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Casenotes: Criminal Law — Evidence —
Attorney-Client Privilege — Disclosures by
Criminal Defendant to Defense-Retained
Psychiatrist Held within Scope of Attorney-Client
Privilege Which Defendant Does Not Waive by
Pleading Insanity. *State v. Pratt*, 284 Md. 516, 398
A.2d 421 (1979)

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CASENOTES

CRIMINAL LAW — EVIDENCE — ATTORNEY-CLIENT PRIVILEGE — DISCLOSURES BY CRIMINAL DEFENDANT TO DEFENSE-RETAINED PSYCHIATRIST HELD WITHIN SCOPE OF ATTORNEY-CLIENT PRIVILEGE WHICH DEFENDANT DOES NOT WAIVE BY PLEADING INSANITY. *STATE v. PRATT*, 284 Md. 516, 398 A.2d 421 (1979).

I. INTRODUCTION

The attorney-client privilege exists to assure freedom of communication between the client and his legal advisor. In *State v. Pratt*,¹ the Court of Appeals of Maryland, in a long-overdue decision in support of this fundamental policy, held that disclosures made by a criminal defendant to a psychiatrist retained by defense counsel to aid in the preparation of an insanity defense are protected by the attorney-client privilege.² The court further held that a defendant does not waive the privilege merely by pleading insanity.³ The court limited its holding to criminal proceedings, however, and declined to decide whether the privilege should extend to disclosures made to experts retained in the course of civil litigation.⁴

II. THE FACTUAL BACKGROUND OF *PRATT*

Margaret Pratt shot and killed her husband on the morning of October 23, 1976, after having spent a sleepless night contemplating suicide.⁵ Later she surrendered herself to the police and was indicted for murder. Considering the feasibility of an insanity defense, Mrs. Pratt's attorney retained a psychiatrist, Dr. Brian Crowley, to examine her.⁶ Dr. Crowley determined that she was sane at the time of the shooting, however, so his report was not used by the defense.

At trial, Mrs. Pratt admitted the killing, but contended that she was insane when she fired the shots. In support of this defense, her attorney put two psychiatrists on the stand. In rebuttal, the state introduced the testimony of three other psychiatrists,⁷ including Dr.

1. 284 Md. 516, 398 A.2d 421 (1979).

2. *Id.* at 520, 398 A.2d at 423-24.

3. *Id.* at 522, 398 A.2d at 424-25.

4. *Id.* at 523 n.5, 398 A.2d at 425 n.5.

5. Mrs. Pratt followed this with a day of erratic behavior which included a drive from Montgomery County, Md. to Front Royal, Va. to spend several hours in prayer at the gravesite of her dog. She then spent the night in a motel and returned to Maryland the next day, driving aimlessly around the old neighborhood in which she and her husband had lived. Upon realizing that she would be apprehended, Mrs. Pratt confessed to Montgomery County police, who verified her story and arrested her for murder. *Id.* at 518, 398 A.2d at 422.

6. See Md. Rule 731(a) and MD. ANN. CODE art. 59, § 25 (1979). These provisions authorize and describe the interposition of the insanity defense.

7. Pursuant to MD. ANN. CODE art. 59, §§ 23, 25(b) (1979), the Circuit Court for Montgomery County ordered that respondent be examined by the Department of Mental Hygiene. 284 Md. at 518, 398 A.2d at 422.

Crowley. Mrs. Pratt's attorney objected to Dr. Crowley's testimony on the basis that disclosures made by her to Dr. Crowley during his examinations were protected by the attorney-client privilege.⁸ Nevertheless, the trial court admitted the testimony. Ultimately, Mrs. Pratt was convicted of second-degree murder.⁹ The court of special appeals reversed and remanded, holding that the attorney-client privilege had been violated,¹⁰ and the court of appeals unanimously affirmed.

III. DEVELOPMENT OF THE PRIVILEGE

The attorney-client privilege, oldest of the common law privileges,¹¹ had its origin in Roman Law which recognized the almost familial nature of the attorney-client relationship.¹² Judicial fact-finding was subordinated to the policy of protecting this relationship; imperial mandate incapacitated an advocate from testifying for or against his client.¹³ The English common law attorney-client privilege against compelled disclosure first appeared during the sixteenth-century reign of Elizabeth I. The privilege was based upon the attorney's oath not to reveal confidences and upon his honor as a gentleman of the law.¹⁴ By 1776, however, obstructions to the courts' search for truth had fallen into disfavor, and the privilege had collapsed.¹⁵

The modern formulation of the privilege emerged in the mid-1800's with the development of the theory that the efficient resolution of disputes, and the avoidance of unnecessary litigation, would be facilitated by a client's full disclosure of all facts to his attorney.¹⁶ The rationale was that if the client knew his lawyer could

8. Objection was also made at the time on the grounds of the work-product doctrine. *Pratt v. State*, 39 Md. App. 442, 446, 387 A.2d 779, 782 (1978). The court of appeals did not address this issue.

9. Respondent was also convicted of the use of a handgun in the commission of a felony. 284 Md. at 518, 398 A.2d at 422-23.

10. *Pratt v. State*, 39 Md. App. 442, 387 A.2d 779 (1978).

11. 8 J. WIGMORE, EVIDENCE § 2290 (McNaughten rev. 1961) [hereinafter cited as WIGMORE].

12. See Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487, 488 (1928) [hereinafter cited as Radin], cited in C. MCCORMICK, LAW OF EVIDENCE § 87 (2d ed. 1972) [hereinafter cited as MCCORMICK].

13. Radin, *supra* note 12, at 488.

14. *Harrison v. State*, 276 Md. 122, 131, 345 A.2d 830, 836 (1975); WIGMORE, *supra* note 11, at § 2290, cited in MCCORMICK, *supra* note 12, at § 87.

15. *Harrison v. State*, 276 Md. 122, 131, 345 A.2d 830, 836 (1975). *Harrison* considers the Duchess of Kingston's Trial, [1776] 20 Howell, State Trials 355, 586, to be the point of honor theory's last gasp. The Duchess exempted her attorney from secrecy, and although he demurred, raising the point of honor, he was required to testify. See WIGMORE, *supra* note 11, at § 2290, cited in MCCORMICK, *supra* note 12, at § 87.

16. WIGMORE, *supra* note 11, at § 2296; MCCORMICK, *supra* note 12, at § 87; Radin, *supra* note 12, at 491.

not testify against him, he would feel free to reveal even those facts he considered unfavorable to his case.¹⁷

The privilege is now recognized as belonging solely to the client.¹⁸ Commentators agree that an attorney can best represent his client when he knows all the facts, and that confidentiality, controlled by the client, encourages complete candor.¹⁹ Beyond this, however, the authorities disagree.²⁰ Older treatises maintain that the privilege, although essential, is an exception to the general rule of disclosure of all relevant evidence and should be strictly construed because it tends to suppress pertinent facts.²¹ Preeminent among these is the multi-volume commentary of Dean Wigmore, who often sounds like Poe's Charley Goodfellow²² — the more he attempts to justify the privilege, the more he undermines it. Wigmore maintains that although the risk of unjust decisions is outweighed by the need for freedom from apprehension of involuntary disclosures of attorney-client confidences, the privilege ought not be extended any further than necessary in contravention of the more basic testimonial duty to reveal the truth.²³

More recent authors view attorney-client confidentiality as the rule and not the exception.²⁴ They argue that the privilege rests on

17. *Harrison v. State*, 276 Md. 122, 134, 345 A.2d 830, 837 (1975) (citing *State v. Kociolek*, 23 N.J. 400, 415, 129 A.2d 417, 425 (1957) (citing 8 J. WIGMORE, EVIDENCE § 2291 (3d ed. 1940)); 2 D. LOISELL & C. MUELLER, FEDERAL EVIDENCE § 207 (1978) [hereinafter cited as LOISELL & MUELLER]; Radin, *supra* note 12, at 491.

18. MCCORMICK, *supra* note 12, at § 92; WIGMORE, *supra* note 11, at § 2321.

19. *E.g.*, Morgan, *Foreword to MODEL CODE OF EVIDENCE* at 25-26 (1942), *quoted in City & County of San Francisco v. Superior Court*, 37 Cal. 2d 227, 235, 231 P.2d 26, 30 (1951). Morgan states:

Unless [the client] makes known to the lawyer all the facts, the advice which follows will be useless, if not misleading; the lawsuit will be conducted along improper lines, the trial will be full of surprises, much useless litigation may result.

20. See LOISELL & MUELLER, *supra* note 17, at § 207.

21. WIGMORE, *supra* note 11, at § 2291, *construed in City & County of San Francisco v. Superior Court*, 37 Cal. 2d 227, 235, 231 P.2d 26, 30 (1951); *In re Richardson*, 31 N.J. 391, 396-97, 157 A.2d 695, 698 (1960). *But see Lindsay v. Lipson*, 367 Mich. 1, 5, 116 N.W.2d 60, 62 (1962).

22. E. POE, *Thou Art the Man*, in COMPLETE STORIES AND POEMS OF EDGAR ALLAN POE (1966). In this tale, Charley Goodfellow murders an old friend under circumstances which make it look as if the deed had been done by the victim's ne'er-do-well nephew. Goodfellow publicly "defends" the nephew at every turn, but succeeds only in implanting every incriminating detail firmly in his listeners' minds.

23. WIGMORE, *supra* note 11, at § 2291; see *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961). See also the oft-cited but rather specious line of reasoning opposing the attorney-client privilege in Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence*, 10 U. CHI. L. REV. 285, 289-91 (1943) [hereinafter cited as Morgan].

24. *E.g.*, Sedler & Simeone, *The Realities of Attorney-Client Confidences*, 24 OHIO ST. L. J. 1 (1963) [hereinafter cited as Sedler & Simeone]. The authors noted that legal advice, not litigation, is the main function of the attorney, and that the primary method of protecting the client is through advice based on the client's confidential disclosures. "An exception to the rule of secrecy should not be made to further the trial of a lawsuit." *Id.* at 2-3 (emphasis in original).

such solid constitutional bases as the sixth amendment right to counsel, the fifth amendment privilege against self-incrimination, due process fairness, and, lately and quite persuasively, the right to privacy.²⁵ One commentary contends that attorney-client confidentiality is not only essential to adequate representation, but also because it always precedes litigation, on a *prior tempore prior jure* rationale, it should outweigh the interest in full disclosure of probative evidence.²⁶ Another maintains that rather than obstructing the search for truth, the privilege actually furthers it by discouraging perjury.²⁷

Wigmore's universally-cited treatment of the subject sets out the dimensions of the privilege. It arises when an actual or prospective client seeks legal services or advice from an attorney in his professional capacity. All communications made in confidence for the purpose of obtaining the lawyer's advice are permanently protected from disclosure by the attorney if the client does not waive the privilege.²⁸ Additionally, courts have held that agents in the attorney's office such as clerks, stenographers, and interpreters are included within the privilege because their presence is necessary to facilitate communication between the attorney and the client.²⁹

In order to represent and advise his client adequately the attorney often needs information regarding areas in which he has

25. LOUISELL & MUELLER, *supra* note 17, at § 207; *accord*, United States v. Alvarez, 519 F.2d 1036, 1046 (3rd Cir. 1975). See the interesting treatment of *Alvarez* in Note, 51 N.Y.U.L. REV. 409 (1976).

26. Sedler & Simeone, *supra* note 24, at 2-3.

27. LOUISELL & MUELLER, *supra* note 17, at § 207. *Contra*, Morgan, *supra* note 23, at 289; see J. BENTHAM, *Rationale of Judicial Evidence*, 7 THE WORKS OF JEREMY BENTHAM 473-75, 477, 479 (Bowring ed. 1842), *quoted in* WIGMORE, *supra* note 11, at § 2291.

28. WIGMORE, *supra* note 11, at § 2292. It is a rare article on attorney-client privilege that does not cite or quote outright Dean Wigmore's famous principle:

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

Id. For a narrower, and no doubt impertinent, revision of this formula, see United States v. United Shoe Mach. Co., 89 F. Supp. 357, 358 (D. Mass. 1950).

29. WIGMORE, *supra* note 11, at §§ 2301, 2317; McCORMICK, *supra* note 12, at § 91; C. TORCIA, 3 WHARTON'S CRIMINAL EVIDENCE § 559 (13th ed. 1973); Annot., 96 A.L.R.2d 125 (1964). The last authority states: "[T]he attorney-client privilege does not automatically extend to any group of third persons [A] third person's function, rather than his status, determines his competency to testify under the attorney-client privilege." *Id.* at 128. See, e.g., State v. Krich, 123 N.J.L. 519, 9 A.2d 803 (1939) (stenographer); State v. Sterrett, 68 Iowa 76, 25 N.W. 936 (1885) (clerk); United States v. Kovel, 296 F.2d 918 (2d Cir. 1961) (interpreter) (dictum); cf. Morton v. Smith, 44 S.W. 683, 684 (Tex. Civ. App. 1898).

In *Morton*, a clerk-stenographer was compelled to testify because he was not a "media of communication" between attorney and client. Otherwise, the court reasoned, "it could as well be claimed that the rule would extend to the employee who swept the attorney's floor."

little training. This may necessitate his consulting or sending his client to an expert in that field.³⁰ To the extent that the client is less candid with the expert than he is with the attorney, the attorney will be deprived of the use of this specialized information. Courts and legislatures have uniformly held that communications to, or in the presence of, a third-party expert who is reasonably necessary for the attorney to advise his client knowledgeably are also covered by the attorney-client privilege.³¹ Cases have specifically extended the privilege to accountants, appraisers, scientific experts and physicians.³²

In the criminal arena, the question becomes whether a defendant may reveal facts to a psychiatrist retained by his attorney so that the lawyer may prepare an insanity defense without fear of disclosure. Courts that have addressed the issue acknowledge that a successful insanity defense is virtually impossible without expert advice and testimony,³³ and that a defendant must be "as free to communicate with a psychiatric expert as with the attorney he is assisting."³⁴ Therefore, they extend the privilege to psychiatrists retained by counsel on the grounds that they are agents of the client

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30. *E.g.*, *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961); *United States ex rel. Edney v. Smith*, 425 F. Supp 1038, 1047-48 (E.D.N.Y. 1976).
 31. *See* LOUISELL & MUELLER, *supra* note 17, at §209; 3 B. JONES, *THE LAW OF EVIDENCE* § 831 (5th ed. Gard rev. 1958); Annot., 96 A.L.R.2d 116 (1964). *But see* Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455, 463-69 (1962).
 32. *E.g.*, *United States v. Kovel*, 296 F.2d 918, 921-22 (2d Cir. 1961) (accountant); *State v. 62.96247 Acres of Land in New Castle County*, 193 A.2d 799, 810 (Del. Super. Ct. 1963) (appraiser); *Lindsay v. Lipson*, 367 Mich. 1, 5-6, 116 N.W.2d 61, 62-63 (1962) (physician); *Lalance & Grosjean Mfg. Co. v. Haberman Mfg. Co.*, 87 F. 563, 564 (C.C.S.D.N.Y. 1898) (scientific expert).
 33. *E.g.*, *Ex parte Ochse*, 38 Cal. 2d 230, 231, 238 P.2d 561, 561 (1951); *United States v. Alvarez*, 519 F.2d 1036, 1046 (3rd Cir. 1975); *United States v. Taylor*, 437 F.2d 371, 377 n.9 (4th Cir. 1971) (quoting A. GOLDSTEIN, *THE INSANITY DEFENSE* 124-25 (1967)): "In practical terms, a successful defense without expert testimony will be made only in cases so extreme or so compelling in sympathy for the defendant, that the prosecutor is unlikely to bring them at all."
 34. *United States v. Alvarez*, 519 F.2d 1036, 1046 (3rd Cir. 1975); *accord*, Note, 51 N.Y.U. L. REV. 409, 411 (1976); *cf.* *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) (necessity for communication with accountant concerning problems in that field).

or attorney,³⁵ interpreters of a specialized "language,"³⁶ or messengers or conduits of expert information.³⁷

In an analogous area, disclosures made to a doctor *qua* doctor in a treatment-oriented relationship were not entitled to confidentiality at common law.³⁸ Notwithstanding this tradition, and over harsh criticism from the legal and academic communities,³⁹ most states have created some statutory form of doctor-patient or psychiatrist-patient privilege.⁴⁰ The theory behind these privileges, similar to the attorney-client rationale, is that the patient will be encouraged to seek treatment if he knows his disclosures to the doctor will be confidential.⁴¹ While the statutory attorney-client privileges usually

35. *E.g.*, *City & County of San Francisco v. Superior Court*, 37 Cal. 2d 227, 237, 231 P.2d 26, 31 (1951): "A communication, [to the attorney] then, by any form of agency employed or set in motion by the client is within the privilege." (emphasis in original); *State v. Kociolek*, 23 N.J. 400, 412, 129 A.2d 417, 423 (1957): "[T]he 'doctor was the agent of the attorney and the sub-agent of the defendant, or vice versa,' and 'in any event, he was an agent.'"; WIGMORE, *supra* note 11, at § 2301; and Annot., 53 A.L.R. 369 (1928). *But see* Note, 16 VAND. L. REV. 419, 420-22 (1963) (criticizing both the use of the agency theory and the extension of the attorney-client privilege to physicians employed by the attorney).
36. *E.g.*, *United States v. Alvarez*, 519 F.2d 1036, 1046 (3d Cir. 1975); *Ex parte Ochse*, 38 Cal. 2d 230, 232, 238 P.2d 561, 562; *City & County of San Francisco v. Superior Court*, 37 Cal. 2d 227, 237, 231 P.2d 26, 31 (1951); *see* Note, 16 VAND. L. REV. 419, 420-21 (1963); 3 B. JONES, LAW OF EVIDENCE § 21:15 (6th ed. Gard rev. 1972); *cf.* *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) ("Accounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases.").
37. *E.g.*, *People v. Goldbach*, 27 Cal. App. 3d 563, 568, 103 Cal. Rptr. 800, 803 (1972); *People v. Hilliker*, 29 Mich. App. 543, 546, 185 N.W.2d 831, 833 (1972); *Lindsay v. Lipson*, 367 Mich. 1, 7, 116 N.W.2d 60, 63 (1962); *see* *People ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1047 (E.D.N.Y. 1976). *See generally* Note, 51 N.Y.U. L. REV. 409, 438 (1976).
38. *See* MCCORMICK, *supra* note 12, at § 98 (doctor-patient); 51 N.Y.U. L. REV. 409, 441 (1976) (psychiatrist-patient); Rappeport, *Psychiatrist-Patient Privilege*, 23 MD. L. REV. 39 (1963) [hereinafter cited as Rappeport]; LOISELL & MUELLER, *supra* note 17, at § 215.
39. *See, e.g.*, *People ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1040 (E.D.N.Y. 1976) ("Legal scholars have been virtually unanimous in their condemnation of these legislative efforts to foster the doctor-patient relationship by rules of exclusion."); Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing The Doctor's Mouth on the Witness Stand?*, 52 YALE L.J. 607 (1943); WIGMORE, *supra* note 11, at § 2380(a); Baldwin, *Confidentiality between Physician and Patient*, 22 MD. L. REV. 181, 186-89 (1962); Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455, 463-69 (1962).
40. LOISELL & MUELLER, *supra* note 17, at § 216 (quoting Ferster, *Statutory Summary of Physician-Patient Privileged Communication Laws*, in READINGS IN LAW AND PSYCHIATRY 239 (Allen, Ferster & Rubin rev. ed. 1975)):
 [F]orty states recognize a psychiatrist-patient privilege, six by specific psychiatrist-patient statute and the remainder by physician-patient statute, that twenty-two of these states also recognize by statute a psychologist-patient privilege, and that an additional five states confer a privilege upon patients of psychologists but not psychiatrists.
41. *Compare* Morgan, *supra* note 23, at 291 ("Nor is there any objective evidence that the . . . absence [of the privilege] has had an adverse influence Have the physically afflicted shunned the famous physicians and surgeons of Baltimore because Maryland denies any such privilege? No one has had the temerity to

codify the common law,⁴² doctor-patient privileges have no such historical basis and depend on the legislatures for their creation and termination.⁴³ An important distinction between the two is the so-called patient-litigant exception to the doctor-patient and psychiatrist-patient privileges.⁴⁴ When a patient's physical or mental condition is put into issue at trial, confidentiality is waived and the doctor may be compelled to testify.⁴⁵ Except for New York, no such exception to the attorney-client privilege exists anywhere in the United States.⁴⁶

IV. WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE

Although the attorney-client privilege is permanent, outliving the professional relationship and even the client,⁴⁷ it is not absolute, and it may be waived either expressly or by implication.⁴⁸ The courts look to Wigmore's two factors of intent and fairness to determine whether a waiver has been effected.⁴⁹ If the client merely takes the stand in his own behalf there is generally held to be no waiver.⁵⁰ If,

make such an assertion.") with *Franklin v. State*, 8 Md. App. 134, 141, 258 A.2d 767, 771 (1969) (Defendant stumbled into a hospital and told the doctor he had taken a large dose of heroin. He was later convicted for possession when the doctor was allowed to testify. The court candidly admitted: "That this decision will likely deter drug addicts and users from seeking medical help when they need it is, unfortunately, the all too plain result of this case.")

42. Note, 16 VAND. L. REV. 419, 420 n.2 (1963) ("Thirty-seven jurisdictions . . . have statutes purporting to define the scope of the privilege, but these are generally held to be merely declarative of the common law." (citing WIGMORE, *supra* note 11, at § 2292 n.2)).
43. *Bremer v. State*, 18 Md. App. 291, 334, 307 A.2d 503, 529 (1973) ("[The privilege] exists by legislative grant, and ordinarily the legislature may provide the conditions under which it is applicable."). See *Rappeport*, *supra* note 38; Annot., 44 A.L.R.3d 24 (1972).
44. See, e.g., CAL. EVID. CODE §§ 996, 1016 (West 1966), construed in *People v. Lines*, 13 Cal. 3d 500, 511, 531 P.2d 793, 800, 119 Cal. Rptr. 225, 232 (1975). See generally Annot., 36 A.L.R.2d 946 (1954).
45. E.g., MD. CTS. & JUD. PROC. CODE ANN. § 9-109(d)(3)(i) (Supp. 1976) (psychiatrist-patient privilege). The statute provides for the exclusion of the privilege "in a civil or criminal proceeding . . . [where] [t]he patient introduces his mental condition as an element of his claim or defense."
46. *People v. Edney*, 39 N.Y.2d 620, 350 N.E.2d 400, 385 N.Y.S.2d 23 (1976). See text accompanying notes 60-66 *infra*.
47. See WIGMORE, *supra* note 11, §§ 2321-23; Note, 16 MINN. L. REV. 818, 822 (1932); 2 H. UNDERHILL, CRIMINAL EVIDENCE § 333 (6th ed. P. Herrick 1973) [hereinafter cited as UNDERHILL].
48. UNDERHILL, *supra* note 47, at § 333; see WIGMORE, *supra* note 11, at § 2327 ("[T]he waiver, like the privilege, belongs solely to the client.")
49. WIGMORE, *supra* note 11, at § 2327. Dean Wigmore might be dismayed, however, to find that the "fairness" he intended as a justification for finding an implied waiver of the privilege is now being used to sustain the privilege against such a finding. See, e.g., *Harrison v. State*, 276 Md. 122, 138, 345 A.2d 830, 840 (1975).
50. *State v. Kociolek*, 23 N.J. 400, 416-17, 129 A.2d 417, 425-26 (1957) ("[O]therwise, the privilege of consultation would be exercised only at the penalty of closing the client's own mouth on the stand' . . . [It] would subvert the privilege of the confidential relation.") (citation omitted); see UNDERHILL, *supra* note 46, at § 333; Sedler & Simeone, *supra* note 24, at 26.

however, he testifies concerning matters protected by the privilege on direct examination,⁵¹ or permits his attorney to do so, or fails to object to the attorney or his expert doing so,⁵² the courts may find an implied waiver. On the other hand, it has been suggested that while the doctrine of implied waiver is acceptable in civil litigation, fundamental fairness mandates the recognition of only express waivers in criminal trials.⁵³ As noted above, however, the other "lesser" privileges of confidentiality that developed regarding disclosures to medical experts (the physician-patient and psychiatrist- or psychotherapist-patient privileges) are subject to the patient-litigant exception removing protection once the patient places his mental condition in issue by raising the defense of insanity.⁵⁴

The question of whether a waiver of the attorney-client privilege should also be implied by assertion of the insanity defense, in effect a client-litigant exception, has been answered by the courts with a nearly unanimous and rather unequivocal, "No." Certainly, if the psychiatrist is called to testify for the defense, the privilege is waived, but unless and until the expert is called, the privilege remains intact.⁵⁵

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51. *Harrison v. State*, 276 Md. 122, 136-37, 345 A.2d 830, 839 (this testimony would also enable the attorney to testify — a complete waiver is effected); WIGMORE, *supra* note 11, at § 2327. *See generally* Annot., 51 A.L.R.2d 521, 529-37 (1957). Maryland also takes the majority position that if the client testifies as to the privileged information on cross-examination, there is no waiver. *See also* *People v. Kor*, 129 Cal. App. 2d 436, 447, 277 P.2d 94, 100 (1954) (merely answering questions on cross-examination did not show intent to waive privilege). *But see* WIGMORE, *supra* note 11, at § 2327; McCORMICK, *supra* note 12, at § 93 ("Unless there are some circumstances which show that the client was surprised or misled," a waiver will be found.)
 52. *Magida ex rel. Vulcan Detinning Co. v. Continental Can Co.*, 12 F.R.D. 74, 78 (S.D.N.Y. 1951) (waiver may be found where client lets his attorney testify without objection); Note, 16 MINN. L. REV. 818, 826 (1932).
 53. UNDERHILL, *supra* note 47, at § 333 (It is "doubtful if any waiver should be implied in a criminal trial."); *accord*, *People v. Kor*, 129 Cal. App. 2d 436, 447, 277 P.2d 94, 100-01 (1954) (Shinn, P.J., concurring). In his concurrence, Judge Shinn insisted: "The privilege of confidential communication between client and attorney should be regarded as sacred. It is not to be whittled away by means of specious argument that it has been waived. Least of all should the courts seize upon slight and equivocal circumstances as a technical reason for destroying the privilege." *Id.*
 54. *See* LOUISELL & MUELLER, *supra* note 17, at § 215 ("When the patient puts his physical [or mental] condition in issue," the privilege is waived.); *e.g.*, *Lind v. Canada Dry Corp.*, 283 F. Supp. 861, 864 (D. Minn. 1968) (The Minnesota rule provides for a waiver when a plaintiff brings a personal injury suit.); *Hill v. Huddleston*, 263 F. Supp. 108, 110 (D. Md. 1967). *See generally* Annot., 21 A.L.R. 3d 912 (1968).
 55. *E.g.*, *United States v. Alvarez*, 519 F.2d 1036, 1047 (3d Cir. 1975); *People v. Lines*, 13 Cal. 3d 500, 514, 531 P.2d 793, 802-03, 119 Cal. Rptr. 225, 234-35 (1975); *State v. Kociolek*, 23 N.J. 400, 416, 129 A.2d 417, 425-26 (1957); *cf.* *Pouncey v. State*, 353 So. 2d 640, 642 (Fla. Dist. Ct. App. 1977) (exception if the defense so depletes the supply of experts as to prejudice the state unfairly). *Contra*, *People v. Edney*, 39 N.Y.2d 620, 624-25, 350 N.E.2d 400, 402-03, 385 N.Y.S.2d 23, 25-26 (1976); *cf.* *Singleton v. State*, 90 Nev. 216, 217, 522 P.2d 1221, 1222 (1974). The defendant's

In *United States v. Alvarez*,⁵⁶ the leading case, the Third Circuit warns against the chilling effect such a waiver would have on consideration of the insanity defense.⁵⁷ The defendant would hesitate to cooperate with the psychiatrist for fear that his disclosures would incriminate him. The attorney would be reluctant to consult a number of experts, wary of creating a potential weapon for the prosecution, or helping the state to meet its burden of proving the defendant's sanity.⁵⁸ The *Alvarez* court therefore rejected the idea of a waiver arising merely from an insanity plea, concluding that its effect would be to make the defendant choose between making a potentially incriminating disclosure to his defense team and foregoing an insanity defense, a choice that would deprive the accused of the effective assistance of counsel.⁵⁹

The sole discordant note was sounded by New York in *People v. Edney*.⁶⁰ There the New York Court of Appeals decided that the rationale supporting an implied waiver of the physician-patient privilege was likewise applicable to attorney-client confidentiality.⁶¹ The *Edney* court noted that a defendant seeking to raise an insanity defense could be compelled to submit to an examination by state psychiatrists.⁶² On the assumption that the defendant would cooperate with the state's doctors as candidly as with his own, the majority reasoned that the state would have before it the very facts the privilege would shield.⁶³ If the defense never raises the insanity

former attorney testified in *Singleton* on rebuttal that the defendant was not always truthful, but that he was always a "lucid individual." The court held the defendant had waived the privilege by placing his sanity and credibility into issue and calling other former attorneys.

56. 519 F.2d 1036 (3d Cir. 1975).

57. *Id.* at 1047; see Note, 51 N.Y.U. L. Rev. 409, 440 (1976).

58. *United States v. Alvarez*, 519 F.2d 1036, 1046-47 (3d Cir. 1975).

59. *Id.* at 1046.

60. 39 N.Y.2d 620, 350 N.E.2d 400, 385 N.Y.S.2d 23 (1976).

61. *Id.* at 625, 350 N.E.2d at 403, 385 N.Y.S.2d at 26. See *People v. Al-Kanani*, 33 N.Y.2d 260, 264, 307 N.E.2d 43, 44, 351 N.Y.S.2d 969, 971 (1973) ("[W]here insanity is asserted as a defense and, as here, the defendant offers evidence tending to show his insanity in support of this plea, a complete waiver [of the physician-patient privilege] is effected . . .").

62. *People v. Edney*, 39 N.Y.2d 620, 625, 350 N.E.2d 400, 403, 385 N.Y.S.2d 23, 26 (1976).

63. *Id.* If one accepts that premise, however, then "[t]he State already has access to the underlying factual basis of the accused's mental affliction for use by its [own] psychiatrists," and would not significantly benefit from access to the defense-employed psychiatrist. *Pratt v. State*, 39 Md. App. 442, 451, 387 A.2d 779, 785 (1978). Even if one disagrees with the *Edney* majority's reasoning, its approach is still unrealistic because it ignores the so-called "battle of the experts" problem. Even if the defendant were fully cooperative with the state psychiatrist, the need for the privilege would not be obviated. Because techniques vary among different schools of psychiatry, examinations of the same subject often yield different results. Furthermore, even if a number of psychiatrists are supplied with the same information, it is quite conceivable that their conclusions as to the subject's mental state will be contradictory. See Professor Slovenko's interesting treatment of the problem in Slovenko, *Reflections on the Criticisms of Psychiatric Expert Testimony*, 25 WAYNE L. REV. 37, 38 n.4 (1978). See also A.

issue, however, no waiver occurs.⁶⁴ Moreover, the court pointed out, the attorney still has his work-product privilege which will protect any disclosures he makes to the psychiatrist while contemplating the defense.⁶⁵ Judge Fuchsberg, in dissent, refused to accept the majority's logic and urged against finding a waiver. He warned against confusing disclosures made within the treatment-oriented physician-patient privilege with "communications to physicians within the compass of and as an adjunct to the *attorney-client privilege*."⁶⁶

V. THE PRATT COURT'S ANALYSIS

The questions faced by the court in *Pratt* were ones of first impression in Maryland.⁶⁷ The first issue, whether the defendant's disclosures to a psychiatrist retained to enable her counsel to prepare an insanity defense were protected by the attorney-client privilege, was conceded by the state. Judge Digges was therefore able to move briskly to the conclusion that because of the "complexities of modern existence,"⁶⁸ lawyers must be able to consult non-legal experts in order to advise their clients effectively. Proceeding on the theory that the expert functions as an agent of the attorney, the *Pratt* court held

GOLDSTEIN, *THE INSANITY DEFENSE* 134 (1967); W. LAFAVE & A. SCOTT, *CRIMINAL LAW* § 40 (1972).

64. *People v. Edney*, 39 N.Y.2d 620, 625, 350 N.E.2d 400, 403, 385 N.Y.S.2d 23, 26 (1976). The *Edney* holding, of course, effectively impales the defendant on the horns of what the *Alvarez* court and other jurisdictions have found to be an impermissible dilemma. See text accompanying notes 55-57 *supra*.

65. *People v. Edney*, 39 N.Y.2d 620, 625, 350 N.E.2d 400, 403, 385 N.Y.S.2d 23, 26 (1976). The majority's position on this issue, although erroneous, might explain the anomalous *Edney* holding. "The attorney-client privilege and the work product doctrine are wholly separate both in coverage and in underlying rationale." LOUISELL & MUELLER, *supra* note 17, at §211 (an excellent comparison of the two doctrines).

66. *People v. Edney*, 39 N.Y.2d 620, 627, 350 N.E.2d 400, 404-05, 385 N.Y.S.2d 23, 27-28 (1976) (Fuchsberg, J., dissenting) (emphasis in original). Judge Fuchsberg also noted that in all the other jurisdictions which had reached the opposite conclusion from *Edney*, there had not been a single dissent. *Id.*

There is, however, a limited amount of support for the *Edney* majority's opinion in some academic corners. Professor Friedenthal of Stanford, for instance, maintains that the psychiatrist is not a pure conduit or interpreter of information disclosed by the client. Rather, as an expert, the psychiatrist adds an "increment" of his own medical knowledge, which should be as discoverable as the knowledge of any other witness. Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455, 463 (1962). See also note 39 *supra* (citing anti-privilege articles).

On the other hand, the Supreme Court of California probably understated the problem with this approach when it noted it could "conceive of situations . . . where it may be an impossible task for the psychiatrist to report or testify as to unprivileged information without drawing upon and utilizing that which is privileged." *People v. Lines*, 13 Cal. 3d 500, 515-16, 531 P.2d 793, 804, 119 Cal. Rptr. 225, 236 (1975).

67. 284 Md. 516, 517, 398 A.2d 421, 422 (1979).

68. *Id.* at 520, 398 A.2d at 423.

that in a criminal case, a defendant's disclosures to an expert are protected by the attorney-client privilege when the purpose of the disclosure is to enable the expert to furnish the attorney with the specialized information necessary to represent the client properly.⁶⁹ The court particularly addressed the special need of the criminal defense attorney to secure expert medical advice when the accused's sanity is in issue, recognizing not only the necessity of medical testimony in the actual presentation of the insanity defense,⁷⁰ but also the need for the attorney to become familiar with essential psychiatric concepts. It specifically reserved, however, the question of whether the privilege extends to experts retained in furtherance of civil litigation.⁷¹

The second issue, whether the insanity defense results in an implied waiver of the privilege, presented a more difficult problem. Because Maryland has a statute similar to the New York law, which authorizes a court-ordered examination of a criminal defendant raising the insanity defense,⁷² the *Pratt* court was obliged to consider the reasoning of the *Edney* court.⁷³ The prosecution in *Pratt* asked the court to create an exception to the attorney-client privilege that would waive confidentiality, similar to the patient-litigant exception to Maryland's psychiatrist-patient privilege.⁷⁴

69. *Id.* at 520, 398 A.2d at 423-24.

70. Indeed, Maryland statutory provisions indicate the need for the criminal attorney contemplating an insanity defense to secure expert assistance before proceeding very far. See MD. ANN. CODE art. 59, § 25(b) (1979) (when accused enters an insanity plea, court may order mental examination). See also MD. CTS. & JUD. PROC. CODE ANN. § 9-120 (Supp. 1979) (psychologists certified under the "Psychologists' Certification Act" and qualified as expert witnesses may testify as to ultimate issue of sanity, as well as psychiatrists).

In addition, a recent court of special appeals decision, *Conn v. State*, 41 Md. App. 238, 396 A.2d 323 (1979), held that lay witnesses may not testify on the ultimate issue of a criminal defendant's sanity. The court of appeals, however, reversed this holding, ruling that lay persons may so testify when they have had adequate opportunity to observe the accused. *State v. Conn*, ___ Md. ___, 408 A.2d 700 (1979). The court of appeals reasoned that normal and abnormal conduct are matters of common knowledge. *Id.* at ___, 408 A.2d at 700.

Note, however, that under the court of appeals decision in *Conn*, only a psychiatrist or a psychologist may conduct an after-the-fact inquiry into the sanity of an accused. *Id.* at ___, 408 A.2d at 710. Consequently, the necessity, under ordinary circumstances, of obtaining expert testimony is critically important for the criminal defense attorney.

71. 284 Md. at 523 n.5, 398 A.2d at 425 n.5.

72. See MD. ANN. CODE art. 59, § 25(b) (1979) and note 7 *supra*. New York actually no longer has a statute authorizing a court-ordered examination, apparently because it was accidentally eliminated from a re-drafted criminal procedure code. One New York court, however, stepped in and declared:

The People clearly had the right to move for a psychiatric examination under Section 658 of the old Code of Criminal Procedure, and . . . that right cannot be lost under Article 730 of the Criminal Procedure Law merely because there may have been an oversight in omitting this provision.

People v. Traver, 70 Misc. 2d 162, 164, 332 N.Y.S.2d 955, 957 (1972).

73. See text accompanying notes 62-68 *supra*.

74. See MD. CTS. & JUD. PROC. CODE ANN. § 9-109(d)(3)(i) (Supp. 1979).

The court agreed there was some degree of mechanical logic to the *Edney* opinion, but rejected the waiver notion because of the "chilling effect" it would have on the attorney-client relationship.⁷⁵ The court was reluctant to create a situation in which the defendant could confide in his attorney or the attorney's expert only at the risk of creating a prosecution witness. Citing *Alvarez*, it declared that the defense attorney should be able to consult a number of experts without fear of assisting the state in meeting its burden of proving the defendant sane.⁷⁶ Further, it reasoned that revealing to the jury that the adverse testimony came from the defendant's own expert would certainly result in considerable prejudice to the defendant.⁷⁷ Acknowledging that forcing such a dilemma on a criminal defendant might have state and federal constitutional implications, Judge Digges concluded that the court could not transform an insanity plea into an implied waiver.⁷⁸

VI. EVALUATION

At common law, Maryland had no physician-patient privilege⁷⁹ (and still has none), no psychiatrist-patient privilege,⁸⁰ and the attorney-client privilege was never construed to cover third-party experts retained by the attorney to help him prepare for trial. As Dr. Jonas Rappeport, eminent Maryland psychiatrist and Chief Medical Officer of the Supreme Bench of Baltimore City, noted, "One cannot help but wonder why there has not been real trouble to date."⁸¹ These comments were made just before the psychiatrist-patient privilege was enacted in 1964⁸² over bitter opposition from the Maryland legal community.⁸³ He offered the explanation that "we have somehow managed to have an 'extra-legal' psychiatrist-patient privilege by the courtesy of the court and the bar" (and an

75. 284 Md. at 522, 398 A.2d at 424.

76. 284 Md. at 524, 398 A.2d at 425-26. See text accompanying notes 58-61 *supra*.

77. 284 Md. at 522-23, 398 A.2d at 425. With *City of Baltimore v. Zell*, 279 Md. 23, 28, 367 A.2d 14, 17 (1977), Maryland has adopted the minority position of vesting the trial court with the discretion to admit evidence of an expert's "employment posture," evidence considered irrelevant by the majority of jurisdictions. *E.g.*, *Dicker v. United States*, 352 F.2d 455, 457 (D.C. Cir. 1965).

78. 284 Md. at 524-25, 398 A.2d at 426. Maryland thus mirrors the approach of every other jurisdiction that has faced the question, except New York, in holding that there is no exception to the attorney-client privilege comparable to the patient-litigant exception. *E.g.*, *United States v. Alvarez*, 519 F.2d 1036, 1047 (3d Cir. 1975); *People v. Lines*, 13 Cal. 3d 500, 511, 531 P.2d 793, 802, 119 Cal. Rptr. 225, 232 (1975); *City & County of San Francisco v. Superior Court*, 37 Cal. 2d 227, 237-38, 231 P.2d 26, 31 (1951).

79. *E.g.*, *Franklin v. State*, 8 Md. App. 134, 141, 258 A.2d 767, 771 (1969). See *O'Brien v. State*, 186 Md. 270, 284, 94 A. 1034, 1040 (1915).

80. See Rappeport, *supra* note 38, at 39.

81. *Id.* at 47.

82. See MD. CTS. & JUD. PROC. CODE ANN. § 9-109 (1974). The privilege was enacted, of course, subject to the patient-litigant exception.

83. Rappeport, *supra* note 38, at 39.

occasional memory lapse by the doctors).⁸⁴ Such an unreliable "privilege" was inadequate protection against compelled disclosure.

In 1973, Maryland finally enacted an attorney-client privilege statute that states: "A person may not be compelled to testify in violation of the attorney-client privilege."⁸⁵ The statute officially sanctions the common law privilege, but makes no attempt to define or to explain it.⁸⁶ In the absence of any assurance that disclosures to non-legal experts would be covered by the privilege, a client had a difficult choice to make: forego adequate legal representation by not revealing anything to his attorney's expert, or make full disclosure and risk creating a superb witness for the other side. In the case of a criminal defendant whose counsel was considering an insanity defense, the dilemma was critical. The attorney in this situation could: (1) refrain from raising the defense for fear of causing his client to make incriminating disclosures to an expert who could later be summoned to testify for the prosecution; (2) tell the client that none of his disclosures to the doctor are protected, knowing full well that the client will withhold anything he considers incriminating; or (3) send the client to the doctor without telling him about the absence of privilege. In each instance, the defendant is deprived of the effective assistance of counsel.

As a result of *Pratt*, a criminal defendant can communicate with necessary experts as freely as with his attorney. With this decision, Maryland joins the overwhelming majority of states that include necessary experts within the protective umbrella of the attorney-client privilege and refuse to find a waiver merely because the defendant puts into issue the matter for which the expert was retained.

Despite these virtues, however, *Pratt* leaves several questions unanswered. The court reserved decision upon whether the attorney-client privilege extends to experts retained in civil cases, and of course, it did not consider the question of experts retained by counsel who do not contemplate litigation. Likewise, the *Pratt* opinion left definition of the scope of an implied waiver of the privilege to future cases. Finally, the *Pratt* court did not find it necessary to address the problem that would occur were a defense attorney to consult most or all of a limited number of experts in a field, and thus prevent the prosecution from obtaining its own witnesses.

Inasmuch as the court has aligned itself with jurisdictions that have extended the privilege to both civil and criminal expert

84. *Id.* at 47.

85. MD. CTS. & JUD. PROC. CODE ANN. §9-108 (1974).

86. Of course, Canon 4 of the ABA's Code of Professional Responsibility was already codified to admonish lawyers to preserve their clients' confidences, but as the Fourth Circuit so aptly pointed out, "Observance of the canon is commendable. The canon, however, does not purport to state the law governing the attorney-client privilege." *NLRB v. Harvey*, 399 F.2d 900, 906 (1965).

consultants,⁸⁷ it is likely that Maryland courts will eventually bring civil experts within the scope of the privilege. The courts will probably continue to look to the common law principles of intent and fairness to determine when the privilege is waived.⁸⁸ Experts not retained in contemplation of litigation should fall within the scope of the privilege so long as the object in consulting them is to provide the client with competent legal representation.⁸⁹ As for the rare case where the defense consults all the available experts in a field, the court will probably modify the privilege, applying the rationale of the Florida District Court of Appeals: "The one major exception to this attorney-client privilege is where the trier of fact is so deprived of valuable witnesses as to undermine the public interest in the administration of justice."⁹⁰

VII. CONCLUSION

Until *State v. Pratt*, a criminal defense attorney risked seriously damaging his client's insanity defense merely by retaining the expert psychiatric assistance needed to prepare it. *Pratt* assures that the retention of a psychiatrist by the defense does not create a potential witness for the prosecution. Although the decision leaves questions unresolved, it is nonetheless welcome as a case that fills a rather sizeable gap in the Maryland criminal defendant's right to effective assistance of counsel. Finally, the *Pratt* decision paves the way for expansion of the coverage of the attorney-client privilege to non-legal experts consulted by the lawyer in order to advise his client more effectively.

Stuart J. Cordish

87. *E.g.*, *People v. Hilliker*, 29 Mich. App. 543, 185 N.W.2d 831 (1971). There, the court held: "[T]he reasoning of the court [in a civil proceeding] is equally applicable to a criminal case." *Id.* at 548, 185 N.W.2d at 833, referring to *Lindsay v. Lipson*, 367 Mich. 1, 116 N.W.2d 60 (1962) (civil case). On the other hand, the sixth amendment considerations are not present in civil cases.

88. This is admittedly still a rather vague standard, but *Harrison v. State*, 276 Md. 122, 345 A.2d 830 (1975), provides as good a starting point as any.

89. See *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) (accountant expert). The *Kovel* court observed that if "what is sought is not legal advice, but only accounting service, or if the advice sought is the accountant's rather than the attorney's no privilege exists."

90. *Pouncey v. State*, 353 So. 2d 640, 642 (Fla. Dist. Ct. App. 1977).