



LD November/December 2013 Neg Analysis

The current resolution, **Resolved: In the United States criminal justice system, truth-seeking ought to take precedence over attorney-client privilege**, can be approached by the negative by a variety of ways. In today's analysis, we'll look at a few of the most potentially strategic options.

As in the affirmative analysis, I want to begin this by encouraging you to take a good look at one of the many excellent online guides to what attorney-client privilege (ACP) is and when it applies. You will not get very far unless you familiarize yourself with the fundamentals of this doctrine.

Now that you've taken the time to learn the basics of ACP, we must discuss the other side of the resolution: truth-seeking. As the negative, you will be defending that ACP is of greater importance within the courts system than truth. Since truth is generally considered to be foundational to justice, this might seem like a daunting task. However, by making some smart arguments about the nature of truth and the criminal justice system, you should be able to score those ballots.

One option would be to argue that **absolute "truth" is impossible**. The argument here is that the criminal justice system often does not have access to definitive, objective proof (such as clear video of the accused committing a crime) and instead must rely on evidence and testimony. This necessarily involves an element of human error. The affirmative should therefore not be able to weigh their arguments as though eliminating ACP would lead to a system where courts would suddenly have unfettered access to the whole of the truth. Remember that *seeking* the truth and actually *finding* it are two very different things. Do not let the aff's truth-based impacts get overblown.



On a similar note, it would also be possible to use a more theoretical argument regarding truth. There are plenty of authors out there who argue that **there is no such thing as objective truth**. This literature is plentiful and interesting, but I won't be going into it in-depth here. If you are interested but unfamiliar, do some googling, or feel free to drop me a line and I will elaborate. For now, though, let's stay focused on the topic itself.

Another argument would be to claim that **ACP is a prerequisite to truth** because it ensures all parties have equal access to the legal system. Without an attorney, a person is likely to be overwhelmed by the complexity of the law and disadvantaged in court. As a result, their trial would be biased against them. Unfair representation and bias are very likely to result in outcomes that do not consider all elements and perspectives involved in the case, and therefore will not lead to uncovering the truth. Instead, it will be some kind of warped version of the truth in which the accused never stood a chance. ACP ensures that all participants in the court fully understand the law, and that makes truth-seeking more effective and more just.

Here is **evidence** to support that claim:

[Grace M. Giesel, James R. Merritt Professor and Distinguished Teaching Professor, University of Louisville, Louis D. Brandeis School of Law, "Upjohn Warnings, the Attorney-Client Privilege, and Principles of Lawyer Ethics: Achieving Harmony," University of Miami Law Review, vol. 65, November 30 2010]

The primary rationale for the privilege is utilitarian. By protecting communications between attorneys and clients, the privilege encourages clients to fully and completely disclose information. Only with this complete information can attorneys render competent and proper legal assistance and advice. The assumption is that clients will not be so open and disclose so much and thus cannot obtain such assistance and advice unless those clients are confident that the communications with attorneys will remain confidential. Long ago in *Annesley v. Anglesea*, an English court stated:



No man can conduct any of his affairs which relate to matters of law, without employing and consulting with an attorney; even if he is capable of doing it in point of skill, the law will not let him; and if he does not fully and candidly disclose everything that is in his mind, which he apprehends may be in the least relative to the affair he consults his attorney upon, it will be impossible for the attorney properly to serve him.

Two hundred and thirty-eight years later, the United States Supreme Court in *Upjohn Company v. United States*, reiterated this rationale and expanded upon it by noting that the attorney-client privilege encourages client candor and full disclosure and frequent consultation by the client with the attorney. This complete candor and consultation means that attorneys can counsel clients as to how to conduct themselves within the bounds of the law. Ultimately, the administration of justice improves.

Additionally, courts have ruled that **ACP only protects communications** between a client and his/her attorney, **not the underlying facts** discussed during the communication. In other words, telling something to an attorney does not make those facts inadmissible in court. Moreover, the burden to prove that ACP applies is on the claimer, and is typically applied narrowly. You can argue that this makes the overall threat to the truth from ACP very minute.

Here is **evidence** on that point:

[Grace M. Giesel, James R. Merritt Professor and Distinguished Teaching Professor, University of Louisville, Louis D. Brandeis School of Law, "Upjohn Warnings, the Attorney-Client Privilege, and Principles of Lawyer Ethics: Achieving Harmony," University of Miami Law Review, vol. 65, November 30 2010]

The generally-recognized cost of the privilege is that applying the privilege in a particular situation may keep relevant evidence away from the truth-finder. This cost probably is less than one might imagine because the privilege protects communications between client and lawyer but does not protect the facts underlying the communications. Even with this downside, the



attorney-client privilege has been an accepted creature of the law for centuries. This acceptance indicates a shared belief that the benefits of the privilege ultimately outweigh the costs. Yet, courts recognize and fear the obstruction of the truth that the attorney-client privilege may cause. As a result, courts have “strictly confined [the privilege] within the narrowest possible limits consistent with the logic of its principle.” As a United States District Court for the District of New Jersey recently stated:

While it is true that the attorney-client privilege is narrowly construed because it “obstructs the truth-finding process,” ..., the privilege is not “disfavored.” ... Courts should be cautious in their application of the privilege mindful that “it protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege.” ... In all instances, the facts underlying any given communication remain discoverable.

Placing the burden on the claimer to prove the applicability of the privilege also reflects a healthy skepticism of it.

You could also defend that other concerns, such as rights, are simply **more important than the truth**. To successfully advance this argument, you will probably have to win that it is ok if guilty people sometimes go free, if that is what it takes to protect other considerations. Below, we'll discuss what some of those considerations might be.

No matter what approach you take to truth, you will also need to create a strong defense of ACP. Here are some ideas you might want to consider as you build your neg case:

Constitutionality: Maintaining ACP can be considered to be critical to upholding both the 5th and 6th amendments. A system without ACP would require defendants to choose between their right to have an attorney on their side and their right to avoid incriminating themselves. It is unacceptable for a person to have to choose between two constitutionally protected rights, so ACP resolves this tension.



Here is **evidence** about the 6th amendment:

[Michael B. Dashjian, People v. Meredith: The Attorney-Client Privilege and the Criminal Defendant's Constitutional Rights, 70 Cal. L. Rev. 1048 (1982).<http://scholarship.law.berkeley.edu/californialawreview/vol70/iss4/10>]

The Sixth Amendment provides that "[i]n all criminal cases, the accused shall enjoy the right. . . to have the Assistance of Counsel for his defense."⁹ This constitutional right is only fulfilled if an attorney provides his client with reasonably effective legal assistance.¹⁰ Although some courts and commentators have stated that effective assistance requires a privilege for attorney-client communications, most of them have not set forth their reasoning in detail.¹¹ An examination of case law, however, shows strong authority for the proposition that a limitation on attorney-client confidentiality results in a denial of effective assistance of counsel because it deprives a defendant of a partisan advocate and restricts attorney-client communications.

If a state denied a criminal defendant the attorney-client privilege, the client's sixth amendment rights would be violated because he would be deprived of an active, partisan advocate. ² A fundamental premise of American law is that justice is achieved through the adversarial system.'³ Each side presents its case and challenges the other's arguments. This is accomplished mainly through the use of attorneys who are advocates for the parties they represent. ¹⁴ Active, partisan advocacy, however, is impossible when a defense attorney is expected to give evidence to the prosecution while he is supposed to defend his client.'⁵ Without the attorney-client privilege, defense attorneys could routinely be subpoenaed to give evidence against their clients. Far from being partisan advocates, they would instead become "medium[s] of confession against their clients."¹⁶ Thus, active, partisan advocacy can only be achieved if the attorney cannot be required to divulge his client's confidences to the prosecution.' ⁷

The denial of the attorney-client privilege would also violate the client's sixth amendment rights because it would damage the attorney's ability to investigate his client's case. To provide effective legal assistance, an attorney must investigate the facts of his client's case.' ⁸ proper investigation can only be made if an attorney is able to communicate with his client and ascertain the client's version of the facts. ¹⁹ Based on those communications, the attorney may then perform other functions required for an adequate defense, such as interviewing



witnesses²⁰ or examining physical evidence."¹ Without the attorney-client privilege, however, the client would be reluctant to confide in his attorney.

²² Thus, by fostering attorney-client communication, the attorney-client privilege helps to ensure that an attorney has whatever information might be necessary for a full investigation.

Here is **evidence** about the 5th amendment:

[Michael B. Dashjian, People v. Meredith: The Attorney-Client Privilege and the Criminal Defendant's Constitutional Rights, 70 Cal. L. Rev. 1048 (1982). <http://scholarship.law.berkeley.edu/californialawreview/vol70/iss4/10>]

The fifth amendment provides that "[n]o person... shall be compelled in any criminal case to be a witness against himself." ²⁹ The amendment prohibits compelled testimonial disclosures which might serve as a "link in a chain" of evidence leading to a criminal conviction. ³⁰ The privilege against self-incrimination, like the right to counsel, has frequently been linked to the attorney-client privilege.³¹ Some courts have stated in dictum that the attorney-client privilege is essential in criminal cases if the client is to maintain his fifth amendment protection against self-incrimination. In *People v. Belge*,³² a New York court said: "[T]he criminal defendant's self-incrimination rights become completely nugatory if compulsory disclosure can be exacted through his attorney." ³³ Similarly, in *State v. Kociolek*,³⁴ the New Jersey Supreme Court stated that the "attorney-client privilege in this country... [is] indispensable to the fulfillment of the constitutional security against self-incrimination.",³⁵ *Belge and Kociolek* do not explain how a denial of the attorney-client privilege violates a defendant's fifth amendment right against compelled self-incrimination. The Supreme Court has held repeatedly that the fifth amendment is a personal privilege limited to prohibiting compulsion of the accused.³⁶ Therefore, for the attorney-client privilege to protect the client's fifth amendment rights, compulsion of the accused would need to result from denial of the privilege. Compulsion of an accused is found whenever the accused must suffer a penalty for invoking his fifth amendment right to remain silent. For example, in *Garrity v. New Jersey*,³⁷ the Supreme Court held that statements obtained under threat of removal from public office could not be used in subsequent criminal



proceedings. The defendants' choice either to forfeit their jobs or to incriminate themselves caused the statements to be "infected by coercion." 38 It was considered irrelevant that the defendants in *Garri y* actually chose to make the incriminating statements, as the statutory scheme which penalized a defendant for invoking his right to remain silent was itself sufficient coercion to violate the fifth amendment.³⁹ Denial of the attorney-client privilege is compulsion because it penalizes the client's right of effective counsel if he wishes to avoid selfincrimination. ⁴⁰ Without the attorney-client privilege, an attorney could routinely be subpoenaed to produce his communications with his client. The only way the client could prevent self-incriminating statements from reaching the prosecution would be for him to limit his communications with his attorney. If this occurs, the attorney may not receive all the facts necessary for an adequate defense.⁴¹ As shown earlier, such limitations on communication between attorney and client constitute automatic violations of the sixth amendment guarantee of effective counsel.⁴² Thus, without the attorney-client privilege, the client loses his constitutional right to counsel in order to avoid self-incrimination. This is compulsion violating the fifth amendment.

Here is **evidence** regarding the relationship between the two:

[Michael B. Dashjian, People v. Meredith: The Attorney-Client Privilege and the Criminal Defendant's Constitutional Rights, 70 Cal. L. Rev. 1048 (1982).<http://scholarship.law.berkeley.edu/californialawreview/vol70/iss4/10>]

While the attorney-client privilege did not originate as a constitutional doctrine, in criminal cases it plays an important role in protecting the defendant's fifth and sixth amendment rights. This Part establishes that in criminal cases the attorney-client privilege is essential to both the fifth amendment privilege against self-incrimination and the sixth amendment right to counsel.⁷ It further shows that with- out the attorney-client privilege, a constitutionally impermissible tension is created between those rights. Finally, it shows that the *Meredith* exception to the attorney-client privilege is constitutionally defective because it creates such an impermissible tension between a defendant's fifth and sixth amendment rights."



When you are impacting out arguments about the constitution, you will want to keep in mind why we consider the constitution to be important. Why is it good to have a set of rights that are considered to be inalienable? How does this protect us against unchecked abuses by government and police? The next two sections will be relevant to these questions, as well.

Deontology: In contrast to utilitarianism, deontology is the philosophy that we ought to consider our actions in terms of rules or principles. In other words, the means are more important than the ends.

Deontology is related to Immanuel Kant's theory of the **categorical imperative**. Kant argues that the only righteous actions are those which you would will to become "universal law." This means that, when faced with a choice, you should act in the manner that you would want everyone else to 100% of the time. So, for example, even if you think lying is justified in one instance (to avoid some negative consequence of telling the truth), you cannot lie *even once*, because the world would obviously be terrible if everyone always chose to lie.

This is directly applicable to what we have already discussed about constitutionality. The constitution was created to establish a series of rights that are to be considered absolute and inalienable. If we allow those rights to be compromised *even once* it would justify forgoing them altogether. Instead, we must stick to our constitutional principles even if there are some compelling arguments against them (such as truth-seeking).

Kant also says that we should always see others as "ends in themselves," never as means to an end. Again, this supports the argument that rights must be prioritized, even over good causes, such as finding out the truth.



If you choose to use this argument, you should be aware that the aff may try to claim that deontology favors truth-telling, because we would not like to see guilty people evade punishment. However, you can answer this by making the connection between deontology and rights. The ends cannot justify the means, so if you have to violate a person's universal rights in order to secure a conviction, deontology would consider that to be wrong. The important thing to remember here that upholding rights is considered to be paramount.

Legal precedent: As we have clearly already demonstrated, the principle of ACP is one that is firmly grounded in established legal precedent. To undermine it would dramatically alter the setup of the courts system, potentially leading to the decay of large portions of the system. You could argue that this would lead to chaos and the degradation of the rule of law.

Here is **evidence** on this:

[George J. Terwilliger III, Mary Beth Buchanan, William B. Mateja, & Theodore B. Olson, U.S. attorney, former senior counsel to deputy attorney general Larry Thompson and James Corney, and former solicitor general, "Attorney-client privilege waivers in criminal investigations," Engage, Vol. 8, Issue 1, pg. 55, Jan. 12 2006]

Let us call a spade a spade and put this issue in perspective. While the matter is one of very great practical concern to counsel, business leaders and business managers who have to deal with it, what we are dealing with here are core aspects of our legal system. That is what the privilege of attorney-client communications and the work product doctrine are essentially—the pillars, really, upon which the legal system and the operation of our ordered system of law depends. So, the main point I want to convey is: we ought to be very careful about tinkering very much with these foundation stones.



Of course, there are many arguments not covered here that could be applied to this topic. You are encouraged to do research and be creative! Don't forget, though, that you should always have **defense** against the importance of truth-telling and **offense** in favor of why ACP is good.

Now go win those negative debates! As always, you can email completed cases to **Rachel.Stevens@NCPA.org** for a free case critique. Don't forget to also join the discussion in the comments below. Good luck!