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The Attorney-Client Privilege and Information Disclosed to an Attorney with the Intention That the Attorney Draft a Document To Be Released to Third Parties: Public Policy Calls for at Least the Strictest Application of the Attorney-Client Privilege

Daniel Northrop

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The Attorney-Client Privilege and Information Disclosed to an Attorney with the Intention That the Attorney Draft a Document To Be Released to Third Parties: Public Policy Calls for at Least the Strictest Application of the Attorney-Client Privilege

Cover Page Footnote

J.D. Candidate, 2010, Fordham University School of Law. I would like to thank Professor Andrew Kent and Professor Daniel Capra for their thoughtful insight and advice. I would also like to thank my father David, my sister Jessica, Ken, and Amanda for their constant love and support.

THE ATTORNEY-CLIENT PRIVILEGE AND INFORMATION DISCLOSED TO AN ATTORNEY WITH THE INTENTION THAT THE ATTORNEY DRAFT A DOCUMENT TO BE RELEASED TO THIRD PARTIES: PUBLIC POLICY CALLS FOR AT LEAST THE STRICTEST APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE

Daniel Northrop*

The attorney-client privilege is the oldest evidentiary privilege known to the common law. It exists to encourage clients to openly communicate with their attorneys. Some commentators, however, have questioned the value of the privilege and called for its elimination. This policy debate, though unlikely to influence typical privilege disputes, is important when the application of the attorney-client privilege is unclear. One example is when a client conveys information to her attorney with the intent that the attorney draft a document to be released to a third party. This Note seeks to shed light on the arguments for and against the application of the attorney-client privilege to this scenario, and concludes that public policy calls for a strict application of the privilege.

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INTRODUCTION

Fusarium keratitis is a rare but serious corneal infection caused by the fungus *fusarium*.¹ The infection requires prompt administration of medication or surgery to remove the fungus.² Without treatment, fusarium keratitis can cause severe vision loss or blindness and can necessitate corneal transplants.³ In April 2006, the Centers for Disease Control and Singapore's Ministry of Health noticed a sharp increase in fusarium keratitis infections.⁴ Both linked this outbreak to Bausch & Lomb's ReNu Moistureloc,⁵ a solution created to clean and disinfect contact lenses.⁶ Bausch & Lomb subsequently ceased shipments of ReNu and asked retailers to stop selling the product.⁷ Class action products liability litigation ensued.⁸

While the ReNu litigation raised complex and modern legal questions concerning class certification and multidistrict litigation,⁹ the suit also highlighted a longstanding and fundamental dispute over evidentiary privilege. In the ongoing ReNu litigation, defendant Bausch & Lomb refused to produce a number of "otherwise responsive documents" on the ground that they were protected by the attorney-client privilege or the work-product doctrine.¹⁰ One specific issue of contention concerned a draft of a PowerPoint presentation that Bausch & Lomb prepared for, but never released to, the Food and Drug Administration. Defendant asserted that the PowerPoint draft was privileged because it was submitted to in-house counsel for legal advice.¹¹ Plaintiffs, on the other hand, argued that because Bausch & Lomb explicitly intended to have the information in its communications released to a third party, Bausch & Lomb did not have a

1. Department of Health and Human Services: Centers for Disease Control and Prevention: Division of Foodborne, Bacterial and Mycotic Diseases (DFBMD), *Fusarium* Keratitis General Information, http://www.cdc.gov/nczved/DFBMD/disease_listing/fusariumkeratitis_gi.html (last visited Oct. 24, 2009).

2. *In re* Bausch & Lomb Inc. Contacts Lens Solution Prods. Liab. Litig., C/A No. 2:06-MN-77777-DCN, 2008 WL 2308759, at *1 (D.S.C. Apr. 9, 2008).

3. *Id.*

4. *Id.* Singapore's Ministry of Health stated that 75 cases of the infection had been reported between November 1, 2004, and April 12, 2006, a sharp increase from the 2 cases that had been reported from January 1, 2004, to October 31, 2004. *Id.* As of May 9, 2006, The Centers for Disease Control (CDC) received reports of 106 confirmed cases and 80 cases under investigation from 32 U.S. states. Department of Health and Human Services: Centers for Disease Control and Prevention, General Information about *Fusarium* Keratitis, http://www.cdc.gov/ncidod/dhqp/fungal_fusariumkeratitis.html (last visited Oct. 24, 2009).

5. *In re* Bausch & Lomb Inc. Contacts Lens Solution Prods. Liab. Litig., 2008 WL 2308759, at *1. The CDC investigated thirty cases and discovered that twenty-six of the twenty-eight patients who wore soft contact lenses also used ReNu. *Id.*

6. *Id.* The Food and Drug Administration approved ReNu in May 2004 and Defendant released the solution for sale in September 2004. *Id.*

7. *Id.*

8. *See id.*

9. *See id.* at *2-8.

10. *In re* New York Renu with Moistureloc Prod. Liab. Litig., No. MDL 1785, CA 2:06-MN-77777-DCN, 2008 WL 2338552, at *5 (D.S.C. May 8, 2008).

11. *Id.*

reasonable expectation of confidentiality.¹² This dispute is not unique to the ReNu litigation.¹³ Rather, the ReNu litigation exemplifies the continued uncertainty and national disagreement over when privilege should be afforded in derogation of the search for truth.

This Note argues for a strict construction and application of the attorney-client privilege. The history of evidentiary privilege indicates that a fundamental principle of our legal system—that in the pursuit of truth and justice, all evidence should be discoverable—is forsaken for other important social goals that privilege allegedly advances. It is equally evident that uncritical acceptance and support of the attorney-client privilege has allowed for the expansion of the privilege and the denial of competing societal and legal concerns. Because our justice system should afford additional public policy issues fair consideration, a reanalysis of the attorney-client privilege would best serve the interests of justice. In the meantime, the privilege should be strictly construed whenever possible.

Part I of this Note provides an explanation of the attorney-client privilege. This includes a brief history of the privilege, the scope and purpose of the privilege, and arguments for and against the privilege. Additionally, Part I uses the relevant empirical studies to address attorney and public perception of the privilege, as well as the effects of the attorney-client privilege.

Part II analyzes the courts' divergent approaches in applying the attorney-client privilege to communications connected with the preparation of documents intended to be disclosed to a third party. This Part compares the U.S. Court of Appeals for the Fourth Circuit's "strict" application of the privilege to the U.S. District Court for the District of Nebraska's "liberal" approach.

Part III argues that the attorney-client privilege has been applied too expansively. It advocates a strict application of the attorney-client privilege, similar to the position of the Fourth Circuit in *United States v. (Under Seal)*;¹⁴ however, this position is justified by additional rationales not utilized in *(Under Seal)*. First, the rationale of the privilege, though logical in theory, does not appear to accurately reflect real-life perception and actions. Second, public policy concerns that oppose the attorney-client privilege exist and should be given due consideration. Finally, the District of Nebraska's expansive applications of the attorney-client privilege, such as in *United States v. Schlegel*,¹⁵ are economically impractical, opening the door for potential discovery abuse.

12. *Id.*

13. *See infra* Part II.

14. 748 F.2d 871, 875 (4th Cir. 1984).

15. 313 F. Supp. 177 (D. Neb. 1970).

I. THE ATTORNEY-CLIENT PRIVILEGE: THE WHAT, THE WHY, AND THE WHY NOT

The attorney-client privilege is a fundamental and entrenched element of the American legal system.¹⁶ It exists to encourage clients to openly communicate with their attorneys. With candid communication, attorneys can provide optimal legal representation, and clients can obtain the advice they need to comply with the law.¹⁷ Despite this well-accepted justification, the privilege is not without critics.¹⁸ The attorney-client privilege, like all evidentiary privileges, impedes the adversary system by keeping relevant and probative evidence from the judge and jury.¹⁹ Consequently, courts generally strictly construe the elements of the attorney-client privilege,²⁰ and some legal theorists have called for its elimination.²¹ The conflict between the benefits and the costs of the attorney-client privilege has emerged in the context of products liability litigation and has highlighted a split of authority regarding the application of the privilege to attorney-client communications in connection with the preparation of documents intended to be disclosed to a third party.²² Before examining the circuit split at the heart of this Note, it is necessary to consider the following: (1) the elements and history of the attorney-client privilege; (2) arguments in support and in condemnation of the attorney-client privilege; and (3) the relevant statistical studies on the effect and perception of the attorney-client privilege.

A. Attorney-Client Privilege Fundamentals

The attorney-client privilege is a unique legal principle. It is the oldest privilege for confidential communication, dating back to the reign of Queen

16. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (stating that the attorney-client privilege is the oldest evidentiary privilege and that it is necessary to “promote broader public interests in the observance of law and administration of justice”).

17. E.g., *id.* at 389; *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888); see *infra* Part I.B.1.

18. See *infra* Part I.B.2.

19. See *infra* Part I.B.2.

20. See, e.g., *Fisher v. United States*, 425 U.S. 391, 403 (1976) (“[S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose.”); see also Steven M. Abramowitz, Note, *Disclosure Under the Securities Laws: Implications for the Attorney-Client Privilege*, 90 COLUM. L. REV. 456, 457 (1990); *infra* Part I.B.2.c. But see 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 2:1, at 8–9 (2d ed. 1999) (stating that it is unclear whether the narrow application supported by some courts and commentators is justified or applied with consistency). See generally *infra* Part I.A.1 (explaining the elements of the attorney-client privilege). The U.S. Supreme Court has even gone so far as to say that centuries of common law development do not require that the attorney-client privilege “endure for all time.” See *Swidler & Berlin v. United States*, 524 U.S. 399, 410 (1998) (citing *Funk v. United States*, 290 U.S. 371, 381 (1933)).

21. See, e.g., 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 193–94 (John S. Mill ed., London, Hunt & Clarke 1827); Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1 (1998).

22. See *In re New York Renu with Moistureloc Prod. Liab. Litig.*, No. MDL 1785, CA 2:06-MN-7777-DCN, 2008 WL 2338552, at *3–4 (D.S.C. 2008).

Elizabeth I in sixteenth-century England.²³ Additionally, unlike other rules of evidence, the attorney-client privilege has not been defined and codified by Congress.²⁴ Federal Rule of Evidence 501 provides that “the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.”²⁵ The attorney-client privilege has therefore been, and continues to be, a malleable concept with sometimes unclear requirements and implications.²⁶ Consequently, few issues arise more frequently in civil litigation than disputes over the application of the attorney-client privilege.²⁷ Nevertheless, the general scope, elements, and requirements of the attorney-client privilege are fairly static.

1. The Nature of the Privilege

The attorney-client privilege protects from disclosure the substance of communications made in confidence by a client to his attorney for the purpose of obtaining legal advice.²⁸ An attorney’s communication with a client is also protected, provided the communication contains confidential information disclosed by the client, or legal advice from the attorney.²⁹ Four elements are required to establish the existence of the attorney-client privilege:

23. JOHN WILLIAM GERGACZ, *ATTORNEY-CORPORATE CLIENT PRIVILEGE* § 1.04, at 1-4 (3d ed. 2000); 8 JOHN HENRY WIGMORE, *EVIDENCE* § 2290, at 542 (John T. McNaughton ed., 1961); *Developments in the Law: Privileged Communications*, 98 HARV. L. REV. 1450, 1456 (1985) [hereinafter *Developments in the Law*]. Because the testimony of witnesses did not become common until the early 1500s and because testimonial compulsion does not appear to have been commonly authorized until the beginning of Queen Elizabeth’s reign, “it would seem that the privilege could hardly have come much earlier into existence.” 8 WIGMORE, *supra*, § 2290, at 543; see GERGACZ, *supra*, § 1.04, at 1-4, § 1.06, at 1-7; *Developments in the Law, supra*, at 1456 (stating that the attorney-client privilege arose coincidentally at the same time as the compulsory process).

24. Paul R. Rice, *Attorney-Client Privilege: Continuing Confusion About Attorney Communications, Drafts, Pre-Existing Documents, and the Source of the Facts Communicated*, 48 AM. U. L. REV. 967, 1005 (1999) (stating that privilege is the only subject within the Federal Rules of Evidence that was left to develop under the common law); see GERGACZ, *supra* note 23, § 3.05, at 3-7 to 3-8 (3d ed. 2000); 1 RICE, *supra* note 20, § 2:1, at 8-9 (stating that Rule 503 of the Federal Rules of Evidence, which sets forth the elements of the attorney-client privilege, was never adopted).

25. FED. R. EVID. 501.

26. See Rice, *supra* note 24, at 968 (asserting that the attorney-client privilege is one of the most complex privileges, largely due to confusion regarding the nature and requirement of confidentiality); *infra* Part II.

27. 1 EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 2 (5th ed. 2007).

28. *Fisher v. United States*, 425 U.S. 391, 403 (1976); *In re Horowitz*, 482 F.2d 72, 81 (2d Cir. 1973).

29. *United States v. Margolis*, 557 F.2d 209, 211 (9th Cir. 1977); 1 EPSTEIN, *supra* note 27, at 76; see also Allan Kanner & Tibor Nagy, *Perspectives on the Attorney-Client Privilege and the Work-Product Doctrine*, in *THE ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION: PROTECTING AND DEFENDING CONFIDENTIALITY* 81, 83 (Vincent S. Walkowiak ed., 4th ed. 2008).

- (1) A communication;
- (2) made between privileged persons;
- (3) in confidence;
- (4) for the purpose of seeking, obtaining, or providing legal assistance to the client.³⁰

In addition to these elements, the privilege must be affirmatively raised and not waived.³¹

a. *Element 1: A Communication*³²

For the attorney-client privilege to attach there must be a communication.³³ This communication may be oral or written.³⁴ The attorney-client privilege protects only the communication, not the information communicated.³⁵ While a court cannot compel disclosure of the nature of the communication, the underlying facts communicated may be revealed by other means.³⁶ Therefore, merely communicating with an attorney does not bar discovery of the underlying information.³⁷

30. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000); 1 EPSTEIN, *supra* note 27, at 65 (citing RESTATEMENT OF THE LAW GOVERNING LAWYERS § 118 (Tentative Draft No. 1, 1988)). While courts and commentators have formulated different tests, the elements are fundamentally the same. *See* 1 EPSTEIN, *supra* note 27, at 65. John Henry Wigmore offers an alternate criterion in his fundamental treatise on evidence. Wigmore's frequently cited definition reads,

(1) Where legal advice of any kind is sought (2) from a professional legal advisor 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.

8 WIGMORE, *supra* note 23, § 2292, at 554; *see also* United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950) (applying a test similar to Wigmore's).

31. 1 EPSTEIN, *supra* note 27, at 65.

32. In consideration of the purpose of this Note, the first, second, and fourth elements of the attorney-client privilege are addressed in a general and cursory fashion. For a detailed analysis of these issues, *see generally* 1 EPSTEIN, *supra* note 27, at 65–390. The third element, confidentiality, is addressed in more detail.

33. 1 EPSTEIN, *supra* note 27, at 66; 1 RICE, *supra* note 20, § 2:1, at 10; *see* GERGACZ, *supra* note 23, § 3.02, at 3–4 (stating that the attorney-client privilege protects confidential communications from disclosure).

34. 1 EPSTEIN, *supra* note 27, at 66.

35. *See* United States v. O'Malley, 786 F.2d 786, 794 (7th Cir. 1986) (stating that the attorney-client privilege protects the communication of information, not the information itself); *In re Grand Jury Subpoena Duces Tecum* Dated Sept. 15, 1983, 731 F.2d 1032, 1037 (2d Cir. 1984) (“[T]he attorney-client privilege protects communications rather than information.”); 1 EPSTEIN, *supra* note 27, at 67–68; 1 RICE, *supra* note 20, § 5:1, at 5–5; Rice, *supra* note 24, at 980–81 (“The privilege protects the fact that the information was communicated . . . but not the information itself, aside from the fact of the communication.”).

36. 1 EPSTEIN, *supra* note 27, at 68; 1 RICE, *supra* note 20, § 5:1, at 5–7 to 5–8.

37. 1 EPSTEIN, *supra* note 27, at 68; 1 RICE, *supra* note 20, § 5:1, at 5–7 to 5–8.

b. *Element 2: Made Between Privileged Persons*

The attorney-client privilege extends only to communications between privileged persons.³⁸ Privileged persons commonly are the client and the client's attorney.³⁹ The client is defined as "the intended beneficiary of legal services."⁴⁰ It is this legal representation relationship that determines the client's identity.⁴¹ Merely paying for legal services does not make an individual a client.⁴² While the beneficiary of legal services is automatically considered a "client" when an agreement has been signed, the privilege also protects initial consultations when conducted with possible representation in mind.⁴³

To qualify as the "client's attorney," a party must be (1) a lawyer and (2) acting as a lawyer when communicating with the client.⁴⁴ A "lawyer" for privilege purposes is a licensed attorney at the time the communication was made.⁴⁵ It is not necessary, however, for the attorney to be admitted to the bar in the jurisdiction where the services were rendered, where the communications were made, or where the court determining the privilege

38. 1 EPSTEIN, *supra* note 27, at 65, 134; *see* 1 RICE, *supra* note 20, § 2:1, at 10, § 2:5, at 35.

39. *See* 1 EPSTEIN, *supra* note 27, at 134; 1 RICE, *supra* note 20, § 2:1, at 10, § 2:5, at 35. Privileged persons also include "communicating agents" of either party, or agents of the attorney included for the purpose of legal representation. 1 EPSTEIN, *supra* note 27, at 134, 211-16; *see* 1 RICE, *supra* note 20, § 2:1, at 10, § 2:5, at 35. For the purposes of this Note, it is only necessary to understand that privilege applies to communications made by agents of either party. Additionally, information may remain privileged even when communicated to third parties, such as experts, provided that such disclosure is for legal representation purposes. 1 EPSTEIN, *supra* note 27, at 216-17.

40. 1 EPSTEIN, *supra* note 27, at 134; 1 RICE, *supra* note 20, § 4:1, at 4-5. Though the application of the attorney-client privilege can be confusing in the corporate context, the privilege applies to corporations as well as individuals. *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981) (citing *United States v. Louisville & Nashville R.R. Co.*, 236 U.S. 318, 336 (1915)); *see* 1 RICE, *supra* note 20, § 4:1, at 4-5 (stating that persons, organizations, or entities may all be clients under the privilege); *see also infra* notes 106-17 and accompanying text. Federal courts apply the privilege "fairly extensively in the corporate context without much discussion, provided that the matters discussed with counsel fall within the compass of the employees' corporate duties." 1 EPSTEIN, *supra* note 27, at 147; *see, e.g.,* *Shriver v. Baskin-Robbins Ice Cream Co.*, 145 F.R.D. 112, 114 (D. Colo. 1992).

41. 1 EPSTEIN, *supra* note 27, at 134; *see* 1 RICE, *supra* note 20, § 4:1, at 4-5 to 4-7.

42. 1 RICE, *supra* note 20, § 4:1, at 4-5 to 4-7; *see* 1 EPSTEIN, *supra* note 27, at 135.

43. 1 EPSTEIN, *supra* note 27, at 98; *see, e.g.,* *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir. 1978) (stating that the duty to protect attorney-client communication extends to initial consultations regardless of whether the attorney is subsequently hired); *see also* 1 RICE, *supra* note 20, § 2:4, at 22.

44. 1 EPSTEIN, *supra* note 27, at 197; GERGACZ, *supra* note 23, § 3.17, at 3-22; *see* 1 RICE, *supra* note 20, § 3, at 6-7 (stating that, with limited exceptions, a necessary element of the attorney-client privilege is that the "attorney-at-law" is a member of the bar).

45. *See* 1 EPSTEIN, *supra* note 27, at 200; GERGACZ, *supra* note 23, § 3.21, at 3-27 to 3-29; 1 RICE, *supra* note 20, § 3, at 7-12 (stating that while the attorney-client privilege applies to nonlawyers in limited circumstances, it is generally necessary for the person offering legal advice to be a member of the bar).

claim is located.⁴⁶ To “act as a lawyer,” the communications between the attorney and client must concern legal representation; communications regarding business or personal matters, even when made to an attorney, are not privileged.⁴⁷

c. Element 3: In Confidence

To obtain protection from the attorney-client privilege, a client also must reasonably believe that her communication is confidential at the time the communication is made and must intend for the communication to remain confidential.⁴⁸ When an attorney-client relationship exists, and when the communication concerns legal representation, there is a presumption that all communications are privileged.⁴⁹ Nevertheless, because the plaintiff bears the burden of proof of establishing each and every element of the attorney-client privilege,⁵⁰ the client frequently must rebut an argument that she did not have the necessary reasonable expectation and intent.⁵¹ Courts generally look to the totality of the circumstances surrounding the communication to determine if the client has met this burden.⁵²

46. See, e.g., *Renfield Corp. v. E. Remy Martin & Co.*, 98 F.R.D. 442, 443–45 (D. Del. 1982) (applying the privilege to communication with the corporation’s French counsel); see also 1 EPSTEIN, *supra* note 27, at 200 (stating that under recent decisions, the attorney is a “privileged person” provided that she is permitted to practice law in some jurisdiction).

47. 1 EPSTEIN, *supra* note 27, at 207–08; GERGACZ, *supra* note 23, § 3.22, at 3–29 to 3–30; 1 MCCORMICK ON EVIDENCE § 88, at 397–98 (Kenneth S. Broun ed., 6th ed. 2006) (“[W]here one consults an attorney not as a lawyer but as a friend or as a business advisor or banker, or negotiator, or as an accountant . . . the consultation is not professional nor the statement privileged.”) (footnotes omitted).

48. 1 EPSTEIN, *supra* note 27, at 235–37; 1 MCCORMICK, *supra* note 47, § 91, at 408; see *United States v. Schaltenbrand*, 930 F.2d 1554, 1562 (11th Cir. 1991); *United States v. Dennis*, 843 F.2d 652, 656–57 (2d Cir. 1988); see also *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) (stating that the attorney-client privilege covers confidential communication and emphasizing, in upholding the privilege, that the documents were intended to be and were kept confidential by the company); *United States v. Furst*, 886 F.2d 558, 575–76 (3d Cir. 1989); *In re Feldberg*, 862 F.2d 622, 628 (7th Cir. 1988); *United States v. Tellier*, 255 F.2d 441, 447 (2d Cir. 1958) (describing confidentiality as essential to the privilege). But see Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853, 856–61 (1998) (asserting that confidentiality should not be a prerequisite to attorney-client privilege protection).

49. 1 EPSTEIN, *supra* note 27, at 234; 1 RICE, *supra* note 20, § 6:7, at 6–56; see *United States v. Devery*, No. 93 Cr. 273 (LAP), 1995 WL 217529, at *8–10 (S.D.N.Y. Apr. 12, 1995) (stating that because the client had a subjective expectation of confidentiality, and because there is little evidence to refute his belief, the attorney-client privilege attaches).

50. GERGACZ, *supra* note 23, § 3.09, at 3–11; Kanner & Nagy, *supra* note 29, at 83; see, e.g., *United States v. Bay State Ambulance & Hosp. Rental Serv. Inc.*, 874 F.2d 20, 27–28 (1st Cir. 1989); *Avianca, Inc. v. Corriea*, 705 F. Supp. 666, 675 (D.D.C. 1989); *SEC v. Gulf & W. Indus., Inc.*, 518 F. Supp. 675, 682 (D.D.C. 1981); see also 1 EPSTEIN, *supra* note 27, at 244.

51. See *In re Bonanno*, 344 F.2d 830, 833 (2d Cir. 1965); *Research Inst. for Med. & Chemistry v. Wis. Alumni Research Found.*, 114 F.R.D. 672, 675 & n.3 (W.D. Wis. 1987); 1 EPSTEIN, *supra* note 27, at 234–37; GERGACZ, *supra* note 23, § 3.09, at 3–11 to 3–12, § 3.13, at 3–17 (stating that blanket assertions of the privilege will not suffice).

52. See *United States v. Wilson*, 798 F.2d 509, 512–13 (1st Cir. 1986) (stating that the existence of the privilege is a factual issue to be decided by a preponderance of the evidence,

The "circumstances surrounding the communication" and the "nature of the services sought by the client" are two factors that are useful when determining whether the client has satisfied the confidentiality element of the attorney-client privilege.⁵³ Certain conditions, such as the presence of a third party during the communication, will typically negate any reasonable expectation of confidentiality.⁵⁴ Similarly, if the client intended for her attorney to share the communication with a third party, she cannot have a reasonable expectation of confidentiality.⁵⁵ This frequently arises in tax or bankruptcy matters, where the attorney is used as a conduit of information.⁵⁶ A more difficult situation, addressed in Part II of this Note, is when a client gives her attorney a draft of a document, the final version of which she intends to release to a third party. Whether a client can reasonably expect that such a communication is confidential is a difficult question that neither courts nor commentators have answered uniformly.⁵⁷

d. *Element 4: For the Purpose of Seeking, Obtaining, or Providing Legal Assistance to the Client*

For a communication to be protected by the attorney-client privilege, the client must have communicated primarily for the purpose of obtaining legal assistance from the attorney.⁵⁸ The client, though, does not have to expressly request legal advice.⁵⁹ Additionally, the privilege attaches even if part of the communication contains nonlegal matters, provided that the

and analyzing whether the circumstances of the communication satisfied each element of the privilege); FED. R. EVID. 104(a) advisory committee note (stating that "[i]f the question is factual in nature, the judge will of necessity receive evidence pro and con on the issue"); 1 RICE, *supra* note 20, § 6.6, at 6-40 to 6-41.

53. 1 RICE, *supra* note 20, § 6:6, at 6-40 to 6-41; see 1 EPSTEIN, *supra* note 27, at 234 (stating that the relevant question is what "function the attorney is performing when the communication is made").

54. GERGACZ, *supra* note 23, § 3.13, at 3-17 to 3-18; 1 RICE, *supra* note 20, § 6:7, at 6-46 to 6-52; see, e.g., *United States v. Gann*, 732 F.2d 714, 723 (9th Cir. 1984) ("Because Gann knew, or should have known, that third parties were present, his attorney-client privilege claim must fail."); *Tutson v. Holland*, 50 F.2d 338, 340 (D.C. Cir. 1931) (holding that because the attorney-client communication was made in the presence of an adverse party, no privilege existed).

55. 1 EPSTEIN, *supra* note 27, at 246; see 1 RICE, *supra* note 20, § 6:7, at 6-53, § 6:9, at 6-63. This is true regardless of whether the attorney ever shared the information. 1 EPSTEIN, *supra* note 27, at 247. In such a situation, however, the client may change her mind and the privilege will apply, provided that no disclosure has taken place. *Id.*

56. 1 RICE, *supra* note 20, § 6:9, at 6-63 to 6-66; see, e.g., *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991); *McKay v. Comm'r*, 886 F.2d 1237, 1238 (9th Cir. 1989); see also 1 EPSTEIN, *supra* note 27, at 248-49.

57. See *infra* Part II.

58. 1 EPSTEIN, *supra* note 27, at 325; see GERGACZ, *supra* note 23, § 3.13, at 3-18 (stating that communications must have a legal nature in order to gain protection from the privilege). But see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 72 cmt. c (2000) (offering an alternative definition that contradicts the "primary purpose" language).

59. 1 EPSTEIN, *supra* note 27, at 329-30; see, e.g., *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 403-04 (8th Cir. 1987); *Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136, 144-45 (D. Del. 1977).

predominant purpose of the communication is the request for legal advice.⁶⁰ Courts frequently take an expansive approach to determining what constitutes legal advice and will frequently resolve difficult situations in favor of the privilege.⁶¹

2. Origins of the Attorney-Client Privilege

In order to understand the attorney-client privilege's unique status in American law, it is also helpful to understand the roots of the privilege. While the attorney-client privilege is the oldest privilege for confidential communication, it has not always existed in its current form. Initially, attorney-client communication was deemed confidential because of the objectively determined position of the attorney.⁶² Referred to as the theory of attorney exemption, attorneys were bound by the oath and honor of their profession to protect the secrets of their clients.⁶³ This "voluntary pledge of secrecy," though, could not withstand the pressure from the judiciary.⁶⁴ The oath and honor of an attorney could not supersede the judicial search for truth and justice.⁶⁵ By the end of the eighteenth century, a subjective and client-focused confidentiality theory emerged as the new justification for the attorney-client privilege.⁶⁶ Rather than respecting the legal profession, the privilege "looked to the necessity of *providing subjectively for the client's freedom of apprehension* in consulting his legal adviser."⁶⁷ The modern attorney-client privilege was born.

B. Arguments for and Against the Attorney-Client Privilege

Despite the entrenched and well-respected position of the attorney-client privilege in the American legal system, debate over the privilege has continued throughout history.⁶⁸ The existence, application, and justification

60. *In re Grand Jury Proceeding*, 68 F.3d 193, 196 (7th Cir. 1995) ("A client does not lose the privilege merely because his attorney serves a dual role."); 1 EPSTEIN, *supra* note 27, at 327; GERGAZ, *supra* note 23, § 3.30, at 3-40.

61. 1 EPSTEIN, *supra* note 27, at 339-40; *see, e.g.*, *U.S. Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 160 (E.D.N.Y. 1994) ("Thus, in situations where advice is rendered or sought which seem to touch upon sensitive issues, I have taken the broad view of legal advice in applying the privilege, in recognition of the unique role that an attorney brings to bear in imparting advice that may incidentally also involve business advice.") (footnote omitted).

62. GERGAZ, *supra* note 23, § 1.04, at 1-4; 8 WIGMORE, *supra* note 23, § 2290, at 543. *But see Developments in the Law*, *supra* note 23, at 1502 (stating that historians do not agree on why the attorney-client privilege was initially created, and that Blackstone suggested it was an extension of the right to avoid self-incrimination).

63. GERGAZ, *supra* note 23, § 1.04, at 1-4; 8 WIGMORE, *supra* note 23, § 2290, at 543.

64. GERGAZ, *supra* note 23, § 1.04, at 1-5; 8 WIGMORE, *supra* note 23, § 2290, at 543.

65. GERGAZ, *supra* note 23, § 1.04, at 1-5; 8 WIGMORE, *supra* note 23, § 2290, at 543.

66. GERGAZ, *supra* note 23, § 1.04, at 1-5 (stating that in the later part of the eighteenth century the rationale for the privilege changed); 8 WIGMORE, *supra* note 23, § 2290, at 543.

67. 8 WIGMORE, *supra* note 23, § 2290, at 543.

68. *Developments in the Law*, *supra* note 23, at 1454, 1501; *see* Jonathan Baumoel, Comment, *The Beginning of the End for the Psychotherapist-Patient Privilege*, 60 U. CIN. L. REV. 797, 798-99 (1992).

of the attorney-client privilege have long been controversial and fiercely contested issues.⁶⁹ This is unsurprising. Unlike other evidentiary rules that exclude evidence because it is unreliable or does not otherwise aid in the search for truth,⁷⁰ “privileges expressly subordinate the goal of truth seeking to other societal interests.”⁷¹ In place of free discovery, privilege advances the goals of improving legal representation and encouraging compliance with the law in a vague and uncertain manner.⁷² Nevertheless, the attorney-client privilege has been recognized for centuries as a fundamental tenet of our legal system.⁷³ This section will explain the compelling arguments that exist both for and against the privilege. Additionally, it will address the statistical studies that help to shed light on the privilege and the positions of its proponents and critics.

1. Rationale of the Attorney-Client Privilege

Several theories have been proposed to justify the attorney-client privilege. The utilitarian rationale and the privacy rationale are two predominant theories that provide a logical explanation for why the

69. See *Developments in the Law*, *supra* note 23, at 1454. Compare 7 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 441 (John Bowring ed., Edinburgh, William Tait 1843) (asserting that the exclusion of probative evidence on the basis of its potential “unpleasant” consequences is “one of the most pernicious and most irrational notions that ever found its way into the human mind”), with *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (“[Privilege] is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.”).

70. See, e.g., FED. R. EVID. 402, 403 (declaring inadmissible evidence that is not relevant due to concerns of issue confusion); FED. R. EVID. 801, 802 (prohibiting out of court statements, introduced to prove the truth of the statement, due to concerns of unreliability); see also 1 MCCORMICK, *supra* note 47, § 72, at 338–39 (stating that while rules of privilege generally seek to exclude unreliable or prejudicial evidence, the effect of privilege is “clearly inhibitive”); Baumoel, *supra* note 68, at 798; *Developments in the Law*, *supra* note 23, at 1454 (“Unlike other rules of evidence, privileges are not fashioned primarily to exclude unreliable evidence or otherwise to aid in the truth-seeking function.”).

71. *Developments in the Law*, *supra* note 23, at 1454 (citing E. GREEN & C. NESSON, PROBLEMS, CASES AND MATERIALS ON EVIDENCE 519 (1983); Jack B. Weinstein, *Recognition in the United States of the Privileges of Another Jurisdiction*, 56 COLUM. L. REV. 535, 535 (1956)).

72. See *Developments in the Law*, *supra* note 23, at 1454, 1502; see also KAREN L. VALIHURA & ROBERT J. VALIHURA, ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT DOCTRINE: CORPORATE APPLICATIONS A-1 (3d ed. 2000) (“Both the [attorney-client] privilege and the [work-product] doctrine are fundamentally at odds with the disclosure philosophy of the Federal Rules of Civil Procedure and the federal securities laws.” (citing *Avery Dennison Corp. v. UCB Films PLC*, No. 95 C 6357, 1998 WL 703647, at *2 (N.D. Ill. Sept. 30, 1998))); WIGMORE, *supra* note 23, § 2291, at 554.

73. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (stating that the attorney-client privilege is “the oldest of the privileges for confidential communications known to the common law.” (citing WIGMORE, *supra* note 23, § 2290)); Baumoel, *supra* note 68, at 798 (“Despite the continuing debate over evidentiary privileges, several privileges have become accepted doctrines of American jurisprudence.”). See generally *Developments in the Law*, *supra* note 23.

attorney-client privilege should and does exist.⁷⁴ These theories, in conjunction with consistent U.S. Supreme Court support, provide a compelling argument in favor of the attorney-client privilege in the American legal system.

a. *Theoretical Justifications for the Privilege*

The traditional and most influential justification for evidentiary privilege is a utilitarian analysis propounded by John Henry Wigmore.⁷⁵ Like all utilitarian evaluations, Wigmore's theory rests on a belief that the benefits of certain evidentiary privileges outweigh their negative consequences, thereby achieving a greater good.⁷⁶ In his influential treatise on evidence, Wigmore recognized four necessary conditions that must exist to justify a privilege under the utilitarian rationale:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.

74. Alison M. Hill, Note, *A Problem of Privilege: In-House Counsel and the Attorney-Client Privilege in the United States and the European Community*, 27 CASE W. RES. J. INT'L L. 145, 172, 177 (1995); *Developments in the Law*, *supra* note 23, at 1501. The power theory is a third rationale typically used to explain why certain communications are privileged. Kerry L. Morse, Note, *A Uniform Testimonial Privilege for Mental Health Professionals*, 51 OHIO ST. L.J. 741, 744 (1990). This rationale, however, does not justify privileges but rather contends that they exist due to wealthy proponents, such as lawyers or doctors, that lobby for their existence. *Id.* (citing Steven R. Smith, *Medical and Psychotherapy Privileges and Confidentiality: On Giving with One Hand and Removing with the Other*, 75 KY. L.J. 473, 477 (1986-87); *Developments in the Law*, *supra* note 23, at 1493-95).

75. Hill, *supra* note 74, at 172. John Henry Wigmore (1863-1943) was an American legal educator whose treatise on evidence "is generally regarded as one of the world's great books on law." 12 THE NEW ENCYCLOPEDIA BRITANNICA 653 (15th ed. 1994). From 1889 to 1892, Dean Wigmore taught American law at Keio University in Tokyo, Japan. *Id.* From 1893 until 1901, Dean Wigmore was a professor of law at Northwestern University, and from 1901 to 1929, he was dean of the law faculty. *Id.*

76. See *Jaffee v. Redmond*, 518 U.S. 1, 9-10 (1996) (holding that in evaluating whether a privilege should be recognized, the question is whether it "promotes sufficiently important interests to outweigh the need for probative evidence" (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980))); *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting) (asserting that privileges should be accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth"); Morse, *supra* note 74, at 742 (stating that, according to the utilitarian rationale, privileges should exist "when society is served more by encouraging a particular relationship than society is hurt by the potential loss of information caused by the privilege").

(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.⁷⁷

When applying this utilitarian analysis to the attorney-client privilege, Wigmore asserted that all four of the above conditions are satisfied.⁷⁸ Commentators and courts have, for the most part, agreed.⁷⁹

The attorney-client privilege aids in the administration of justice by encouraging free communication between client and attorney.⁸⁰ In addition to the fact that the right to counsel is constitutionally protected in both the criminal and civil contexts,⁸¹ clients need attorneys in an increasingly complex legal system.⁸² Only through free communication between attorney and client can an attorney provide optimal legal representation.⁸³ Further, free communication enables attorneys to provide legal advice, thereby increasing the likelihood that clients will act in conformity with the law.⁸⁴

The consequences of the privilege, on the other hand, are seemingly minimal. Because privilege induces a client to communicate openly with her attorney, the client will sometimes reveal incriminating evidence.⁸⁵ Without this inducement, however, the communication would presumably not take place.⁸⁶ Consequently, the attorney-client privilege does not negatively harm the truth-seeking process because "it keeps from the court only sources of information that would not exist without the privilege."⁸⁷ Proponents of the utilitarian rationale argue that the benefits of the attorney-client privilege outweigh the privilege's negative consequences.⁸⁸

77. 8 WIGMORE, *supra* note 23, § 2285, at 527.

78. *Id.* at 528. Wigmore did recognize, however, that the fourth condition is the one requirement open to dispute. *Id.*

79. See, e.g., 1 RICE, *supra* note 20, § 2:3, at 18; *Developments in the Law*, *supra* note 23, at 1472-73 (asserting that "[s]ociety would surely suffer greatly if the lack of a privilege discouraged clients from conferring with their lawyers"); see also *infra* Part I.B.1.b (detailing Supreme Court support for the attorney-client privilege). But see Fischel, *supra* note 21 (arguing that confidentiality rules harm rather than benefit clients and society).

80. See 1 EPSTEIN, *supra* note 27, at 4-5; 1 RICE, *supra* note 20, § 2:3, at 14-15; *Developments in the Law*, *supra* note 23, at 1502.

81. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1117-18 (5th Cir. 1980).

82. See *Developments in the Law*, *supra* note 23, at 1502, 1506.

83. See 1 EPSTEIN, *supra* note 27, at 4-5; 1 RICE, *supra* note 20, § 2:3, at 14-15.

84. See 1 EPSTEIN, *supra* note 27, at 6; 1 RICE, *supra* note 20, § 2:3, at 14-15; *Developments in the Law*, *supra* note 23, at 1507.

85. See 1 RICE, *supra* note 20, § 2:3, at 20-21; *Developments in the Law*, *supra* note 23, at 1507-08.

86. *Developments in the Law*, *supra* note 23, at 1507-08; see Stephen A. Saltzburg, *Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: Garner Revisited*, 12 HOFSTRA L. REV. 817, 822 (1984) (stating that the privilege only protects the additional communication that the privilege generates).

87. *Developments in the Law*, *supra* note 23, at 1508; see Saltzburg, *supra* note 86, at 822.

88. 8 WIGMORE, *supra* note 23, § 2291, at 528, 545-49; see 1 RICE, *supra* note 20, § 2:3, at 18. Balancing the positive and negative effects of the privilege under the utilitarian

The privacy rationale is a second theory frequently used to justify evidentiary privilege.⁸⁹ The theory emphasizes that human autonomy, respect for relationships, and respect for “the bonds and promises that protect shared information,” are important values that must be protected.⁹⁰ Consequently, the personal autonomy of a client is a compelling interest that justifies the impairment of the truth-seeking process.⁹¹ If a client confides in her attorney, compelled disclosure is inherently wrong, violating the right of the individual to control the distribution of private information and to form private loyalties.⁹² The result is the infliction of two distinct harms: (1) the embarrassment of having secrets revealed and (2) the forced revelation of confidential information.⁹³ “The first harm is shame, the second, treachery.”⁹⁴ Such a compelled disclosure would harm both the client and the attorney.⁹⁵ Although the need for privacy is not always viewed as a legal interest,⁹⁶ the importance of privacy continues to be emphasized in privilege disputes and may help to shed light on why evidentiary privilege is respected and supported in the American justice system.⁹⁷

b. Supreme Court Support for the Privilege

The Supreme Court has also provided strong support for the attorney-client privilege. Over centuries of jurisprudence, the Court has championed the value, importance, and beneficial effects of the privilege, while noting that the negative implications of the privilege are limited. As the Court stated in *Hunt v. Blackburn*⁹⁸ in 1888, the attorney-client privilege “is

rationale may incorporate additional factors, such as the cost to society when clients use the privilege to break the law. *See, e.g., Developments in the Law, supra* note 23, at 1507–08. For the purposes of this Note, it is only necessary to understand that proponents of the utilitarian rationale assert that the privilege nets a benefit to society.

89. 1 MCCORMICK, *supra* note 47, § 72, at 340; *Developments in the Law, supra* note 23, at 1480; Hill, *supra* note 74, at 177; Morse, *supra* note 74, at 744.

90. SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 120 (1982); *see* Morse, *supra* note 74, at 744.

91. *See* 1 MCCORMICK, *supra* note 47, § 72, at 340; *Developments in the Law, supra* note 23, at 1480–81.

92. *Developments in the Law, supra* note 23, at 1481; *see* 1 MCCORMICK, *supra* note 47, § 72, at 340.

93. *Developments in the Law, supra* note 23, at 1481; Hill, *supra* note 74, at 178.

94. *Developments in the Law, supra* note 23, at 1481.

95. *Id.*; Hill, *supra* note 74, at 178; *cf. In re Agosto*, 553 F. Supp. 1298, 1329 (D. Nev. 1983) (discussing harms caused by the breach of the parent-child privilege).

96. *Developments in the Law, supra* note 23, at 1482; *see* 1 MCCORMICK, *supra* note 47, § 72, at 340.

97. *See, e.g., Fritsch v. Chula Vista*, 187 F.R.D. 614 (S.D. Cal. 1999) (discussing privacy in the context of the patient-therapist privilege); *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 106 F.R.D. 187 (N.D. Ill. 1985) (discussing privacy in the context of the patient-doctor privilege); *In re Agosto*, 553 F. Supp. at 1329 (discussing privacy in the context of the parent-child privilege); *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038 (E.D.N.Y. 1976) (discussing privacy as a factor in a number of privileged relationships).

98. *Hunt v. Blackburn*, 128 U.S. 464 (1888).

founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."⁹⁹ Almost a century later in *Trammel v. United States*,¹⁰⁰ the court offered a similarly strong endorsement of the privilege, stating 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."¹⁰¹ Finally, to complete the compelling utilitarian argument, the Court has highlighted that the attorney-client privilege only protects communication, not the underlying facts.¹⁰² Consequently, "the attorney-client privilege . . . puts the adversary in no worse position than if the communications had never taken place."¹⁰³

In addition to continually affirming the underlying justification for the privilege, the Court has demonstrated its support for the privilege—in arguably its most powerful fashion—in the historic cases *Upjohn Co. v. United States*¹⁰⁴ and *Jaffee v. Redmond*.¹⁰⁵ In both cases, the Court faced a unique context for the application of evidentiary privilege and, in both cases, applied the privilege in an expansive fashion.

In *Upjohn*, the Court addressed contradictory circuit court approaches to determining the identity of the "client" in the legal representation of a company or corporation.¹⁰⁶ *Upjohn* was a pharmaceutical company whose in-house counsel had initiated an internal investigation after discovering that one of its subsidiaries made payments to foreign government officials in order to secure business contracts.¹⁰⁷ The in-house counsel distributed a questionnaire, interviewed the company's employees, and subsequently disclosed the "questionable payments" to the Securities and Exchange Commission and the Internal Revenue Service (IRS).¹⁰⁸ The IRS then issued a summons demanding production of all files relevant to the investigation.¹⁰⁹ The company refused to produce the questionnaires or the attorney's notes from the interviews, claiming that they were protected by the attorney-client privilege and the work-product doctrine.¹¹⁰ The question presented was whether the employees were the corporate client and were

99. *Id.* at 470.

100. 445 U.S. 40 (1980).

101. *Id.* at 51.

102. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981); *City of Philadelphia v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962).

103. *Upjohn*, 449 U.S. at 395; see also *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring) ("Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.").

104. 449 U.S. 383.

105. 518 U.S. 1 (1996).

106. *Upjohn*, 449 U.S. at 386.

107. *Id.*

108. *Id.* at 386–87.

109. *Id.* at 387.

110. *Id.* at 388.

therefore protected by the privilege, or whether the corporate client was limited to those individuals in control of the company (the control group test).¹¹¹

In deciding this question, the court began by emphasizing the virtues of the privilege, stating,

[The attorney-client privilege's] purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy . . . depends upon the lawyer's being fully informed by the client.¹¹²

The court went on to say that in order to properly represent a company, an attorney must obtain information from employees with varying levels of seniority, and must in turn provide legal guidance to employees throughout the company.¹¹³ By limiting the privilege to the company's management, the control group test "frustrates the very purpose of the privilege."¹¹⁴ Furthermore, the control group test yields unpredictable results.¹¹⁵ "An uncertain privilege," said the Court, "is little better than no privilege at all."¹¹⁶ The court rejected the "unpredictable" and "narrow" control group test, and instead held that attorney-employee communication is protected under the attorney-client privilege when the following are true: (1) The communications were made by employees to counsel at the direction of a corporate superior in order for the corporation to secure legal advice; (2) The information needed for counsel to give legal advice was not available from corporate management; (3) The communication concerned matters that were within the scope of the employee's duties; (4) The employees knew that they were communicating with counsel so the corporation could obtain legal advice and; (5) The communication was intended to be kept confidential and was kept confidential.¹¹⁷

In *Jaffee*, the Court addressed the U.S. Court of Appeals for the Seventh Circuit's expansion of evidentiary privilege to include the psychotherapist-patient privilege.¹¹⁸ The case concerned a police officer who had fatally shot a man and had subsequently received counseling from a licensed clinical social worker.¹¹⁹ The administrator of the victim's estate brought a wrongful death suit against the officer and sought access to the social worker's notes during discovery.¹²⁰ The social worker refused, and the trial judge instructed the jury that they could presume that the contents of the

111. *Id.* at 390-92.

112. *Id.* at 389.

113. *Id.* at 390-92.

114. *Id.* at 392.

115. *Id.* at 393.

116. *Id.*

117. GERGACZ, *supra* note 23, § 3.03, at 3-6 to 3-7; see *Upjohn*, 449 U.S. at 394.

118. *Jaffee v. Redmond*, 518 U.S. 1 (1996).

119. *Id.* at 4-5.

120. *Id.* at 5.

notes would have been favorable to plaintiff.¹²¹ The jury awarded plaintiff \$545,000 in damages.¹²² The Seventh Circuit reversed, recognizing a qualified psychotherapist-patient privilege, and remanded for a new trial.¹²³

The *Jaffee* Court reviewed the Seventh Circuit's decision and addressed two pivotal questions: (1) should psychotherapist-patient communication be protected by evidentiary privilege, and, if so (2) should the Court adopt the Seventh Circuit's balancing test, evaluating on a case by case basis the relative importance of the patient's privacy interest and the evidentiary need for disclosure?¹²⁴ The Court not only recognized the psychotherapist-patient privilege, but also expressly rejected the balancing test applied by the Seventh Circuit.¹²⁵ In doing so, the Court strongly rejected an ad hoc evaluation of competing interests and the viability of a qualified privilege. The Court stated,

Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. . . . [I]f the purpose of the privilege is to be served, the participants in the confidential conversation "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."¹²⁶

By emphasizing the importance of both a clear and absolute privilege, the Court established that privilege is highly regarded and should not be qualified, regardless of competing interests.¹²⁷

2. Arguments for Elimination or Strict Construction of the Attorney-Client Privilege

Exemptions from testifying and producing evidence are recognized by all courts.¹²⁸ Exclusionary rules and privileges, however, "contravene the fundamental principle that 'the public . . . has a right to every man's evidence.'"¹²⁹ With this justice-driven principle in mind, legal thinkers and

121. *Id.* at 5–6.

122. *Id.* at 6.

123. *Id.* at 6–7.

124. *Id.* at 3, 17.

125. *Id.* at 9–10, 17–18.

126. *Id.* at 17–18 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

127. *See id.*

128. *Unites States v. Bryan*, 339 U.S. 323, 331 (1950); *see, e.g., United States v. Patane*, 542 U.S. 630, 637 (2004) (stating that the self-incrimination clause of the Fifth Amendment to the U.S. Constitution prohibits compelling a criminal defendant to testify at trial); *Upjohn*, 449 U.S. at 395 (stating that the statements made by employees to the company's counsel "must be protected against compelled disclosure").

129. *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quoting *Bryan*, 339 U.S. at 331); *see also VALIHURA & VALIHURA, supra* note 72, at A-1 ("One of the guiding principles underlying the Federal Rules of Civil Procedure, particularly the discovery rules, is full disclosure of relevant, material information.").

American courts have consistently argued for a strict construction, if not elimination, of the attorney-client privilege.

a. *A Historical Argument To Eliminate the Attorney-Client Privilege*

While legal thinkers have historically defended the attorney-client privilege, there has not been universal support for the privilege. Jeremy Bentham, a world-renowned philosopher and legal critic,¹³⁰ is one example of a respected legal theorist who has articulated several persuasive arguments for why the attorney-client privilege should be abolished.¹³¹

Bentham asserted that the attorney-client privilege should be eliminated for three reasons. First, Bentham argued that the attorney-client privilege harms, rather than benefits, clients and society as a whole.¹³² If an attorney could disclose all communication with a client, innocent clients would have nothing to fear; their communication would not divulge incriminating information.¹³³ On the other hand, the cost to a guilty client is not of grave social concern.¹³⁴ The effect would be merely that a guilty person would not be allowed to concoct a false legal defense or derive the same benefit from legal assistance as an innocent client.¹³⁵ This does not unjustly wrong a guilty party, but rather protects victims and ensures justice by revealing the truth.¹³⁶

Second, the elimination of the attorney-client privilege would bring a “higher tone of morality” to the legal profession.¹³⁷ Under the protection of

130. Jeremy Bentham (1748–1832) was an English philosopher, economist, and theoretical jurist. 2 THE NEW ENCYCLOPEDIA BRITANNICA, *supra* note 75, at 109. He was the earliest and principle proponent of utilitarianism, and he spent much of his life critiquing institutions such as the English legal system. *See id.* at 109–10.

131. *See* 7 BENTHAM, *supra* note 69, at 473–79; *see also* 8 WIGMORE, *supra* note 23, § 2291, at 549 (stating that Bentham stands out as one of only three “eminent names” that have offered strong opposition to the attorney-client privilege).

132. *See* 7 BENTHAM, *supra* note 69, at 473–79.

133. *Id.* at 473.

134. *See id.* at 473–75. As Bentham explains,

[t]o what object is the whole system of penal law directed, if it be not that no man shall have it in his power to flatter himself with the hope of safety, in the event of his engaging in the commission of an act which the law, on account of its supposed mischievousness, has thought fit to prohibit?

Id. at 475.

135. *Id.* at 473.

136. *See id.* at 475, 477. In Bentham’s critique of the attorney-client privilege, he explains a typical policy argument in favor of the privilege and of criminal defendants. The argument emphasizes that even guilty defendants who confess their guilt to their attorneys have a right to a fair trial, to have their guilt clearly established by independent evidence, and to not be run down “like beasts of prey” without fair procedure. *Id.* at 477. Bentham counters this argument by mocking its proponents:

[t]hey speak and act, every now and then, as if they regarded a criminal trial as a sort of game, partly of chance, partly of skill, in which the proper end to be aimed at is, not that the truth may be discovered, but that both parties may have fair play.

Id.

137. *See id.* at 479.

the attorney-client privilege, lawyers effectively become accomplices to criminal acts and injustice:

A rule of law which, in the case of the lawyer, gives an express licence to that wilful concealment of the criminal's guilt, which would have constituted any other person an accessory in the crime, plainly declares that the practice of knowingly engaging one's self as the hired advocate of an unjust cause, is . . . a virtuous practice. But for this implied declaration, the man who in this way hires himself out to do injustice or frustrate justice with his tongue, would be viewed in exactly the same light as he who frustrates justice or does injustice with any other instrument.¹³⁸

Conversely, without an evidentiary privilege, lawyers would be forced to operate as honest advocates rather than adversarial obstacles to justice.¹³⁹

Third, without the attorney-client privilege, there is no concern that an attorney will betray a client's trust by disclosing attorney-client communication.¹⁴⁰ Clients who previously understood that attorney-client communication was privileged will now understand that it is not; whatever is disclosed to an attorney is discoverable.¹⁴¹ A client will divulge information at his own risk, and the attorney will serve justice by freely testifying to her knowledge of the case.¹⁴²

b. *A Modern Criticism of the Attorney-Client Privilege*

Modern-day commentators have built upon Bentham's analysis and asserted additional arguments against the attorney-client privilege. Professor Daniel R. Fischel is a notable example of such a critic.¹⁴³ Fischel calls for the abolition of the attorney-client privilege due to several interesting arguments, namely that the privilege principally benefits attorneys while harming clients and raising the cost of litigation.¹⁴⁴

The attorney-client privilege benefits attorneys by increasing the value of, and demand for, an attorney's services.¹⁴⁵ Because attorney-client communication that primarily concerns legal advice is protected under the privilege, attorneys can serve broad roles for both corporations and individuals.¹⁴⁶ In addition to enabling clients to communicate incriminating information for the purposes of litigation, the attorney-client privilege enables an attorney to provide valuable services relating to taxes,

138. *Id.*

139. *Id.*

140. *See id.* at 473.

141. *Id.*

142. *See id.*

143. *See generally* Fischel, *supra* note 21. Daniel R. Fischel is a Lee and Brena Freeman Professor of Law and Business at the University of Chicago Law School. *Id.* at 1.

144. *See id.* at 3.

145. *See id.* at 5-9.

146. *See id.* at 5-6; *see supra* Part I.A.1.d (providing an explanation for the fourth element of the attorney-client privilege, "for the purpose of seeking, obtaining, or providing legal assistance to the client").

investment banking, financial and estate planning, and investigation, all under the protection of the attorney-client privilege.¹⁴⁷ An illustrative example is when a company considers testing a potentially dangerous product that it manufactures. While the negative results of company-initiated product testing are discoverable, attorney-initiated product testing in “anticipation of litigation” is protected.¹⁴⁸ The privilege creates a “substitution effect,” raising an attorney’s value over other professionals.¹⁴⁹

While the privilege benefits attorneys, Fischel asserts that the privilege does not benefit, and instead harms, clients as a whole.¹⁵⁰ Although the privilege ostensibly helps clients by allowing them to communicate potentially incriminating information to their attorney, the same privilege applies to the client’s adversary.¹⁵¹ Clients pay for a privilege that merely re-levels the playing field.¹⁵² Further, even if one side—say the guilty party—benefits more substantially from the privilege, civil litigation is a zero-sum game.¹⁵³ Perhaps one party will win where they otherwise would lose, but this merely redistributes the same amount of assets and does not benefit the class of clients as a whole.¹⁵⁴

Instead, the privilege harms clients. Because paid advocates utilizing a veil of privilege are understandably viewed with skepticism by the judge or jury, confidentiality penalizes honest parties.¹⁵⁵ “The result resembles a lemons market, where clients with nothing to hide attempt to signal the merit of their case by using attorneys as reputational intermediaries to overcome informational asymmetries between themselves and the decisionmaker.”¹⁵⁶ The difference between low-quality, dishonest clients and high-quality honest clients is marginalized, with honest clients losing out.¹⁵⁷

c. *Courts and Commentators Call for Strict Construction of the Attorney-Client Privilege*

While the majority of legal thinkers have not called for the elimination of the attorney-client privilege,¹⁵⁸ proponents of the privilege such as

147. See Fischel, *supra* note 21, at 5–6.

148. *Id.* at 8.

149. *Id.* at 5–6.

150. See *id.* at 16–17.

151. See *id.* at 16.

152. See *id.* at 16–17.

153. *Id.* at 17.

154. See *id.*

155. See *id.* at 18–19.

156. *Id.* at 19.

157. See *id.*

158. See 8 WIGMORE, *supra* note 23, § 2291, at 549 (stating that Bentham is one of only three “eminent names” in strong opposition to the attorney-client privilege); *Developments in the Law*, *supra* note 23, at 1501 (stating that the privilege is so entrenched and favored that the question is not whether it should exist, but how).

Wigmore recognized the dangers of an expansive privilege.¹⁵⁹ For this reason, Wigmore advocated a strict application of his utilitarian framework.¹⁶⁰ When balancing the "injury" to the attorney-client relationship with the benefits of disclosure, Wigmore only considered "extrinsic policy" concerns in his evaluation.¹⁶¹ Damage to a specific relationship, i.e., the potential dissolution of an attorney-client business arrangement, should not be relevant. Rather, the harm to the general class of relations is the appropriate concern.¹⁶² This position emphasized that only true public policy concerns justify the privilege.

Additionally, despite the assertion that the privilege has no actual negative effect, numerous courts have agreed with Wigmore and held that privilege negatively burdens the search for justice.¹⁶³ Consequently, these courts have stressed that the attorney-client privilege must be applied in the strictest fashion possible.¹⁶⁴ As stated by the Fourth Circuit in *National Labor Relations Board v. Harvey*,¹⁶⁵ "[i]ts benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It is worth preserving for the sake of general policy, but it is nonetheless an obstacle to the investigation of the truth."¹⁶⁶ U.S. courts, though supportive of the privilege,¹⁶⁷ frequently apply the privilege in a strict and narrow fashion.

159. See 8 WIGMORE, *supra* note 23, § 2192, at 70 ("[W]e start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule."); *Developments in the Law*, *supra* note 23, at 1472 ("[Wigmore] was not only the foremost proponent of the traditional justification, but he was also one of the toughest critics of the unrestrained manner in which courts and legislatures tended to apply it.").

160. See, e.g., 8 WIGMORE, *supra* note 23, § 2332, at 642, § 2380a, at 829-30, § 2396, at 878; *Developments in the Law*, *supra* note 23, at 1472.

161. 8 WIGMORE, *supra* note 23, § 2285, at 527.

162. See *Developments in the Law*, *supra* note 23, at 1473. Despite this fact, many courts citing Wigmore have ignored or failed to understand this limitation. See, e.g., *In re Doe*, 711 F.2d 1187, 1193 (2d Cir. 1983) (determining the effects on a particular relationship when applying Wigmore's fourth condition to an asserted psychotherapist-patient privilege); *Zaustinsky v. Univ. of Cal.*, 96 F.R.D. 622, 625 (N.D. Cal. 1983) (contending that Wigmore's utilitarian analysis can be performed only with reference to the specific lawsuit).

163. See, e.g., *United States v. Nixon*, 418 U.S. 683, 710 (1974) ("[E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."); *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting) ("Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."); *United States v. Bryan*, 339 U.S. 323, 331 (1950).

164. See *Fisher v. United States*, 425 U.S. 391, 403 (1976); *Nixon*, 418 U.S. at 710; *Bryan*, 339 U.S. at 331.

165. *NLRB v. Harvey*, 349 F.2d 900 (4th Cir. 1965).

166. *Id.* at 907 (quoting 8 WIGMORE, *supra* note 23, § 2292); see also *Fisher*, 425 U.S. at 403 (stating that "since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose").

167. See *supra* Part I.B.1.b.

4. Empirical Research: Is the Glass Half Empty or Half Full?

Empirical research on the attorney-client privilege and evidence supporting its practical effectiveness are almost nonexistent.¹⁶⁸ Despite this fact, courts and commentators routinely presume the essential nature of strict confidentiality in the American legal system.¹⁶⁹ Two studies do provide insight on how the attorney-client privilege affects the attitude and actions of both attorneys and clients.¹⁷⁰ The question remains how these studies should be interpreted, and whether the glass is half empty or half full.

a. *The Yale Study on Attorney-Client Privilege*

In 1962, the *Yale Law Journal* conducted a study on the importance and effect of the attorney-client privilege. Its primary goal was to compare the privilege afforded to attorneys with the privilege granted to other professions.¹⁷¹ The *Yale Law Journal* conducted surveys of 108 laypersons, 125 lawyers, and between 12 and 51 members of other professions, including psychology and accounting.¹⁷²

The survey revealed considerable confusion concerning privileges in each profession, particularly the attorney-client privilege.¹⁷³ Seventy-one of 108 laypersons believed that attorneys would not disclose confidential matters;¹⁷⁴ however, a significant percentage believed that lawyers, if questioned in court, would be compelled to reveal communicated

168. Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605, 1619 (1986) (stating that there has never been statistical evidence that the attorney-client privilege promotes client disclosure); Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601, 635 (1990); see *Swidler & Berlin v. United States*, 524 U.S. 399, 409 n.4 (1998); GERGACZ, *supra* note 23, § 1.06, at 1-7 (stating that neither behavioral records nor historical studies confirm that the privilege is effective in promoting attorney-client communication); David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 112 (1956) (stating that the justification that confidentiality promotes disclosure is premised on "sheer speculation").

169. Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 376 (1989); see, e.g., *Fisher*, 425 U.S. at 403 ("[I]f the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."); see also GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 89 (Supp. 1986) ("Although there is no empirical evidence of the precise degree to which clients rely on the principle of confidentiality, it is intuitively obvious that lawyers will be better able to gain the trust of clients, to serve them, and to help them obey the law under a requirement of confidentiality that goes beyond mere tradition.").

170. See Zacharias, *supra* note 168, at 635.

171. Zacharias, *supra* note 169, at 377.

172. See Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1261-73 (1962) [hereinafter *Functional Overlap*].

173. See Zacharias, *supra* note 169, at 377.

174. *Functional Overlap*, *supra* note 172, at 1239 n.81.

information.¹⁷⁵ This fact did not alarm participants in the study. Rather, 40 of the 108 participants believed there should be a legal obligation of attorneys to reveal confidential communications in court, and 19 more took no position opposing disclosure.¹⁷⁶

Additionally, the results question whether privilege actually increases client disclosures, a fundamental justification for the attorney-client privilege.¹⁷⁷ "Lawyers, significantly more than laymen, believe the privilege encourages free disclosure to them."¹⁷⁸ Laypersons were almost evenly divided on whether elimination of the attorney-client privilege would deter client disclosures.¹⁷⁹ This figure is particularly compelling when compared to responses for other professions. Seventy percent of laypersons believed a similar privilege existed and was necessary to ensure disclosures to psychiatrists, psychologists, marriage counselors, and social workers,¹⁸⁰ and sixty percent of laypersons believed that a lack of an accountant-client privilege would significantly deter disclosure.¹⁸¹ In other words, a smaller percentage of participants believed privilege induced disclosure in the attorney-client context than in any other profession included in the survey.

b. *The Tompkins County Study on Confidentiality*

In preparation for his *Iowa Law Review* article on confidentiality, Fred C. Zacharias conducted a survey of attorneys and laypersons in Tompkins County, New York.¹⁸² The survey elicited responses to questions about a series of hypothetical disclosure situations and inquired about the degree to which other professions follow confidentiality rules.¹⁸³

The Tompkins County study produced similar results to the Yale study in a number of ways. First, the Tompkins County study uncovered considerable client confusion over the extent of the attorney-client privilege.¹⁸⁴ Approximately 43% of the surveyed clients believed confidentiality was absolute; 25% believed that confidentiality rules allowed more liberal disclosure; and only 32.8% correctly responded that

175. Thirty-two of the 108 laypersons believed the attorneys would disclose, while another twenty-one did not know. *Id.* at 1262.

176. *See id.*

177. *See supra* Part I.B.1.

178. *Functional Overlap*, *supra* note 172, at 1232. Ninety of the 102 responding attorneys thought the privilege helped encourage disclosure, while only fifty-five of ninety-two laypersons agreed. *Id.* at 1232 n.38.

179. *See id.* at 1236 & n.59.

180. Zacharias, *supra* note 169, at 378; *see Functional Overlap*, *supra* note 172, at 1255.

181. Zacharias, *supra* note 169, at 378; *see Functional Overlap*, *supra* note 172, at 1262. Many of the subjects that comprise the sixty percent figure mistakenly believed an accountant-client privilege existed. Zacharias, *supra* note 169, at 378; *see Functional Overlap*, *supra* note 172, at 1262.

182. Zacharias, *supra* note 169, at 380.

183. *Id.* at 379.

184. *See id.* at 383.

lawyers must “usually” maintain confidentiality with certain exceptions.¹⁸⁵ Second, a large majority of clients responded that lawyers are not obligated to, and in fact do not, preserve confidential information more than doctors, psychologists, and psychiatrists; approximately forty percent believed the same for accountants and social workers.¹⁸⁶ Finally, most lawyers thought confidentiality should be retained in its current form, while approximately half of laypersons believed that they would limit disclosure to attorneys if no firm obligation of confidentiality existed.¹⁸⁷

c. Critical Evaluation of the Yale and Tompkins Studies

Before reaching conclusions about the Yale and Tompkins County studies, it is important to recognize the studies’ limitations.¹⁸⁸ The Yale study is limited by its methodology; the study was not tailored to address issues of confidentiality specifically, and it does not assess how clients rely on governing rules to determine what to disclose to an attorney.¹⁸⁹ The Tompkins County study surveyed residents who had exhibited an interest in legal issues by volunteering to serve as mock jurors.¹⁹⁰ “One might therefore surmise that the surveyed laypersons were more legally sophisticated than typical individual clients, but not so educated as business clients one would find in commercial urban litigation.”¹⁹¹ Additionally, both the Yale study and the Tompkins County study surveyed a relatively small sample group. Zacharias, the author of the Tompkins County study, concedes that “[n]either subject pool was large or diverse enough to represent the country as a whole.”¹⁹²

In addition to potential flaws in the Yale study and Tompkins County study methodologies, those who support the attorney-client privilege generally assert that empirical research conclusions are oversimplified and overstated.¹⁹³ It is difficult to accurately gauge how much confidentiality factors into the psyche of both a client and an attorney.¹⁹⁴ It is even more difficult to speculate how behavior would change without the privilege.¹⁹⁵ Finally, while the benefits of the privilege may be difficult to estimate, the

185. *Id.*

186. *Id.* at 384 & n.166.

187. *Id.* at 380.

188. *See id.* at 377 (“The studies’ methodologies are imperfect and their results not definitive.”).

189. *Id.* at 379.

190. *Id.* at 380.

191. *Id.*

192. *Id.* at 379.

193. *See Developments in the Law, supra* note 23, at 1474; Zacharias, *supra* note 169, at 396 (“I would be the first to caution against overreliance on the Tompkins County study. Its sampling was limited, though substantial, and its methodology somewhat unscientific.”).

194. *See Developments in the Law, supra* note 23, at 1474–77.

195. *See id.*

costs of the privilege are similarly hard to assess.¹⁹⁶ "In short, legal decisionmakers face a perhaps unavoidable empirical indeterminacy."¹⁹⁷

II. SHOULD THE ATTORNEY-CLIENT PRIVILEGE PROTECT INFORMATION DISCLOSED TO AN ATTORNEY WITH THE INTENTION THAT THE ATTORNEY DRAFT A DOCUMENT TO BE RELEASED TO THIRD PARTIES?

Part I of this Note provided a basic explanation of the attorney-client privilege in the American legal system. This included the elements of the privilege, the origins of the privilege, and arguments for and against the privilege. Part I also discussed two studies that address both the public perception of the privilege and the privilege's effects. Part II addresses the U.S. federal courts' divergent approaches in applying the attorney-client privilege to communications connected with the preparation of documents intended to be disclosed to a third party.

A split of authority exists regarding whether information disclosed to an attorney with the intention that the attorney draft a document to be released to third parties is protected by the attorney-client privilege.¹⁹⁸ This particular type of communication arguably falls within the attorney-client privilege's grey area. There was a communication, between privileged persons, for the purpose of obtaining legal advice; however, the intention was for the attorney to release the information to a third party. The question, therefore, is whether the intent to have the information communicated to an attorney passed on to a third party can be reconciled with the intent to keep the communication confidential.

A. *The Fourth Circuit Approach: The Intent To Have a Communication with an Attorney Disclosed to a Third Party Negates Any Reasonable Expectation of Confidentiality*

On February 24, 1984, the Fourth Circuit decided *In re Grand Jury Proceedings*.¹⁹⁹ In this case, the petitioner, John Doe, sought a writ of mandamus requiring the reversal of an order of the U.S. District Court for the Southern District of West Virginia directing him to testify regarding his

196. See *id.* at 1477; *supra* notes 86, 87, 102, 103 and accompanying text.

197. *Developments in the Law*, *supra* note 23, at 1474-75.

198. Compare *In re Grand Jury Proceedings*, 727 F.2d 1352, 1355 (4th Cir. 1984), *United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983), *United States v. Bump*, 605 F.2d 548, 550-51 (10th Cir. 1979), *United States v. Pipkins*, 528 F.2d 559, 563 (5th Cir. 1976), and *United States v. Cote*, 456 F.2d 142, 145 n.3 (8th Cir. 1972) (stating that the attorney-client privilege does not attach to information communicated to an attorney with the intention that the attorney release the information to a third party), with *Natta v. Hogan*, 392 F.2d 686, 692 (10th Cir. 1968), *United States v. Willis*, 565 F. Supp. 1186, 1193 (S.D. Iowa 1983), *SEC v. Tex. Int'l Airlines, Inc.*, 29 Fed. R. Serv. 2d (Callaghan) 408, 410 (D.D.C. 1979), *United States v. Schmidt*, 360 F. Supp. 339, 350 n.35 (M.D. Pa. 1973), and *United States v. Schlegel*, 313 F. Supp. 177, 179 (D. Neb. 1970) (holding that the attorney-client privilege protects the parts of the attorney-client communication that were not ultimately disclosed to a third party).

199. 727 F.2d 1352 (4th Cir. 1984).

communication with three individuals named Margolin, Kimball, and Chernack.²⁰⁰ The petitioner claimed the communication was protected by the attorney-client privilege.²⁰¹

In September 1977, Margolin hired the petitioner for legal assistance with a proposed private placement of limited partnership interests in the leasing of coal mining equipment.²⁰² The petitioner met with Margolin and his two partners, Kimball and Chernack, to discuss the preparation of a prospectus to be used to enlist investors.²⁰³ In October 1977, however, Margolin fired the petitioner, and the petitioner had no further contact with the three individuals.²⁰⁴ On May 2, 1983, the petitioner was informed by the Government that he would be subpoenaed to testify before a grand jury regarding the proposed joint venture.²⁰⁵

Margolin subsequently waived the attorney-client privilege with regard to the September 28 conference; however, the petitioner was unable to locate Kimball or Chernack.²⁰⁶ He consequently appeared before the grand jury and asserted the attorney-client privilege for all communication with Kimball and Chernack.²⁰⁷ The U.S. Attorney moved the district court to compel petitioner's testimony, arguing that (1) the petitioner had not acted as an attorney for Kimball and Chernack; (2) communications between the parties were not intended to be kept confidential; and (3) if the two were clients, the crime/fraud exception applied.²⁰⁸ The district court granted the Government's motion on all grounds, and Doe filed a petition for a writ of mandamus in the Fourth Circuit.²⁰⁹

At the outset of its analysis, the Fourth Circuit explained that because the attorney-client privilege impedes the search for truth, "it is not 'favored' by federal courts" and should be "strictly confined within the narrowest possible limits consistent with the logic of its principle."²¹⁰ The court then went on to explain that the intention of confidentiality is the very essence of the attorney-client privilege.²¹¹ When information is given to an attorney to "assist in preparing such prospectus which was to be published to others. . . [t]hat is the critical circumstance, to wit, the absence of any intent that the information was to be kept confidential."²¹² It was irrelevant that the prospectus was never published.²¹³ Because Kimball and Chernack communicated with Petitioner in regard to the creation of a prospectus that

200. *Id.* at 1353.

201. *Id.* at 1354.

202. *Id.* at 1353.

203. *Id.* at 1354.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 1355.

211. *Id.*

212. *Id.* at 1358.

213. *Id.*

would be released to third parties, the attorney-client privilege did not apply.²¹⁴

Subsequently, the Fourth Circuit limited and clarified its holding in *In re Grand Jury* with its decision in (*Under Seal*). (*Under Seal*) concerned a grand jury investigation into the activities of three unnamed persons that were referred to as John Doe, Jane Doe, and Richard Roe.²¹⁵ In March and April of 1984, the grand jury issued two subpoenas to Egbert Jonker, a tax attorney hired by John Doe to prepare a proposed tax ruling for the establishment of a corporation in the Netherlands Antilles.²¹⁶ The grand jury also subpoenaed John Wisiackas and James Pittleman, requesting that the attorneys "produce all records relating to any transactions between the law firm and [John Doe, Jane Doe, and Richard Roe]."²¹⁷ John Doe, Jane Doe, and Richard Roe intervened to quash the subpoenas.²¹⁸

The district court concluded that when Doe communicated with Jonker in the form of tax documents, he did not have the necessary expectation of confidentiality.²¹⁹ As for the communications with Wisiackas and Pittleman, the district court granted the motions to quash in part, but it required the production of fifty-two documents because the information contained in the documents either did not originate from the clients or was not intended by the clients to be kept in confidence.²²⁰

In assessing the district court's rulings, the (*Under Seal*) court analyzed the role of the attorney in the communication in order to determine "when a client intends or assumes that his communication will remain confidential."²²¹ The court explained that while the existence of the attorney-client relationship does not, by itself, lead to a presumption that attorney-client communications are confidential, "a layman does not expect his attorney to routinely reveal all that his client tells him. . . . [W]e must look to the services which the attorney has been employed to provide and determine if those services would reasonably be expected to entail the publication of the clients' communications."²²²

The court distinguished *In re Grand Jury* from the case before it.²²³ In *In re Grand Jury*, the clients decided to publish a prospectus before approaching their attorney, indicating that the attorney had been retained to convey information to third parties.²²⁴ Conversely, certain documents in (*Under Seal*) were communicated to the attorneys in consideration of the

214. *See id.*

215. 748 F.2d 871, 873 n.1 (4th Cir. 1984).

216. *Id.* at 873.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 875.

222. *Id.*; *see supra* note 54 and accompanying text.

223. *Id.*

224. *Id.* at 875; *see In re Grand Jury Proceedings*, 727 F.2d 1352, 1353, 1358 (4th Cir. 1984).

possibility of filing public papers.²²⁵ “Only when the attorney has been authorized to perform services that demonstrate the client’s intent to have his communications published will the client lose the right to assert the privilege as to the subject matter of those communications.”²²⁶ The question whether there is a reasonable intention that a communication will remain confidential is therefore determined by whether the decision had been made to disclose the information prior to communicating with the attorney.²²⁷

B. The Schlegel Approach: Only the Information Disclosed to a Third Party Is Discoverable

Contrary to the Fourth Circuit approach, numerous courts have extended the attorney-client privilege to cover all information not actually published to third parties, even if the information was communicated to an attorney in connection with the preparation of a document to be released to a third party.²²⁸ *United States v. Schlegel* is the leading example of this viewpoint.

In *Schlegel*, the government sought indictment against Willard Schlegel for violation of income tax laws.²²⁹ In seeking the indictment, the government relied on information contained in business summaries created by Schlegel and given to his tax attorney, Jay L. Dunlap.²³⁰ Schlegel moved to have this evidence declared inadmissible at trial in the event of an indictment.²³¹ Schlegel contended that the communication was protected by the attorney-client privilege, while the government asserted that information was communicated for the purpose of creating a tax return and therefore did not have the requisite intention of confidentiality.²³²

In analyzing these arguments, the *Schlegel* court recognized that some information conveyed to a tax attorney would be disclosed to the government upon the filing of a tax return.²³³ Nevertheless, the court concluded that this factor does not eliminate a client’s reasonable intention of confidentiality for the communication:

[A] more realistic rule would be that the client intends that only as much of the information will be conveyed to the government as the attorney

225. *United States v. (Under Seal)*, 748 F.2d 871, 875 (4th Cir. 1984).

226. *Id.* at 875–76.

227. *Id.*; see also 1 EPSTEIN, *supra* note 27, at 249, 253 (stating that “the matters placed in the drafts of documents are discoverable because they were intended at their inception to be made public,” and that courts that hold otherwise confound the finding of no waiver with a reasonable expectation of confidentiality).

228. *E.g.*, *Schenet v. Anderson*, 678 F. Supp. 1280, 1283 (E.D. Mich. 1988); *United States v. Willis*, 565 F. Supp. 1186, 1193 (S.D. Iowa 1983); *SEC v. Tex. Int’l Air-lines, Inc.*, 29 Fed R. Serv. 2d (Callaghan) 408, 410 (D.D.C. 1979); *United States v. Schmidt*, 360 F. Supp. 339, 350 n.35 (M.D. Pa. 1973); *United States v. Schlegel*, 313 F. Supp. 177, 179 (D. Neb. 1970).

229. 313 F. Supp. at 178.

230. *See id.*

231. *Id.*

232. *Id.* at 178–79.

233. *See id.* at 179 (citing *United States v. Merrell*, 303 F. Supp. 490 (N.D.N.Y. 1969)).

concludes should be, and ultimately is, sent to the government. . . . The fact that the client has relinquished to his attorney the making of the decision of what needs to be included within the tax return should not enlarge his intent or decrease the scope of the privilege.²³⁴

In addition to the fact that a client may reasonably intend her communication to be confidential, the court added that this holding is consistent with the purpose of the attorney-client privilege.²³⁵ By affording the client free communication with her attorney regarding what to disclose to a third party, effective legal advice will be possible.²³⁶ Conversely, if all information communicated lost its confidential status because eventual disclosure was intended, a client would withhold information, and “the very one professionally capable of evaluating information, could be of no help in evaluating it, because he would not receive it.”²³⁷ Consequently, the *Schlegel* court applied the privilege to all information not incorporated in the final draft.²³⁸

Recently, in *In re New York Renu with Moistureloc Product*,²³⁹ Special Master Daniel Capra chose to apply the *Schlegel* approach. Special Master Capra disagreed with the Fourth Circuit approach because it “does not provide protection in the more nuanced situation in which the client is going to make a public disclosure but submits it to the lawyer in order to determine whether the final form is consistent with the client’s legal interest.”²⁴⁰ Because this is a situation where a client should be able to seek legal advice, the Fourth Circuit approach “is contrary to the underlying principles of the attorney-client privilege under New York law.”²⁴¹

234. *Id.*; see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 71 reporter’s note cmt. d (2000) (stating that “in the typical situation of a lawyer and client exchanging drafts of a communication ultimately made to a nonprivileged person, the otherwise confidential drafts of the published document remain privileged.” (citing *Kobluk v. Univ. of Minn.*, 574 N.W.2d 436 (Minn. 1998))); 1 RICE, *supra* note 20, § 5:12, at 5-137 to 5-141 (stating that the “ultimate intended use” test employed by the U.S. Court of Appeals for the Fourth Circuit incorrectly denies the privilege to a client that may have reasonable expectation of confidentiality and privacy); Timothy P. Glynn, *One Privilege To Rule Them All? Some Post-Sarbanes-Oxley and Other Reflections on a Federally Codified Attorney-Client Privilege*, 38 LOY. L.A. L. REV. 597, 623 (2004) (stating that the Fourth Circuit continues to “cling to the erroneous view that the client’s intent to disclose the final version of a document means that the privilege never attaches” (citing *In re Grand Jury Proceedings*, 727 F.2d 1352, 1358 (4th Cir. 1984); *United States v. (Under Seal)*, 748 F.2d 871, 874-76 (4th Cir. 1984); 1 RICE, *supra* note 20, § 5:13)).

235. *Schlegel*, 313 F. Supp. at 179; see also *Schenet v. Anderson*, 678 F. Supp. 1280, 1283 (E.D. Mich. 1988) (holding that “the *Schlegel* rule encourages clients to disclose information freely to their attorneys, and thus is most consistent with the purpose of the attorney-client privilege”).

236. *Schlegel*, 313 F. Supp. at 179.

237. *Id.*

238. *Id.* at 179-80.

239. *In re New York Renu with Moistureloc Product*, No. MDL 1785, CA 2:06-MN-77777-DCN, 2008 WL 2338552 (D.S.C. May 8, 2008).

240. *Id.* at *5.

241. *Id.*

Special Master Capra did recognize that the *Schlegel* approach could be expensive.²⁴² Because the privilege only protected the information not eventually disclosed in the final document, the prior drafts were discoverable.²⁴³ Each draft was redacted, line-by-line, of any information not included in the final draft.²⁴⁴ “Arguably the costs of a line-by-line redaction might be considerable if the case involves hundreds of drafts.”²⁴⁵ Nevertheless, Special Master Capra concluded that the *Schlegel* approach is most consistent with the attorney-client privilege and therefore is the proper test.²⁴⁶

III. THE ELEMENTS OF THE ATTORNEY-CLIENT PRIVILEGE, PUBLIC POLICY, AND ECONOMICS CALL FOR A STRICT APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE

Part II of this Note highlighted the divergent approach of U.S. federal courts in the application of the attorney-client privilege to communications connected with the preparation of documents intended to be disclosed to a third party. Part III will discuss these decisions, as well as the unique nature of the attorney-client privilege, in an effort to determine how the attorney-client privilege should be applied.

The attorney-client privilege is a fundamental element of the U.S. legal system with numerous presumed beneficial effects.²⁴⁷ The privilege is consequently well-entrenched, with centuries of common-law development and support.²⁴⁸ On the other hand, truth and justice have paramount importance in a well-functioning society. How does one balance these seemingly irreconcilable tenets?

Historically, the attorney-client privilege has been the victor in this perpetual conflict. Legal thinkers have championed the privilege for encouraging attorney-client communication, thereby promoting law-abiding behavior from the client and ensuring optimal legal representation from the attorney.²⁴⁹ More importantly, the Supreme Court has consistently endorsed these attorney-client privilege justifications.²⁵⁰ Most recently, in *Upjohn* and *Jaffee*, the Court expanded the scope of the privilege and

242. *Id.* at *6.

243. *Id.*

244. *Id.*; see also 1 EPSTEIN, *supra* note 27, at 257 (“When confidential communications are included in public documents . . . redaction will be applied to protect undisclosed client communications.”). But see 1 RICE, *supra* note 20, § 5:12, at 5-134 (stating that information in the draft that was included in the document released to a third party should remain confidential).

245. *Renu*, 2008 WL 2338552, at *6; see also *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 268 (2004) (Breyer, J., dissenting) (stating that discovery in general is both costly and time consuming, and that threats of cost and delay can force parties to settle).

246. *Renu*, 2008 WL 2338552, at *6.

247. See *supra* Part I.B.1.

248. See *supra* Part I.B.1.b.

249. See *supra* Part I.B.1.a.

250. See *supra* Part I.B.1.b.

emphasized that privilege must be absolute rather than qualified.²⁵¹ However, as poignantly stated by Justice Felix Frankfurter in his dissenting opinion in *Elkins v. United States*,²⁵² privilege must be accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."²⁵³ In concluding that communications should be deemed privileged and declared inadmissible in court, a greater public good must be achieved. Public policy is the sole justification for the attorney-client privilege.²⁵⁴

Unfortunately, the ostensibly strong public policy foundation for the attorney-client privilege appears to be based on conjecture and assumption rather than real world experience and statistical evidence.²⁵⁵ This recognition, as well as persuasive arguments that the privilege primarily benefits attorneys while harming the public, calls for a reanalysis of the rationale and scope of the privilege. In the meantime, these issues should be considered when addressing the application of the attorney-client privilege to difficult and uncertain situations.

The application of the attorney-client privilege to information disclosed to an attorney with the intention that the attorney draft a document to be released to a third party is one example of a difficult and uncertain situation.²⁵⁶ Despite the legitimate position of both sides in this debate, a finding that no privilege should attach is most consistent with the elements of the attorney-client privilege. Perhaps more importantly, because the correct resolution to this conflict is not certain, ancillary issues should be considered. These include the justification and nature of the privilege, as well as the practicality of a rule that would apply the privilege compared to one that would not. The narrow approach of the Fourth Circuit in (*Under Seal*) is preferred because statistical evidence fails to justify the attorney-client privilege, because there are additional public policy considerations, and because of the potential economic impracticability of the *Schlegel* court's application of the attorney-client privilege.

A. The Confidentiality Requirement

A reasonable expectation of confidentiality is an essential element of the attorney-client privilege that must be present in order to warrant evidentiary privilege.²⁵⁷ This requirement is not satisfied when a client discloses information to an attorney with the intention that the attorney draft a document to be released to third parties.²⁵⁸ While the average attorney-

251. *Id.*

252. 364 U.S. 206 (1960).

253. *Id.* at 234 (Frankfurter, J., dissenting).

254. *See supra* Part I.B.1.

255. *See supra* Part I.B.3.

256. *See supra* Part II.

257. *See supra* Part I.A.1.c.

258. *See supra* Part II.A.

client communication concerning matters of legal representation is presumed to be in confidence and privileged,²⁵⁹ this scenario is not a typical attorney-client communication. As explained by the Fourth Circuit in (*Under Seal*), the dispositive factor in this dispute is that the client has affirmatively decided to communicate information to a third party prior to communicating with her attorney.²⁶⁰ It is logical to conclude that a client cannot reasonably expect that a communication is in confidence while simultaneously expecting the information communicated to be released to a third party.²⁶¹ Without a reasonable expectation of confidentiality, the attorney-client privilege cannot attach.²⁶²

Admittedly, this is a narrow application of the attorney-client privilege in a difficult situation. (*Under Seal*)²⁶³ and *Schlegel*²⁶⁴ demonstrate that this dispute is not about clients who utilize an attorney merely as a conduit for information.²⁶⁵ The clients in (*Under Seal*) and *Schlegel* sought legal advice when communicating with their attorney.²⁶⁶ Further, *Renu* correctly noted that denying privilege in this scenario would not protect the client that has chosen to disclose information but seeks legal advice concerning the disclosure's final form.²⁶⁷ Nevertheless, both the Supreme Court and proponents of the privilege, such as Wigmore, have emphasized that the privilege should be construed strictly.²⁶⁸ The attorney-client privilege does not attach merely because a client seeks legal guidance and desires confidentiality.²⁶⁹ The client must have a reasonable expectation of confidentiality.²⁷⁰ When a client has decided to release information to a third party prior to communicating to her attorney, this reasonable expectation does not appear to be present. Nevertheless, because the

259. See *supra* note 49 and accompanying text.

260. See *United States v. (Under Seal)*, 748 F.2d 871, 875–76 (4th Cir. 1984).

261. See *id.*; 1 EPSTEIN, *supra* note 27, at 249 (“In theory, the matters placed in the draft documents are discoverable because they were intended at their inception to be made public.”).

262. See *supra* Part I.A.1.c.

263. See *supra* Part II.A.

264. See *supra* Part II.B.

265. See *supra* Part II; *supra* notes 55, 56 and accompanying text; see also, e.g., *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991); *McKay v. Comm’r*, 886 F.2d 1237, 1238 (9th Cir. 1989).

266. See (*Under Seal*), 748 F.2d at 873 (stating that the client hired his attorney to assist in the establishment of a corporation); *United States v. Schlegel*, 313 F. Supp. 177, 178 (D. Neb. 1970).

267. *In re New York Renu with Moistureloc Prod. Liab. Litig.*, No. MDL 1785, CA 2:06-MN-7777-DCN, 2008 WL 2338552, at *5 (D.S.C. May 8, 2008) (stating that the client communicated with the attorney for the purposes of legal assistance with tax filings).

268. See *supra* Part I.B.2.c.

269. See *supra* Part I.A.1.c. *In re New York Renu with Moistureloc Product* did not hold that the attorney-client privilege applied merely because the client sought legal advice and desired confidentiality. See *Renu*, 2008 WL 2338552, at *5. The court did hold that the attorney-client privilege should protect such a situation under New York law. *Id.*

270. See *supra* Part I.A.1.c.

question is difficult and the answer a close call,²⁷¹ it is necessary to assess additional factors to help determine whether the attorney-client privilege should attach.

B. *Relevant Considerations in Uncertain Situations*

When assessing attorney-client privilege claims, courts frequently frame their analysis with overarching policy considerations.²⁷² This is particularly true for borderline questions such as when a client discloses information to an attorney with the intention that the attorney draft a document to be released to a third party. When addressing this question, the *Schlegel* court looked to the purpose of the attorney-client privilege to help determine whether the privilege should attach.²⁷³ Because a more expansive privilege would further promote free attorney-client communication, the *Schlegel* court held that the drafts should be protected under the rationale of the attorney-client privilege.²⁷⁴ Conversely, the Fourth Circuit in *In re Grand Jury Proceedings* analyzed the question of drafts through a narrow lens, explaining that the attorney-client privilege "is not 'favored' by federal courts,"²⁷⁵ and should be "strictly confined within the narrowest possible limits consistent with the logic of its principle."²⁷⁶ This strict perspective led the Fourth Circuit to conclude that the attorney-client privilege should not attach to the drafts at issue.²⁷⁷ Both courts were correct in their analysis. It was their starting point—the *Schlegel* court concentrating on the goal of the privilege and the Fourth Circuit emphasizing that privilege is an exception that should be strictly construed—that determined each court's holding.

The Fourth Circuit's strict application of the attorney-client privilege is preferable. By determining that a more expansive privilege would better serve the goals of the attorney-client privilege, the *Schlegel* court relied on three questionable assumptions: (1) that the attorney-client privilege actually accomplishes its intended purpose; (2) that because a broader privilege would further encourage communication, an expansive application of the privilege is beneficial to society; and (3) that a line-by-line redaction of material not included in a final draft is economically practical. However, attorney-client privilege justifications are statistically unsubstantiated and, therefore, suspect. Additional theories on the effects of the attorney-client privilege exist and should be afforded due consideration. Moreover, the

271. Despite the fact that a client has decided to release information to a third party, it is arguably logical that she can communicate confidential information to her attorney with the intention that the attorney will make the final decision as to what should be kept confidential and what should be released. See *supra* Part II.B.

272. See *supra* Parts I.B.1.b, I.B.2.C, II.

273. *United States v. Schlegel*, 313 F. Supp. 177, 179 (D. Neb. 1970).

274. *Id.*

275. *In re Grand Jury Proceedings*, 727 F.2d 1352, 1355 (4th Cir. 1984) (citing *Herbert v. Lando*, 441 U.S. 153, 175 (1979)).

276. *Id.* (quoting *In re Grand Jury Investigation*, 599 F.2d 1224, 1235 (3d Cir. 1979)).

277. See *id.* at 1358.

Schlegel court's application of the attorney-client privilege may be economically impracticable. Therefore, courts should narrowly apply the attorney-client privilege when a client discloses information to an attorney with the intention that the attorney draft a document to be released to a third party.

1. Attorney-Client Privilege Justifications Are Unsubstantiated and Questionable

The attorney-client privilege is rooted in the belief that only through privilege will clients communicate openly with their attorneys.²⁷⁸ This belief is plausible and almost certainly accurately reflects some attorney-client relationships. Whether this principle is true for the average client, however, is far from certain.²⁷⁹ The limited statistical evidence that exists today suggests that the attorney-client privilege is not essential to the attorney-client relationship for a significant percentage of clients and that attorney-client privilege justifications do not accurately reflect the real world.²⁸⁰ Furthermore, theorists have persuasively questioned whether the privilege, regardless of effectiveness, actually benefits clients and society as a whole.²⁸¹ These studies and critiques of the attorney-client privilege call for a reanalysis of whether the privilege functions properly and is beneficial to the American legal system and the American people. In the meantime, because of the tenuous foundation for the attorney-client privilege, the privilege should be applied narrowly in uncertain situations.

a. *Statistical Evidence Demonstrates That Many Clients Neither Understand nor Rely on the Attorney-Client Privilege*

To justify the attorney-client privilege, clients must understand the privilege and rely on its protections when communicating with their attorneys.²⁸² Without understanding and reliance, inhibiting the search for truth is unnecessary and therefore unwarranted.²⁸³ Statistical evidence, though sparse and methodologically limited, suggests that a substantial portion of the public neither understands nor relies on the privilege.²⁸⁴

First, both the Yale study and the Tompkins County study found considerable confusion among laypersons as to the application and extent of

278. See *supra* Part I.B.1.

279. See *supra* Part I.B.3.

280. *Id.*

281. See *supra* Part I.B.2.a–b.

282. See *supra* notes 75–88 and accompanying text; see also, e.g., *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (stating that the privilege is necessary to encourage free communication between attorney and client).

283. See *supra* Part I.B.1.a; see also, e.g., *Fisher v. United States*, 425 U.S. 391, 403 (1976) (stating that “since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose”).

284. See *supra* Part I.B.3.

the attorney-client privilege.²⁸⁵ According to the Yale Study, a significant percentage of participants believed that lawyers could be compelled to testify in court.²⁸⁶ The Tompkins study similarly found that twenty-five percent of participants believed that confidentiality rules allowed more liberal disclosure than the law actually dictates.²⁸⁷ Additionally, a large majority of the Tompkins County study participants inaccurately believed that lawyers are not required to protect confidential information more than doctors, and forty percent believed the same for accountants.²⁸⁸ This evidence suggests that a substantial percentage of clients do not understand the extent of the privilege. If clients are in fact relying on the attorney-client privilege, many are relying on a less stringent privilege than actually exists.

In addition to not accurately understanding the privilege, a significant percentage of participants in the two studies do not appear to rely on the privilege. According to the Yale study, laypersons were equally divided on whether elimination of the attorney-client privilege would deter client disclosures.²⁸⁹ Participants found confidentiality to be more important to disclosure in all other professions in the survey, including accounting, for which no privilege exists.²⁹⁰ The Tompkins County study similarly found that only half of laypersons believed they would limit disclosure to attorneys if no firm obligation of confidentiality existed.²⁹¹ These findings, though limited,²⁹² suggest that the attorney-client privilege is not necessary for free disclosure, optimal legal representation, and law-abiding behavior for a significant percentage of clients.

b. The Attorney-Client Privilege May Do More Harm Than Good

In addition to statistical evidence that challenges the beneficial effects of the attorney-client privilege, the privilege likely has unintended and undesirable effects as well. Despite the dominance of Wigmore's traditional perspective and justification of the attorney-client privilege²⁹³ in American courts and society,²⁹⁴ critics such as Jeremy Bentham and Professor Fischel credibly challenge whether the attorney-client privilege actually benefits clients and society as a whole.²⁹⁵ By positing that the attorney-client privilege harms rather than protects clients, Bentham and

285. *See supra* notes 173–76 and accompanying text; *supra* notes 184–86 and accompanying text.

286. *See supra* note 175 and accompanying text.

287. *See supra* note 185 and accompanying text.

288. *See supra* note 186 and accompanying text.

289. *See supra* notes 178–79 and accompanying text.

290. *See supra* notes 180–81 and accompanying text.

291. *See supra* note 187.

292. *See supra* Part I.B.3.c.

293. *See supra* notes 75–88 and accompanying text.

294. *See supra* Part I.B.1.b; *see also supra* Part I.B.2.c.

295. *See supra* Part I.B.2.a–b.

Fischel persuasively challenge the utilitarian justification for the attorney-client privilege and call for the privilege's abolishment.²⁹⁶

Bentham's nineteenth-century criticism of the attorney-client privilege rests on the assertion that honesty will benefit attorneys and clients, and therefore society as well.²⁹⁷ With the attorney-client privilege in effect, deceitful clients are awarded with the ability to concoct a dishonest legal strategy.²⁹⁸ Attorneys are complicit in the deception, degrading the individual attorney and the profession as a whole.²⁹⁹ The result is a legal system where the devious behavior of attorneys and clients is protected and encouraged.³⁰⁰ Alternatively, without the attorney-client privilege, both the honest client and the attorney are free to demonstrate that they have nothing to hide.³⁰¹ The truth will be uncovered, and justice will be served.

Bentham's portrayal of attorneys and clients is admittedly oversimplified. It is flawed to understand the legal system as a black and white struggle between deceitful clients and attorneys and honest parties who merely want to tell the truth. Nevertheless, Bentham's assertions are both provocative and compelling. Clients with the most to hide appear to benefit from the privilege most, while victims or honest parties benefit little.³⁰² The effect is the leveling of the playing field between those who should win a legal dispute and those who should lose.³⁰³

Fischel builds upon Bentham's critique with a present-day effects analysis of the attorney-client privilege.³⁰⁴ Fischel persuasively argues that while the attorney-client privilege benefits attorneys by increasing the demand for their services, it harms clients by increasing discovery costs and by preventing honest parties from differentiating themselves from dishonest adversaries.³⁰⁵ As previously articulated by Bentham, the privilege levels the playing field between the truthful and the deceitful and prevents courts from ascertaining the truth and delivering justice.³⁰⁶ Further, due to the zero-sum nature of civil litigation, the privilege at best redistributes the same asset pool.³⁰⁷ While clients pay more for the privilege, clients as a whole do not gain financially.³⁰⁸

296. *See supra* Part I.B.2.a–b.

297. *See supra* Part I.B.2.a.

298. *See supra* note 135 and accompanying text.

299. *See supra* notes 137–39 and accompanying text.

300. *See supra* notes 132–39 and accompanying text.

301. *See id.*

302. *See supra* notes 132–36 and accompanying text.

303. *Id.*

304. *See supra* Part I.B.2.b.

305. *See id.*

306. *See supra* notes 155–57 and accompanying text.

307. *See supra* notes 153–54 and accompanying text.

308. *See supra* notes 153–54 and accompanying text.

c. *Statistical Evidence and Critiques of the Attorney-Client Privilege Seriously Question the Privilege's Position in the American Legal System*

The *Yale Law Journal* and Tompkins County studies, as well as the arguments of Bentham and Fischel, raise profound questions about the true nature and effect of the attorney-client privilege. They do not, however, conclusively refute the traditional justifications for the attorney-client privilege, nor do they require an elimination of the privilege. Instead, they suggest that the conventional wisdom—that the attorney-client privilege is necessary for free communication between attorney and client, and that the privilege passes Wigmore's utilitarian analysis—is potentially incorrect and requires further investigation. This reanalysis of the attorney-client privilege should, though most likely will not, take place soon. In the meantime, the uncertainty surrounding the attorney-client privilege should be considered when deciding whether the privilege should apply in borderline situations. Because the privilege contravenes normal principles of discovery and justice, and because its justifications are suspect, borderline scenarios such as when information is disclosed to an attorney with the intention that the attorney draft a document to be released to third parties should not be afforded the privilege.

2. The *Schlegel* Approach Is Economically Impractical

A second consideration relevant in resolving an uncertain application of the attorney-client privilege is the economic practicality of the potential resolutions. Few issues arise more frequently in civil litigation than questions of attorney-client privilege.³⁰⁹ Furthermore, discovery and discovery-related proceedings, particularly in the electronic age, are extremely expensive and time consuming.³¹⁰ The economic impracticality of the *Schlegel* approach, and the resulting opportunity for discovery abuse, are additional reasons to adopt the strict application of the attorney-client privilege.

As explained in *Renu*, the *Schlegel* approach can be both expensive and time consuming.³¹¹ All prior drafts of a released document remain discoverable; however, the rule requires a line-by-line redaction of any information not included in the final document.³¹² The cost of this redaction could be substantial for both the parties involved and the courts, particularly if there are a large number of drafts.³¹³ Additionally, this

309. See *supra* note 27 and accompanying text.

310. See, e.g., *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 268 (2004) (Breyer, J., dissenting) (stating that discovery is both costly and time-consuming, and that threats of cost and delay can force parties to settle).

311. *In re New York Renu with Moistureloc Prod. Liab. Litig.*, No. MDL 1785, CA 2:06-MN-77777-DCN, 2008 WL 2338552, at *6 (D.S.C. May 8, 2008).

312. *Id.*

313. *Id.* ("Arguably the costs of a line-by-line redaction might be considerable if the case involves hundreds of drafts.")

approach opens the door for discovery abuse, as the parties could disagree over the redaction process and whether specific issues were disclosed in the final draft.

The Fourth Circuit approach, on the other hand, employs a clear standard for attachment of the privilege.³¹⁴ If a client created a draft of a document with the intention of releasing it to a third party, the privilege does not attach, and all drafts are discoverable.³¹⁵ If a client did not make this affirmative decision and instead has a reasonable expectation of confidentiality, the privilege attaches to the drafts.³¹⁶ This straightforward approach presents an economically practical rule in our increasingly expensive justice system. Economic practicality is an important additional benefit of a narrow application of the attorney-client privilege to information disclosed to an attorney with the intention that the attorney draft a document to be released to third parties.

CONCLUSION

The attorney-client privilege is a well-respected and entrenched element of the U.S. legal system. Its rationale is logical in theory. Unfortunately, the privilege's effects and use in the real world do not appear to conform to the privilege's stated purpose. The limited studies that address clients' perceptions of the privilege show a significant percentage of Americans neither understand the scope of the privilege nor rely on the privilege when communicating with attorneys. Additionally, legal thinkers persuasively argue that the privilege principally benefits attorneys and dishonest clients while harming honest clients and society as a whole. The justice system would benefit from a reanalysis of the privilege. In the meantime, the privilege should be applied narrowly in uncertain situations such as when information is disclosed to an attorney with the intention that the attorney draft a document to be released to third parties.

314. See *United States v. (Under Seal)*, 748 F.2d 871, 875–76 (4th Cir. 1984).

315. *Id.*

316. *Id.*

Notes & Observations