 604 (7th Cir. 1991)] to determine whether or not the attorney-client privilege applies."); Stonehenge/Fasa-Texas, JDC, L.P. v. Miller, 1998 WL 826880 (N.D. Tex. 1998) ("These letters and drafts do not satisfy the third prong of the above-stated test because they do not relate to facts of which the attorney was informed by Miller for the purpose of securing legal services."); Boling v. First Utility District of Knox County, 1998 U.S. Dist. LEXIS 21157, *10 (E.D. Tenn. Oct. 5, 1998) ("the attorney-client privilege protects an attorney's communications to his or her client which are in the nature of legal advice or opinion and which might reveal the confidences of the client."); White v. U.S. Catholic Conference, 1998 WL 429842 (D.D.C. 1998); Alexander v. F.B.I., 1998 WL 292083 (D.D.C. 1998) ("Furthermore, the privilege extends to communications from attorneys to their clients if the communications rest on confidential information obtained from the client."); Savoy v. Richard A. Carrier Trucking, Inc., 178 F.R.D. 346, 350 (D. Mass. 1998) ("Strictly constructed, the privilege applies 'to a confidential communication from an attorney to a client, but only if that information is based on confidential information provided by the client.' . . . 'The purpose of the privilege is to insure that the client may confide in his attorney to obtain legal advice. Unless the legal advice reveals what the client has said, no legitimate interest of the client is impaired by disclosing the advice.' "); Ami-Rec-Pro, Inc. v. Illinois

In practice . . . advice does not spring from lawyers' heads as

Tool Works, Inc., 46 U.S.P.Q.2d (BNA) 1369, 1998 WL 70607 (N.D. Ill. 1998) ("Lawyer-authored communications are covered by the privilege only if they reveal the client's confidences. . . . This court has inspected document 24, and it plainly reveals no confidences. Nor does document 24 apply the law to any facts specifically related to the '017 patent (or patents similar to the '017 patent). Indeed, the form letter gives general legal advice untied to any particular factual circumstances. Under these circumstances, this court must conclude the magistrate judge's order is clearly erroneous with respect to document 24."); CF Packing Co., Inc. v. IBP, Inc., 1997 WL 619848 (N.D. Ill. 1997) ("Information from an attorney to a client is protected by privilege if disclosure would reveal the client's confidential communications."); Hollar v. I.R.S., 97-2 U.S. Tax Cas. (CCH) ¶ 50783, 80 A.F.T.R.2d (P-H) ¶ 97-6181, 1997 WL 732542 (D.D.C. 1997) ("The attorney-client privilege encompasses information from the client to his or her attorney and advice from an attorney to a client which reflects that information." "Communications between one agency's attorneys and another agency's attorneys are also covered by both Exemption 5 and the attorney-client privilege as 'interagency' memoranda so long as those communications reflect the facts given by agency decision makers to elicit legal advice."); Soriano v. Treasure Chest Casino, Inc., 1996 WL 736962 (E.D. La. 1996) ("the Court finds that common law and Louisiana statutory law are materially similar in this case in regards to attorney-client privilege. Under both legal definitions, the attorney-client privilege between an attorney and the client protects communications only to the extent the communications may disclose confidential information provided by the client for the purpose of facilitating legal advice."); Hunt v. U.S. Marine Corps, 935 F. Supp. 46, 53 (D.D.C. 1996) ("While this privilege usually applies to facts divulged by a client to his attorney, it also encompasses any opinions given by an attorney to his client based upon those facts."); Gen-Probe Inc. v. Amoco Corp., 1996 WL 264707 (N.D. Ill. 1996) ("The attorney-client privilege is designed to protect, from discovery, documents which reflect communications made in confidence by the client. . . . Furthermore, communications from attorney to client fall under the privilege only to the extent that they reveal confidential information provided by the client. . . . Thus, communications from the attorney to the client should be privileged only if the statements do in fact reveal, directly or indirectly the substance of a confidential communication by the client. . . . Legal advice or communications, standing alone, should not automatically receive protection. Instead, the party asserting the privilege must show that such advice relates to prior confidential client communications. Strong public policy considerations also militate against finding a waiver of the privilege. A finding that publication of an internal investigative report constitutes waiver might well discourage corporations from taking the responsible step of employing outside counsel to conduct an investigation when wrongdoing is suspected. The failure to obtain the advice of outside counsel in the face of potential violations of law could only be detrimental to shareholders and potential shareholders, whose best interests are entrusted to the corporate directors and officers. For shareholders to obtain the benefits of investigative reports of the type at issue here, these corporate decision makers must know that the integrity of communications made to independent counsel will be preserved."); North Shore Gas Co. v. Elgin, Joliet &

The derivative protection applies equally to cooperative communications between attorneys representing the same[70] or separate clients[71] on matters of joint or common interest. Such interat-

254 (D.C. Cir. 1977) ("when an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged."); Commercial Union Ins. Co. v. Allstate Ins. Co., 1987 WL 9664 (E.D. Pa. 1987) ("The mere disclosure by a lawyer of facts within his or her personal knowledge to a client will not bring those facts within the protection of the privilege."); International Business Machines Corp. v. Sperry Rand Corp., 44 F.R.D. 10, 14 (D. Del. 1968) ("Not discussed by IBM, no doubt because IBM could not have been aware of the situation, is the fact that some of the information in the twenty-eight letters was obtained by Sperry's attorneys from sources other than Sperry. This information is not entitled to protection, . . . and, therefore, Sperry is directed to produce those portions of the correspondence containing such information.").

But see H.W. Carter & Sons, Inc. v. William Carter Co., 1995 WL 301351 (S.D.N.Y. 1995) ("Plaintiff has not cited any case where an attorney was compelled to disclose facts learned from representing a client.").

70. See, e.g., Natta v. Zletz, 418 F.2d 633, 637 (7th Cir. 1969) (correspondence between house and outside counsel); Direct Response Consulting Service v. I.R.S., 76 A.F.T.R.2d (P-H) ¶ 95-6285, 1995 WL 623282 (D.D.C. 1995) ("Moreover, although it ordinarily applies to facts divulged by a client to his attorney, this privilege also encompasses any opinions given by an attorney to his client based upon those facts . . . as well as communications between attorneys which reflect client-supplied information."); Guy v. United Healthcare Corp., 154 F.R.D. 172, 179 (S.D. Ohio 1993) (communication from outside counsel to in-house counsel); Donovan v. Robbins, No. 78 C 4075, No. 82 C 7951 (N.D. Ill. Nov. 14, 1983) (memorandum from one of the client's attorneys to another).

71. See, e.g., Hunydee v. U.S., 355 F.2d 183, 185 (9th Cir. 1965) ("The rule announced in [Continental Oil Co. v. U. S., 330 F.2d 347, 350, 9 A.L.R.3d 1413 (9th Cir. 1964)] is that where two or more persons who are subject to possible indictment in connection with the same transactions make confidential statements to their attorneys, these statements, even though they are exchanged between attorneys, should be privileged to the extent that they concern common issues and are intended to facilitate representation in possible subsequent proceedings."); U.S. v. Mobil Corp., 149 F.R.D. 533, 537, (N.D. Tex. 1993) (communications between in-house counsel for Mobil and in-house counsel for one of its subsidiaries on a tax matter in which each client shared a common legal interest); In re Grand Jury Testimony of Attorney X, 621 F. Supp. 590, 592-93 (E.D.N.Y. 1985) ("[T]he information that the third party attorney conveyed to the attorney and that he conveyed to his client was not confidential. This is not a case where the client of an attorney told him in confidence facts that the attorney then relayed to another attorney whose client was also subject to grand jury investigation. The court is satisfied from the facts in the government's *in camera* affidavit that the third-party attorney did not obtain the information which he gave to the attorney from his client. The addition of another attorney to the chain of communicators does not change the nonconfidential nature of the information transmitted.");

torney communications are protected by the privilege to the extent they reveal prior confidential communications from the attorneys' respective clients.[72] Consequently, attorneys' communications summarizing the state of the law on a particular area,[73] or based upon information from third parties (including

Green v. I.R.S., 556 F. Supp. 79, 85 (N.D. Ind. 1982), judgment aff'd, 734 F.2d 18 (7th Cir. 1984) ("This privilege applies equally to interattorney communications . . . ."). See also § 5:17, infra.

72. See, e.g., U.S. v. (Under Seal), 748 F.2d 871, 874, 17 Fed. R. Evid. Serv. (LCP) 190 (4th Cir. 1984) ("Because the privilege protects the substance of communications it may also be extended to protect communications by the lawyer to his client, agents, or superiors or to other lawyers in the case of joint representation, if those communications reveal confidential client communications." vacated as moot, 757 F.2d 600 (4th Cir. 1985); CF Packing Co., Inc. v. IBP, Inc., 1997 WL 619848 (N.D. Ill. 1997) ("The 4/10/85 letter from Paul Del Guico to John Hoffman is not privileged. It is a communication between two of the client's attorneys that contains the results of a patent search. . . . The document does not contain any client confidences, and there is not indication that it was intended to be confidential."); Martin Marietta Corp. v. Fuller Co., 1986 WL 13308 (E.D. Pa. 1986) (letters between counsel discussing strategy in litigation not protected by the attorney-client privilege); Kramer v. Halcon S.D.Group, No. 84-4396 (E.D. Pa. July 19, 1985) (memorandum from an attorney to his file was not privileged because "[w]hile it is evident that [the] communication somehow involves the house counsel . . . this alone is not adequate. The attorney-client privilege was adopted in order to foster confidential communications from the client to the attorney, and not to give blanket protection to anything on which the attorney worked."); Miller v. Haulmark Transport Systems, 104 F.R.D. 442, 444, 18 Fed. R. Evid. Serv. (LCP) 340, 3 Fed. R. Serv. 3d (LCP) 453 (E.D. Pa. 1984) (intraoffice memorandum prepared by attorneys after meeting with client).

73. See, e.g., Esposito v. U. S., 436 F.2d 603, 606 (9th Cir. 1970) (defense counsel could testify that he informed the defendant of the potential penalties he was facing); Ziemack v. Centel Corp., 1995 WL 314526 (N.D. Ill. 1995) ("Furthermore, communications from attorney to client fall under the privilege only to the extent that they reveal confidential information provided by the client. . . . 'A rule conferring privileged status upon a broad[er] range of communications from the attorney to the client would ignore *Radiant Burners'* caveat [that the privilege 'ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.']. . . . Thus communications from the attorney to the client should be privileged only if the statements do in fact reveal, directly or indirectly, the substance of a confidential communication by the client. . . . Legal advice or communications, standing alone, should not automatically receive protection. Instead, the party asserting the privilege must show that such advice relates to prior confidential client communications. . . . [T]he privilege does not attach to purely legal advice unless the advice relates to a prior confidential communication from the client to the attorney."); Republican Party of North Carolina v. Martin, 136 F.R.D. 421, 428 (E.D.N.C. 1991) ("Many more documents are

public records)[74] and other nonprivileged sources,[75] or acquired

. . . memoranda which merely summarize the case law but contain no factual application to the client, and thus could not be protected by the attorney-client privilege . . . "); North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., 110 F.R.D. 511, 517 (M.D.N.C. 1986) ("Legal memoranda which summarized case law but contain no factual application to the client do not contain confidential client information and are thus not privileged."); Sperti Products, Inc. v. Coca-Cola Co., 262 F. Supp. 148, 149 (D. Del. 1966) ("[A communication from an attorney] is not privileged if it is based solely on public documents such as patents, statutes, decisional law, or information supplied by third parties, or sources other than the client's disclosures."); Pruitt v. Peyton, 243 F. Supp. 907, 909 (E.D. Va. 1965) (communication in which attorney advised client of maximum sentence not privileged). But see United States v. Bauer, 132 F.3d 504 (9th Cir. 1997), discussed in § 9:54, infra.

As the attorney's summary of the law is not privilege because it does not reveal confidential communications of fact by the client, the client's bare request for a summary of the law is also not protected by the privilege because there can no reasonable expectation of confidentiality for the nature of the services sought. Evans v. Atwood, 177 F.R.D. 1, 3 (D.D.C. 1997) ("If, on the other hand, an agency official asks the lawyer whether a particular statute gives one person a priority as against another in a reduction in force, the agency official has not communicated to the lawyer any information that is confidential, i.e., unknown by anyone except the client who has disclosed it for the purpose of securing the advice. Learning that the agency was contemplating a RIF and sought a lawyer's advice as to how to comply with the pertinent laws hardly discloses a confidential communications."). See also § 6:21, *infra*.

74. See, e.g., U. S. v. Hall, 346 F.2d 875, 882 (2d Cir. 1965) (attorney required to testify about whether he had informed his client that his presence was required in court on a particular calendar day), cert. denied, 382 U.S. 910 (1965); United States v. Clemons, 676 F.2d 124, 125 (5th Cir. 1982) ("An attorney's message to his client concerning the date of trial is not privileged."); United States v. Defazio, 899 F.2d 626, 635 (7th Cir. 1990) (attorney relaying to client what IRS agent said to him); Rucker v. Wabash R. Co., 418 F.2d 146, 154 (7th Cir. 1969) ("Communications by a defense counsel to the client or by the client regarding the time and place of trial are not confidential and therefore are not protected by the attorney-client privilege."), cert. denied, 434 U.S. 999 (1977); McKay v. C.I.R., 886 F.2d 1237, 1238 (9th Cir. 1989) (attorney testifying that he sent IRS notice of deficiency to client); U.S. v. Gray, 876 F.2d 1411, 1415-16, 28 Fed. R. Evid. Serv. (LCP) 273 (9th Cir. 1989) (attorney notified client of sentencing hearing date); U. S. v. Freeman, 519 F.2d 67, 68 (9th Cir. 1975) (attorney testified that he notified client of trial date); Boling v. First Utility district of Knox County, 1998 U.S. Dist. LEXIS 21157, *11 (E.D. Tenn. Oct. 5, 1998) ("On the other hand, correspondence from counsel to plaintiff which is based on information learned from any person outside the plaintiff's organization is not privileged."); CF Packing Co., Inc. v. IBP, Inc., 1997 WL 619848 (N.D. Ill. 1997) ("the results of patent research are not privileged if they will be used to prepare the patent application. . . . Thus, [a] communication that merely contains the study of prior art, unless legal issues

by the attorneys from public records, are not protected. An extension of the protection to third-party communications and communications from other nonclient sources (e.g., public records) "would not serve to protect and foster the client's freedom of expression."[76] If, however, the attorney renders an opinion based upon information which the client gleaned from the public record and subsequently communicated to him in confidence, the advice should be protected to the extent that it discloses the substance of the previous client communications.[77] The *nature* and *source* of the information communicated is irrelevant to the privilege de-

predominate, is not privileged. . . . But a letter from attorney to client which contains the results of a patent search and provides legal opinions, is protected by privilege."); Zapata v. IBP, Inc., 1997 WL 50474 (D. Kan. 1997) (The privilege "also do[es] not protect from discovery the facts learned from interviewees."); U.S. v. Polichemi, 1996 WL 332680 (N.D. Ill. 1996) ("Many of the interviews are with persons other than employees of the CHA and therefore could not be attorney-client communications."); Allen v. West Point-Pepperell Inc., 848 F. Supp. 423, 427 (S.D.N.Y. 1994) ("Similarly, the privilege does not protect facts which an attorney obtains from independent sources and then conveys to his client."); Smith v. Conway Organization, Inc., 154 F.R.D. 73, 78 (S.D.N.Y. 1994) (documents conveying information the attorney obtained from public sources are ordinarily not protected); Clark v. City of Munster, 115 F.R.D. 609, 613 (N.D. Ind. 1987); United States v. Chavez, Crim. No. 83-344 (E.D. Pa. Feb. 27, 1985) ("Because information pertaining to a client's trial date originates from the court and not the client, an attorney's communication to his client concerning the trial date is not privileged."); U. S. v. Woodruff, 383 F. Supp. 696, 698 (E.D. Pa. 1974) (communications to client of time and date of trial by attorney are not protected).

75. See In re Underwriters at Lloyd's, 666 F.2d 55, 57 (4th Cir. 1981) ("Advice given by [the attorney was] based on information from nonprivileged documents" and therefore not protected by the privilege.).

76. Matter of Fischel, 557 F.2d 209, 212, 2 Fed. R. Evid. Serv. (LCP) 363 (9th Cir. 1977); Vanguard Sav. and Loan Ass'n v. Banks, 1995 WL 555871 (E.D. Pa. 1995) ("[T]he letters were prepared by counsel after communication with Vanguard (the client) for the purpose of securing assistance in a regulatory examination, namely the reporting of loss contingencies in connection with the financial audit of Vanguard. However, these letters really only relay facts to the Pennsylvania Department of Banking, and do not involve privileged communications between client and attorney. . . . [T]he plaintiffs are required to hand over these letters."). Although the product of the attorney's research, investigation and other work is not protected by the attorney-client privilege, it may be protected by the work product immunity. See Hickman v. Taylor, 329 U.S. 495, 508, 67 S. Ct. 385, 91 L. Ed. 451, 34 Ohio Op. 395 (1947); Federal Rule of Civil Procedure 26(b)(3).

77. See In re Ampicillin Antitrust Litigation, 81 F.R.D. 377, 389-90 (D.D.C. 1978) ("It is not necessary that the *information* be confidential. Under this standard, information the attorney learned

termination. The privilege protects the *fact* that the information was communicated.[78] Some courts, failing to appreciate the distinction between the "information" and the "communication" of that information, have refused to grant the privilege to the attorney's advice based upon public information, regardless of whether the client communicated the information to the attorney in confidence.[79]

An attorney's legal advice to the client will often reveal the substance of the client's confidential communications to the attorney. Acknowledging this fact, many courts have extended the privilege both to the substance of the client's communication as well as the attorney's advice in response thereto.[80] The attorney's

from a client would be privileged if it was learned in a confidential client communication. Similarly, the attorney may be questioned about information obtained from public documents or other public sources because it was learned *outside* of the confidential attorney-client relationship (not because there is a requirement that the information be confidential). The *communication* of this publicly-obtained information, however, should be privileged to the extent that the communication was treated as confidential by the client and would tend to reveal a confidential communication of the client.").

78. See cases cited in footnote 20, supra; see also § 6:29, infra.

79. See cases cited in footnote 21, supra; see also § 6:29, infra.

80. See, e.g., Matter of Grand Jury Proceeding, 68 F.3d 193, 196-197 (7th Cir. 1995) (An attorney was asked questions about his communications to the client and third parties. The court held that "if the questions do not entail legal advice, the attorney-client privilege does not come into play—irrespective of whether the attorney is or is not also the records custodian. *The privilege is limited to legal advice.*") (emphasis added); U.S. v. Defazio, 899 F.2d 626, 635, 30 Fed. R. Evid. Serv. (LCP) 190 (7th Cir. 1990) ("Communications from attorney to client are privileged only if they constitute legal advice, or tend directly or indirectly, to reveal the substance of a client confidence."); Matter of Fischel, 557 F.2d 209, 211, 2 Fed. R. Evid. Serv. (LCP) 363 (9th Cir. 1977) ("Ordinarily the compelled disclosure of an attorney's communications or advice to the client will effectively reveal the substance of the client's confidential communication to the attorney. To prevent this result, the privilege normally extends both to the substance of the communication as well as to the attorney's advice in response thereto."); In re Sealed Case, 737 F.2d 94, 99, 15 Fed. R. Evid. Serv. (LCP) 1811 (D.C. Cir. 1984) ("In practice, however, advice does not spring from lawyers' heads as Athena did from the brow of Zeus. Inevitably, attorneys' opinions reflect an accumulation of education and experience in the law and the large society law serves. In a given case advice prompted by the client's disclosures may be further and inseparably informed by other knowledge and encounters. We have therefore stated that the privilege cloaks a communication from attorney to client 'based, *in part at least*, upon a confidential communication [to the law-

yer] from [the client].' ''); Salgado v. Club Quarters, Inc., 1997 WL 227598 (S.D.N.Y. 1997) (''Document [1] is a memorandum from Bahna's attorney to Bahna summarizing hearings before the New York State Divisions of Human Rights. The documents is almost entirely an objective description of the proceedings, with only two conclusory assessments of credibility. Although no affidavits have been submitted addressing the issue, it appears that Document 1 is in the nature of a status report to the client. It does not contain legal advice or strategy as to what steps should be taken. It is merely an objective report of a non-privileged proceedings. . . . Document 1 is not within the attorney-client privilege because it does not contain legal advice, nor does it [contain] any confidential information conveyed by the client.''); Direct Response Consulting Service v. I.R.S., 76 A.F.T.R.2d (P-H) ¶ 95-6285, 1995 WL 623282 (D.D.C. 1995) (''Moreover, although it ordinarily applies to facts divulged by a client to his attorney, this privilege also encompasses any opinions given by an attorney to his client based upon those facts.''); Phillips Electronics North America Corp. v. Universal Electronics Inc., 892 F. Supp. 108 (D. Del. 1995) (attorney's notes and draft licensing agreements were held to be protected under the attorney-client privilege only to the extent that they are shown to reveal confidential communications from the client or advice from the attorney); Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 442 (S.D.N.Y. 1995) (''It is now well established that the privilege attaches not only to communications by the client to the attorney, but also to advice rendered by the attorney to the client, at least to the extent that such advice may reflect confidential information conveyed by the client.''); Sequa Corp. v. Gelmin, 1994 WL 538124 (S.D.N.Y. 1994) (''The only portion withheld consists of legal advice, and hence the redaction is proper.''); U.S. Fidelity & Guar. Co. v. Barron Industries, Inc., 809 F. Supp. 355, 364 (M.D. Pa. 1992) (''[T]he privilege does not extend to every written or oral communication by an attorney. Rather, the privilege applies only to discussions where the individual is acting as an advisor, i.e., presenting opinions and setting forth defense tactics as to the procedures to be utilized for an effective defense. The privilege simply does not attach to a discussion of the facts, no matter how extensive or involved the discussion may become.''); Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 144 (D. Del. 1977) (''The privilege also extends to the attorney's legal advice and opinions which encompass the thoughts and confidences of the client.''); SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 522-23, 2 Fed. R. Evid. Serv. (LCP) 535 (D. Conn. 1976), appeal dismissed, 534 F.2d 1031 (2d Cir. 1976) (''Extending the privilege to communications from the attorney that might reveal client confidences reverses the normal approach that places the burden of establishing entitlement to the privilege on the client who claims it. On the other hand it does serve the purpose of the privilege by maintaining a client's ability to confide fully in his attorney. Without the protection for attorney communications that arguably contain client confidences, clients might be inhibited from confiding in their attorneys for fear that they might not be able to demonstrate that the attorney's communication was in fact based on their communication to him. The risk of such inhibition is virtually removed by holding the privilege unavailable when the attorney's communication is demonstrably based on facts that did not come from the client in confidence.''); Burlington Industries v. Exxon Corp., 65 F.R.D. 26, 37 (D.

responsive communication is protected whether addressed or sent to the client, an agent of the client, an agent of the attorney, co-counsel,[81] or simply placed in a file for later reference.[82] The two central prerequisites for the derivative privilege are first that the attorney's communication reveal prior confidential communications of the client and second that confidentiality of both the prior client communication and the attorney's response was maintained.[83] To the extent the attorney's responsive communication to the client is protected, the client's notes about that protected attorney communication will also be privileged,[84] along with communications among agents of the client in which that advice

Md. 1974) ("The privilege further extends to the attorney's legal advice and opinions which encompass the thoughts and confidences of the client."); Jack Winter, Inc. v. Koratron Co., 54 F.R.D. 44, 46 (N.D. Cal. 1971) ("[D]ocuments containing considerable technical factual information but which were nonetheless primarily concerned with giving legal guidance to the client were classified as privileged."); American Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85, 87 (D. Del. 1962) ("The privilege is restricted to the client's own revelations; however, quite often an attorney's oral conversation, letters or memos adopt a client's disclosure and therefore, traditionally, come within the cloak of the immunity"Georgia-Pacific Plywood Co. v. U.S. Plywood Corp., 18 F.R.D. 463, 464 (S.D.N.Y. 1956) ("Since communications by the attorney to the client might reveal the substance of a client's communication they are also within the privilege.").

81. See Natta v. Zletz, 418 F.2d 633, 637 n.3 (7th Cir. 1969) (correspondence between inside and outside counsel was privileged); Bank Hapoalim, B.M. v. American Home Assur. Co., 1993 WL 37506 (S.D.N.Y. 1993) ("[T]he privilege does extend to communications between an attorney and the client's agent."); Burlington Industries v. Exxon Corp., 65 F.R.D. 26, 36 (D. Md. 1974) (the privilege can apply to communications between in-house and outside counsel); Dura Corp. v. Milwaukee Hydraulic Products, Inc., 37 F.R.D. 470, 472 (E.D. Wis. 1965) (" Ten of the letters . . . constitute correspondence between plaintiff's outside counsel . . . and an employee of plaintiff serving as patent counsel. [T]he letters concern 'facts and legal advice communicated in anticipation of and relative to this proceeding.' . . . These are clearly within the attorney-client privilege.").

82. See § 5:8, infra.

83. See § 5:12, infra.

84. See, e.g., Bank Hapoalim, B.M. v. American Home Assur. Co., 1993 WL 37506 (S.D.N.Y. 1993) ("Document 21, dated July 2, 1992, consists of Mr. Spencer's notes from a conversation with counsel regarding the status of the instant litigation. It is protected by the attorney-client privilege."); Smith v. Harmon Group, Inc., 1992 WL 8176 (S.D.N.Y. 1992) (memorandum summarizing a conversation agent of client had with client's attorney); Polycast Technology Corp. v. Uniroyal, Inc., 125 F.R.D. 47, 48-49 (S.D.N.Y. 1989)(client's notes recounting substance of telephone conversations between himself and his attorney are privileged); Kansas-Nebraska Natural Gas Co., Inc. v. Marathon Oil Co., 109

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; and THE PORT OF SEATTLE, Respondents.	No. 01-160 CERTIFICATE OF SERVICE (Section 401 Certification No. 1996-4-02325 and CZMA concurrency statement, issued August 10, 2001, Reissued September 21, 2001, under No. 1996-4-02325 (Amended-1))

I, Andrea Grad, an employee of Helsell Fetterman LLP, attorneys for the Airport Communities Coalition, certify that:

I am now, and at all times herein mentioned was, a citizen of the United States, a resident of the State of Washington, and over the age of eighteen years.

On October 23, 2001, I caused to be sent a true and correct copy of ACC's Statement of Supplemental Authorities in Reply on ACC's Motion for Reconsideration, with attachments, by Fed Ex, for next-day morning delivery, to the Pollution Control Hearings Board and to:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23rd day of October, 2001, at Seattle, Washington.

Andrea Grad

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