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legislature did not expressly include these acts. Because this question has arisen in several cases in recent years, it is unlikely that the legislature did not consider this question. Perhaps the legislature should amend the new Code to state explicitly whether or not such acts were intended to be included. In the meantime, the supreme court should adhere to its traditional policy of strict construction of criminal statutes.

HOLLY D. McCoy

THE NEW ATTORNEY-CLIENT PRIVILEGE IN MISSOURI: INCREASED PROTECTION FOR THE CLIENT OR ADDED OBSTACLES TO DISCOVERY?

State ex rel. Great American Insurance Co. v. Smith

On December 18, 1978, the Missouri Supreme Court rendered its decision in the case of State ex rel. Great American Insurance Co. v. Smith, and thereby established precedent protecting an extensive attorney-client privilege in Missouri. The case arose out of an incident on Christmas Eve in 1973, when a restaurant and nightclub owned by Cannova Enterprises, Inc., was destroyed by fire. Proof of loss was furnished to the insurance companies which had issued policies covering Cannova's restaurant business, but the insurance claims were denied on the ground that the loss was of incendiary origin. Cannova and Mid-Continent National Bank (the loss payee in the insurance policies) then filed suit in three counts

did in Moore. In State v. Light, 577 S.W.2d 134 (Mo. App., S.D. 1979), the defendant had been convicted of manslaughter under a theory of misdemeanor-manslaughter. The defendant and the deceased had been attempting to steal property valued at less than $50, a misdemeanor, when the deceased was electrocuted by an electrical wire. The appellate court reversed the conviction, basing its decision on the approach taken by other jurisdictions to the question of felony-murder. One of the two main factors it considered decisive in those jurisdictions was that the "death was caused by an outside agency, human or natural, which had the effect, calculated or accidental, of thwarting rather than furthering the commission of the underlying felony." Id. at 139.

81. RSMo § 565.003 (1978) defines first degree murder as follows:
Any person who unlawfully kills another human being without a premeditated intent to cause the death of a particular individual is guilty of the offense of first degree murder if the killing was committed in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary, or kidnapping.

1. 574 S.W.2d 379 (Mo. En Banc 1978).
against the insurance companies (relators), alleging vexatious refusal to pay on the insurance policies.2

In response to interrogatories, each of the relators identified the person who made the decision on its behalf to deny the fire loss claims. The depositions of those individuals were taken, during which each of these key witnesses was asked what he considered before denying the claim. Each stated that three letters written by John C. Risjord, the attorney representing the relators in the matter of the fire loss claims, were among the materials reviewed.3 Production of all the materials reviewed by the insurance company representatives was then requested. The relators produced these materials, except the three letters written by Risjord to the insurance companies. The relators asserted that the three letters were protected from discovery proceedings as they constituted privileged communications between attorney and client.

Cannova and Mid-Continent subsequently moved for a court order directing the witnesses to produce the three letters in question. After a hearing, trial judge Laurence Smith issued an order directing the production of the documents.4 In response to this order, the relators sought a writ of prohibition. In rendering its first decision in this case,5 the Missouri Supreme Court declined to issue a permanent writ of prohibition and ruled that the trial judge should examine the letters in camera, using standards set forth in the majority opinion,6 to determine whether the letters were privileged.

Judge Smith accordingly examined the letters and, applying the standards handed down by the supreme court, held that the three letters were not protected by the attorney-client privilege. The relators again sought prohibition, and a provisional rule in prohibition was issued. The matter was reconsidered, and in a stunning reversal the Missouri Supreme Court overruled its prior decision and held that the three letters were privileged.

2. Suit was brought in three counts. In Counts I and II the claimants sought to recover the face amounts of the policies plus damages, attorney's fees, and interest. Count III was brought against Risjord's law firm and the relators, and alleged that statements in the letter denying the claim were libelous. As to this latter claim, the trial court sustained a motion for summary judgment.

3. Attorney Risjord was employed by the relators to assist in investigating the cause of the fire and to represent their interest in the lawsuit filed by Cannova and Mid-Continent.

4. The order did contain a provision that the documents could first be submitted to the court for review by the judge, who reserved the right to exclude any portions of the documents from discovery proceedings.


6. Judge Donnelly cited four instances where the attorney-client privilege would protect a letter written by an attorney to his client from discovery: "when the letter: (1) 'concerns any communication made to him by his client' in the attorney-client relation; or (2) contains 'his advice thereon'; or (3) could lead to 'the use of his statements as admissions of the client'; or (4) could lead 'to inferences of the tenor of the client's communications.'" Id. at 64.
and not subject to discovery. The supreme court opinion set forth a broad view of the privilege, asserting:

[W]hen one undertakes to confer in confidence with an attorney whom he employs in connection with the particular matter at hand, it is vital that all of what the client says to the lawyer and what the lawyer says to the client... be treated as confidential and protected by the attorney-client privilege.7

As a result, the provisional rule in prohibition was made permanent.

Several basic statements can be made regarding the privilege; these will provide a framework in which Great American can be considered. The attorney-client privilege dates back at least to the reign of Elizabeth I, and is "the oldest of the privileges for confidential communication."8 As it first developed, the privilege was the attorney's, not the client's.9 This has since changed, and the privilege under the modern theory is the client's, not the attorney's.10 Restated in general terms, the privilege provides that an attorney cannot be compelled to testify as to communications between himself and his client which relate to the business and interest of the client for which the attorney has been consulted. Essentially, the purpose of the privilege is to protect the client.11 The basic rationale for the privilege is to "enable a client to place unrestricted and unbounded confidence in his attorney in matters affecting his rights and obligations without danger of having disclosures forced from the attorney on the witness stand."12

At first blush, the logic of the rationale for the privilege appears irrefutable. Problems arise, however, when the scope of the privilege conflicts with another basic legal principle, namely, that of placing all the evidence having rational probative value before the trier of facts in a lawsuit. This latter view was espoused by Wigmore in his treatise on evidence, in which he argued for the existence of a limited attorney-client privilege, one which should "be strictly confined within the narrowest possible limits consistent with the logic of its principle."13 These two basic formulations set the stage for the ideological clash in Great American. One view, that adopted by the majority in Great American, urges the

7. 574 S.W.2d at 383 (emphasis in original).
8. 8 J. Wigmore, Evidence § 2290, at 542 (McNaughton rev. 1961).
9. 8 J. Wigmore, supra note 8, § 2321, at 629.
10. Id. For an application of the modern theory, see Fischer v. Continental III. Nat'l Bank & Trust Co., 424 S.W.2d 664 (Tex. Civ. App. 1968).
13. 8 J. Wigmore, supra note 8, § 2291, at 554.
preeminence of the attorney-client privilege and considers as secondary the need to have all evidence of probative value placed before the trier of facts. The other view, shared by the dissenters in *Great American*, asserts the primacy of broad discovery proceedings and the need of the judicial system to have all relevant evidence presented to the trier of facts.

It is important to recognize that a longstanding state statute provides for an attorney-client privilege in Missouri. Section 491.060 of the Missouri Revised Statutes reads in part: "The following persons shall be incompetent to testify: . . . (3) An attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the consent of such client." In *Great American*, however, the supreme court pointed out that the statute does not limit or diminish the common law rule. The critical issue to be considered, then, is the scope of the common law prior to the *Great American* decision. Although the majority opinion in *Great American* specifically states that the "opinion does not broaden the scope of the attorney-client privilege as it has existed and been applied in Missouri," this is a disputable assertion. It would appear that the decision considerably expands the attorney-client privilege beyond both the statutory requirements and prior case law.

It is significant that the trial judge acted fairly and properly in determining whether the three letters in question were privileged. A well-established principle in Missouri provides that "whether a communication is a privileged one is a question for the court." Thus, absent an

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14. The privilege was recognized in Missouri as early as 1889. See RSMo § 8925 (1889).
15. RSMo § 491.060 (1978).
16. 574 S.W.2d at 382. *Accord*, Bussen v. Del Commune, 239 Mo. App. 859, 871, 199 S.W.2d 13, 20 (St. L. 1947), where the court stated that the Missouri statute "is declaratory of the common law rule."
17. 574 S.W.2d at 385 n.6.
18. Hull v. Lyon, 27 Mo. 570, 576 (1858). *Accord*, State v. Brauch, 529 S.W.2d 926, 930 (Mo. App., D. St. L. 1975); Hutchinson v. Steinke, 358 S.W.2d 137, 144 (St. L. Mo. App. 1962). The rule that the issue of privilege is a question of law for the trial court to determine is nearly universally accepted. See San Diego Professional Ass'n v. Superior Court, 58 Cal. 2d 194, 202, 373 P.2d 448, 553, 23 Cal. Rptr. 384, 389 (1962), where the California Supreme Court accepted the ruling of the trial judge denying a claim of attorney-client privilege with respect to an engineering report. The court stated:

Whether the facts of an individual case support a conclusion that an expert's report did or did not emanate from the client as a confidential communication to his attorney, is a question for the trial court in the first instance. Nothing in the discovery statutes or in the law of privilege authorizes a reviewing court to disturb such a finding if there is any substantial evidence to support it.

*Id.* at 202, 373 P.2d at 453, 23 Cal. Rptr. at 389. See also Lietz v. Primock, 84 Ariz. 273, 278, 327 P.2d 288, 291 (1958) ("trial court in the first instance must determine whether or not the privilege surrounds the answers called for by the questions propounded"); Ex *parte* Lipscomb, 111 Tex. 409, 415, 239 S.W. 1101, 1103 (1922). The rule has been accepted by the federal courts as well. See Schwimmer v. United States, 232 F.2d 855, 864 (8th Cir. 1956); Attorney Gen. v. Covington & Burling, 430 F. Supp. 1117, 1120 (D.D.C. 1977).
abuse of discretion, an appellate court will accept the finding of a trial judge as to the existence of a privilege. In Great American, no such abuse of discretion was alleged. Judge Smith's initial order allowed the defense attorneys to submit the three letters to the court for his review, thereby protecting the documents from plaintiffs' attorneys until a determination was made as to the existence of the privilege.19 Upon receiving the first ruling from the supreme court, Judge Smith conducted the in camera hearing as ordered, but still believed that the letters did not fall within the scope of the privilege as established by the standards handed down by the supreme court only a few weeks earlier.20 Moreover, there is no suggestion in the second Great American opinion that Judge Smith misapplied the law as set forth in the earlier Great American decision when he determined that the letters were not privileged. Despite the court's disclaimer,21 one can conclude only that the court made a distinct determination to broaden the scope of the attorney-client privilege beyond its previous application in Missouri, so as to achieve the desired result: protecting the three letters in question from discovery.

The attorney-client privilege has long been recognized by the Missouri courts, but the exact limits of the privilege have not heretofore been established.22 The Great American case is particularly significant because it specifically addresses the issue of which communications between attorney and client are privileged. Prior to this decision, the Missouri courts had not firmly resolved the question of whether the privilege extends to all relevant communications between attorney and client, or only to those which disclose a fact or statement made by the client to the attorney.

As early as 1886, the Missouri Supreme Court recognized the attorney-client privilege and the policy arguments raised in its support. In State v. Dawson,23 the court reversed burglary and larceny convictions after finding

19. This situation is to be compared with that facing the Texas Supreme Court in State ex rel. West v. Solito, 563 S.W.2d 240 (Tex. 1978), where the court held improper the ruling of a trial judge which ordered that allegedly privileged material be produced at a deposition, and which preserved objections based on the attorney-client privilege until the time of trial. The Texas court stated that "an attorney should not be required to produce documents that he considers to be within the attorney-client privilege until after a trial court has determined whether or not they are privileged." Id. at 246.
20. See note 6 supra.
21. See note 17 and accompanying text supra.
22. There are three plausible explanations for this dearth of case law. The first is that appellate courts have deferred to the decisions of trial courts on the issue of privilege, because of the longstanding Missouri rule that privilege is a matter of law to be determined by the trial court. See note 18 supra. The second is that discovery regarding communications from attorney to client is not sought in many lawsuits because such communications often are not relevant to the central issues of the lawsuit. Finally, even if communications from attorney to client are deemed not privileged but are deemed relevant, such communications are inadmissible on hearsay grounds if the attorney's out-of-court statements are offered for their truth.
23. 90 Mo. 149, 1 S.W. 827 (1886).
that the trial court erred in permitting the defendants' attorney to testify as to the kind of money defendants paid him as a retainer. In 

Dawson, the court described the privilege as one which protected "the client from a disclosure by his attorney, not only of what he has communicated to his attorney orally or in writing, but of any information derived by the attorney from being employed as such." Seventeen years later, in 

State v. Faulkner, the supreme court added the requirement of confidentiality to the Dawson language and denied a claim of privilege on the ground that "[t]he rule does not exclude all that passes between client and attorney, but that only which passes between them in professional confidence." In both of these early cases the language describing the scope of the privilege is actually quite broad, but because neither of the fact situations involved the specific issue presented in Great American, i.e., whether a communication originating wholly with the attorney is protected, this language may be doubtful authority for the court's resolution of that specific issue.

In 1927 the Missouri Supreme Court had occasion to consider the scope of the attorney-client privilege in a claim of privilege similar to that made in Great American. In State ex rel. Chicago, R.I. & P. Railway v. Woods, the court allowed a claim of privilege for letters written by the attorneys to the client in regard to a previous lawsuit. The court asserted that "[t]he privilege is to be granted if it can be shown that the client was free to communicate with the attorney regarding a matter relating to the representation in the suit." Thus, the precedent effect of the Woods decision as to the scope of the attorney-client privilege is uncertain.

In Ex parte Schneider, a decision rendered the same year as the Woods decision, the St. Louis District of the Missouri Court of Appeals held that an address given to an attorney by his client was privileged information. The court stated that "[i]t is undoubtedly the general rule that all confidential communications between attorney and client, made because of the existence of such relationship, and concerning the subject-matter of

24. The defendants were charged with stealing, among other things, $160 in silver coins. Mr. French, defendants' attorney, testified that defendants paid him $45 in silver and $5 in gold as a retainer.
25. 90 Mo. at 155, 1 S.W. at 829.
26. 175 Mo. 546, 75 S.W. 116 (1903).
27. Id. at 597, 75 S.W. at 132.
28. 816 Mo. 1032, 292 S.W. 1033 (En Banc 1927).
29. Id. at 1040, 292 S.W. at 1036.
30. 294 S.W. 736 (St. L. Mo. App. 1927).
the attorney's employment, are privileged." 31 Because the communication in question was from client to attorney, and thereby protected by the state statute, the court's broad language is dictum and questionable authority for the proposition that an attorney's self-initiated communication is protected.

In 1953, twenty-six years after Woods and Schneider, the Missouri Supreme Court in State ex rel. Terminal Railroad Association v. Flynn, 32 made permanent a provisional rule in prohibition to protect from discovery four photographs of an accident scene taken by relator's employee. The court's reasoning in Flynn refers to both the work product privilege and the attorney-client privilege, but a close reading of the opinion indicates that the holding is based predominantly on the operation of the work product privilege. Thus, the Flynn decision did little to clear up the uncertainty regarding the true scope of the attorney-client privilege in Missouri.

A little more than a decade later, in the 1964 case of Heald v. Erganian, 33 the Missouri Supreme Court again had the opportunity to consider the attorney-client privilege. The court held that statements by the defendant to his attorney regarding a real estate transaction were privileged and had been improperly admitted into evidence. The supreme court excluded the communications in its review de novo of the evidence in the transcript, but as the communications in question were from client to attorney, and thereby privileged under the state statute, the court once again had no occasion to expand the privilege.

Perhaps the broadest statement of the privilege was made by the Kansas City District of the Missouri Court of Appeals in Erickson v. Civic Plaza National Bank. 34 There the court in dictum asserted that "[w]hen the client has committed his affairs to an attorney for his advice thereon, communications between them made in confidence . . . are privileged against disclosure." 35 In Erickson the appellate court did not elaborate further on this assertion, presumably because plaintiff's counsel did not adequately attack defendant's claim of privilege.

This was the state of the law at the time the Missouri Supreme Court, in the first Great American opinion, ordered Judge Smith to conduct the in camera hearing to determine whether or not the letters were privileged. The first Great American opinion provided standards to guide Judge Smith in his determination, standards which were essentially a reformulation of the Missouri statute and of the Wigmore test of the privilege. 36 In the second Great American opinion, the supreme court, after first taking note of the fact that the Wigmore approach does not protect all of the

31. Id. at 738.
32. 365 Mo. 1065, 257 S.W.2d 69 (En Banc 1953).
33. 377 S.W.2d 431 (Mo. 1964).
34. 422 S.W.2d 373 (K.C. Mo. App. 1967).
35. Id. at 378.
36. See note 6 supra.
possible communications between attorney and client, specifically rejected that view as too narrow. The court concluded that the Wigmore approach “does not provide enough protection for the confidentiality of attorney-client communications to accomplish the objective for which the privilege was created and now exists.” The supreme court endeavored to extend the Wigmore test by providing for a privilege for virtually all communications between attorney and client related to the subject matter of the consultation.

The majority opinion in Great American cites the case of Bussen v. Del Commune with approval, asserting that the key issue in determining the existence of the privilege is whether the relationship of attorney and client existed at the time of the communication with reference to the subject matter of the communication. The Bussen court, however, adopted the view that “the communication, if it is to be privileged, must have been made to the attorney in his professional capacity, and on account of the relation of attorney and client.” As Judge Seiler notes in his dissent in Great American, the communication at issue in Bussen was from the alleged client to the attorney. Seiler goes on to assert:

[Bussen] is not authority for the proposition that if the attorney-client relationship exists, any communication by the attorney to the client is privileged, [but] is authority only for the proposition that if the relationship does exist, then a communication by the client to the lawyer is privileged, but that is not what we have before us at the moment.

This distinction between Bussen and Great American seems persuasive, and thus the majority’s reliance on Bussen as authority for its view of the scope of the attorney-client privilege may be suspect.

Prior to Great American, with the exception of the Woods decision and notwithstanding the broad dictum set forth in Erickson, the test for the existence of the attorney-client privilege was applied narrowly. That is, for the privilege to exist, the communication must have originated with the client and have been directed to the attorney. In Dawson, Schneider, and Heald, the attorney-client privilege was invoked precisely because the communication in question originated with the client.

37. 574 S.W.2d at 384.
38. Id. at 383.
39. 199 S.W.2d 13 (St. L. Mo. App. 1947) (rejecting Del Commune’s assertion of the privilege on the ground that the note in question, written by the alleged client, had not been communicated on account of the attorney-client relationship).
40. 574 S.W.2d at 386-87.
41. 199 S.W.2d at 20 (emphasis added).
42. 574 S.W.2d at 388.
43. See notes 28 & 29 and accompanying text supra.
44. See notes 34 & 35 and accompanying text supra.
45. See notes 23 & 24 and accompanying text supra.
46. See notes 30 & 31 and accompanying text supra.
47. See note 33 and accompanying text supra.
and was directed to the attorney. *Bussen* is authority for the proposition that an attorney's communication to a client is privileged only to the extent that it reveals the nature of the client's communication to the attorney. In essence, the supreme court has determined that the privilege in Missouri will now be applied broadly, protecting both communications from client to attorney and from attorney to client. Under this broad view of the privilege, the legal analyses and opinions of an attorney not based upon information given by the client to the attorney will be included within the scope of the privilege.

By way of comparison, the federal courts, to a considerable extent, have applied a narrow test for the existence of the attorney-client privilege and have regularly cited with approval the test formulated by Judge Wyzanski in *United States v. United Shoe Machinery Corp.* The pertinent portion of this test provides:

> [The attorney-client privilege applies only if the] communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort.

Wyzanski's test provides no protection for an attorney's communication to a client not related to a fact disclosed to the attorney by his client. As between a broad attorney-client privilege and extensive discovery proceedings, the trend in the federal courts has been to consistently favor extensive discovery proceedings. The one chink in the armor of the broadened Missouri privilege is that the supreme court continues to recognize that discoverable factual information cannot be made privileged "by being recited by the attorney or the client in their confidential communications." By way of example, the court goes on to point out that written reports of investigative agencies cannot be attached to privileged letters so as to prevent discovery.


49. *Id.* at 358. The Wyzanski test is cited with approval in *Bird v. Penn Cent. Co.*, 61 F.R.D. 45, 46 (E.D. Penn. 1973), where the court utilized a narrow test of the privilege and denied the claim of privilege ("to the extent the information sought to be discovered was not conveyed to counsel by his client, the attorney-client privilege is inapplicable"). Also citing the Wyzanski test are *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962) (refusing to apply the privilege with regard to an attorney's testimony concerning the income tax liability of his clients), and *J.P. Foley & Co. v. Vanderbilt*, 65 F.R.D. 523 (S.D.N.Y. 1974).

50. *See* cases cited note 49 supra. For a recent federal case in Missouri supporting extensive discovery proceedings as against a broadening of the attorney-client privilege, see *American Standard Inc. v. Bendix Corp.*, 80 F.R.D. 706, 709 (W.D. Mo. 1978), where Judge Becker held that "[b]y voluntarily injecting into a litigated case, a material issue which requires ultimate disclosure by the attorney of the information, ordinarily protected by the privilege, the client makes the information discoverable."

51. 574 S.W.2d at 385.
In his dissent, Judge Seiler finds little solace in this limitation placed upon the broadened privilege. In his view, "[t]he broadened scope of attorney-client privilege established by the proposed opinion will dismantle a good part of the scope of Missouri discovery."\(^{52}\) Seiler's concern in this area appears well-founded, and it can be presumed that astute attorneys, seeking to provide their clients with the best possible representation in an adversary setting, will push the privilege to the limit and attempt to protect damaging evidence from discovery by including it within the attorney-client relationship. This appears to be the danger inherent in the court's holding. Expansion of the privilege is intended to protect clients, but if, as a result of Great American, discovery becomes more difficult, clients stand to gain little. If expansion of the attorney-client privilege hinders the discovery of evidence vital to a litigant's case, that litigant may be forced to go to great additional expense or hardship to overcome the effects of the privilege. One can easily imagine a factual communication written by the attorney to the client which is essential to the case of the opposing party but which cannot be discovered by that party because the communication is now privileged.

Speculating for just a moment, and remembering that the cause of action in Great American was vexatious refusal to pay, suppose the three letters in question in the noted case contained Risjord's repeated recommendation to his client to deny the fire loss claims on the ground that the attorney representing the claimants was incompetent and that a successful lawsuit was highly unlikely. Suppose the three letters contained a report of Risjord's own investigation into the cause of the fire, and he concluded that the cause was accidental and that the claims should be paid. Finally, suppose the three letters contained Risjord's recommendation to deny the claims on the ground that the claimants were affiliated with the Mafia and had a history of "torching" unproductive businesses. The information in each of these hypothetical communications would have considerable bearing on the disposition of the case, and could even be determinative of the outcome. Given that the central issue in the case is whether there was a vexatious refusal to pay the insurance claims, the claimants have a pressing need to discover the nature of the communications in each of the hypotheticals.\(^{53}\) Great American prevents such discovery by virtue of the expanded attorney-client privilege.

The Missouri work product rule will be of little assistance in such instances because that rule does not apply to privileged communications.\(^{54}\)

\(^{52}\) Id. at 388.

\(^{53}\) See Weinshenk v. Sullivan, 100 S.W.2d 66 (St. L. Mo. App. 1937), where the appellate court refused to allow defendant's claim of attorney-client privilege because disclosure of privileged communications was necessary to protect the rights of the plaintiff/attorney in his suit for services rendered.

\(^{54}\) Mo. Sup. Cr. R. 56.01 (b) (1), the rule providing general limitations on the scope of discovery, provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."
As Judge Seiler points out in his dissent, "Under the proposed decision work product can now easily be made privileged and hence immune from discovery." Unfortunately, the majority opinion in Great American specifically avoids a discussion of the relationship between the rules regarding discovery of work product materials and the broadened scope of the privilege. As it now stands, the scope of the broadened privilege would appear to restrict significantly the operation of the work product rule.

The balance to be struck between the competing values at stake remains subject to litigation, but Great American is a clear victory for those who believe an expansive attorney-client privilege is desirable. Whether that belief is correct will be determined to a large extent by the attitude and conduct of the bar in response to the Great American decision. If the expanded scope of the privilege is used to promote genuine communication between attorney and client, then the interests of justice will be greatly furthered. If the new privilege becomes a vehicle to conceal information vital to the trial of a lawsuit, however, both attorneys and clients, as well as society as a whole, will ultimately be the worse for it.

ALEXANDER D. TOMASZCZUK

55. 574 S.W.2d at 388.
56. Id at 385 n.7.
57. The Missouri work product rule, Mo. Sup. Ct. R. 56.01 (b) (3), was adopted on January 1, 1975. Prior to that time, there was virtually an absolute prohibition on the discovery of work product materials in Missouri. State ex rel. Terminal R.R. Ass'n v. Flynn, 363 Mo. 1065, 257 S.W.2d 69 (En Banc 1953), should be reconsidered in light of this. It is somewhat surprising that the claimants' attorney did not invoke the discovery provisions of the work product rule with respect to the three letters in question in Great American. One major difference between the two protective devices is that the work product privilege is the attorney's, while the attorney-client privilege is the client's.
58. See State ex rel. Cain v. Barker, 540 S.W.2d 50 (Mo. En Banc 1976), where the Missouri Supreme Court held that statements given by the insured to his insurance adjuster fell within the protection of the attorney-client privilege.