An Analysis of the Troubling Issues surrounding In-House Counsel and the Attorney Client-Privilege

II. Background

1. Definition and Elements

The attorney-client privilege protects confidential communications between attorneys and clients from disclosure. Wigmore's classic definition of the privilege requires legal advice to be sought from a professional legal adviser in his capacity as such. Further, the communication must relate to the legal advice sought, be made in confidence by the client, and be permanently protected from disclosure unless the protection is waived.

3. Justification and Purpose

One of the primary justifications for the attorney client privilege is that the attorney's duties of good faith and loyalty encourage increase client disclosure. The modern purpose of the privilege is to encourage "full and frank communication between attorneys and their clients and thereby promoting broader public interests in the observance of law and administration of justice." The privilege promotes client candor and superior client representation. As a result, the justice system benefits because the attorney's advice is based on complete client information. Moreover, corporations commonly consult in-house counsel with questions on how to comply with the law, even more so than individual clients. Consequently, preventive law is practiced and society also benefits. In addition, justification for the privilege is founded on three related assumptions. First, upholding rights, complying with the law, and modern legal processes are matters often too complex and uncertain for a person untrained in the law. Accordingly, clients need to consult lawyers. Second, a client needs to disclose all of the facts to counsel in order to receive adequate legal assistance and to facilitate efficient representation. This is especially true for corporate clients, as applicable laws and regulations are frequently complex and fact specific. Therefore, in-house lawyers are better situated to appreciate the effect of legal rules and to identify facts that determine whether a legal rule is applicable. Finally, clients may be unwilling to disclose unpleasant facts unless they can be assured that neither they nor their lawyers will be called later to testify about the

IV. Conclusion

Accordingly, the privilege creates a zone of privacy where a client may more effectively exercise the full autonomy that the law and legal institutions allow.
Three troubling problems confront in-house counsel and the corporate attorney-client privilege. First, there is uncertainty regarding who speaks on behalf of the corporate client. In response, courts across the country must uniformly adopt a modified subject matter test for determining who constitutes the corporate client. In Goodfarb, the court established a modified subject matter test, which is the superior method for achieving certainty and the purposes of the attorney-client privilege. Moreover, uniformity will afford in-house counsel certain application of the privilege, as well as ensure that the purposes of the privilege are served. Indeed, an uncertain privilege is little better than no privilege at all.

Uniform application, of any test provides in-house counsel with certainty in determining who represents the
corporate client regardless of where the communication takes place. Second, in-house counsel also face uncertainty when courts apply the predominant purpose test to communications that contain a mix of legal and business advice. In response, courts should apply a significant purpose test, which requires a significant amount of legal services to be provided in the communication. More importantly, courts must shift the focus from resting solely on the capacity of in-house counsel to the context in which the communication was made. Finally, courts must eliminate the apparent bias towards in-house counsel when scrutinizing communications that involve mixed advice. However, realizing a solution to such issues will take time, in the interim in-house counsel should employ the practical guide provided. Such a guide will allow corporations and in-house counsel to structure their relationship in such a manner that ensures that the attorney-client privilege applies to the appropriate communications.

21 See WIGMORE, supra note 14, at § 2292. The Restatement of Law Governing Lawyers and Upjohn recognized that the privilege applies to information relating to communications made in confidence between the client and lawyer. See Upjohn, 449 U.S. at 390; RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 118 cmt. c. (1996) [hereinafter Restatement].

22 See WIGMORE, supra note 14, at § 2292. Judge Wyzanski's definition in United Shoe is also often quoted. He expressed that: [T]he privilege applies only if (1) the asserted holder of the privilege is or sought to be come a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) 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; and (4) the privilege has been (a) claimed and (b) not waived by the client. United Shoe Corp., 89 F. Supp. at 358-59.

23 See WIGMORE, supra note 14, at § 2292.

33 See Fisher v. United States, 425 U.S. 391, 403 (1976). In its reasoning, the Court stated that the privilege encourages clients to make full disclosure and seek legal advice freely without fear that the communication will be disclosed. See id. 

34 Upjohn, 449 U.S. at 389. The court emphasized that the privilege applies to communications made by the attorney to the client, as well as client confidences. See id.

35 See id. See also Trammel v. United States, 445 U.S. 40, 51 (1980). The court reasoned that "[t]he lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." Id.

36 See Upjohn 449 U.S. at 389; Harper and Row Publishers, Inc. v. Decker, 423 F.2d 487, 492 (7th Cir. 1970). The court found that "maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice." Id. See also United States v. Adlman, 68 F.3d 1495, 1499 (2d Cir. 1995) (reasoning that the privilege encourages candor so the attorney is sufficiently well-informed to provide reliable legal advice); Giesel, supra note 13, at 1179.

37 See Upjohn 449 U.S. at 391. Another court reasoned that "[i]n a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential." United Shoe, 89 F. Supp. at 358.

38 See ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 3. Lawyers know that almost all clients (corporations especially) consult them in order to determine what their rights are and what is deemed to be legal and correct. See id. Further, based on experience, almost all clients follow the advice given and consequently, the law is upheld. See id. See also In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1036-37 (2d Cir. 1984) (the court found that the public benefits from the rendering of sound legal advice).

39 See RESTATEMENT § 118 cmt. c.

40 See id.

41 See id.

42 See id.
43 See Diversified, 572 F.2d at 609 (citing REPORT OF THE COMMITTEE ON FEDERAL COURTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 43-45 (May 1970)) The Association of the Bar of New York noted the problem, stating that rules of evidence should not discourage communications to lawyers made in a good faith effort to promote compliance with the complex laws governing corporate activities. See id.

44 See RESTATEMENT § 118 cmt. c.

45 See id. This justification is controversial and unable to be tested due to waiver of the privilege, yet most lawyers accept it as sound. See id.

46 See id. Courts have especially attacked the "zone of privacy" rationale when applying the privilege to corporations. See Upjohn, 449 U.S. at 395. Further, there is a continuing tension between construing the privilege narrowly to avoid the zone of silence and guarding it "jealously" to promote the purposes behind the privilege. See Higgins v. Eichler, 1998 WL 181825 at *1 (E.D. Pa. 1998).

334 See Upjohn, 449 U.S. at 393 Another court reasoned that "only if the client is assured that the information he relays in confidence, when seeking legal advice, will be immune from discovery will he be encouraged to disclose fully all relevant information to his attorney." Hercules Inc., 434 F. Supp. at 144.

Referring Principles:

XII.6 - Attorney-client privilege