

The Privilege — Part One  
by Phillip Weeks

The elevator doors slid open and Frank stepped into the dimly lit reception room, switched on the lights, grabbed one of the morning newspapers off the receptionist's desk, and hurried down the partially lit hall to his office. It was six in the morning, the time he usually arrived.

He left the lights off when he entered his office and walked to the large window that spanned the length of one wall. He was on the 21st floor, and the night lights of the city stretched out for miles and then disappeared into the darkness of the mountains to the northeast. A sliver of pale light was just beginning to outline the jagged ridge line of the mountains. Rain clouds snuggled in around the peaks. He watched the sunrise develop, the sky turning to pale blue, and the clouds serially changing, as the sun's rays reached them, from black to dark to light, and then to vivid hues of red and orange.

This is the best time of day, he thought. No one to interrupt me. I'm able to relax, read the paper, and then get in a couple of hours of uninterrupted work before the damn phone starts ringing.

It had been five years since he prosecuted criminal cases at the county attorney's office. It had been exciting — the day-to-day courtroom work, the adrenaline flowing from being on his feet matching wits with opposing lawyers and witnesses — a giant chess game, marshaling facts like chess pieces, shielding his case against the attacks of defense lawyers, and finally closing in for the kill. After two years he decided a county attorney's salary wasn't what he wanted out of life, and joined the firm of Stevens and Kessler. It was a good decision, a young firm building an excellent practice. His trial experience enabled him to move up quickly in the litigation section. He missed the daily trial work he found so exhilarating, but he enjoyed his practice just the same. He got to court often enough, the civil issues were more challenging, and he enjoyed working with the successful business people who made up the firm's clients. The firm, 15 lawyers when he arrived, had grown to 25 and was still expanding. He had just made partner and was earning three times what he'd be making if he had stayed at the county attorney's office.

Frank switched on the lights, sat down in one of the chairs next to the small conference table in the corner of his office, and began glancing through the paper. He started every morning this way. It took no more than a half hour, and it was important to know what was happening in the city.

*Ex-con charged with murder.* The caption caught his eye. A black ex-con, just out of prison a few months, robs a Circle K, kills the young clerk. He's with a white guy who's waiting in the car. The police probably hammered on the white guy to get him to come clean and agree to testify against the ex-con. Frank knew the routine — an informer sneaks to the police the names of the persons involved. They jerk them off the streets and interrogate them separately. Scare the hell out of the white guy who was waiting in the car, and then cop a deal with him — in exchange for his testimony against the ex-con they agree to give him a light sentence.

Of course, the ex-con's story is the opposite. He claims he was waiting in the car and thought the white guy was just going in to buy booze to take back to the party. Says he didn't even know him — met him at a party that night. They ran out of beer, and the two of them agreed to make the trip for more. He heard the shots, and the white guy comes running out with a gun in his hand. He knew he was in trouble, an ex-con. When the white guy jumped in the car he got the hell out of there, just panicked.

Sure, Buddy! Frank thought. There's no way he'll get a jury to believe that. If he takes the stand to testify the prosecutor will be able to cross-examine him about his prior conviction. The only way he can prevent it from coming out is not taking the stand, but then he wouldn't be able to tell his story. There's a good chance he'll get the death penalty. The clerk was a young boy, a freshman at Glendale Community College.

Frank hurriedly skimmed through the rest of the paper — nothing important that caught his attention. He had to finish outlining Gallagher's deposition in the bid preference case before Gallagher came in this morning at 10. He had called yesterday — wanted to see Frank about some new matter — and Frank rearranged his calendar to see him. Gallagher's work was important to the firm, kept almost four lawyers busy full time, and he paid his bills on time.

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Gallagher walked into Frank's office without knocking. "Receptionist told me to just come on back," he said as he went to the window and looked out. "I like the view up here. It's almost worth the outrageous money I pay you guys." He laughed loudly at his own joke, and Frank smiled. "You look good, Frank. Glad to hear that Larry made you a partner. I told him you were doing so much of my work that it was about time." Gallagher settled into the seat in front of Frank's desk.

“Cup of coffee?” Frank asked.

“No, I’m trying to cut down. I need your help on a matter that happened a few weeks ago.” He glanced at the open door, got up and closed it. “I need you to keep this to yourself. Can you do that — only you work on it, keep the file here in your office?” he asked as he walked back to his chair. He said it more as a command than asking a question.

“~~Sue What about Larry?~~ OK to—”

“Yeah. He’s been my lawyer for so long he knows everything about me. I called him right after it happened. He said to call you if I couldn’t get it worked out.”

“What’s the problem?”

“About two weeks ago I was in an accident — late at night. Stella was with me. That’s why I don’t want my insurance to handle this.”

Frank pulled a pad from his desk drawer and began taking notes as Gallagher talked: Gallagher driving — Stella beside him — Gallagher blows the red light at intersection — police come — Gallagher not hurt but Stella badly bruised — driver of other car taken to hospital — broken ribs — collarbone — nasty cut on head — don’t know if had seatbelt on. Discharged next day — now complaining of lower back pain and headaches.

“I need to get this taken care of quick — get it settled. My wife thinks I was out of town on a business trip. I can’t let a lawsuit be filed. The last thing I want is having Betty served. I’ve had Hank, our in-house lawyer, trying to settle it, but he’s getting nowhere. The guy’s got a lawyer now.”

“I need to get more information from you,” Frank said, “while it’s fresh in your mind.”

“O.K. — but I don’t have a lot of time.”

“Start at the time you left work that evening. Tell me what you did from that point up to the accident.”

Frank related the details. He and Stella worked late that night, went to her apartment for a drink, next to Luigi’s for dinner, then left for Stella’s for the night. Accident happened on way to Stella’s.

“I need to know the route you took from Luigi’s. You stop anywhere?”

Gallagher shifted forward in his chair and rested his forearms on the edge of Frank’s desk. “We went north on 7th Avenue. Turned right on Bethany. Just to the East of 7th Street I pulled into the Circle K parking lot for a pack of cigarettes. The God-damnedest thing happened. As I was coming to a stop in front of the store a guy comes charging out the door. He’s got a gun in his hand, and he jumps into the passenger side of a car and it speeds off.”

“My God! What’d you do?”

“Got the hell out of there in a hurry.”

“You get a good look at him?”

“No. Just some white guy — dark jacket, blond hair.”

“What about the guy driving the car?”

“Didn’t see him. I gunned the car to get the hell out of there. Was afraid they might see us. I don’t think they noticed us. The reason I ran the red light was because I was so shook up. The accident happened a few blocks from —”

“Have you read this morning’s paper?”

“No.”

Frank picked it up off his desk and handed it to him. “Read this — the one about the ex-con.”

Gallagher scooted back in his chair and began reading. After reading the article he looked up at Frank. “Jesus Christ — this is the one I saw.”

“You sure the guy running out the store was white?”

“I’m sure. Even had blond hair.”

“What about Stella? She see—”

“Yeah. She saw him. She doesn’t think she could identify him, but she knows he’s white and has blond hair.”

“~~You’ve got to help me out—~~”

“You crazy?” You think I want that kind of publicity?”

“But that guy could get the death penalty. You could save his life.”

“And ruin my marriage. That son-of-a-bitch is a worthless ex-con. You don’t believe that cock-and-bull story about him being at a party and running—”

“I didn’t. But now I know the white guy’s lying.”

“Look. I’ve been married 25 years. I can’t let Betty find out about Stella. We’ve got two daughters, grandchildren.”

“You can’t let him be convicted of something he didn’t do. That white guy is lying, and his testimony will probably get the ex-con executed.”

Gallagher stood up. “Look Frank, I’m running short on time. I’ve got to be going.” His face was flushed, and Frank could tell he was agitated. Gallagher turned and walked to the door, opened it, and then turned around, facing Frank. “I don’t give a damn about that ex-con. Forget about him. You just get this case settled — as quick as you can.” He shut the door behind him as he left.

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The next day Frank walked into the men’s grill at Larry’s country club. “I’m here to meet Mr. Kessler,” he told the maitre d’.

“Yes. Mr. Kessler called and said he would be about 15 minutes late. We have a table reserved for you.”

He showed Frank to the table, gave him the menu, and took an iced tea order.

Larry had left an e-mail that he wanted to have lunch with him at the club. He didn’t say why, but that was not unusual. They often had lunch here — sometimes to talk about a specific matter, sometimes to just talk about matters in general. So far Frank had been able to resist Larry’s urgings that he join the club. It wasn’t that he disliked the members. He knew and liked a lot of them. He just didn’t like the setting, old establishment — no minorities, except for a few tokens. Everyone hustling each other for business. The insurance defense lawyers entertaining pushy insurance adjusters on the golf course — adjusters who were paid poorly and demanded free perks in exchange for running cases to the lawyers. Frank knew he was good enough that he didn’t have to jump through those hoops to get work. He usually spent his Saturday mornings working or attending bar committee meetings. He sure as hell didn’t have time to play golf.

Frank saw Larry working his way toward him, pausing at tables, hello-ing, back-slapping, and small talking his way over. He didn’t miss a table. Larry was the rainmaker that every firm needs. Never forgot a name, knew just the right thing to say, good golfer, savvy businessman. He spent time at it — always had lunch at the club, mostly with clients, took clients to dinner on a regular basis, played golf with them on Wednesday afternoons and weekends. Because he spent so much time getting business his legal skills probably weren’t as good as they used to be — but he was still a good lawyer. He brought in enough business to keep eight to 10 lawyers busy.

“How’d the argument on Gallagher’s bid case go this morning?” Larry asked as he sat down.

“Good. I liked the judge’s questions. He’d read our papers and seemed interested in our position.”

They talked about small things for a while. How things were going for Frank around the office. How some of the major cases Frank was handling for some of Larry’s clients were progressing. They gave their orders to the waiter.

“Gallagher called me yesterday. He was upset about your meeting. Felt you were more concerned about some ex-con than him. He asked me to talk to you.”

“I thought he might,” Frank said. “I wanted to talk with you about it, but I got tied up and—”

“What the hell happened?”

Frank told Larry about his meeting with Gallagher.

“You agree your conversation was privileged?” Larry asked, but it wasn’t meant to be a question.

“I know. But the guy’s life is at stake. He could get the death penalty. Maybe you could talk to Gallagher — convince him to do the right thing. You’ve been his lawyer over 20 years and—”

“Yeah, and I want to stay his lawyer too. He’s pissed off enough right now.”

“Isn’t there some way you could meet with him, talk to him. Make him understand how—”

“Frank,” Larry’s voice was getting a little louder. He glanced at the tables next to them and then continued more quietly. “Look. You realize what this means to Gallagher? Having Betty find out about Stella. What the negative publicity could do to his business. There’s no way he’ll let this come out. There are only two things that he cares about — his business and his family. He may screw around on the side, with Stella and others. She’s not the first one. But he’s careful, almost paranoid, about keeping it from his family. I’ve seen him react when he thinks someone is threatening his business. He’s ruthless. He won’t care what happens to that ex-con.”

“What if he gets the death penalty? We can’t let that happen.”

Larry leaned forward, putting his elbows on the table. His voice changed, took on a reassuring and understanding tone. “Frank, I know it’s not easy. But there’s nothing I can do. I could never talk Gallagher into going to the county attorney.”

“If Gallagher won’t, maybe I should.”

“Damn it, Frank. You can’t do that. You do, and you’ll have a problem with the Bar Association. I’m not going to piss off Gallagher by bringing it up again, and you better not either. If we push this the only

thing we'd accomplish is he'd leave the firm. If you push it, he'd tell me I have a choice, either you leave or he leaves. Let's talk about something more pleasant. Tell me how Sally and the kids are."

Frank gave him the usual information — the latest funny thing Tommy, his four-year-old, said — how Ashley, the baby, was doing. He wasn't sure whether Larry was asking just to change the subject — looking for small talk — or to remind Frank what it would do to his family if he had to leave the firm.

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Frank sat in the third row of the courtroom. It had been a month since his talk with Larry about the ex-con. Neither one brought the matter up again. He had called his old secretary at the county attorney's office to find out when the arraignment was scheduled. The ex-con's name was Adolphus Jones. The courtroom was full. The usual group of prisoners, dressed in the pale blue prison garb, were sitting in the jury box. Two deputy sheriffs stood at each end. The prisoners were mostly black and Mexican, a few whites mingled among them. Aaron Schwartz, an old friend, was sitting at the prosecutor's table, and a young public defender he didn't know was at the defense table.

"The State vs. Adolphus Jones," the judge called out. "Bring the defendant forward."

Jones looked young, in his late 20s. He stood up and picked his way out of the jury box, like a person trying to get out of a crowded theater row, stumbling over the other defendants. He nodded "hello" and smiled at a young woman and a small boy sitting next to her in the front row. The judge, Adolphus, and the lawyers went through the arraignment ritual and the appointment of the public defender to represent him. Adolphus was tall and slender. He seemed brighter than the usual defendant. Didn't have that indolent look a lot of them have. Frank stayed and watched the few remaining defendants be arraigned and then, after the judge left the bench, watched the sheriffs chain the defendants together and lead them out of the jury box. Adolphus tried to stop and say something to the woman and boy in the front row, but the sheriffs kept the line moving. He was able to pause for only a second, smile at them and say a few words as he passed. Frank couldn't hear what he said.

"What you doing here?" Aaron asked. He threw an arm around Frank's shoulder while Frank was waiting in the hall for an elevator. "Saw you at the arraignments. You going to be defending someone? I thought you gave up criminal work."

"I was just down here on a motion and feeling a little nostalgic. Thought I'd sit in on an arraignment — just to reminisce. Got time for coffee?"

"Sure. Let's go down to the cafeteria."

They spent about an hour together — talking about old times. Aaron didn't know who would be assigned to the Jones case. It was a high-profile case — lot of newspaper interest because he had just been released from prison and then kills someone. Lot of heat.

"I don't think the parole board was wrong," Aaron said. "From what I hear he'd been a model prisoner. Got his G.E.D. in prison. Was never in trouble while in jail. He made a good impression at the parole hearing."

"Who's the guy who's going to testify against him?" Frank asked.

"He's never been convicted — but he's been in trouble a lot. His testimony will probably hold up, especially when matched against an ex-con."

"What's it like working for Crozier?" Frank decided he'd heard all Aaron knew about Jones and changed the subject. Crozier had been elected a year ago, and it was rumored he'd changed the office a lot.

"Not as bad as we thought it would be," Aaron said. He pretty much lets us alone. Hired a lot of new lawyers."

"What's it like being the old veteran?"

"It's changed some. There's more emphasis on winning. You know how a few of the guys kept win-loss columns. More of them seem to be doing that now."

As Frank was driving back to the office he thought about Aaron. They had been close when he was at the county attorney's. He was a hard worker and had a keen interest in the law. It was more than just a job to him. He believed in the system — thought it worked and came up with the right result most of the time. He was always willing to take time to help other lawyers with their cases, discuss tough questions they had. Frank wished he had taken the time to stay in contact with him after he left the county attorney's office.

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It had been several weeks since Jones' arraignment. It kept getting harder for Frank to forget about him. Maybe if he went to Crozier and told him he had reliable information that his witness was lying, but he couldn't disclose it because it came from a client and was privileged. That the client wouldn't let it be disclosed. Possibly he could convince Crozier to put pressure on the witness — maybe insist he take a lie

detector test. Make sure he was telling the truth. If that worked — if Crozier became convinced he was lying — the case could be dropped.

Frank decided to call Crozier. If Hank were still the county attorney, he knew it would work. He and Hank had developed a close friendship when he worked there — he had supported Hank when he ran for re-election. But with Crozier, he didn't know. They had not been close friends when Frank worked with him at the county attorney's office. Maybe it was because Crozier was so damn ambitious, political. Crozier was elected a year ago on a get tough on crime — lock them up and throw away the key campaign. Crozier probably knew he had supported Hank in the election. Still, Crozier should be concerned. That's his job.

Crozier was cordial on the phone. Frank told him he had some information on a case Crozier's office was handling, nothing specific. Crozier agreed to meet him that afternoon.

When Frank walked into Crozier's office he immediately noticed the changes. Hank had kept it low-key, very professional. Now it looked like a political campaign headquarters, pictures of Crozier with the local sheriff, the Republican party chairman, a framed newspaper article announcing Crozier's election in bold headlines prominently displayed behind his desk. Crozier was arrogant. Said if Frank had any real facts he should give them to him. He'd be damned if he would ruin a good witness because of a vague statement that Frank had information, which he wouldn't disclose, that the witness was lying. It had not been easy to get the guy to turn state's evidence, and he wasn't going to destroy all that hard work. If Frank gave him the facts — and if they checked out — he'd look into it. Otherwise Frank was wasting his time. The Circle K murder, the second convenience clerk killed in four months, had sparked a lot of controversy. That liberal parole board thinks these guys are reformed, lets them out early, and then they kill some kid. The papers are real interested in this one. The last thing Crozier said to him, as he was leaving, was: "I think you have a duty to disclose the facts, even if they are privileged. What's the problem? You afraid of losing that posh job with the firm? I thought you were the big principle man when you were around here."

Frank couldn't get Crozier's sarcastic remark out of his mind. It had infuriated him, but that wasn't what kept him thinking about it. Maybe Crozier was right. Maybe he did have a duty to disclose the facts. Crozier could subpoena Gallagher and Stella. They weren't stupid enough to lie under oath.

That evening he decided to talk with Sally about it. Over the years he'd realized that she could be trusted with information. She was even more careful than he, sometimes telling him after they had been out partying with a group of lawyers, "that he had not been careful enough, had talked about one of his cases too much." After a while he came to rely on her advice.

At dinner that night he told Sally the entire story, including Crozier's parting cheap shot.

"Have you talked with Larry?"

"Yes."

"What was his reaction?"

Frank told her.

"What you going to do?"

"I don't know. Maybe I should give the information to Crozier."

"This is awful. You — we — could lose everything. It's not fair." They talked for more than an hour. About the firm. What would happen to the firm and to Frank if he went to Crozier. What he would do if he had to leave the firm. What action the Bar Association might take against Frank. There must be some way out. Maybe if he went to the State Bar Ethics committee — that's what it was for — to give confidential advice to lawyers faced with ethical problems. If the committee told Frank he had to divulge the information — he could then talk to Larry and they could tell Gallagher that they had no choice. And if the committee told Frank he could not disclose the information, then Frank had done his duty — done everything he could.

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*Watch for Part Two  
of The Privilege  
in the November issue.*