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as was stated in the *Caplan* case, because the father's personal assets cannot be reached to satisfy the judgment.

If the courts are going to adhere to the doctrine of parental immunity, it should be applied in all situations in which liability on the father is imposed, indirectly as well as directly. The father's ultimate liability should not be ignored in order to allow recovery in the first instance.

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ATTORNEY'S PERSONAL OBSERVATIONS AS WITHIN ATTORNEY-CLIENT PRIVILEGE

The policy of granting a privilege to communications made by a client to his attorney is one of the venerable doctrines of Anglo-American law. The privilege originated during the reign of Elizabeth I in recognition of the honor and dignity of the attorney's profession.[1] By the latter part of the eighteenth century, however, the purpose of the privilege had been altered so as to become a guarantee of freedom from apprehension and anxiety on the part of clients as they sought legal advice.[2] This is essentially the basis of the privilege today. It encourages complete divulgence to the attorney of facts known by the client in order that the attorney may best be able to prepare his client's case.[3]

The doctrine has been the subject of some statutory regulation.[4] Except for minor changes the various statutes are declaratory of the common law.[5] Generally speaking, the privilege extends to communi-

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[1]Waldron v. Ward, Style 449, 82 Eng. Rep. 853 (K.B. 1654); Dennis v. Codrington, Cary 100, 21 Eng. Rep. 53 (Ch. 1580); Kelway v. Kelway, Cary 88, 21 Eng. Rep. 47 (Ch. 1580). See 8 Wigmore, Evidence § 2290 (3d ed. 1940) for a full discussion of this matter.

[2]Greenough v. Gaskell, 1 My. & K. 98, 39 Eng. Rep. 618 (Ch. 1933).

[3]Pritchard v. United States, 181 F.2d 326 (6th Cir. 1950); United States v. United Shoe Mach. Corp., 89 F Supp. 357 (D. Mass. 1950), Stone v. Minter, 111 Ga. 45, 36 S.E. 321 (1900); State v. Johns, 209 La. 244, 24 So. 2d 462 (1945); Doherty v. O'Calaghan, 157 Mass. 90, 31 N.E. 726 (1892); State v. Toscano, 13 N.J. 418, 100 A.2d 170 (1953); In re Kleman, 132 Ohio St. 187, 5 N.E.2d 492 (1936); 8 Wigmore, Evidence § 2291 (3d ed. 1940).

[4]Ind. Ann. Stat. § 2-1714 (Repl. Vol. 1946); Kan. Gen. Stat. Ann. § 60-2805 (1949); Model Code of Evidence Rule 210 (1942). For a textual discussion of this point see 58 Am. Jur. Witnesses § 463 (1948); 97 C.J.S. Witnesses § 276 (1957).

[5]Olsson v. Pierson, 237 Iowa 1342, 25 N.W.2d 357 (1946); Kent Jewelry Corp. v. Kiefer, 202 Misc. 778, 113 N.Y.S.2d 12 (Sup. Ct. 1952); In re Williams' Estate, 179 Misc. 805, 39 N.Y.S.2d 741 (Surr. Ct. 1942); State v. Emmanuel, 42 Wash. 2d 799, 259 P.2d 845 (1953).

cations made by a client to his attorney, who has been retained and is acting in his professional capacity. The privilege applies to communications that concern the subject matter of the attorney's employment.[6]

The many ramifications of the privilege give rise to difficult and often complex questions. Two of these questions were posed in the case of *Taylor v. Sheldon*,[7] a will contest from Ohio.

The contestants offered testimony of an attorney as to the mental competency of the testator. The attorney had been summoned by the testator to draw the will but after the initial conference he withdrew without doing so. During the course of the trial, the contestants called the attorney as a witness to testify as to the competency of the testator. The trial court, upon objection by the proponents of the will, refused to allow the attorney to testify as to such matter on the ground that the testimony concerned a privileged communication. The trial court directed a verdict validating the will.

Upon appeal, the Court of Appeals of Ohio found that no attorney-client relationship existed and that irrespective of that relationship, an attorney is competent to testify as to a client's mental condition where such knowledge would be apparent to any casual observer.

The case went to the Ohio Supreme Court where a majority of the court reinstated the trial court's judgment, holding that communications made to an attorney by a prospective client constitute privileged communications inasmuch as a tentative attorney-client relationship exists. Furthermore, the court pointed out that this privilege covers observations by an attorney of a client's mental condition when such knowledge is acquired by the attorney during the attorney-client relationship.

The dissenting judge felt that the Ohio law should not be so strictly interpreted and, like the Court of Appeals, would not include within the privilege knowledge gained incidentally by the attorney from his client.

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[6]Modern Woodmen v. Watkins, 132 F.2d 352 (5th Cir. 1942); Snow v. Gould, 74 Me. 540 (1883); Ex parte Martin, 141 Ohio St. 87, 47 N.E.2d 388 (1943); Jackson v. State, 155 Tenn. 371, 293 S.W. 539 (1927); Collins v. Hoffman, 62 Wash. 278, 113 Pac. 625 (1911).

The privilege does not exist where an attorney is consulted with reference to the commission of a future crime or tort. Furthermore, the privilege does not exist where it can be said that the client has waived it. Inasmuch as the rule of privileged communications does not readily lend itself to a brief summation, the above is necessarily oversimplified. For a more complete discussion see 58 Am. Jur. Witnesses §§ 483, 484 (1948); 97 C.J.S. Witnesses §§ 276, 280 (1957).

[7]172 Ohio St. 118, 173 N.E.2d 892 (1961).

The first question raised in *Taylor v. Sheldon* is whether the rule of privileged communications between attorney and client applies where the only business ever transacted between the parties is a conference preliminary to actual employment. The relation of attorney and client is usually thought of as arising by contract, either express or implied, and so requires a valid offer and acceptance.[8]

Clearly, no contractual arrangement existed between the prospective attorney and prospective client in the *Taylor* case.[9] However, the Supreme Court pointed out that in some instances the purpose of the privilege would be defeated by excluding from its protection a preliminary conference between an attorney and client with a view towards future employment. Obviously, an attorney will ordinarily want to know certain facts in order to decide whether to accept or reject employment. Without the protection of the rule at this time, clients would not be able to reveal freely and completely all pertinent facts to attorneys. "To hold otherwise would so weaken the rule as to make it useless in many instances and, therefore, would discourage a person from seeking the services of an attorney which he might sorely need."[10]

The second and more difficult problem presented by the *Taylor* case is whether the rule of privileged communications extends to all matters observed by the attorney in his relationship with the client. More particularly, the question in this case was whether an attorney could testify as to the mental condition of the testator, based upon the attorney's general observations. made during his only conference with the prospective client.[11]

The majority opinion reasoned that although the knowledge in question was such as might have been available to any layman observing the decedent, the attorney obtained this knowledge by virtue of

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[8]Keir v. State, 152 Fla. 389, 11 So. 2d 886, 888 (1943); Moyers v. Fogarty, 140 Iowa 701, 119 N.W. 159, 165 (1909); 8 Wigmore, Evidence § 2304 (3d ed. 1940).

[9]172 Ohio St. 118, 173 N.E.2d 892, 893 (1961).

[10]173 N.E.2d at 895. See United States v. Funk, 84 F. Supp. 967 (E.D. Ky. 1949); State ex rel. Martin v. Tally, 102 Ala. 25, 15 So. 722 (1894); Sheehan v. Allen, 67 Kan. 712, 74 Pac. 245 (1903); 8 Wigmore, Evidence § 2304 (3d ed. 1940).

[11]The Ohio Revised Code, which appears to be declaratory of the common law rule (see text supra at notes 4-6) as to privileged communications between attorney and client provides as follows:

> "The following persons shall not testify in certain respects: (A) An attorney, concerning a communication made to him by his client in that relation or his advice to his client...but the attorney...may testify by express consent of the client... and if the client...voluntarily testifies, the attorney...may be compelled to testify on the same subject...." Ohio Rev. Code Ann. § 2317.02 (Baldwin 1958).

his professional relationship with the decedent. The court concluded that such knowledge is privileged.[12] Furthermore, the court pointed out that the knowledge possessed by the attorney was related to the subject matter of the contemplated employment.

> "This determination of competency is a necessary and essential element of the preparation of a will, is directly related to the services for which the attorney is employed and is, therefore, a definite part of the privileged communications made to the attorney."[13]

The most questionable feature of the *Taylor* decision is that it imports that all knowledge gained by an attorney while acting in his professional capacity might be privileged simply because of the attorney-client relationship.[14] It is well settled that the mere relationship of attorney and client is not enough to bring a communication within the rule of privileged communications.[15]

Inasmuch as the *Taylor* court stated that mental competency was material to the subject matter of employment—the drafting of a will—the further question of significance of materiality is raised.

Courts do not always use consistent language in answering the question of whether or not the privilege is limited in some way to communications material to the subject matter of the attorney's employment. They tend to state that communications between an attorney and client are privileged only when they concern the subject matter of the employment. It is usually noted that where a client knowingly departs from the professional relationship and speaks of irrelevant matters the communications are not privileged. However, a problem arises with this reasoning where a client is unable to distinguish between what is relevant and irrelevant. If a materiality test is applied in this

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[12]The Ohio Supreme Court first considered whether or not the situation presented by the Tayor case fell within either of the exceptions in the Ohio Statutes.

In Knepper v. Knepper, 103 Ohio St. 529, 134 N.E. 476 (1921), the attorney who had drawn a will and acted as a subscribing witness was permitted to testify as a subscribing witness. In having his attorney act as a subscribing witness to his will, a testator expressly consents that the attorney may testify fully as to factors affecting the validity of the will.

The doctrine of waiver does not fit the Taylor situation since there was no express consent by the client to the attorney's testimony, nor testimony by the client from which to imply consent.

[13]172 Ohio St. 118, 173 N.E.2d 892, 897 (1961).

[14]173 N.E.2d at 896, 897.

[15]See United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950); In re Selser, 15 N.J. 393, 105 A.2d 395, 402 (1954); Emley v. Selepchak, 76 Ohio App. 257, 63 N.E.2d 919, 921 (1945); Heiselmann v. Franks, 48 Ohio App. 536, 194 N.E. 604 (1934); 8 Wigmore, Evidence § 2291 (3d ed. 1940); See also the dissent in Taylor v. Sheldon, 172 Ohio St. 118, 173 N.E.2d 892, 898 (1961).

situation, the very purpose of the doctrine might well be defeated. In this situation courts do not as a general rule require that communications bear a material relation to the attorney's employment.[16]

In discussing this matter in his treatise on *Evidence,* Professor Wigmore suggests an "intent" limitation on the privilege:

> "[T]hose data which would have come to the attorney's notice in any event, by mere observation, without any action on the client's part—such as the color of his hat or the pattern of his shoe—and those data which become known by such acts as the client would ordinarily have done in any event, without any purpose of communicating them to the attorney as his adviser... are not any part of the communication of the client.... On the other hand, almost any act, done by the client in the sight of the attorney... may conceivably be done by the client as the subject of a communication, and the only question will be whether, in the circumstances of the case, it was intended to be done as such."[17]

Under the intent test suggested by Professor Wigmore, a communication might be material and not privileged. Likewise, a communication may be immaterial to the subject matter of the employment and still privileged. This is not to say that an express request for secrecy is necessary for the privilege to apply. The circumstances of each case must be considered in order to determine if intended confidentiality may be implied therefrom. Certainly materiality would be one of the prime circumstances to be considered. The important point is that materiality and intent are not synonymous in this context. The "intent" test looks to the character of the communication rather than its relevancy. Though courts often seem to use "materiality" and "intent" interchangeably in writing opinions, it is suggested that in most of these instances the test used is essentially an intent test, the real consideration being whether an element of confidentiality existed.[18]

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[16]In re Bathwick's Will, 241 Mich, 156, 216 N.W. 420 (1927); Bussen v. Del Commune,239 Mo. App. 859, 199 S.W.2d 13 (1947); In re Williams' Estate, 179 Misc. 805, 39 N.Y.S.2d 741 (Surr. Ct. 1942). For a full discussion of this point see 8 N.Y.S.2d 741 (Surr. Ct. 1942). For a full discussion of this point see 8 Wigmore, Evidence § 2310 (3d ed. 1940).

[17]8 Wigmore, Evidence § 2306 (3d ed. 1940). See Hawley v. Hawley, 114 F.2d 745, 749 (D.C. Cir. 1940); Jackson v. Pillsbury, 380 Ill. 554, 44 N.E.2d 537, 547 (1942); Debolt v. Blackburn, 328 Ill. 420, 159 N.E. 790, 792 (1928); Wicks v. Dean, 103 Ky. 69, 44 S.W. 397 (1898); Canty v. Halpin, 294 Mo. 96, 242 S.W. 94, 96 (1922).

[18]See Hawley v. Hawley, 114 F.2d 745, 749 (D.C. Cir. 1940); Oliver v. Warren, 16 Cal. App. 164, 116 Pac. 312 (Dist. Ct. App. 1911); O'Brien v. Spalding, 102 Ga. 490, 31 S.E. 100 (1897).

It might well be argued that in the *Taylor* situation an "intent" test gives the same result. A testator quite likely intends that everything connected with the substance of his will should remain confidential. Why then should not general observations of a client's behavior by an attorney in conjunction with the drawing of a will be privileged? The answer is most clearly and forcefully stated by Professor Wigmore.

> "But the answer is that such utterances were obviously not confidentially made with reference to the secrecy of the fact of insanity or undue influence, for the testator of course did not believe those facts to exist and therefore could not possibly be said to have communicated them."[19]

The privilege exists to secure freedom of communication between attorneys and their clients. The rule is thought essential to the administration of justice. Nevertheless the privilege runs counter to the fundamental theory of our judicial system that the fullest disclosure will lead to justice.[20] It is an obstacle to arriving at the truth and so the privilege ought to be narrowly construed in accord with its object.[21] It is submitted that it is quite unlikely that a prospective client would hesitate in seeking legal advice out of fear that an attorney might make adverse observations concerning his mental condition and later reveal them.

It is suggested that inasmuch as the *Taylor* court does not appear to have been bound by statute or precedent, it should have adopted a more restrictive test as to communications falling within the attorney-client privilege. Under the *Taylor* test the privilege is extended beyond its object in that its application depends upon the materiality or relevancy of a fact or statement to the subject matter of employment. The best test would seem to be whether the communication is

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[19] 8 Wigmore, Evidence § 2314 (3d ed. 1940).

[20] It is also suggested that the privilege tends to increase litigation. Suppose Mr. X, a dishonest claimant, is informed by his attorney after the latter has heard all the facts that his claim is not a valid one. Nevertheless, Mr. X as a dishonest claimant will desire the attorney to help him win his csae. If the attorney refuses, X is likely to seek aid from a less scrupulous attorney. Without the protection of the privilege, the first attorney could reveal the facts defeating X's claim. If X is an honest claimant, the existence of the privilege would be of little significance in this situation, for Mr. X would not wish to litigate an invalid claim and would make no attempt to conceal pertinent facts.

[21] Hawley v. Hawley, 114 F.2d 745, 749 (D.C. Cir. 1940); In re Selser, 15 N.J. 393, 105 A.2d 395, 401 (1954); 58 Am. Jur. Witnesses § 487 (1948); 97 C.J.S. Witnesses § 276 (1957); 8 Wigmore, Evidence § 2291 (3d ed. 1940).

made as a part of the client's endeavor to obtain legal advice on a subject.[22]

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[22] 8 Wigmore, Evidence § 2310 (3d ed. 1940). See United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950); Hawley v. Hawley, 114 F.2d 745, 749 (D.C. Cir. 1940); Jackson v. Pillsbury, 380 Ill. 554, 44 N.E.2d 537, 547 (1942); House v. House, 61 Mich. 69, 27 N.W. 858 (1886); Hazlett v. Bryant, 119 Tenn. 251, 241 S.W.2d 121, 124 (1951). See O'Brien v. Spalding, 102 Ga. 490, 31 S.E. 100, 102 (1897); Sheehan v. Allen, 67 Kan. 712, 74 Pac. 245, 247 (1903); Debolt v. Blackburn, 328 Ill. 420, 159 N.E. 790, 792 (1928); Canty v. Halpin, 294 Mo. 96, 242 S.W. 94 (1922).