The Legal Advice Requirement of the Attorney-Client Privilege: A Special Problem for In-House Counsel and Outside Attorneys Representing Corporations

Grace M. Giesel
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In practice, however, advice does not spring from lawyers' heads as Athena did from the brow of Zeus. Inevitably, attorneys' opinions reflect an accumulation of education and experience in the law and the large society law serves. In a given case, advice prompted by the client's disclosures may be further and inseparably informed by other knowledge and encounters.1

I. INTRODUCTION

The attorney-client privilege protects certain communications between attorney and client from compelled disclosure. The privilege applies to clients who are individuals as well as to corporate clients.2 The lawyers providing legal services to corporations may be outside attorneys who are employees of law firms. Many corporations, however, rely on in-house attorneys for many, if not all, of their legal needs.3 Often, in-house

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3. In-house law departments are often bigger than most firms. For example, in 1996 General Electric had 507 in-house attorneys while Exxon had 430. Some insurance companies had more in-house attorneys. See The 1996 Corporate Legal Times 200 Largest
attorneys have official responsibilities that involve them in the management of the company. Even if the attorneys do not have official nonlegal responsibilities, the corporation may seek the opinion of in-house attorneys with regard to all sorts of issues, some of which may be clearly legal issues, some of which may be clearly business issues, and some that are a jumble of both. Even outside attorneys sometimes hold


4. See, e.g., Bruce T. Rubenstein, Bringing a Broader Business Perspective to the Job of General Counsel, CORP. LEGAL TIMES, July 1996, at 7 (general counsel is also a member of “The Group of Corporate Officers” that participates in strategic planning); Angela Ward, Only Happy Problems for Platinum's General Counsel, CORP. LEGAL TIMES, Nov. 1994, at 14 (general counsel is also Chief Operating Officer); Bruce Rubenstein, Hyatt General Counsel Adds Vice President-Development to Title, CORP. LEGAL TIMES, Oct. 1994, at 4 (general counsel also Vice President of Development). See also In re Sealed Case, 737 F.2d 94, 96 (D. C. Cir. 1984) (vice president was general counsel); Fine v. Facet Aerospace Prods. Co., 133 F.R.D. 439, 441 (S.D.N.Y. 1990) (general counsel was assistant secretary of corporation); Henson v. Wyeth Labs., Inc., 118 F.R.D. 584, 587 (W.D. Va. 1987) (in-house counsel and secretary of corporation); Cooper-Rutter Assocs., Inc. v. Anchor Nat'l Life Ins. Co., 563 N.Y.S.2d 491, 492 (N.Y. App. Div. 1990) (in-house counsel was also corporate secretary).

5. See, e.g., Turner Broadcasting, supra note 3, at 16. The general counsel of Turner Broadcasting stated that the in-house counsel department “is fully integrated into the daily operations of the company.” Id. In-house attorneys “become very much a part of the management teams of each of the subsidiaries. We try to get them involved in the building stages so they understand the history of the development, before there's an explicit need for the lawyer's services.” Id.
positions within the management of corporations. Likewise, corporations may consult outside attorneys, whether or not they have management responsibility, not only with regard to legal issues but also business issues or issues involving a mix of business and legal considerations.

While the legal profession should perhaps cheer this evolution of roles and duties, the application of the attorney-client privilege in the corporate representation environment creates problems because the tradition of the privilege requires that it apply only to a communication involving a lawyer in his or her professional legal capacity and only if the communication relates to obtaining or rendering legal advice, services, or assistance. Courts have not agreed in defining the kinds of services rendered by attorneys that the privilege protects. Nor have courts acted consistently and uniformly in dealing with communications containing a mix of advice, service, and assistance. The resulting confusion in this area of privilege law has proved to be fertile ground for some courts' reliance upon antiquated notions about what attorneys do and particularly what attorneys, inside and out, do for corporate clients. Some courts have exhibited significant bias against corporations and particularly against in-house counsel, relying on assumptions based on status and supposed probabilities. The resultant uncertainty of whether the privilege applies in particular corporate settings threatens the privilege's ability to create the positive impact of client

6. See, e.g., David Rubenstein, Both Sides Like the Hybrid Legal Department at Alamo or Is There Only One Side?, CORP. LEGAL TIMES, July 1993, at 18 (general counsel/corporate secretary was outside law firm attorney). See also Great Plains Mutual Ins. Co. v. Mutual Reinsurance Bureau, 150 F.R.D. 193 (D. Kan. 1993) (outside attorney was on the board of directors and also served as legal advisor); SEC v. Gulf & Western Indus., Inc., 518 F. Supp. 675, 678 (D.D.C. 1981) (outside attorney was general counsel, director, secretary of the corporation, and a member of pension committee); In re Rospatch Sec. Litig., 1991 WL 574963, at 1 (W.D. Mich. 1991) (outside attorney served as director). The practice of legal counsel serving as a director raises ethical questions because it creates a plethora of conflicts potentialities. See generally Craig C. Albert, The Lawyer-Director: An Oxymoron?, 9 GEO. J. LEGAL ETHICS 413 (1996).

7. The principal of an association of attorneys with in-house expertise stated, "[I]t is typical for us to be asked for our business view of issues as well as our legal view." Bruce Rubenstein, Independents: No Associates, No Staff, No $300-an-Hour Billers, CORP. LEGAL TIMES, Dec. 1995, at 28. A managing partner of a group of attorneys who are former partners or associates at large firms stated that the clients "use us for practical advice too." Id.

8. See infra Part IV.

9. See infra Part IV.

10. See infra Part IV.

11. See infra Part V.
disclosure and, therefore, a positive impact on the justice system, the *raison d'etre* of the privilege.

At least since the time of Jeremy Bentham, a debate has raged about the benefits and burdens of the attorney-client privilege. Proponents of the privilege argue that the privilege must protect communications so clients will make full disclosure to their attorneys, and the attorneys, as a result of the complete disclosure, can render the best possible representation. Thus, society benefits by a superior administration of justice. In addition, full disclosure by clients in decision-making stages creates an environment of more law abidance because lawyers, aware of issues at an early stage, practice preventive law. Lesser, occasional arguments are that the privilege protects privacy interests of the clients, the autonomy of the clients, and the clients' belief in the fairness of the United States system of justice. The proponents of the privilege argue that these benefits outweigh any possible burden. Critics doubt the benefits and argue that the burden of subversion of truth, inherent in any application of the attorney-client privilege, outweighs any possible benefit, especially when the client is a corporation. A few scholars have attempted empirical studies to document the effect of the attorney-client privilege, but the scant data has significant faults, and is at best equivocal on the issue of whether the privilege in fact encourages candor of clients.

This Article does not seek to enter into the debate about the benefits of the attorney-client privilege and the burdens which may accompany it. Rather, this Article accepts the fact that all United States jurisdictions have honored the attorney-client privilege throughout their history and continue to do so, even in light of the ongoing debate. Courts have applied the privilege uniformly to corporations as well. This universal acceptance of the privilege by courts and legislatures of the various jurisdictions evidences a shared belief that the privilege's primary modern justification or goal is valid—that the law should encourage clients to deal with their counsel with complete candor so that superior representation can occur, that the superior representation can take justice to an elevated plane, and that the attorney-client privilege can act as the catalyst for the result of client candor. As United States District Judge Wyzanski stated in *United States v. United Shoe*

13. See infra Part II(A) for a discussion of the policy debate.
14. See infra notes 46-48 and accompanying text.
15. See infra Part II(B).
Machinery Corp.,\textsuperscript{16} "[t]he social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases."\textsuperscript{17}

Assuming, as jurisdictions evidently do, that applying the attorney-client privilege creates such benefits, the certainty of the parameters of the privilege is critical. For the privilege to encourage client disclosure to counsel, a high degree of certainty must exist that the privilege will protect what the client says from disclosure in the event litigation ensues. If a client doubts at the time for disclosure that a court will protect the communication in the long run, disclosure in the short run may not occur. Thus, the efficacy of the privilege as an encourager of candor diminishes.\textsuperscript{18}

Many aspects of the corporate attorney-client privilege create uncertainty.\textsuperscript{19} Yet, the courts' inconsistent application of the requirement that the communication relate to the obtaining or rendering of legal advice, service, or assistance, and the related professional legal capacity requirement, creates substantial uncertainty in the application of the attorney-client privilege. The uncertainty causes slippage in the

\textsuperscript{17} Id. at 358 (quoting MODEL CODE OF EVIDENCE 210, cmt.).
\textsuperscript{18} See also infra discussion in Part II(C).

Often corporate activities touch many states and sometimes many nations. A corporation may not be able to determine at the time of the communication which jurisdiction's version of the attorney-client privilege will apply. Thus, a corporation may not know which test that a court will apply and will not know whether the privilege will apply.

Uncertainty of application for corporations may spring from the confidentiality requirement or waiver standards. At the time of the communication, the corporation cannot know that the communication will be inadvertently disclosed. In some jurisdictions, inadvertent disclosure waives the privilege which otherwise attached. For a discussion of the inadvertent disclosure issue, see Roberta M. Harding, Waiver: A Comprehensive Analysis of a Consequence of Inadvertently Producing Documents Protected by the Attorney-Client Privilege, 42 CATH. U. L. REV. 465 (1993). For a discussion of sources of uncertainty in general, see Elizabeth G. Thornburg, Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege, 69 NOTRE DAME L. REV. 157, 168-71 (1993).
connection between the privilege and the goals society expects the privilege to achieve.

Ironically, courts' desire to confine the privilege to narrow parameters\(^2\) causes much of this confusion, inconsistency and uncertainty. With regard to corporations in general, and in-house counsel in particular, this desire to police the privilege has led some courts basically to re-evaluate the policy arguments for and against the privilege's application. These courts use the issues that are a part of the policy discussion as guides to application of the privilege in individual cases.\(^2\) In doing so, courts' decisions often seem motivated by assumptions, fears, and probabilities suggested by the policy discussion, but unsupported by the facts of the individual cases.

From this point of recognition of the uncertainty obvious in this area of privilege law, two possible paths emerge. One can argue that the attorney-client privilege, especially as it relates to corporate representation, with this legal advice slippage, does not work as an encourager of client candor; thus, courts and legislatures should abolish it.\(^2\) Alternatively, one can argue that the courts' application of the privilege must improve so that it will be more likely to succeed in creating an environment for client candor. This Article follows the latter path, arguing that courts must define more flexibly the legal advice, service, or assistance requirement, so that the definition can mesh with what corporate lawyers, inside and outside, do in the ever-changing legal profession. In addition, courts must apply the requirement more consistently. The related professional legal capacity requirement should not receive separate analysis. Courts should determine whether the privilege applies and how it applies free of assumptions about corporate represen-

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21. In United States v. Rowe, 96 F.3d 1294 (9th Cir. 1996), Judge Kozinski, writing for the United States Court of Appeals for the Ninth Circuit, appeared to recognize that once a court decided that the privilege applied to corporations or in-house attorneys, the usefulness of the policy arguments ended. The court stated:

We are not unmindful that the attorney-client privilege, like all privileges, can impede fact-finding . . . . Nor are we unaware of academic criticism that the privilege allegedly gives unjustified protection to entrenched interests . . . . Nonetheless, we have no doubt that, under existing caselaw, the activities here meet the "attorney-client" and "professional legal services" requirements for the privilege.

Id. at 1297.

22. For just such an argument, see Thornburg, supra note 19, at 159.
tation that the facts of the individual cases before the courts do not evidence. Finally, courts must eliminate the anticorporation and anti-in-house counsel bias which is obvious in many courts' opinions, and which easily exists in the present confusion. Having accepted the balance struck by agreeing that the privilege applies to corporations and to in-house attorneys, courts should not subvert the effectiveness of the privilege by attempting to reset the balance in individual cases or by making status-based decisions. The increased certainty gained should result in the privilege as a more effective encourager of client candor in all situations.

Part II of this Article discusses the rationale of the privilege, the courts' acceptance of the privilege and the importance of certainty to the societal goals of the privilege. Part III explains the requirements of the privilege. Part IV critiques the professional legal capacity and legal advice requirements as applied by courts, especially as applied to corporations in the 1980s and 1990s. Part V discusses anticorporation and anti-in-house bias present in many decisions. Part VI concludes that the improvements suggested in this Article enhance the certainty of application of the attorney-client privilege for client corporations, and thus should enhance the achievement of the goal of the privilege recognized by courts today—encouragement of client candor.

II. BACKGROUND OF THE ATTORNEY-CLIENT PRIVILEGE

A. Rationale for the Attorney-Client Privilege

For centuries the courts have recognized the attorney-client privilege as a privilege of clients.23 The primary stated rationale has been utilitarian.24 Clients must fully disclose matters to their attorneys so

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For a discussion of the history of the privilege, see Rice, supra, § 1:2, at 6-8; Wigmore, supra note 12, § 2290; James A. Gardner, A Re-Evaluation of the Attorney-Client Privilege (Part I), 8 Vill. L. Rev. 279 (1963); Geoffrey C. Hazard, Jr., A Historical Perspective on the Attorney-Client Privilege, 66 Cal. L. Rev. 1062 (1978); Max Radin, The Privilege of Confidential Communications Between Lawyer and Client, 16 Calif. L. Rev. 487 (1928).

24. See McCormick, supra note 23, § 72, at 270; Christopher B. Mueller & Laird C. Kirkpatrick, 2 Federal Evidence § 181, at 302-03 (1994) [hereinafter Mueller & Kirkpatrick]; 8 Wigmore, supra note 9, § 2291; Stephen A. Saltzburg, Communications Falling within the Attorney-Client Privilege, 66 Iowa L. Rev. 811, 817 (1981). See also
that the attorneys can adequately and beneficially represent those clients. Three assumptions form the basis of this rationale: the

RICE, supra note 23, § 2:3, at 52 ("The purpose of the privilege in the United States has always been to encourage people to seek legal advice freely and to communicate candidly with the attorney during those consultations."); Note, Attorney-Client and Work Product Protection in a Utilitarian World: An Argument for Recomparison, 108 HARV. L. REV. 1697, 1703 (1995) (arguing that though the situation may have been different in the past, the modern rationale is utilitarian).

25. Attorneys in the United States have an ethical duty to keep client matters confidential. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1996) [hereinafter MODEL RULES]; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1983) [hereinafter MODEL CODE]. This duty is not only the creature of ethical rules, but also has roots in the fiduciary nature of the relationship of attorney and client, and in agency concepts. For a discussion of the confidentiality principle as a creature of legal ethics, see Nancy J. Moore, Limits to Attorney-Client Confidentiality: A "Philosophically Informed" and Comparative Approach to Legal and Medical Ethics, 36 CASE W. RES. L. REV. 177 (1985); L. Ray Patterson, Legal Ethics and the Lawyer's Duty of Loyalty, 29 EMORY L.J. 909 (1980); Lee A. Pizzimenti, The Lawyer's Duty to Warn Clients About Limits on Confidentiality, 39 CATH. U. L. REV. 441 (1990); Fred C. Zacharias, Rethinking Confidentiality, 74 IOWA L. REV. 351 (1989).

For a discussion of fiduciary principles, see Deborah A. DeMott, Beyond Metaphor: An Analysis of Fiduciary Obligation, 1988 DUKE L.J. 879; Robert Flannigan, The Fiduciary Obligation, 9 OXFORD J. LEGAL STUD. 285 (1989); Tamar Frankel, Fiduciary Law, 71 CAL. L. REV. 795 (1983); Austin W. Scott, The Fiduciary Principle, 37 CAL. L. REV. 539 (1949). No one disagrees with the notion that attorneys are fiduciaries. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 4.1, at 146-47 (1986); DeMott, supra at 908; Flannigan, supra at 293-94; Scott, supra at 541. See also Zeiden v. Oliphant, 54 N.Y.S.2d 27 (N.Y. Sup. Ct. 1945) (discussing attorney's duty of confidentiality as derived from the attorney's role as a fiduciary).

In some situations, attorneys are also agents. See RESTATEMENT (SECOND) OF AGENCY § 1, 395 (1958). The duty of confidentiality as derived from fiduciary law and agency law may not be as broad as the principle stated in Model Rule 1.6. See RESTATEMENT (SECOND) OF AGENCY § 395 cmt. f (1958).

Although each state crafts its own ethical precepts governing attorneys, many states follow, at least in part, Model Rule 1.6 of the American Bar Association's Model Rules of Professional Conduct. MODEL RULES Rule 1.6. The American Bar Association first adopted the Model Rules in 1983. Model Rule 1.6 requires that an attorney not reveal "information relating to representation of a client" without informed client consent. MODEL RULES Rule 1.6(a). The Rule allows but does not require disclosure if the lawyer reasonably believes it necessary to prevent the client from "committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm," to "establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client," in a matter involving the client, to "establish a defense to a criminal charge or civil claim against the lawyer," and to "respond to allegations in any proceeding concerning the lawyer's representation of the client." MODEL RULES Rule 1.6(b).

Some states use Model Rule 1.6 unchanged. See, e.g., ALA. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1995); DEL. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1996); KY. SUPR. CT. Rule 3.130 (1.6) (1996). Many states have a modified version of Model Rule 1.6. See, e.g., CONN. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1996) (allows attorney
disclosure in a wider array of circumstances, including situations of financial injury to another; MD. LAWYER'S RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1996) (allows attorney disclosure in a wider array of circumstances).


A primary justification for the duty of confidentiality is that it encourages clients to fully disclose matters to their counsel so that counsel can render superior advice and further justice. Comment two to Model Rule 1.6 states, "The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance." MODEL RULES Rule 1.6 cmt. 2. Comment four states that "[a] fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." MODEL RULES Rule 1.6 cmt. 4. Some commentators have noted that the duty of confidentiality has moral underpinnings identical to those of the attorney-client privilege. See, e.g., Zacharias, supra at 367-68. See generally Charles Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 YALE L.J. 1060 (1976).

The broad principle of confidentiality bows, however, in situations where a court requires attorney testimony.

The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning the client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law.

MODEL RULES Rule 1.6 cmt. 5. The attorney-client privilege applies in the setting of compelled testimony and production, but the privilege is a narrower protection. The duty of confidentiality protects all information regarding the representation; the attorney-client privilege protects only attorney-client communications which meet certain, more-limiting requirements of the privilege. See infra Part III for a discussion of the requirements of the privilege. Yet, the attorney-client privilege protects against compelling attorney or client testimony or documents regarding communications within the privilege. The duty of confidentiality silences only the attorney.

The attorney has the obligation of asserting the evidentiary privilege when appropriate, but the court ultimately decides to compel or not to compel the testimony of the attorney or the client, or to require the production of documents or not to require such.

If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, [Rule 1.6] (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.
assumption that clients need to consult lawyers, the assumption that lawyers need all the facts to adequately deal with clients' matters, and the assumption that clients would not disclose information without the privilege's promise of confidentiality. Courts have relied upon such logic for hundreds of years. In 1743 in Annesley v. Anglesea, the 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 every thing 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.

Courts have continued to accept and rely upon this raison d'etre for the privilege. For example, in Trammel v. United States, the United States Supreme Court stated 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."

MODEL RULES Rule 1.6 cmt. 20. Therefore, though the ethical duty of confidentiality is vital in the vast array of possible attorney-client information circumstances, the attorney-client privilege, only an issue in litigation, is the ultimate arbiter of what a client can view as confidential in all client disclosure settings.


27. 17 How. St. Tr. 1139 (1743). For a discussion of this case, see Hazard, supra note 23.

28. 17 How. St. Tr. at 1237.


30. Id. at 51. See also Fisher v. United States, 425 U.S. 391, 403 (1976) (purpose is to "encourage clients to make full disclosure"); Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (in the interest of justice that client be "free from ... apprehension of disclosure"); United States v. Adlman, 68 F.3d 1495, 1498 (2d Cir. 1995) (encourages candor so the attorney is sufficiently well-informed to provide sound legal advice); In re Sealed Case, 877 F.2d 976, 979 (D.C. Cir. 1989) ("The raison d'etre of the hallowed attorney-client privilege is the protection of a client's communications to counsel so that persons, including organizations will be induced to consult counsel when needed."). In re Leslie Fay Cos., Inc. Sec. Litig., 161 F.R.D. 274, 282 (S.D.N.Y. 1995) (facilitates openness); United States v. Buitrago-Dugand, 712 F. Supp. 1045, 1048 (D.P.R. 1989) ("The attorney-client privilege exists to encourage people to seek legal advice freely and to speak candidly to the attorney without fear that the communication will be disclosed" (citing Fisher, 425 U.S. at 403)).
In *Upjohn Co. v. United States*, the Supreme Court relied upon and further developed the utilitarian rationale by focusing on the preventive law aspects of consultation with lawyers so typical and necessary with corporate clients. The Court in *Upjohn* indicated that to encourage candor between lawyer and client was to encourage the client to consult with counsel more readily as to how the client should proceed so as to remain within the bounds of the law.

The disclosure rationale concludes with the notion that the client's full disclosure ensures superior representation in a retrospective and prospective manner, and thus the administration of justice benefits. In *Commodity Futures Trading Commission v. Weintraub*, the United States Supreme Court stated that "the attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients. It thereby encourages observance of the law and aids in the administration of justice." In addition to utilitarian ideas, deontological justifications have surfaced. One idea is that the clients' privacy interest in attorney communications justifies the privilege. Another suggestion is that respect for the clients' autonomy justifies the privilege. A third, less
clear proposition is that the attorney-client privilege is bundled up with broad ideas of loyalty and fairness. Modern courts have not relied on these ideas, though surely some courts implicitly consider one or all of them.  

The privilege has a cost to the extent that it hinders access to truth. Critics of the privilege note that the privilege, like other exclusionary rules, keeps relevant evidence out of court so that flawed decisions result. Some commentators have attacked this position, arguing that without the privilege, no information would flow to attorneys. Thus, no communication of information would exist to be disclosed later in litigation. This reasoning depends, however, on the belief that the attorney-client privilege encourages disclosure by clients that would not occur without the privilege.

Others suppose that the cost of the privilege is small, if it exists at all, because the privilege protects only communications, not the underlying facts. Thus, the privilege does not prevent access to the relevant information, it only hinders access to the communication, and therefore requires the opposing party to obtain the information by a manner other than the communication with the attorney. Some note that even such a detour creates a significant cost and may, in fact, be not only a detour but a barrier.

36. For a rare example of a court addressing this aspect of the privilege, see United States v. Upjohn Co., 600 F.2d 1223, 1225 (6th Cir. 1979) (noting that the privilege is based on the utilitarian concept but also has a privacy aspect). rev'd, 449 U.S. 383 (1981).

37. 2 MUELLER & KIRKPATRICK, supra note 24, § 181, at 304-05. With regard to privileges in general, the McCormick treatise states: “Their effect instead is clearly inhibitive; rather than facilitating the illumination of truth, they shut out the light.” MCCORMICK, supra note 23, § 72, at 269. See also 2 WEINSTEIN & BERGER, supra note 26, § 18.01, at 18-4; Louisell, supra note 35, at 110.

38. For discussions of this suggestion, see RICE, supra note 23, § 2:3, at 56-57; Albert W. Alschuler, The Search for Truth Continued, The Privilege Retained: A Response to Judge Frankel, 54 U. COLO. L. REV. 67, 74 (1982); Alschuler, supra note 35, at 350; Stephen A. Saltzburg, Privileges and Professionals: Lawyers and Psychiatrists, 66 VA. L. REV. 597, 610-11 (1980); Developments, supra note 35, at 1508. See also Stephen A. Saltzburg, Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: Garner Revisited, 12 HOFSTRA L. REV. 817, 823-24 (1984) (“[N]o tribunal can demonstrate that had the client been denied a privilege, the additional communications would exist. The assumption of the privilege is that they would not.”).

39. See infra notes 79-80 & accompanying text (discussion of the lack of protection for the facts).

40. For discussions of this argument, see 24 WRIGHT & GRAHAM, supra note 26, § 5472, at 85-86; Robert Allen Sedler & Joseph J. Simeone, The Realities of Attorney-Client Confidences, 24 OHIO ST. L.J. 1, 9 (1963).

41. See 24 WRIGHT & GRAHAM, supra note 26, § 5472, at 85-86; Vincent C. Alexander, The Corporate Attorney-Client Privilege: A Study of the Participants, 63 ST. JOHN'S L. REV. 191, 228-31 (1989) (corporate context); Thornburg, supra note 19, at 192-93 (corporate
Commentators have criticized the attorney-client privilege as applied to corporations specifically as a situation in which the rationales fail. These commentators suggest that in the corporate sphere the privilege does not increase candor, and that the burden of undisclosed information is huge in part because alternative avenues to facts in the corporate environment are costly and corporations and corporate actors have a tendency toward evasiveness. Critics argue that deontological theories do not apply to corporations because ideas of rights peculiar to individuals form the basis of those theories.

The privilege has been attacked as creating, at best, benefits that are "all indirect and speculative" and creating the burden of the obfuscation of the truth which is "plain and concrete." But little evidence exists proving the merit or demerit of the privilege in its present form. Scholars have attempted a few studies. None have produced forceful results. None of the studies measured the true effect of the privilege,
but only dealt with how participants in the legal world felt about the privilege. Measuring the true effect of the privilege cannot occur. Any observation of attorney-client dealings would create waiver of privilege arguments for the observed communications in any later litigation. Comparative studies with foreign jurisdictions cannot assist because the foreign legal systems differ fundamentally from the United States approach in the privilege area.

B. The Acceptance of the Privilege

Even if the privilege hinders access to truth, the acceptance of the privilege in the United States for individuals and corporations indicates a general belief that the benefits created by the privilege outweigh any possible burdens it creates. As the United States Court
of Appeals for the Third Circuit stated in *Rhone-Poulenc Rorer Inc. v. Home Indemnity Co.*:

Privileges forbid the admission of otherwise relevant evidence when certain interests the privileges are thought to protect are regarded as more important than the interests served by the resolution of litigation based on full disclosure of all relevant facts. The [attorney-client] privilege ... is intended to ensure that a client remains free from apprehension that consultations with a legal adviser will be disclosed. The privilege encourages the client to reveal to the lawyer confidences necessary for the lawyer to provide advice and representation. As the privilege serves the interests of justice, it is worthy of maximum legal protection.

In *Upjohn Co. v. United States*, the United States Supreme Court expressed its belief in the attorney-client privilege in general, and in the application of the privilege to corporations. Courts have applied the attorney-client privilege to corporate clients throughout history. The Court in *Upjohn* did the same, noting that the parties did not contend otherwise. The Court went further, however, expressing approval of the attorney-client privilege for corporations and expressing belief in the utilitarian balance struck by the privilege.

*Upjohn* placed before the Court the issue of who within the corporation constituted the client for purposes of the privilege. Lower courts had devised two approaches: the control group test and the subject matter test. The control group test allowed the privilege to apply to communications otherwise satisfying the privilege requirements if those

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50. 32 F.3d 851 (3d Cir. 1994).
51. Id. at 862 (citations omitted). See also Union Carbide Corp. v. Dow Chem. Co., 619 F. Supp. 1036, 1046 (D. Del. 1985) ("it has thus been determined that the need to permit the attorney to provide sound legal advice generally outweighs any disadvantage of withholding evidence in a particular case"); Magida *ex rel* Vulcan Detinning Co. v. Continental Can Co., 12 F.R.D. 74, 76 (S.D.N.Y. 1951) (the privilege "is an expression of policy, sacrificing full disclosure for the considered advantage of untrammeled attorney-client relations").
54. 449 U.S. at 390.
55. Courts favored the control group test. RICE, supra note 23, § 4:14, at 4-38.
communications were between individuals in the control group of the corporation and an attorney. The control group consisted of people who could control or be significantly involved in the plotting of the corporate path in response to legal advice. This test appealed to courts because it limited the communications possibly protected by the privilege to a relatively definable, finite set. The test, therefore, created a degree of certainty of application and at the same time minimized the application of the privilege.

The subject matter test directed that the privilege applied if the communicating employee's superior directed that the communication occur and the subject matter of the communication fell within the scope of the employee's duties. This test, therefore, allowed the privilege to apply to communications between an attorney and a larger group of individual representatives of the corporation. As a result, the test allowed for a more expansive application of the privilege.


An employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment. Id. at 491-92. See also Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978).

The attorney-client privilege is applicable to an employee's communication if (1) a communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents. Id. at 609. See generally Gergacz, supra note 19, ¶ 3.02[3][a][ii], at 3-64-69; Weissenberger, supra note 56, at 911-18; Gerald G. Dixon, The Corporate Attorney-Client Privilege: Alternatives to the Control Group Test, 12 TEX. TECH. L. REV. 459 (1981).
The communications at issue in *Upjohn* were made in the context of an internal investigation conducted by in-house counsel and outside attorneys. The attorneys spoke or communicated in writing with employees not necessarily within the traditional bounds of the corporation's control group. The United States Court of Appeals for the Sixth Circuit decided that the control group test applied and remanded for an analysis of who might fall within the control group.

The Supreme Court rejected the more privilege-limiting control group test for purposes of the federal common law. The Court explained its rejection of the control group test by noting that that test discouraged the flow of information to attorneys necessary for legal advice and therefore undermined the purposes of the attorney-client privilege. The Court stated that “the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy.”

The Court then noted that the nature of a corporation makes a broader application of the privilege more appropriate, stating: “In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law, particularly since compliance with the law in this area is hardly an instinctive matter.”

The Supreme Court, adhering to the purposes of the privilege, noted that the communications in question were necessary for counsel to properly advise *Upjohn* as to past and future conduct, otherwise fit within the parameters of the privilege, were made at the direction of superiors, were made with knowledge that the communications were for

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60. 449 U.S. at 389-91. The Court stated:

In the corporate context, . . . it will frequently be employees beyond the control group as defined by the court below . . . who will possess the information needed by the corporation's lawyers. Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.

Id. at 391.
61. 449 U.S. at 392.
62. Id.
the rendering of legal advice, and were communications within the
sphere of responsibility of the employees. Thus, concluded the Supreme
Court, the privilege must protect the communications from disclosure.64

The opinion in Upjohn is significant because the Supreme Court firmly
embraced the attorney-client privilege as applying to corporations and
espoused a belief in the propriety of the utilitarian rationale in the
Corporate communication context. Of course, any jurisdiction or court
applying the privilege to corporations has implicitly agreed that the
utilitarian benefits exceed the burdens.

C. The Importance of Certainty

The attorney-client privilege's utilitarian rationale depends on the
certainty of the rule. If the privilege is to encourage disclosure, the
client must be able to predict that the communicated disclosure will
enjoy the privilege in any possible future legal proceeding. The United
States Supreme Court addressed the importance of certainty in the
privilege calculus in Upjohn,65 stating:

But if the purpose of the attorney-client privilege is to be served, the
attorney and client must be able to predict with some degree of
certainty whether particular discussions will be protected. An
uncertain privilege, or one which purports to be certain but results in
widely varying applications by the courts, is little better than no
privilege at all.66

Lower courts also have recognized the validity and importance of the
certainty principle in the privilege context. For example, the United
States District Court for the District of Delaware stated in Hercules Inc.

64. 449 U.S. at 395. Yet, as Chief Justice Burger pointed out in his concurring opinion,
the opinion in Upjohn does not provide a standard for predictable application. Id. at 402.
Because Upjohn involved federal common law, its teachings do not bind the individual
states. Yet, many states have embraced it and have not limited the privilege to a control
group. See, e.g., National Farmers Union Prop. & Cas. Co. v. District Court, 718 P.2d 1044,
1048-50 (Colo. 1986); OR. REV. STAT. § 40.225(1)(d) (Butterworths 1995). Some courts have
refused to apply it, relying instead on the control group approach. See, e.g., Consolidation
Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250, 256-57 (Ill. 1982); ALASKA RULE OF EVID.

For further discussion of Upjohn, see Stephen A. Saltzburg, Corporate and Related
Attorney-Client Privilege Claims: A Suggested Approach, 12 Hofstra L. Rev. 279 (1984);
Sexton, supra note 19; Waldman, supra note 15. See also 8 CHARLES ALAN WRIGHT,
ARTHUR R. MILLER, & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE § 2017, at
of an appropriate test).


66. Id. at 393.
v. Exxon Corp.,67 "[o]nly 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."68

To obtain a degree of certainty, any utilitarian balancing of the benefits and burdens of the privilege should occur on a rule basis, not on an ad hoc case basis.69 Balancing in individual cases cannot occur if the underlying rationale of the privilege is to succeed because the communicator client can never with any degree of certainty predict whether a court will later determine that in the particular facts of a litigation, the benefits of the privilege outweigh the burdens. Likewise, for a degree of certainty to obtain, courts must apply the privilege similarly in similar situations.


68. Id. at 144. The United States Court of Appeals for the Third Circuit explained the connection between certainty of application and successful operation of the privilege in Rhone-Poulenc Rorer Inc. v. Home Indemnity Co., 32 F.3d 851 (3d Cir. 1994). The court stated:

If we intend to serve the interests of justice by encouraging consultation with counsel free from the apprehension of disclosure, then courts must work to apply the privilege in ways that are predictable and certain. "An uncertain privilege—or one which purports to be certain, but rests in widely varying applications by the courts—is little better than no privilege".

Id. at 863 (quoting In re von Buelow, 828 F.2d 94, 100, (2d Cir. 1987)). Apparently, the Second Circuit quoted Upjohn without attribution. See Upjohn, 449 U.S. at 393. See also Southern Guar. Ins. Co. v. Ash, 192 Ga. App. 24, 25, 383 S.E.2d 579, 581 (1989) (quoting Upjohn regarding certainty and expressing the need for a bright line approach).

69. For discussions of the need for certainty in the privilege context, see Rice, supra note 23, § 2-3, at 57 ("Whatever the scope of the privilege, its application must be clear and consistent. Only through clarity and consistency is there predictability, and only through predictability can there be confidence in the protection and a willingness by clients to rely upon it."); Saltzburg, supra, note 64, at 281 ("The less certain the scope of the privilege, the less reliance clients can place upon it."); Sexton, supra note 19, at 482; Thornburg, supra note 19, at 166 (certainty must exist at the time of communication); Waldman, supra note 19, at 498-501; Weissenberger, supra note 56, at 918 (privilege requires predictability); Developments, supra note 35, at 1486-87; H. Richard Dallas, Note, The Attorney-Client Privilege and the Corporation in Shareholder Litigation, 50 S. Cal. L. Rev. 303, 308 (1977); The Supreme Court, supra note 42, at 270, 273. But see Note, supra note 35, at 470-71 (doubting the need for rule utilitarianism). While discussing the suggestion of a conditional privilege, section 118, comment c to the Restatement states: "The predictability of a definite rule encourages forthright discussions between client and lawyer. The law accepts the risks of factual error and injustice in individual cases in deference to the values that the privilege vindicates." RESTATEMENT, supra note 23, at § 118, cmt. c.

For discussion of rule utilitarianism, see Richard B. Brandt, ETHICAL THEORY 396-400 (1959); John Rawls, Two Concepts of Rules, 64 Phil. Rev. 3 (1955); John J.C. Smart & Bernard A.O. Williams, UTILITARIANISM: FOR AND AGAINST 9-12 (1973).
III. DEFINITION OF THE PRIVILEGE

The attorney-client privilege has existed for centuries in Anglo-Saxon jurisprudence. Historically a creature of the common law, the privilege has been defined in a variety of ways. In modern days, the shared understanding is that once a court determines that the privilege applies to a communication, the privilege protects the communication absolutely. A court may not evaluate the opponent's need for the communication in deciding whether to protect it as courts do when applying the work product doctrine.

Often, in establishing the metes and bounds of the modern attorney-client privilege, courts refer to one or both of two sources: Judge Wyzanski's 1950 definition in United States v. United Shoe Machinery Corp., and Wigmore's definition in his treatise on evidence law. Judge Wyzanski stated:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become 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

74. 8 WIGMORE, supra note 12, § 2292, at 554.
purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.\textsuperscript{75}

Wigmore stated that the attorney client privilege could apply

(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.\textsuperscript{76}

Both of these definitions deal with the communication from the client to the attorney but do not address communications flowing from the attorney to the client. Many courts take the position that the privilege protects attorney communications to clients only to the extent that the communications reveal the substance of confidential client communications.\textsuperscript{77} Other courts seem to apply the privilege to all attorney advice, opinion or other communications without analysis of the relationship to client confidences.\textsuperscript{78}


\textsuperscript{77} Neither of these definitions deal with the exceptions to the privilege, perhaps the most notable of which is the inapplicability of the privilege to a communication in furtherance of a crime or fraud. See, e.g., United States v. Davis, 132 F.R.D. 12, 15 (S.D.N.Y. 1990); Coleman v. American Broadcasting Co., 106 F.R.D. 201, 206-09 (S.D. N.Y. 1985). See also 24 WRIGHT & GRAHAM, supra note 26, § 5501.


The Proposed Final Draft of the Restatement (Third) of the Law Governing Lawyers has adopted the approach of applying the privilege to all lawyer-client communications without regard to its relation to client communication. Section 118 states: “Except as otherwise provided in this Restatement, the attorney-client privilege may be invoked as provided in
All versions of the privilege agree that the privilege protects only communications, not the facts contained in the communications themselves.\textsuperscript{79} If the chief executive officer of a corporation has a conversation with the corporation's counsel about the company's stock, the privilege may protect the conversation. The privilege does not prevent executive from being deposed about his knowledge of the stock on the day in question before he spoke to the attorney.\textsuperscript{80}

IV. THE LEGAL OR BUSINESS CONFUSION

An issue that courts encounter frequently in applying the attorney-client privilege in the corporate setting is whether the communication relates to the legal representation or rather is really a creature of business.\textsuperscript{81} As is obvious from the definitions above, the privilege traditionally protects only communications in the legal sphere. Relying on the utilitarian rationale, courts have noted that the privilege exists so that clients will be forthcoming with their attorneys and thus the attorneys can render superior legal representation. The reasoning continues that the privilege protects client communications for the purpose of obtaining legal advice, and that client communications for other reasons, such as communications for the purpose of obtaining business advice, do not enjoy the privilege.\textsuperscript{82} Because almost all that

\textsuperscript{79} United States v. Upjohn, 449 U.S. 383, 395-96 (1981); Hickman v. Taylor, 329 U.S. 495, 516 (1947) (Justice Jackson recognized the limit of obfuscation which can be laid at the feet of the privilege, stating: “Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary.”). See also Pippenger v. Gruppe, 883 F. Supp. 1201, 1208 (S.D. Ind. 1994).

\textsuperscript{80} A related principle is that any document not created for the purpose of communicating with an attorney, sometimes referred to as a preexisting document, is not privileged if it was not privileged in the hands of the client. Fisher v. United States, 425 U.S. 391, 403-04 (1976). Rice argues that the preexisting document should not be obtainable from the attorney, but only the client, because the transmission of the document is in itself a protected communication. See Rice, \textit{supra} note 23, § 5:19, at 368-70.

\textsuperscript{81} Federal judges and magistrates interviewed in the late 1980s in New York City noted it as one of the most frequent privilege issues before their court. Alexander, \textit{supra} note 41, at 258.

\textsuperscript{82} Some courts specifically analyze a communication in terms of causal motivation. \textit{See}, e.g., Griffin v. Davis, 161 F.R.D. 687, 697 (C.D. Cal. 1995) (if business advice were a "sufficient cause," no privilege applied); McCaugherty v. Siffermann, 132 F.R.D. 234, 238 (N.D. Cal. 1990).
a corporation does is "business," communications by corporations to legal counsel are particularly vulnerable on this issue. 83

A. Legal Advice, Service, or Assistance

In dealing with the question of whether the privilege applies to the communication before it, a court must first define what kinds of activity the privilege protects so that the court can then measure the communication before it against the protected class. Definition of the class of communications protected has been elusive. Wigmore's definition of the privilege focuses on situations in which clients seek "legal advice." 84 Judge Wyzanski's definition focuses on situations in which clients seek "(i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding." 85 Likewise, some courts have analyzed application of the privilege in terms of legal advice 86 while others have focused on "legal service" or "legal assistance." 87 For example, the United States District Court for the District of New Hampshire in Pacamor Bearings, Inc. v. Minebea Co., 88 required that the document relate "to facts communicat-

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83. See, e.g., In re Grand Jury Subpoena Dated September 15, 1983 (Marc Rich & Co. A.G. v. United States), 731 F.2d 1032 (2d Cir. 1984). A corporation was considering a corporate reorganization to achieve business purposes. The corporation consulted with outside counsel regarding "tax consequences of a reorganization and whether those consequences should affect the structure of the corporate realignment, and as to corporate law considerations in structuring the reorganization." Id. at 1307. The court noted that the resulting documents "memorialize client confidences obtained in the pursuit of legal advice concerning the mechanics and consequences of alternative business strategies." Id.

84. See supra text accompanying note 76.

85. See supra text accompanying note 75.

86. In Diversey U.S. Holdings, Inc. v. Sara Lee Corp., No. 91 C 6234, 1994 WL 71462 (N.D. Ill. Mar. 3, 1994), the district court stated that the client must be "seeking legal advice." Id. at *1. The court did not clarify whether the documents in question were from attorney to client or from client to attorney. One can assume that the court believed the test was the same in either situation. See also Itoba, Ltd. v. LEP Group PLC, 930 F. Supp. 36, 43 (D. Conn. 1996) ("obtaining or providing legal advice"); Montgomery v. Leftwich, Moore & Douglas, 161 F.R.D. 224, 224-26 (D.D.C. 1995) (stated the broad Wyzanski test, but narrowed the analysis to "legal advice" when applying the test to the documents before the court prepared by counsel); Griffith v. Davis, 161 F.R.D. 687, 694 (C.D. Cal. 1995) ("generating legal advice"); Glaxo, Inc. v. Novopharm, Ltd., 148 F.R.D. 535, 540 (E.D.N.C. 1993) ("legal advice or requests for such advice").


ed for the purpose of securing a legal opinion, legal services or assistance in a legal proceeding.” And in Rossi v. Blue Cross & Blue Shield, the New York court stated that the client must communicate for the purpose of obtaining legal advice, but that the privilege applies to attorney communications if made for the "purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship."

Professor Hazard has argued that the historical roots of the attorney-client privilege are tied to the litigation context. Limiting the privilege to a narrow definition of "legal advice" may be consistent with this view of the history. Perhaps such a limitation is also consistent with what clients asked attorneys to do for them years ago. Limiting protection to communications for the purpose of obtaining "legal advice" seems rather narrow given the types of work attorneys now do and that clients frequently ask attorneys to do, such as negotiate deals and construct contracts. Why should the privilege not apply to client communications with an attorney in which the client tells the attorney facts essential to creating a contract or other transaction for a client that serves the client's interest best? Or would a court find that scenario to be one in which the client communicated for the purpose of obtaining "legal advice?" The terms "legal service" or "legal assistance" may be more consistent with the realities of how clients now use and rely on attorneys. Yet, even these terms, though broader than "legal advice," are to an extent unclear in definition.

The Proposed Final Draft of the Restatement (Third) of the Law Governing Lawyers, perhaps, suggests an improvement. The Restatement applies the privilege to communications "for the purpose of obtaining or providing legal assistance for the client." In attempting to define "legal assistance," a comment states:

The claimant of privilege must have consulted the lawyer to obtain legal counseling or advice, document preparation, litigation services, or any other assistance customarily performed by lawyers in their professional capacity. A lawyer's assistance is legal in nature if the lawyer's professional skill and training would have value in the matter.\(^\text{94}\)

89. Id. at 510 (quoting United States v. Bay State Ambulance & Hosp. Rental Serv., Inc., 874 F.2d 20, 27-28 (1st Cir. 1989)).
90. 540 N.E.2d 703 (N.Y. 1989).
91. Id. at 706. See also Spectrum Sys.Intl Corp. v. Chemical Bank, 581 N.E.2d. 1055, 1060 (N.Y. 1991) (quoting Rossi regarding communications from attorneys).
92. Hazard, supra note 23.
93. RESTATEMENT, supra note 23, at § 118.
94. RESTATEMENT, supra note 23, at § 122 cmt. b.
Although the list of activities provided does reject a narrow notion of litigation-related advice or assistance, the second sentence suggests the real improvement because it focuses attention on the lawyer's "skill and training" as opposed to focusing on any idea of customary lawyer duties, a concept which could easily become an out-of-date exclusive list.

In the past, the lack of precision in delineating the standard courts should apply has set the tenor for the confused application of the imprecise standard. Perhaps a more open and realistic view of what ought to be privileged as legal representation communications, such as that suggested in the Restatement, will eliminate futile attempts to define the many and various facets of lawyers' occupations.

B. Professional Legal Capacity

McCormick, in his treatise on evidence, stated that "[w]here one consults an attorney not as a lawyer but as a friend or as a business advisor . . . or as an agent, the consultation is not professional nor the statement privileged." 95 This statement accords with both Wigmore's and Judge Wyzanski's definition of the privilege in that both definitions seem to require, in addition to the legal advice requirement, that the attorney act in the role of lawyer.96 Some of the confusion as to what the client must seek by the communication, that is, what kinds of activities the privilege ought to protect, also arises when courts attempt to analyze whether the attorney acts in the role of attorney.

Some courts have interpreted this requirement as an inquiry into whether what the lawyer did, and presumably, what the client sought, was a function traditional to attorneys. This approach requires courts to analyze application of the privilege on the basis of a rather static notion of lawyer functions, but courts have not agreed on what they should include in that category of traditional lawyer functions.

In Diversey U.S. Holdings, Inc. v. Sara Lee Corp.,97 the United States District Court for the Northern District of Illinois stated that the attorney must act in a legal capacity and the client must seek legal advice.98 In addressing the capacity argument, the court noted that the attorneys had negotiated the language of a contract with a third party and that the attorneys had submitted drafts of the contract to corporate

95. MCCORMICK, supra note 23, § 88. See also In re Shell Oil Refinery, 812 F. Supp. 668, 662 (E.D. La. 1993).
96. See supra text accompanying notes 75-76.
98. Id. at *1.
management to obtain information on how the deal might affect areas of the corporation. The court stated:

This strikes us as the gathering of information by an attorney from the client to enable the attorney to provide competent legal services—in this case, the drafting of a contract. Drafting legal documents is a core activity of lawyers, and obtaining information and feedback from clients is a necessary part of the process.99

In contrast, in Georgia-Pacific Corp. v. GAF Roofing Manufacturing Corp.,100 an in-house attorney negotiated provisions of a contract and communicated with management with regard to various strategies to follow in the negotiation of the contract provisions. The United States District Court for the Southern District of New York held that "[a]s a negotiator on behalf of management, [the attorney] was acting in a business capacity."101

In deciding whether the lawyer acted as a lawyer, some courts have looked to whether a nonlawyer could do the task even though a lawyer might do it better. In Sackman v. Liggett Group, Inc.,102 the court, in reviewing the attorneys' activities, stated:

The documents instead demonstrate that the attorneys were serving a function other than that of a legal advisor. Counsel to the tobacco companies were functioning in a scientific, administrative, or public relations capacity in taking the action that they did. The role delegated to the attorneys was one that could have been performed by the Scientific Advisory Board, a doctor or scientist, or a tobacco company executive.103

Likewise, in National Employment Service Corp. v. Liberty Mutual Insurance Co.,104 the Massachusetts state court stated that to determine whether a lawyer acted in the capacity of lawyer, one must

99. Id. The district court also found the client to be seeking legal advice. Id.
101. Id. at *4. In United States Postal Service v. Phelps Dodge Refining Corp., 852 F. Supp 156, 164 (E.D.N.Y. 1994), the United States District Court for the Eastern District of New York found that communications relating to lobbying efforts did not enjoy the privilege because "lobbying conducted by attorneys does not necessarily constitute legal services for purposes of the attorney-client privilege." Id. at 164. See also J.P. Foley & Co. v. Vanderbilt, 65 F.R.D. 523, 526 (S.D.N.Y. 1974) (attorney acting as negotiator or business agent not subject to privilege).
103. Id. at 365.
consider whether a nonlawyer could do the task or rather whether the task was a "lawyer-related task." 106

Attorneys use their legal expertise, knowledge, and training to assist clients in an ever-evolving variety of ways. Any attempt to analyze an attorney's capacity regarding a communication in light of traditional functions of attorneys cannot be done without flexibility. For example, in the past, negotiating and drafting contracts for clients may not have been a traditional function for attorneys. In the latter part of the twentieth century, attorneys frequently negotiate and draft contracts for clients and use legal expertise and training in doing so. 106 Courts should not deny the privilege to client disclosures to obtain such lawyer services simply because the services rendered do not resemble litigation assistance or work typically done by an attorney in 1900 or even 1950. Not all communications with an attorney should enjoy the privilege, but sorting communications on the basis of a notion of capacity, that in turn has opinions of traditional functions of attorneys as a basis, is a flawed methodology. Rather, courts should analyze situations to determine whether the client sought the application of an attorney's skill and training.

Another problem with the capacity requirement, at least in the corporate context, is that such a requirement assumes that a court can determine which "hat" or "suit" an attorney wears at the time of a

105. Id. at *2. The court then gave examples: applying law to facts, reviewing client acts in light of laws, advising about law and trends in law. Id. In Jackson v. Capital Bank & Trust Co., Civ. A. Nos. 90-4734, 90-4735, 1993 WL 413141 (E.D. La. Oct. 7, 1993), an attorney held the position of senior claims attorney in the claims department. Id. at *1. The court looked at the documents in question to determine whether the attorney performed the tasks of an attorney. The court concluded that the attorney was not acting as an attorney and in doing so noted the attorney's comments written on a draft form. The court noted that the attorney mentioned that a court might find one area of the form ambiguous, "but that is a comment that could be made by a non-attorney." Id. at *2. Management sent documents to the legal department for legal review and management did not indicate that the documents were sent to the claims department for legal review. Id.

Attorneys occasionally conduct internal investigations. In Upjohn the United States Supreme Court treated such activity as within the purview of the privilege. See Upjohn Co. v. United States, 449 U.S. 383 (1981). See also United States v. Rowe, 96 F.3d 1294, 1296-97 (9th Cir. 1996) (fact-gathering is a "professional legal service."). The United States Court of Appeals for the Eighth Circuit, in Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978), noted that such activity "could have been performed just as readily by non-lawyers." Id. at 603.


107. Courts and commentators often talk in terms of hats or suits when dealing with this issue. See, e.g., Albert, supra note 6, at 474 (using the hats jargon); United States v.
particular communication somewhat independent of the analysis of whether the communication relates to the obtaining or rendering of legal advice, service, or assistance. The assumption does not comport with reality. Outside of the corporate sphere, it may be possible to do that. A court may be able to state with certainty that with regard to a real estate deal, for example, that the attorney was involved as an investor, not as an attorney. Yet, even in that situation, if another investor communicated to the attorney for the purpose of obtaining legal advice, one wonders whether the court would determine that the attorney acted in the capacity of lawyer and hold the communication privileged. Or would the court refuse to apply the privilege on the basis of a failure of the capacity requirement even though the client sought legal advice, service or assistance by the communication?

Within the corporate sphere, courts cannot truly determine capacity without analyzing the nature of the particular communication at issue. In-house and outside counsel to corporations may officially have dual responsibilities. These attorneys may hold positions as officers or directors, for example, or may otherwise responsible for nonlegal areas. Yet, these attorneys do not really change hats, nor do they separate their work days into nonlegal and legal parts.

To determine capacity in such a setting, courts must look at capacity for the particular communication. To the extent the court evaluates the particular communication and evaluates the nature of what the client sought or what the attorney rendered as a way of determining capacity, the capacity analysis simply repeats the analysis of whether the client seeks legal advice, service, or assistance. The repetitive analysis becomes a source of confusion for courts.

Many attorneys have no official nonlegal responsibilities, yet clients request and these lawyers render nonlegal services. Frequently, business advice mixes with legal advice in a single communication. With regard to distinguishing legal advice, service, or assistance, the United States District Court for the District of New Jersey stated in Leonen v. Johns-Manville: "Although the rule is clearly stated, its application is difficult, since in the corporate community, legal advice 'is often intimately intertwined with and difficult to distinguish from business advice.'"
If courts analyze these situations for capacity, they might conclude that a lack of official nonlegal duty shows that the attorney acted in an attorney capacity regarding the communication. Or a court might conclude that the fact that an attorney is an outside attorney shows that the attorney acted in an attorney capacity. Yet, such decisions, based on status, seem of little value to privilege analysis, and ultimately, to privilege objectives. Other courts might evaluate the attorney's capacity in light of the particular communication in question. If a court chooses this latter path, again the capacity analysis repeats the analysis required to determine if the client seeks by the communication legal advice, service, or assistance.

Courts can streamline and improve the analysis of the applicability of the privilege by eliminating the capacity analysis entirely. Some courts already appear to forego treating the professional legal capacity requirement as a separate issue. If a court determines that a communication satisfies the other definitional requirements of the privilege, including the requirement that by the communication the client seek or obtain legal advice, service, or assistance, then the underlying rationale of the privilege would suggest that the privilege apply.

C. Applying the Legal Advice Requirement

How does a court determine whether the client, in communicating with the attorney, sought legal advice, service, or assistance or that the attorney in communicating rendered such? Unfortunately, courts have approached this question from many perspectives and have reached varied results. Courts repeatedly acknowledge that clients need not

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magistrate's statement:
In this case, the attorney-client privilege is being invoked by Chevron to protect documents which largely reflect an amalgamation of tax and business strategy. This strategy involves both business people and their business-related decisions, as well as attorneys and their legal advice regarding past decisions made and future decisions considered. It is therefore extremely difficult to determine exactly where the business advice starts and the legal advice ends—this precludes a neat separation between the two.

Id. at *2. In Sealy Mattress Co. v. Sealy, Inc., 1987 WL 12500 (Del. Ch. June 19, 1987), the Delaware court stated that the “letter contains an admixture of business and legal advice that is not readily divisible into separate categories. Indeed, any effort to parse the advice which is ‘legal’ from that which is ‘business’ would be hazardous at best.” Id. at *3. Some of the documents considered in United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950), contained a mix of business and legal advice. Id. at 359.


113. See, e.g., Motley v. Marathon Oil Co., 71 F.3d 1547 (10th Cir. 1995).
request advice, service, or assistance expressly. Even so, courts have placed the burden on the party claiming the privilege to establish that the privilege applies. Some courts require fairly rigorous proof. For example, in Western Trails, Inc. v. Camp Coast to Coast, Inc., the United States District Court for the District of Columbia had before it the outside general counsel’s affidavit stating that he rendered legal advice with the communications. The client asserted that the attorney acted as an attorney in “opining on the legality” of a corporate plan. The court stated, “[c]onclusory statements asserting the elements of the privilege, however, are not sufficient to establish the privilege.” The court went on to analyze whether the documents contained legal advice and concluded that some did not. The court supported denial of the privilege to one of the documents with the fact that the attorney stated in the document that he had not researched the issue being discussed. To the court, this statement indicated that the document was not legal advice.

Occasionally courts have suggested that they should presume that communications are for the sake of legal advice if the attorney acts in the capacity of professional legal advisor. However, as explained


117. Id. at 11.

118. Id.

119. Id.

120. See 8 WIGMORE, supra note 12, § 2296 ("A matter committed to a professional legal adviser is prima facie so committed for the sake of legal advice . . . and is therefore within the privilege unless it appears to be lacking in aspects requiring legal advice."). See also Weeks v. Samsung Heavy Indus., Ltd., No. C-93-4899, 1996 WL 288511 (N.D. Ill. Mar. 30, 1996) (court applied presumption to outside counsel billing statements); In re Federated Dep't Stores, Inc. v. United States, 170 B.R. 331, 354-55 (S.D. Ohio 1994) (government
earlier, in the corporate context a court cannot properly resolve the capacity issue unless the court evaluates the nature of the communication between client and attorney. The presumption then has no value.

In determining whether the claimant has met the burden of proving that the privilege applies, courts must recognize that the clients of many lawyers, even those lawyers with no official management responsibilities, request traditionally nonlegal services, and those attorneys render that assistance. Courts must also recognize that often the legal and other services are stirred into the same communication. Professor Vincent Alexander's study of New York City corporations and their attorneys supports the notion that attorneys, in-house and outside, routinely give business advice. For example, in the securities context, the client corporation may consult an attorney about the prospect of raising capital with a public offering. The client wants an attorney to lead it through this valley of legal requirements and regulations, but also expects the attorney to provide insight into business ramifications the corporation might feel in the short or long term. The client seeks the attorney's advice and guidance because the attorney, though not a business person, has done similar deals with other corporations. Management of the corporation may not know or understand all the alternatives and consequent business effects of the undertaking.

Many courts recognize the nature of corporate representation. For example, in Note Funding Corp. v. Bobian Investment Co., N.V., the United States District Court for the Southern District of New York recognized that clients consult attorneys for business as well as legal reasons. The court stated:

In pursuing large and complex financial transactions, commercial entities often seek the assistance of attorneys who are well equipped
both by training and by experience to assess the risks and advantages in alternative business strategies. When providing this assistance, counsel are not limited to offering their client purely abstract advice as to the rules of law that may apply to their situation. Of necessity, counsel will often be required to assess specific tactics in putting together transactions or shaping the terms of commercial agreements, and their evaluation of alternative approaches may well take into account not only the potential impact of applicable legal norms, but also the commercial needs of their client and the financial benefits or risks of these alternative strategies.\textsuperscript{124}

As a result of the "intimately intertwined" nature of corporate representation, many courts have required corporations to prove, with regard to a particular communication, that it sought "primarily" legal advice, service, or assistance, or rendered "primarily" such.\textsuperscript{125} Similarly, some courts require that "the legal advice given to the client must be the predominant element in the communication," or that, with regard to the communication, the corporation sought "predominantly" legal advice, service, or assistance.\textsuperscript{126}

In \textit{Note Funding},\textsuperscript{127} the court deftly applied this type of analysis. The court looked to whether the client consulted the attorney "at least in part, because of his legal expertise and the advice rests 'predominantly' on his assessment of the requirements imposed, or the opportunities offered, by applicable rules of law."\textsuperscript{128} The court focused on "whether the attorney's performance depends principally on his knowledge of or application of legal requirements or principles, rather

\textsuperscript{124} Id. at *2.


\textsuperscript{127} No. 93 Civ. 7427 (DAB), 1995 WL 662402 (S.D.N.Y. Nov. 9, 1995).

\textsuperscript{128} Id. at *3 (quoting Rossi v. Blue Cross & Blue Shield, 540 N.E.2d 703, 706 (N.Y. 1989)).
than his expertise in matters of commercial practice."\textsuperscript{129} Although the court acknowledged that many of the documents contained extensive discussions of "financial questions and issues of commercial strategy and tactics," the court noted that the discussions occurred "in a context that makes it evident that the attorney is presenting the issues and analyzing the choices on the basis of his legal expertise and with an obvious eye to the constraints imposed by applicable law."\textsuperscript{130} Thus, the privilege protected the documents.\textsuperscript{131}

The United States District Court for the Northern District of California used a different analysis in \textit{Griffith v. Davis},\textsuperscript{132} in applying the same "primarily" standard to a situation not involving a corporation. The court first stated that the privilege applied only to communications made "primarily for the purpose of generating legal advice."\textsuperscript{133} In deciding whether the communication had primarily that purpose, the court stated: "[N]o privilege can attach to any communication as to which a business purpose would have served as a sufficient cause, i.e., any communication that would have been made because of a business purpose, even if there had been no perceived additional interest in securing legal advice."\textsuperscript{134} Because the client communication in question would have occurred for reasons other than the pursuit of legal advice, the privilege did not apply.\textsuperscript{135}

Courts applying this standard sometimes seem to limit consideration to whether more paragraphs on the document that constitutes the communication deal with business issues or legal issues, regardless of the communicators' purposes. In \textit{Itoba, Ltd. v. LEP Group PLC},\textsuperscript{136} the United States District Court for the District of Connecticut stated that the claimant must prove that the communication was "made for the purpose of obtaining or providing legal advice."\textsuperscript{137} Yet, the court then decided the application of the privilege by noting that "the information contained in [the document] is primarily business related."\textsuperscript{138} The court concluded that for the privilege to apply the "advice given must be

\begin{flushleft}
129. \textit{Id.}
130. \textit{Id.}
131. \textit{Id.}
134. \textit{See also McCaugherty}, 132 F.R.D. at 238 (using same causation approach).
137. \textit{Id.} at 43.
138. \textit{Id.}
\end{flushleft}
predominantly legal, as opposed to business, in nature." In Cooper-Rutter Associates, Inc. v. Anchor National Life Insurance Co., the New York state court considered two memoranda written by the in-house attorney who also held the office of corporate secretary. The memoranda discussed the business and legal aspects of the corporation's then ongoing negotiations regarding a business transaction. The court noted that "the documents were not primarily of a legal character, but expressed substantial non-legal concerns," and thus the memoranda were not privileged.

If a court follows the common rule that the privilege applies to attorney communications only if those communications reveal client communications made for the purpose of obtaining legal advice, a focus on the percentage of the document which is legal is misguided. To the extent that the court applies a rule protecting communications by attorneys for the purpose of rendering legal advice, the percentage content of the document is more relevant. Yet purpose or motivation is important and the court should consider it. If the court applies a rule protecting attorney communications which involve legal advice regardless of client or attorney purpose, perhaps the exact content percentages are more useful.

Courts, though repeatedly called upon to decide the issue of whether a document is privileged or not, have devised no useful guiding principles for applying the primarily or predominantly standard. Courts can, and have, interpreted and applied the standard in a variety of ways. Such decisions are extremely subjective, and given the fact that the privilege decision usually involves in camera review of documents, application of the standard cannot be subject to the same scrutiny other decisions of the courts enjoy. In addition, with this test, some communications in which a client seeks legal advice will not enjoy the privilege because other advice or information has, in the particular court's opinion, overshadowed the legal advice sought. The application of an

139. Id. See also Rossi v. Blue Cross & Blue Shield, 540 N.E.2d 703, 706 (N.Y. 1989) ("[s]o long as the communication is primarily or predominantly of a legal character"); Spectrum Sys. Int'l Corp. v. Chemical Bank, 581 N.E.2d 1055, 1060 (N.Y. 1991) ("communication itself must be primarily or predominantly of a legal character").
141. Id. at 492.
142. See supra notes 77-78 and accompanying text.
143. Courts usually decide whether a document is privileged on the basis of the claimant's statements of applicability, supporting affidavits, and in camera review. See, e.g., Note Funding Corp. v. Bobian Inv. Co., N.V. No. 93 Civ. 7427 (DAB), 1995 WL 662402, at *1 (S.D.N.Y. Nov. 9, 1995) (claimant proffered affidavits, a "privilege log" containing the bases for its claims of privilege, and relied upon in camera inspection).
underinclusive standard such as this is consistent with the stated intent of many courts to keep the attorney-client privilege carefully reined. 144 Courts, of course, could use a standard that requires that the communication have a solely legal purpose, but that standard would leave even more communications that are partially for the purpose of obtaining legal representation unprivileged. Finally, courts could apply a standard finding all communications privileged if seeking legal advice motivated the client at all.145 Although such a standard is overinclusive, it would protect all communications for the purpose of seeking legal advice, and thus would have the greatest impact on the encouragement of client candor. An overinclusive standard may be more true to and effective in obtaining the utilitarian goal of the privilege. Yet, the burdens may outweigh the benefits.

The primarily or predominantly standard may be the superior standard on a policy basis. Yet, its application by the courts has not created an environment of certainty with regard to corporate communications. Whatever the standard applied, it must translate into an understandable guide for prospective client communication. The difficulty courts have had in defining the protected class of communications and in determining which documents dealing, in whole or part, with those subject matters enjoy the protection of the privilege, has created an environment in which many courts are simply lost without shared realistic guides. The confusion has led some courts to decide privilege on assumptions based on status, which perhaps allows biases to be interjected into the analysis.

V. THE BIAS PROBLEM

A. Anticorporation Bias

Because jurisdictions accept that the attorney-client privilege applies to corporations, one would think it logical to assume good faith from members of the legal profession and their clients in the assertion of attorney-client privilege absent specific evidence of abuse. However,

144. See supra note 20 and accompanying text.
145. See United States v. Chevron, No. C-94-1885 SBA, 1996 WL 264769, at *3 (N.D. Cal. Mar. 13, 1996) (district court found fault with magistrate's statement that "the attorney-client privilege is triggered only by the exchange of some measure of legal advice, as contrasted with purely business advice"). The Restatement states that the “client must consult the lawyer for the purpose of obtaining legal assistance and not predominantly for another purpose." RESTATEMENT, supra note 23, at § 122 cmt. c. This statement seems to suggest that the focus should not be on whether the purpose is predominantly legal but whether it is predominantly something else.
applying the privilege to corporations, some courts seem to have adopted the habit of assuming that corporations and their counsel abuse the privilege or simply assume that the communication does not relate to legal advice, service, or assistance. The burden arguments raised in the debate about the appropriateness of an attorney-client privilege reappear as a rationale justifying a heightened scrutiny analysis to claims of privilege by corporations. The corporation must prove more than individuals do in proving that the privilege applies. In doing so, the corporation must overcome assumptions of sharp dealing.

Southern Bell Telephone & Telegraph Co. v. Deason exemplifies the more substantial proof burden. The Supreme Court of Florida in that case noted that "to minimize the threat of corporations cloaking information with the attorney-client privilege in order to avoid discovery, claims of the privilege in the corporate context will be subjected to a heightened level of scrutiny." Another example of, arguably, an increased proof burden is in McCaugherty v. Siffermann, in which the United States District Court for the Northern District of California stated that if there is a "clear business purpose in the environment in which the communications occurred," there must be a "clear evidentiary predicate" for applying the privilege. Because most of the issues about which a corporation might want legal assistance would involve a business purpose, this standard places a particularly onerous burden on corporations. Other courts state that the privilege applies to corporate communications with attorneys only if the attorney acts in his professional legal capacity and the communication is for the "express purpose of securing legal advice."

Some courts' presumption of abuse is clear. A common statement is that "corporate dealings are not made confidential merely by funnelling

146. Critics argue that the cost of the privilege in the corporate context is great because accessing the information from other sources will be costly. In addition, access may be impossible because of the evasiveness of a corporation. See generally James A. Gardner, A Personal Privilege for Communications of Corporate Clients—Paradox or Public Policy?, 40 U. Det. L.J. 299 (1963); David Simon, supra note 42. See also supra notes 42-43 and accompanying text.
147. 632 So. 2d 1377 (Fla. 1994).
148. Id. at 1383.
150. Id. at 238.
them routinely through an attorney.”

Although certainly true, this statement and others like it appear in cases in which there is no evidence of “funnelling.”

Not all courts exhibit explicit or even implicit bias. Are the courts that do show bias correct in looking askance at corporations claiming the attorney-client privilege? Alexander’s empirical study of the corporate attorney-client privilege in New York City suggests that corporations do not send documents to attorneys in an attempt to cloak the documents with the privilege. Three-fourths of the attorneys said corporate clients had never done so and most of the remaining one-fourth said that clients “rarely” did so. Alexander reported that most of the attorneys in the latter group were “quick to add that they had disabused their clients of the notion that privilege would apply.” Such answers, of course, carry no particular indicia of reliability. With regard to a fear of lost information in the corporate setting, Alexander’s interviews with judges and magistrates revealed that “application of the privilege to corporations usually causes no severe damage to the search for truth.”

Perhaps some courts simply do not fully appreciate the fact that the privilege does not protect the underlying facts and does not protect documents created for other purposes and then sent to counsel.

With the balance struck and the privilege in place, a corporation’s consultation with a lawyer for the purpose of obtaining legal advice enjoys the privilege. If the corporation consults with the attorney for the


155. Alexander, supra note 41, at 345. “The survey results suggest that a great deal of business information indeed is exchanged between attorneys and clients in the corporate context, but they contain little evidence of conscious attempts to create privilege for such communications.” Id. at 349-50.

156. Id. at 345.

157. Alexander, supra note 41, at 259-60.

purpose of obtaining legal advice about everything the corporation does, then the privilege rightfully protects all of those communications. The communications are rightfully within the “zone of silence.” The facts, of course, are not. If the number of communications protected becomes bothersome to society, that is, if the “zone of silence” seems too broad, then jurisdictions should re-evaluate the calculus of benefits and burdens of the application of the privilege to corporations. Courts should not, however, apply a different analysis or hold a corporation’s claim of privilege more suspect on the basis of assumptions that the specific facts of the case do not support.

B. Anti-In-House Counsel Bias

1. Evidence of Bias. Some commentators have argued that little benefit accrues from applying the privilege to in-house counsel, yet much is lost, so the privilege should not apply. These privilege opponents base the lack of benefit argument on a belief that the privilege does not encourage candor in the in-house counsel setting, or if it does, the encouragement creates only small marginal benefit. In addition to the hypothesis that the nature of organizational behavior subverts any encouraging effect of the privilege, this argument postulates that a corporation’s need for legal advice, and its trust in the in-house counsel as a loyal member of the corporate team, provides all the incentive needed for complete candor. Thus, the privilege has little or no effect as a candor catalyst.

With regard to the costs of having the privilege apply to in-house counsel communications, these commentators see in-house attorneys as players in the corporation-as-evil-doer theory. They are the ones, it is argued, who make abuse of the privilege by corporations easy. They make spurious claims of the privilege for business matters possible. Several of these commentators view in-house

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159. David Simon, supra note 42, at 955 (“Where corporations are involved, with their large number of agents, masses of documents, and frequent dealings with lawyers, the zone of silence grows large.”).

160. Gardner, supra note 146, at 354-62; Sedler & Simeone, supra note 40, at 23-25; David Simon, supra note 42, at 969-973; Note, supra note 42. See also Alexander, supra note 41, at 276-86 (suggesting, but not advocating, differentiation for in-house counsel).

161. Alexander, supra note 41, at 276-84; Sedler & Simeone, supra note 40, at 25.

162. Alexander, supra note 41, at 195 (“The modern trend toward increased participation of house counsel in the day-to-day affairs of large corporations makes the prospect all the more likely.”); David Simon, supra note 42, at 973 (“the relative ease with which [in-house counsel] could be converted into a privileged sanctuary for corporate records”).
counsel as being co-opted into the business culture, and thus as being simply business advisors.\(^{163}\)

Yet, just as courts and legislatures have decided that the attorney-client privilege applies to corporations, courts have decided that the privilege applies when the corporation's attorney is an in-house counsel. The courts have weighed the benefits and burdens and have decided that the privilege should apply; the benefits exceed the costs.\(^{164}\) This position accords with the traditional view in the United States that no difference exists for professional or ethical purposes between an in-house counsel and an outside counsel.\(^{165}\) The case frequently quoted for its

\(^{163}\) Such ideas appear in articles from earlier times. They perhaps express a certain view of in-house counsel, not generally shared in the 1990s, that in-house attorneys were lesser attorneys. See, e.g., Note, supra note 42, at 246 (house counsel "often get so involved with the commercial aspects of their employer's business that they cease to function as attorneys"). For a clearer example of how other attorneys viewed in-house attorneys, see H.J. Aibel, Corporate Counsel and Business Ethics: A Personal Review, 59 MO. L. REV. 427 (1994), in which Aibel, chief legal officer of International Telephone & Telegraph, stated that in the 1950s "the generally accepted wisdom [was] that jobs in corporate law departments were for second raters, or lawyers who had failed to make partner at some of the better firms." Id. at 427. Historically in-house attorneys perhaps did not receive respect equal to law firm attorneys. See, e.g., Walter B. Davis, Reflections of a Kept Lawyer, 53 A.B.A. J. 349 (1967) (noting "disapproval" of bar for "kept" lawyers); Jeffrey S. Slovak, The Ethics of Corporate Lawyers: A Sociological Approach, 1981 AM. B. FOUND. RES. J. 753, 772, (1981) ("second class citizens"). See generally Robert Eli Rosen, The Inside Counsel Movement, Professional Judgment and Organizational Representation, 64 IND. L.J. 479 (1989).


\(^{165}\) All ethical rules apply to all lawyers regardless of their status as litigators, outside corporate counsel, or in-house counsel. See, e.g., In re Capps, 250 Ga. 242, 297 S.E.2d 249 (1982) (in-house attorney subject to discipline for ethical violation). See also Brian D. Forrow, The Corporate Law Department Lawyer: Counsel to the Entity, 34 BUS. L. 1797, 1804 (1979). Occasionally this equal treatment leads to unfortunate results. For example, some courts have held that an in-house attorney discharged for inappropriate reasons has no cause of action for the wrongful discharge because the traditional rule for all attorneys is that the client can discharge the attorney for any reason. See, e.g., Herbster v. North Am. Co. for Life & Health Ins., 501 N.E.2d 343 (Ill. App. 1986), cert. denied, 484 U.S. 850 (1987). The error of such a holding seems manifest. For discussion of the in-house counsel discharge issue, see Grace M. Giesel, The Ethics or Employment Dilemma of In-House Counsel, 5 GEO. J. LEGAL ETHICS 535 (1992). Occasionally, courts treat in-house attorneys differently for other purposes. See Louis S. Sorell, In-House Counsel Access to Confidential Information Produced During Discovery in Intellectual Property Litigation, 27 J. MARSHALL L. REV. 657 (1994) (discussing limits on in-house counsel access imposed by some courts).

In-house attorneys do not enjoy the privilege in some countries. See Alison M. Hill, Note, A Problem of Privilege: In-House Counsel and the Attorney-Client Privilege in the United
description of the attorney-client privilege, *United States v. United Shoe Machinery Corp.*, also eloquently addresses the in-house counsel issue. In *United Shoe* the court held that courts should treat in-house counsel like outside attorneys for privilege purposes, for the only real difference between outside and in-house counsel is that "house counsel gives advice to one regular client, the outside counsel to several regular clients." Clearly, in-house counsel should not receive different treatment because of their status as in-house attorneys.

Some courts, however, continue to cast a distrustful eye at in-house counsel. In particular situations, this distrust may derive wholly from the distrust felt for corporations and may be motivated by assumptions that corporations will seek to abuse the privilege. In other cases the distrustful eye may result from a distrust of corporations accentuated by the involvement of an in-house attorney. These courts seem to assume that in-house counsel will act to abuse the privilege and also that in-house attorneys do not render legal assistance. The language of *United States v. Davis* expresses the wariness. The United States District Court for the Southern District of New York, in reviewing claims involving in-house counsel who was involved in a negotiation process, stated that it had "carefully scrutinized each document ... in order to ensure that 'in house counsel's law degree and office are not ... used to create a 'privileged sanctuary for corporate records.'"

Even without a presumption of intentional abuse, many courts seem to treat in-house attorneys differently because they assume that in-house counsel do a substantial amount of nonlegal work for the corporation and that outside counsel do not render traditionally nonlegal services. On the basis of these assumptions, courts require corporations claiming the

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168. 132 F.R.D. 12 (S.D.N.Y. 1990). *See also* Abel v. Merrill Lynch & Co., No. 91 Civ. 9261 (RPP) 1993 WL 33348, at *3 (S.D.N.Y. Feb. 4, 1993) ("A corporation may not insulate itself from suit for civil rights violations by funneling all data ... to in-house counsel, eliminating the underlying records, and then claiming that the data in the in-house counsel's file is privileged.").

169. 132 F.R.D. at 16 (quoting *United States v. Davis*, 131 F.R.D. 391, 401 (S.D.N.Y. 1990) (quoting Research Inst. for Medicine & Chemistry, Inc. v. Wisconsin Alumni Research Found., 114 F.R.D. 672, 676 (W.D. Wisc. 1987))). *See also* SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 515 (D. Conn. 1976) ("Legal departments are not citadels in which public, business or technical information may be placed to defeat discovery and thereby ensure confidentiality.").
ATTORNEY-CLIENT PRIVILEGE

privilege to overcome an assumption that the communication in question does not relate to legal advice, services, or assistance. For example, in Avianca, Inc. v. Correia, \(^{170}\) the United States District Court for the District of Columbia stated:

Where the communication is with in-house counsel for a corporation, particularly where that counsel also serves a business function, the corporation must clearly demonstrate that the advice to be protected was given "in a professional legal capacity" . . . . This limitation is necessary to prevent corporations from shielding their business transactions from discovery simply by funnelling their communications through a licensed attorney. \(^{171}\)

In Rossi v. Blue Cross & Blue Shield, \(^{172}\) the Court of Appeals of New York stated:

staff attorneys may serve as company officers with mixed business-legal responsibility; whether or not officers, their day-to-day involvement may blur the line between legal and nonlegal communications; and their advice may originate not in response to the client's consultation about a particular problem but with them, as part of an ongoing, permanent relationship with the organization. In that the privilege obstructs the truth-finding process and its scope is limited to that which is necessary to achieve its purpose . . . the need to apply it cautiously and narrowly is heightened in the case of corporate staff counsel, lest the mere participation of an attorney be used to seal off disclosure. \(^{173}\)

In so stating, the court evaluated a memorandum from an in-house attorney with no other corporate "role" to an officer of the corporation. \(^{174}\) Requiring the document to be "primarily or predominantly of a legal character," the court found that the privilege applied to the document in spite of the above quoted statement. \(^{175}\) The New York court then stated: "While we are mindful of the concern that mere participation of staff counsel not be used to seal off discovery of corporate


\(^{171}\) Id. at 676 (citation omitted) (The court then referenced the David Simon article which warned of the "zones of silence"). See David Simon, supra note 42. See also Teltron, Inc. v. Alexander, 132 F.R.D. 394, 396 (E.D. Pa. 1990) (quoting Avianca, 705 F. Supp. at 676); United States Postal Serv. v. Phelps Dodge Ref. Corp., 852 F. Supp. 156, 163-64 (E.D.N.Y. 1994) ("a corporation cannot be permitted to insulate its files from discovery simply by sending a 'cc' to in-house counsel").

\(^{172}\) 540 N.E.2d 703 (N.Y. 1989).

\(^{173}\) Id. at 705 (citations omitted).

\(^{174}\) Id.

\(^{175}\) Id. at 706.
communications, here "[n]othing suggests that this is a situation where a document was passed on to a defendant's attorney in order to avoid its disclosure."

Other courts regularly adopt this increased wariness of in-house attorneys and apply this heightened scrutiny to privilege questions involving such attorneys. For example, the United States District Court for the Eastern District of Pennsylvania in *Kramer v. The Raymond Corp.*, stated:

> Because of the resulting obstruction to the truth-finding process, however, the attorney-client privilege is construed narrowly . . . . This is especially so when a corporate entity seeks to invoke the privilege to protect communications to in-house counsel. Because in-house counsel may play a dual role of legal advisor and business advisor, the privilege will apply only if the communication's primary purpose is to gain or provide legal assistance . . . . Rather, the corporation "must clearly demonstrate that the communication in question was made for the express purpose of securing legal not business advice."

Several courts applying this heightened level of scrutiny have clarified that it does not apply to outside counsel. In *United States v. Chevron*, the United States District Court for the Northern District of California was reviewing a decision of a magistrate who had reviewed documents involving in-house counsel. The magistrate had applied a presumption of privilege. The District Court found fault with this approach, stating:

> Some courts have applied a presumption that all communications to outside counsel are primarily related to legal advice . . . . In this context, the presumption is logical since outside counsel would not ordinarily be involved in the business decisions of a corporation. However, the . . . presumption cannot be applied to in-house counsel because in-house counsel are frequently involved in the business decisions of a company . . . . [A] corporation must make a clear

176. *Id.* (quoting *Rossi v. Blue Cross & Blue Shield*, 528 N.Y.S.2d 51, 52 (N.Y. App. Div. 1988)).


181. *Id.* at *1*.
showing that in-house counsel's advice was given in a professional legal capacity.\textsuperscript{182}

On the basis of the assumption that in-house attorneys provide substantial nonlegal services to the corporate client and that outside attorneys do not, these courts apply a more strenuous analysis to the claim of privilege. Courts do so without referring first to whether the facts of the particular cases before them merit such assumptions. The assumption of abuse appears to be unsubstantiated and odd. The courts' assumptions that in-house attorneys render nonlegal services and outside attorneys do not are likewise unsubstantiated. Alexander's study of New York executives, law firm partners, in-house counsel, and the judiciary reveals that outside attorneys give business advice at about the same frequency as do in-house attorneys who have no official nonlegal responsibilities. The study found no statistically significant difference between in-house and outside counsel regarding the frequency with which they give business advice. In fact, 47.8\% of outside counsel and 46.7\% of in-house attorneys said they give business advice frequently.\textsuperscript{183} There is no doubt that in-house attorneys do render nonlegal services to some extent.\textsuperscript{184} There is also no doubt that outside attorneys do as well. One outside attorney in Alexander's study said, "My clients expect me to serve as a perceptive businessman."\textsuperscript{185} Another outside attorney commented, "About 95\% of what I do in putting a deal together for a corporate client is business in nature."\textsuperscript{186} The corporate executives interviewed said they wanted that assistance.\textsuperscript{187} Reports of outside attorneys rendering more than traditional legal assistance abound.\textsuperscript{188}

At the very least, any assumption that outside attorneys do not give business advice, and therefore, communications involving them deserve a lesser level of scrutiny than in-house counsel communications, seems flawed. Courts should evaluate in-house and outside counsel by the

\textsuperscript{182} Id. at *4.
\textsuperscript{183} Alexander, supra note 41, at 341-42 (reporting that 37.0\% of outside counsel said that they did so occasionally; 48.9\% of in-house attorneys said they did occasionally; 15.2\% of outside attorneys said that they did rarely; and 4.4\% of in-house attorneys responded in this way).
\textsuperscript{184} See, e.g., Turner Broadcasting, supra note 3, at 16 (legal department is part of management team running business on a day-to-day basis).
\textsuperscript{185} Alexander, supra note 41, at 339.
\textsuperscript{186} Id. at 342.
\textsuperscript{187} Seventy-eight point eight percent of the executives said they wanted such advice. Alexander, supra note 41, at 340-41 ("We want legal advice tempered by practical business considerations.").
\textsuperscript{188} See, e.g., Woolsey, supra note 106, at 14. See also Rubenstein, supra note 6, at 18.
same standard and same level of scrutiny. It is illogical to differentiate between in-house and outside attorneys on the basis of false assumptions. A court should evaluate each case before it and decide the privilege not on the basis of assumptions, but on the basis of the facts. To the extent lesser scrutiny or even a presumption of privilege has applied to outside counsel communications, it should no longer.

In situations in which the in-house attorney has an official nonlegal role in addition to a legal one, a court can assume that some of the communications with that attorney do not relate to the legal representation. Yet, outside counsel have dual roles just as in-house attorneys do, so any assumption based on dual roles limited to in-house attorneys is unsupportable. Even with regard to in-house counsel with a management or other nonlegal role, the assumption that some of the attorney's communications do not relate to legal advice, service, or assistance cannot be the basis of a decision. To do so is to decide on the basis of probability, not fact. In Fine v. Facet Aerospace Products Co., the United States District Court for the Southern District of New York stated that the fact that the in-house counsel also acted as an assistant secretary of the corporation “thus increas[ed] the probability that the communications were made for general business purposes. [The attorney's] averment that he provided legal advice in connection with the report is entirely conclusory.” In evaluating communications with a general counsel who also acted as a vice president of the corporation, then Judge Ginsburg in In re Sealed Case, noted that given this status, “[t]he Company can shelter [the attorney's] advice only upon a clear showing that [the attorney] gave it in a professional legal capacity.” In this dual role situation, it seems proper to require the

189. See supra note 6 and accompanying text.
190. See supra note 4 and accompanying text.
192. Id. at 444. In contrast, see Cuno, Inc. v. Pall Corp., 121 F.R.D. 198, 202 (E.D.N.Y. 1988), where the court accepted the affidavits of counsel involved which stated that the engineering department, by the submission of technical information to the attorney, sought legal advice even though the documents on their face did not suggest this purpose.
194. Id. at 99. See also Hardy v. New York News, Inc., 114 F.R.D. 633, 644 (S.D.N.Y. 1987) (in-house counsel and Vice President & Director of Employee Relations—corporation failed to establish that the attorney was acting as "legal advisor to the corporation as opposed to Director of Employee or Labor Relations"); North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., 110 F.R.D. 511, 517 (M.D.N.C. 1986) ("Several of [the corporation's] house counsel also performed duties outside the legal department. Thus, defendant bore a burden to show that advice was given in a legal, rather than business, capacity."); Barr Marine Prods. Co. v. Borg-Warner Corp., 84 F.R.D. 631, 637 (E.D. Pa. 1979) (general counsel and Senior Vice President did not prove role).
corporation to meet its burden of proof, something made more difficult by the dual roles. It does not seem logical to impose a higher standard of proof or to scrutinize the corporation's claim more carefully in this situation simply on the basis of a probability. Many in society may think the fact that a criminal defendant committed a crime in the past makes his guilt to the later charge more likely. Yet, our law does not apply a different standard of proof or scrutiny to that defendant in the later case.

The following scenario noted in the legal press makes the faults of the approach taken by these courts particularly clear. A corporation uses an outside law firm as its legal department. The company and law firm are in the same building and share the same electronic mail system. A partner in the firm is the corporation's general counsel and corporate secretary. The law firm monitors work sent to other firms and renders a variety of services itself. Yet, the general counsel claims that his firm can create an attorney-client privilege situation but an in-house attorney could not. Courts that apply a heightened scrutiny analysis to in-house counsel situations indeed might find no privilege for in-house counsel communications while finding privilege for the same communication with lawyers in this firm or even the general counsel himself. The general counsel's outside status may, in the court's eyes, be proof of the applicability of the privilege. Such a result hardly comports with notions of fairness and justice. Each communication and each situation must be considered separately.

Certainly not all opinions reveal anti-in-house counsel bias. *Upjohn* itself involved communications with in-house and outside attorneys and not a whisper of bias presents itself. In *Motley v. Marathon Oil Co.*, the United States Court of Appeals for the Tenth Circuit evaluated two documents: a draft memorandum authored by in-house counsel regarding proposed guidelines for employee terminations, and a document prepared by management. After affirming that the corporation had the burden of proving that the privilege applied, the court relied on the in-house counsel's affidavit that the memorandum contained legal advice, not business advice, and that the management-prepared document was done at the behest of the attorney and was created for the attorney's use in rendering legal advice. Noting that the opposition had presented no evidence "directly contradicting" the

195. See Rubenstein, *supra* note 6, at 18.
197. 71 F.3d 1547 (10th Cir. 1995).
198. *Id.* at 1550.
affidavit, the court affirmed the lower court's application of the privilege. The court applied no assumptions and seemed to analyze the application of the privilege simply on the basis of whether the facts before it merited application of the privilege.

Several courts have noted that the facts before them do not suggest bad faith. Thus, these courts have not inferred bad faith, or a high probability thereof, from the participation of in-house counsel. For example, in *Natta v. Hogan*, the United States Court of Appeals for the Tenth Circuit, in reviewing communications involving in-house counsel, stated that the record did not indicate that the corporation "channeled any papers into the hands of its lawyers for custodial purposes to avoid disclosure." And in *United States v. Lipshy*, in reviewing communications involving a person who was an officer, general counsel, and director, the United States District Court for the Northern District of Texas accepted the attorney's testimony that he acted as an attorney regarding the communication, stating, "I find no reason to doubt his good faith in making these statements."

2. In Contrast: The Patent Counsel Experience. Although some courts have treated the group differently on the basis of assumptions about the group as a whole, quite the reverse has occurred with courts' treatment of patent attorneys. At one time courts commonly held that the attorney-client privilege did not apply to much of the technical or scientific information communicated between clients and their patent attorneys because the patent attorney acted as the "mere conduit of factual and technical information." The majority of courts have now rejected such a narrow view based on a narrow assumption of the patent attorney role. These courts now analyze patent attorney communications as they do any other attorney communications. Courts focus now

199. *Id.* at 1551. In *Shell Oil Co. v. Par Four Partnership*, 638 So. 2d 1050 (Fla. Dist. Ct. App. 1994), the Florida court applied the privilege to communications involving in-house counsel, stating that if communications "appear on their face to be privileged, the party seeking disclosure bears the burden of proving that they are not." *Id.* at 1050.

200. 392 F.2d 686 (10th Cir. 1968).
201. *Id.* at 692.
203. *Id.* at 42. See also supra note 176 and accompanying text.
205. In *Fromson v. Anitec Printing Plates, Inc.*, 152 F.R.D. 2 (D. Mass. 1993), the court noted the two approaches taken by courts and concluded that the majority of courts now use the more expansive approach in evaluating the application of the attorney-client privilege to patent attorneys. *Id.* at 3.
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on the client's purpose of obtaining legal advice regardless of the technical nature of much of the communications. The United States District Court for the District of Massachusetts, in Fromson v. Anitec Printing Plates, Inc., stated: "The rendering of legal advice regarding the patentability is a quintessential role for lawyers; the sanctity of communications in this context are entitled to no less protection than other attorney/client communications ..."

Another court, in adopting the enlightened approach, stated:

The inventor usually brings to the dialogue little reliable legal knowledge but much technical information about the product or process and some information about prior art. The lawyer brings to the dialogue an understanding of . . . the criteria used by the PTO [Patent and Trademark Office] in deciding whether to issue patents and of the legal principles or considerations that come into play when parties seek to enforce a patent against an alleged infringer or to challenge a patent's validity. In their private dialogue, inventor and lawyer attempt, as a team, to make judgments that are subtle and have real legal dimensions and implications.

The court stated that the broader view was "more consistent with the professional realities of the patent attorney-client relationship."

This approach to evaluating patent attorneys contrasts starkly to the treatment of in-house counsel by some courts. Although courts have recognized the impropriety of basing privilege decisions on assumptions about patent attorney work and communications, other courts have continued to do so when the attorney is an in-house counsel, whether or not that attorney has official nonlegal responsibilities.

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208. Id. at 4 (quoting Minnesota Mining & Mfg. Co. v. Ampad Corp., No. 85-0457-F, 1987 WL 124334 (D. Mass. May 14, 1987)). See also Glaxo, Inc. v. Novopharm, Ltd., 148 F.R.D. 535, 540 (E.D.N.C. 1993) ("The patent attorney is not simply a conduit between the client and the Patent Office; he or she also serves as a filter straining out that which must be included in patent prosecution documents from that which may be held back.").


C. A Better Approach: Eliminate Bias Based on Assumptions

With regard to corporations in general, courts should not assume that abuse of the privilege is occurring in particular cases and should not assume that communications involving attorneys relate to or do not relate to legal advice, service, or assistance. Such assumptions are, at best, based on speculation and guessed probabilities. Courts should require all types of privilege claimants to prove that the privilege applies. Because of the nature of corporations, they may find doing so more difficult. A different standard of proof, however, seems inappropriate absent specific evidence of abuse or specific evidence of inapplicability of the privilege.

In addition, courts should treat in-house attorneys and outside attorneys the same for purposes of the attorney-client privilege. In-house counsel and outside counsel are subject to the same ethical rules, trained in the same law school classes, and in many cases gain experience in the same law firms. There is no reason to assume that in-house counsel, but not outside counsel, will behave unethically or seek to abuse an evidentiary privilege. Further, there is no reason to assume or even to think it probable for any one communication involving an in-house attorney who has no official nonlegal responsibilities that the communication is nonlegal in nature. In-house attorneys render all sorts of legal and business advice—and so do outside attorneys. Claims of privilege involving both types of attorneys should be carefully proved and carefully evaluated by a court. Lastly, even claims of privilege relating to an in-house attorney with substantial nonlegal responsibilities should not be confronted with assumptions based on the assumed probability that the communication in question is nonlegal in nature. Again, courts should require proof by the claimant that the communication in issue deserves the privilege.

The result may be that communications with outside counsel are evaluated with a more careful eye, not that communications with in-house counsel are subject to less scrutiny. Corporations may find such claims difficult to prove; yet, the courts should not require the claimant to do more or less than proving privilege applicability. As courts now evaluate communications involving patent attorneys on the basis of the communications and the clients’ and attorneys’ motivations, not on the basis of status-based assumptions, so too courts should evaluate in-house counsel on the basis of the communications at issue and the motivations for those communications. Privilege should not be a probabilities game.

The elimination of bias should improve the certainty quotient of the privilege. Any standard that requires communication-by-communication evaluation allows for a substantial lack of certainty at the time of a
communication that a court will later deem the communication privileged. Yet, the situation is improved if, at the time of the communication, the standard of proof and evaluation is clear, uniform, and rational.

IV. CONCLUSION

The attorney-client privilege, to achieve its stated goal of increased client candor with attorneys, must carry with it a measure of certainty. Unfortunately, the requirement that the communication relate to legal advice, service, or assistance, sometimes coupled with an allegedly separate requirement that the attorney act in a professional legal capacity, has resulted in a muddle of decisions which has in turn created a sea of uncertainty and a significant degree of injustice, especially for corporate claimants.

Major sources of the uncertainty include a lack of understanding or agreement in the courts about what kinds of activities might be considered privileged. Also, some courts evaluate activities and professional legal capacity on the basis of traditional or historical functions of attorneys, though attorneys commonly apply their legal expertise, education, and training in nontraditional settings. Other courts do not so limit the analysis. Most courts agree that the privilege should apply as long as the legal essence is primary, yet some courts focus on whether the client primarily sought legal advice, service, or assistance in communicating, while others focus on whether the communication itself constituted primarily legal advice, service, or assistance. Any such standard is inherently subjective and in addition problematic because any determination usually results from an in camera review of documents.

Into this confusion has crept a bias against corporations, and specifically, against in-house counsel. Though courts admit that the privilege applies in these settings, some courts assume that corporations and in-house attorneys abuse the privilege. In addition, some courts make unsubstantiated assumptions about the type of services corporations request and that their attorneys, in-house and outside, render. These courts subject corporate claimants of the privilege to a stricter scrutiny than they would apply if the communication involved no corporation and especially no in-house attorneys. Courts have relied on assumptions based on supposed probabilities in erecting hurdles for corporate claimants to overcome. Other courts accept the balance struck by the policy decision to apply the privilege to corporations and in-house counsel. Because of the mixed message these two divergent treatments of corporations and in-house counsel convey to the prospective corporate
speaker, there is less certainty surrounding the privilege for corpora-
tions.

Achieving clarity in this area of privilege law is elusive and may be
impossible. Courts can act to improve the situation. First, courts should
abandon attempting to define the type of lawyer activity protected by
some notion of traditional lawyer functions. The practice of law does not
remain static and courts should recognize this fact while keeping the
rationale of the privilege in the forefront of the analysis. A focus on a
client's desire to access the lawyer's particular skill and training seems
appropriate.

Second, courts should forego a professional legal capacity analysis. In
the corporate sphere, in the vast majority of situations, no capacity
analysis can occur without resort to a consideration of the nature of the
particular communication. Evaluating capacity in the abstract is
impossible because attorneys do not truly change hats when rendering
different types of services. Capacity decisions based on assumptions
about tasks done by in-house or outside counsel are indefensible. To the
extent that the evaluation of capacity involves evaluation of the
particular communication, the analysis repeats the analysis of whether
the client sought, or the attorney rendered, legal advice, service, or
assistance. Such analysis adds nothing but confusion. Many courts
have not analyzed capacity separately. All courts should follow their
lead.

Third, courts should attempt to state and apply standards of
evaluation more consistently in all situations. Lastly, courts should
require all claimants, individual and corporate, to shoulder the same
burden of proof subject to the same level of scrutiny in proving that a
particular communication deserves the protection of the privilege.
Likewise, claims of privilege involving in-house counsel should receive
the same treatment as claims of outside counsel.

An increased fairness and an increased certainty in the application of
the attorney-client privilege in the corporate environment should result.
With such improvement, the attorney-client privilege can perhaps
encourage client candor. Without improvement, the privilege risks being
only a mass of confusion providing fertile ground for expensive corollary
litigation.