THE INDISPENSABLE ADVISOR: WHY COMMUNICATIONS WITH CERTAIN NON-PARTIES SHOULD FALL WITHIN THE ATTORNEY-CLIENT PRIVILEGE

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I. INTRODUCTION

The Supreme Court has recognized the attorney-client privilege as the "oldest of the privileges for confidential communications known to the common law . . . [and] its purpose [as] . . . encourag[ing] full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[1] In its purest form, it is a privilege from disclosure of any confidential communications made between an attorney and his client for the purposes of rendering legal advice.[2] However, in the modern legal context, determining to whom the privilege extends is much more complicated, and is especially complex when attempting to determine who is the "client" in the corporate and business contexts.[3]

There is a current lack of clarity on how far the attorney-client privilege will extend to non-party advisors, third party consultants, and other individuals who may be intimately connected to a business or transaction, but are not clients of an attorney or employees of a client. This can hamper an attorney attempting to render the best possible legal advice to a client on numerous complicated business matters. Therefore, attorneys may be overly cautious in whom they speak with before advising clients for fear of those communications becoming the subject of

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1. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).
2. 8 J. WIGMORE, WIGMORE ON EVIDENCE § 2290 (McNaughton rev. ed. 1961).
3. A brief discussion of the history of the attorney-client privilege as it pertains to employees of a corporation can be found *infra* Part III.A. The current state of the federal attorney-client privilege as it applies to agents and employees is discussed *infra* Parts II-III, and the Texas attorney-client privilege is discussed *infra* Parts II-IV.

discovery in future litigation. This is an issue that affects almost all legal advice rendered to a business or corporate client.

A. *Hypothetical*

The problem of defining how far the attorney-client privilege should extend to non-parties may be more easily understood through the use of a hypothetical situation. A good example is in the context of representing a client who is a commercial real estate developer.

1. The Situation

Assume an attorney has a client, Mr. Developer. Mr. Developer is the principal of an LLC called Development LLC. Development LLC is the entity through which Mr. Developer conducts most of his development activities. Mr. Developer, not Development LLC, is the attorney's client.

Development LLC has one employee, an MBA who works as Mr. Developer's "right hand man," named Mr. Right. Mr. Right handles all business affairs for Mr. Developer, including managing assets, meeting with clients, negotiating leases, accounting, drafting press releases, and generally advising Mr. Developer on other decisions regarding Development LLC.

Additionally, Mr. Developer's father-in-law, Mr. Inlaw, shares office space with Mr. Developer. He is neither an employee of Development LLC, nor does he represent himself as an agent or representative of Development LLC. Mr. Inlaw, however, has spent his entire career in the real estate development business and often advises both Developer and Mr. Right on their business decisions regarding Development LLC.[4]

Mr. Developer begins development of a new shopping center. He creates a new LLC, Shopping Center LLC, in which he (not Development LLC) is the managing partner, and several investors are limited equity partners. Due to an economic downturn and an inability to get suitable construction financing, the shopping center development is never finished. Mr. Developer seeks his attorney's advice regarding the best strategy

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4. This type of informal arrangement between commercial real estate developers is not uncommon. Because of the nature of the business, a development company may often consist of a single individual or only a few employees. Because of this, it is not uncommon to find multiple "companies" sharing office space. Also, it is not uncommon for each development project to be incorporated as its own LLC with individual members of the development company serving as partners in the development project. *See, e.g.*, Marshall v. Quinn-L Equities, Inc., 704 F. Supp. 1384, 1386 (N.D. Tex. 1988) (describing the creation of 26 separate LLCs by one development company where each LLC was a different development).

to dissolve Shopping Center LLC because he is concerned he may be sued by other members of Shopping Center LLC or third party lien holders.

The attorney, in the course of her discussions with Mr. Developer, learns that although Development LCC was not a partner in Shopping Center LLC, Mr. Developer relied heavily on Mr. Right's advice when structuring the LLC. Mr. Right was involved in varying capacities throughout the development process, such as assisting Mr. Developer with management of finances, project management, and permitting.

Additionally, Mr. Inlaw, while never holding himself out as an agent or employee of Mr. Developer, has given Mr. Developer extensive advice on his predicament and has even attended some meetings with the partners of Shopping Center LLC to advise Mr. Developer on how to proceed.

Finally, in an effort to aid Mr. Developer further, Mr. Right and Mr. Inlaw have gotten together and taken some steps to "help" Mr. Developer resolve his predicament. However, based on her discussions with Mr. Developer, the attorney cannot determine exactly what Mr. Right and Mr. Inlaw have done. Even Mr. Developer appears unclear on all of the details; he simply knows they have been "helping get this all sorted out in a way that makes the most sense for me."

2. The Problem

In the hypothetical, the attorney may need to speak with either Mr. Right or Mr. Inlaw in order to fully understand Mr. Developer's situation and render the best legal advice to him.[5] However, these conversations with Mr. Right and Mr. Inlaw will most likely require her to discuss information she received from Mr. Developer. However, because neither Mr. Right nor Mr. Inlaw are clients of the attorney or employees of Mr. Developer, any discussions she has with them create the possibility of waiving the attorney-client privilege on the matter discussed.[6]

Therefore, to render the best possible advice to her client, the attorney needs to at least be able to argue that her communications with Mr. Right and Mr. Inlaw are protected. To this end, this paper argues that Mr. Right and Mr. Inlaw should be considered "indispensable advisors": individuals who have information necessary for the attorney to render the best possible

5. *See infra* Part II.A and note 14.

6. *See* discussion *infra* Part II.

advice to her client, but who are not currently covered by any privilege.

B. *Who is an "Indispensable Advisor"?*

For the purposes of this paper, the indispensable advisor is someone who does not fall under the privilege based on either the employee or the agent definition as described below, but to whom the privilege should extend under the same logic. The best logical extension defining who should be covered by the privilege is expressed by the Eighth Circuit as anyone who possesses a "significant relationship to the [client] and the [client's] involvement in the transaction that is the subject of legal services."[7] The key difference between the "indispensable advisor" theory espoused in this paper and the general extension of attorney-client privilege to an agent is that the agency approach focuses on the relationship of the client and the agent, while the "indispensable advisor" analysis will focus on the nature of the information and its usefulness to the attorney regardless of who possess it. The following sections will describe the circumstances under which courts have extended the attorney-client privilege, and how these cases can be logically extended to "indispensable advisors" who have a significant relationship with the client and a transaction that is the subject of the litigation.

C. *Overview*

The Eight Circuit has expressed that the attorney-client privilege should extend to non-employees who possess a "significant relationship to the [client] and the [client's] involvement in the transaction that is the subject of legal services."[8] This concept has started to gain some traction in the federal courts on the theory that sometimes an attorney will have to discuss privileged matters with non-clients in order to fully understand the client's situation and render reliable and accurate advice.[9] Courts have extended the privilege to accountants and consultants hired by either an attorney or a client, as long as the accountant is acting as a "translator" to help the attorney understand the client's financial matters, and only if the client is seeking "legal" and not "business" advice from the

7. *In re* Bieter Co., 16 F.3d 929, 938 (8th Cir. 1994).

8. *Id.*

9. *See* Upjohn Co. v. United States, 449 U.S. 383, 389-91 (1981); *see also infra* Part II.

attorney.[10] However, there is no bright line rule on how far the privilege extends. Neither the Texas Supreme Court nor the Fifth Circuit has ruled on the extension of privilege to non-parties, like those described in the hypothetical, with whom an attorney must communicate in order to render the best possible legal advice to her client.

This paper argues for the extension of the attorney-client privilege to indispensable advisors in the situation where there is no guiding common law doctrine. This is especially important because the manner in which the court decides this issue determines how an attorney can go about obtaining information while representing a business client.

Section II will briefly discuss the current state of the attorney-client privilege and why its underlying purpose supports an extension of the privilege to "indispensable advisors." Section III will examine current extensions of the attorney-client privilege to accountants and other advisors, as well as the extension of privilege to employees of a corporation under *Upjohn*.[11] The necessity of these extensions is demonstrated by the precarious position of the attorney in the hypothetical described above. Section IV will discuss *In re Bieter Co.*, a recent case in which the attorney-client privilege was extended to third party advisors,[12] as well as cases adopting its reasoning or following parallel reasoning.[13]

II. HISTORY AND PURPOSE OF THE ATTORNEY-CLIENT PRIVILEGE

Because this paper argues for the extension of the attorney-client privilege to non-party "indispensable advisors," a logical starting place for the discussion is with the current state of the privilege, and how it has already been extended to non-parties such as employees of a corporation, agents of the client or attorney, and accountants and other non-clients hired by the attorney or the client.

A. *Attorney-client Privilege Generally*

The attorney-client privilege is the oldest privilege protecting confidential communication.[14] According to the

10. *See* United States v. Kovel, 296 F.2d 918, 922 (2nd Cir. 1961); *see also infra* Part II.B.1.

11. *See Upjohn*, 449 U.S. at 389-90; *see also infra* Part III.

12. *See infra* Part IV; In re *Bieter Co.*, 16 F.3d at 939-40.

13. *See infra* Part IV.

14. *Upjohn*, 449 U.S. at 389; EVIDENCE § 2290 (McNaughton rev. ed. 1961).

Supreme Court, the purpose of the privilege is "to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[15] The privilege promotes the public interest of justice by allowing for open discussions between attorneys and their clients, and it remains a reverently guarded privilege despite the fact that by its very nature it will keep otherwise admissible information out of the courtroom.[16] However, for the purposes of this discussion, it is important to note that over time the privilege has been adapted to cover more than just communications between an individual and his attorney.[17] An example of the privilege being extended beyond communications directly with the "client" is its extension to corporate employees.[18]

Before courts could extend the attorney-client privilege to employees of a corporation, the concept of "client" in the business context had to be extended to include the legal construct that is the corporation itself; only then could the court determine which associated individuals would be protected by the privilege based on their connection to the entity.[19] The Supreme Court has upheld the extension of the privilege to corporations since as early as 1915.[20] By the time it decided *Upjohn* in 1981, the Court

15. *Upjohn*, 449 U.S. at 389.

16. *See* John E. Sexton, *A Post Up-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. Rev. 443, 446 (1982) ("[M]ost commentators would agree that, today, the privilege is based on Wigmore's utilitarian model and is designed to promote freedom of consultation between lawyer and client. Notwithstanding the interests that the attorney-client privilege purports to serve, even its staunchest proponents concede that, whenever the privilege is invoked, otherwise relevant and admissible evidence may be suppressed. Inherently, the attorney-client privilege, like all privileges, potentially hinders the administration of justice. Indeed, although the benefits of the privilege are indirect, in the words of Wigmore, 'its obstruction is plain and concrete.' In other words, a tension exists between the secrecy required to effectuate the privilege and the openness demanded by the fact finding process.") (internal citations omitted).

17. *See Upjohn*, 449 U.S. at 389-90 (extending the privilege to corporate employees).

18. *Id.*

19. There is still some scholarly debate over the decision to extend the attorney-client privilege to corporations. *See* Sexton, *supra* note 16, at 447 ("[T]he rules for applying the privilege to corporations and the justifications underlying the existence of the corporate privilege have remained unclear.... It is not self-evident that the attorney-client privilege available to individuals also should be available to corporations. Indeed, in 1962, in *Radiant Burners, Inc. v. American Gas Association*, the first federal court to consider the question expressly held that the privilege was unavailable to corporations.") (internal citation omitted).

20. *See* United States v. Louisville & Nashville R.R. Co., 236 U.S. 318, 336 (1915) ("The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by textbooks and courts to need extended comment now. If such communications were

simply assumed the privilege applied when the client was a corporation.[21]

Given the original purpose and subsequent expansion of the attorney-client privilege, the following sections provide a brief overview of the form the privilege has currently taken at the federal and state levels, and how it has been extended in the context of third parties. Texas is used as an example of how the privilege has been codified at the state level, and how it has been applied to disclosures to third parties.

B. *Federal Attorney-client Privilege*

1. Generally

Federal courts generally rely on Proposed Rule of Evidence 503, also known as Supreme Court Standard 503, to define the attorney-client privilege in federal cases.[22] The rule is generally stated as:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and his lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.[23]

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required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance.").

21. *See Upjohn*, 449 U.S. at 389-90 ("Admittedly complications in the [attorney-client] privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual; but this court has assumed that the privilege applies when the client is a corporation.").

22. *See In re* Bieter Co., 16 F.3d 929, 935 (8th Cir. 1994); Michael H. Graham, HANDBOOK OF FEDERAL EVIDENCE 522 4th ed. (1996).

23. In re *Bieter*, 16 F.3d at 935 (citing Supreme Court Standard 503(b)); Graham, *supra* note 22, at 522.

2. Extension to Non-parties

The Supreme Court has rejected the "control group" test,[24] but has not adopted an alternative test to determine the extension of attorney-client privilege within a company.[25] Therefore, extension of the privilege to employees must be done on a case-by-case basis.[26] The Court did give some guidance as to what should be considered when determining how far to extend the attorney-client privilege by asking "whether application of the privilege in circumstances of the kind at issue would enhance the flow of information to corporate counsel regarding issues about which corporations seek legal advice."[27] This is a concept, which can be easily applied beyond the corporate context to extend the attorney-client privilege to indispensable advisors.[28]

C. *Texas Attorney-client Privilege*

1. Generally

In Texas, the elements of the attorney-client privilege are: (1) a confidential communication; (2) made for the purpose of facilitating the rendition of professional legal services; (3) between or amongst the client, lawyer, and their representatives; and (4) the privilege has not been waived.[29] A "representative" is any person: (1) who has authority to obtain professional legal services on behalf of the client; (2) who has authority to act on legal advice rendered to the client; or (3) who makes or receives a confidential communication while acting within the scope of the client's employment for the purpose of effectuating legal representation for the client.[30]

2. Extension to Non-parties

Texas Rule of Evidence 503 adopts the "subject matter" test for an entity's assertion of attorney-client privilege.[31] Under the

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24. For a brief discussion of the "control group" test, see *infra* note 50.

25. Upjohn Co. v. United States, 449 U.S. 383, 396-97 (1981). *Upjohn* is discussed in greater detail *infra* Part III.A.

26. *Upjohn*, 449 U.S. at 396-97.

27. Sexton, *supra* note 16, at 462.

28. The *Upjohn* decision and its application to the hypothetical are discussed in greater detail *infra* Part III.

29. *See* TEX. R. EVID. 503(b); Huie v. DeShazo, 922 S.W.2d 920, 923 (Tex. 1996).

30. TEX. R. EVID. 503(a)(2)(A)-(B); *see In re* Monsanto Co., 998 S.W.2d 917, 929-30 (Tex. App. 1999).

31. TEX. R. EVID. 503(a)(2), cmt.; National Tank Co. v. Brotherton, 851 S.W.2d 193, 197-98 (Tex. 1993).

subject-matter test, an employee's communication is deemed to be that of the corporation/client if, "the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment."[32] Again, while the rule focuses on the relationship of the agent to the client, the crucial issue is actually the nature of the information. This suggests that an extension of the privilege to an "indispensable advisor" based on the nature of the information the advisor has, as opposed to the agency status of the individual, should be acceptable.

III. CURRENT EXTENSIONS OF THE ATTORNEY-CLIENT PRIVILEGE

The previous section outlined the current rules for attorney-client privilege both in Texas and at the Federal level. However, a more in-depth discussion of how exactly the privilege has been extended to cover communications with non-parties is warranted.

A. *Upjohn and the Extension of Privilege to Employees*

Upjohn Company v. United States is the definitive case extending the attorney-client privilege, which exists between an attorney and the corporation to third parties.[33] Given that the extension of the attorney-client privilege to "indispensable advisors" is a conceptual extension of the privilege as applied to employees, a good starting place is an overview of the facts and Supreme Court's reasoning in *Upjohn*.

1. Facts

Upjohn Company was a "manufactur[er] and sell[er] of pharmaceuticals here and abroad."[34] In 1976, after discovering one of the company's foreign subsidiaries may have made improper payments to foreign government officials, the company

32. *National Tank*, 851 S.W.2d at 198. The indispensible advisor analysis discussed *infra* can be viewed as a type of "subject matter" test, except the subject matter is the relevance of the information to the attorney, and the necessity of making that information available to her to allow her to render the best possible legal advice.

33. *See, e.g., In re* Teleglobe Commc'ns Corp., 493 F.3d 345 (3d Cir. 2007). In *Upjohn*, the corporation is treated as an individual to whom the attorney-client privilege extends, and the employees are considered third parties because they are not directly represented by the lawyer. *See* Sexton, *supra* note 16. As discussed below, however, the court found that privilege should nonetheless extend to these third parties. *See Upjohn*, 449 U.S. at 391.

34. *See Upjohn*, 449 U.S. at 386.

launched an "internal investigation" into the matter.[35] As part of the investigation, the company's general counsel sent out confidential questionnaires and interviewed with various employees of the company to determine if improper payments had been made, and if so, what the "nature and magnitude" of those payments may have been.[36]

Later that year after concluding the investigation, the company voluntarily submitted a report to both the Securities and Exchange Commission and the Internal Revenue Service (IRS) disclosing the "questionable payments."[37] The IRS "immediately began an investigation to determine the tax consequences of those payments" and was provided a list of all Upjohn employees who were interviewed or provided questionnaires in connection with the investigation.[38]

As part of its investigation, the IRS proceeded to issue a summons demanding production of the questionnaires, as well as any memoranda and notes of the interviews conducted by the General Counsel for Upjohn, as part of the internal investigation into the payments.[39] Upjohn refused to produce the documents on the grounds that they were protected by the attorney-client privilege.[40] After a District Court opinion in favor of the IRS and enforcement of the summons, the Court of Appeals for the Sixth circuit held that while the communications were not necessarily waived, the case should be remanded to determine which of the individuals interviewed were within the "control group," because communications with employees outside this group were not communications with the "client."[41] Upjohn appealed this decision.[42]

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35. *Id.*

36. *Id.* at 387.

37. *Id.*

38. *Id.*

39. *Id.* at 387-88 (requesting "[a]ll files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments and any political contributions made by the Upjohn Company or any of its affiliates since January 1, 1971 and to determine whether any funds of the Upjohn Company had been improperly accounted for on the corporate books during the same period. The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries.").

40. *Id.*

41. *Id.* at 388-89.

42. *See id.*

2. Holding

Justice Rehnquist began the opinion by declaring: "We granted certiorari in this case to address important questions concerning the scope of the attorney-client privilege in the corporate context."[43] However, he immediately dispelled any notion that the Court will simply choose between one of the existing theories on the application of privilege to employees in the corporate context.[44] Instead, he noted that the Court's role was to "decide concrete cases and not abstract propositions of law" and further that the Court would "decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even if we were able to do so."[45] This statement is important because the Court's refusal to "lay down a broad rule or series of rules" highlights the argument that the Court intended for the purpose of the privilege to be most important consideration, and therefore did not preemptively stifle future extension of the privilege by laying down an absolute rule.[46]

Analyzing the issue before it, the Court first noted that, in addition to being the oldest of the privileges, the "purpose [of the privilege] is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in observance of law and administration of justice."[47] Perhaps even more importantly, when arguing for the extension of the privilege to an indispensable advisor however, the Court reiterated its reasoning that "[t]he lawyer-client privilege rest[ed] on the need for the advocate and counselor to know all that relate[d] to the client's reasons for seeking representation if the professional mission [wa]s to be carried out."[48] Finally, before dealing head on with the "control group test" issue, the Court admitted that despite its importance, applying the attorney-client privilege to corporations is more complicated because the corporation is not a single individual, but rather an

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43. *Id.* at 386.

44. *See id.* (rejecting the idea proposed by the parties and the amici that the courts task is to "[choose] between two 'tests' which have gained adherents in the courts of appeals"). Presumably he is referring to the "control group test" and the "subject matter test" which were the two competing theories at the time. For the purposes of this paper however a more detailed analysis of those two theories is not required.

45. *Id.*

46. *Id.*

47. *Id.* at 389.

48. *See* Trammel v. United States, 445 U.S. 40, 51 (1980). Chief Justice Burger argued that the attorney-client privilege, like the priest penitent and physician patient privilege, are special in that they "are rooted in the imperative need for confidence and trust." *Id.*

artificial construct of the law which is ostensibly made up of individuals with whom the attorney must communicate on behalf of the corporation.[49]

The Court next took on the "control group test" as espoused originally by the Eastern District of Pennsylvania.[50] The Court levied two major arguments against the control group test, which are relevant to the argument that the attorney-client privilege should extend to "indispensable advisors."[51] The first was that while the control group test may protect the advice given by the attorney to the individuals in the control group, it did nothing to protect communications from employees outside the control group to the attorney, which may in fact be the more important communications for fully informing the attorney and allowing her to render the most effective advice.[52] The second was that "the control group test frustrate[d] the purpose of the privilege by discouraging an attorney from conducting a full investigation of the facts before rendering advice."[53]

Acknowledging that the underlying facts disclosed to the lawyer were not protected and that the Government was free to question any of the employees who communicated with the lawyer, the Court explicitly refused to set a new test for determining the existence of attorney-client privilege in the corporate context, opting instead to hold that based on the facts of this case, "the communications by Upjohn employees to

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49. *See Upjohn*, 449 U.S. at 389-90 ("Admittedly complications in the [attorney-client] privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual; but this court has assumed that the privilege applies when the client is a corporation.").

50. *Id.* at 390 ("The Court of Appeals, however, considered the application of the privilege in the corporate context to present a 'different problem,' since the client was an inanimate entity and 'only the senior management, guiding and integrating the several operations, . . . can be said to possess an identity analogous to the corporation as a whole.' The first case to articulate the so-called 'control group test' adopted by the court below, *Philadelphia v. Westinghouse Electric Corp.*, reflected a similar conceptual approach.") (internal citations omitted).

51. *Id.* at 390-91; Sexton, *supra* note 16, at 460.

52. *Upjohn*, 449 U.S. at 391 ("In the corporate context, however, it will frequently be employees beyond the control group . . . who will possess the information needed by the corporation's lawyers. Middle-level-and indeed lower-level-employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties."); Sexton, *supra* note 16, at 460.

53. Sexton, *supra* note 16, at 460; *Upjohn*, 449 U.S. at 391-92 ("In a corporation, it may be necessary to glean information relevant to a legal problem from middle management and nonmanagement personnel as well as from top executives. . . . If . . . he interviews *only* those employees with the 'very highest authority,' he may find it extremely difficult, if not impossible, to determine what happened.") (quoting Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 608-09 (8th Cir. 1978) (en banc)).

counsel [we] recovered by the attorney-client privilege . . . so far as the responses to the questionnaires and any notes reflecting responses to interview questions [we]re concerned."[54] The Court did, however, specifically reject the control group test.[55]

3. Analysis

In *Trammel,* the Court held that "the lawyer-client privilege rest[ed] 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 [wa]s to be carried out."[56] In the indispensable advisor context, there is no reason the privilege could not extend to an indispensable advisor so long as the purpose of the communication with the advisor "relates to the client's reasons for seeking representation" in the interest of the lawyer carrying out her "professional mission."[57] Further, the Court noted that an attorney faced with a complex legal issue faces a "Hobson's Choice" when deciding with whom to speak when attempting to gather information in order to issue a legal opinion to a client.[58] The Court's reasoning was that under the control group test, the attorney would be confronted with the equally unappealing options of either interviewing the lower-level employees who might actually have some useful information but risk destroying privilege, or speak only with the employees in the "control group" - assuming she could identify the control group - and not getting the information she required to make an informed legal opinion.[59]

This is the exact situation in which the attorney finds herself in the hypothetical situation at the beginning of this paper. In the hypothetical, there is a high likelihood either Mr. Right or Mr. Inlaw has information which the attorney will need to deliver an informed opinion to Mr. Developer. The attorney in the hypothetical is then faced with the same "Hobson's Choice"

54. *Upjohn*, 449 U.S. at 396-97.

55. *Id.* at 397 ("[W]e conclude that the narrow 'control group test' sanctioned by the Court of Appeals, in this case cannot . . . govern the development of the law in this area."). The opinion continues with a discussion of a second issue regarding the work product doctrine which is not germane to this discussion. *Id.* at 397-402.

56. Trammel v. United States, 445 U.S. 40, 51 (1980).

57. *Id.*

58. *Upjohn*, 449 U.S. at 391-92. A "Hobson's Choice" is defined as "an apparent choice in which there is no real freedom to choose or in which the alternatives are equally unsatisfactory." THE NEW INTERNATIONAL WEBSTER'S COLLEGIATE DICTIONARY OF THE ENGLISH LANGUAGE 337-38 (2002 ed.). Hobson (1544-1631) was an English liveryman who always required his customers to take the horse nearest the door, or to take none at all. *Id.*

59. *Upjohn*, 449 U.S. at 391-92.

the Supreme Court was trying to resolve in *Upjohn*.[60] She is faced with the equally unsatisfactory options of getting information from the "indispensable advisors" Mr. Right and Mr. Inlaw but destroying privilege on the issues she discusses with them, and not being able to claim privilege over information they give her, or not speaking with them and not having all of the information she needs to correctly advise Mr. Developer on his legal issues.

The Court in *Upjohn* rejected the control group test specifically because it "frustrate[d] the very purpose of the privilege by discouraging the communications of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation."[61] If the "purpose [of the privilege]" truly 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"[62] as described at the outset of this paper, it seems inconsistent to apply an interpretation of privilege which frustrates that exact purpose based solely on the status of the information-givers. The argument for extending privilege to the indispensable advisor is that it should be the type and importance of the information being communicated that determines whether it is privileged, as opposed to a mechanical rule based on who the information-giver is. The lack of an agency relationship between Mr. Right or Mr. Inlaw and Mr. Developer does not diminish the value of the information they possess to the attorney's ability to render sound legal advice any more than the lower-level employees' status of not being in the "control group" did not diminish the value of the information they had to Upjohn's corporate and outside counsel.[63]

Analyzing the impacts of *Upjohn*, Sexton notes that

> A strength of the functional approach employed by the *Upjohn* Court is that it does not attempt to analogize the corporate attorney-client privilege to the privilege available to individuals. Instead, it focuses on the purposes of the corporate privilege. Thus, the Court determined that the privilege should cover the communications in the *Upjohn*

60. *See id.*
61. *Id.* at 392
62. *Id.* at 389.
63. *See id.* at 390, 392.

> case because such an extension would foster the purposes of the privilege.[64]

He goes on to argue that in order to be useful, the *Upjohn* opinion must go beyond the "mere invocation of the purpose of the privilege . . . [and] delineate specific rules to govern the availability of the privilege."[65]

Sexton recognizes that to remain in accord with *Upjohn*, any set of rules must tend to err on the side of overprotection of the privilege.[66] He nonetheless extrapolates a set of rules from *Upjohn* in which the application of the privilege hinges on the relationship of the information-giver to the person seeking legal advice, as opposed to the application of privilege hinging on the nature and importance of the information being sought.[67] At first blush, these derived "rules" appear incongruous with the purpose of the privilege; however, they warrant a closer investigation.

The rules Sexton proposes are similar to the conditions for privilege set out by Dean Wigmore, which are at the root of the federal courts' approach to application of the privilege.[68] Sexton's rules are intuitive and on their face lend themselves to proper

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64. Sexton, *supra* note 16, at 479.

65. *Id.* at 480.

66. *Id.* at 484-85 ("Fidelity to *Upjohn* commands that a broader, overprotective rule be chosen when it is difficult or impossible to determine whether the risks flowing from overprotection are greater or less than the risks flowing from underprotection. This is so because, as the *Upjohn* Court posed the issue, the benefits of the privilege, communication and its concomitant law abidance, accrue at the moment of the communication by the client to the attorney, while the costs of the privilege are speculative and theoretical at the time of the communication and frequently never come to be felt. The costs of the privilege are litigation-related: adversaries are deprived of otherwise discoverable information, thereby enabling the corporation to win lawsuits that it should lose.").

67. *Id.* at 487 ("As will be shown, the following five rules are among the more important rules that should guide a principled application of the Court's opinion. 1) The communication must be one that would not have been made but for the contemplation of legal services. 2) The content of the communication must relate to the legal services being rendered. 3) The information-giver must be an employee, agent, or independent contractor with a significant relationship to the corporation and the corporation's involvement in the transaction that is the subject of legal services. 4) The communication must be made in confidence. 5) The privilege may be asserted either by the corporation or by the information-giver.").

68. Alan J. Meese, *Inadvertent Waiver of The Attorney-Client Privilege by Disclosure of Documents: An Economic Analysis*, 23 CREIGHTON L. REV. 513, 515 (identifying eight conditions that must be met for privilege to apply: "(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 [the client's] instance permanently protected (7) from disclosure by [the client] or by the legal advisor, (8) except the protection be waived"); *see* WIGMORE ON EVIDENCE § 2290, *supra* note 2.

application of the attorney-client privilege in any situation.[69] That the communication must be in contemplation of legal services and the content of the communication must relate to the legal services being rendered is in accord with the general rules of privilege set out by Wigmore and is not in conflict with the concept of the indispensable advisor.[70] Similarly, Sexton's fourth and fifth rules requiring the communication to be made in confidence and the requirement that the privilege be asserted either by the corporation or the information giver, are in accord with Wigmore and not in conflict with the concept of the indispensable advisor.[71] The disconnect is with the third "rule" that "[t]he information-giver must be an employee, agent, or independent contractor with a significant relationship to the corporation and the corporation's involvement in the transaction that is the subject of legal services."[72] While it is true that in *Upjohn* there was an employee relationship, the relationship of the information giver to the advice seeker does not seem relevant to the application of privilege.[73] In fact, the second half of the proposed rule, "with a significant relationship to the corporation and the corporation's involvement in the transaction that is the subject of legal services" would suffice, and would accommodate an extension of privilege to the indispensable advisor as outlined in the hypothetical and yet still protect the "purpose of the privilege" as required by the Supreme Court in *Upjohn*.[74]

Much of the existing analysis regarding the extension of attorney-client privilege to non-parties and third parties is focused on independent contractors and employees and ex-employees of a corporation.[75] For example, Sexton argues that, post *Upjohn*, the privilege still may only apply to an employee or an agent, or to an independent contractor if the contractor has "a significant relationship to the corporation and the corporation's involvement in the transaction that is the subject of the legal services" because

> [a]bsent this requirement, the privilege . . . would entail a serious and unnecessary cost. Communications from those who are mere

69. *See* Sexton, *supra* note 16, at 487.
70. *See* WIGMORE ON EVIDENCE § 2290, *supra* note 2; Sexton, *supra* note 16, at 487.
71. Sexton, *supra* note 16, at 487; *accord* WIGMORE ON EVIDENCE § 2290, *supra* note 2.
72. Sexton, *supra* note 16, at 487.
73. *See* Upjohn Co. v. United States, 449 U.S. 383, 389, 394 (1981).
74. *Id.*; Sexton, *supra* note 16, at 487.
75. Sexton, *supra* note 16, at 498, 499 n.179.

> witnesses to a transaction, who have no stake in its resolution or any connection with the corporation, would be protected by a privilege designed for the corporation. To protect those communications arguably would contravene the teaching of *Hickman v. Taylor* that 'the protective cloak of this privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation.' More important for present purposes, to protect those communications would violate the first shaping principle by incurring a cost unnecessary to the attainment of any benefit. Mere witnesses are likely to speak to the attorney without the prompting of the privilege. For this reason, the privilege approved in *Upjohn* is a corporate privilege, not a witness privilege. And, because the *Upjohn* privilege is a corporate privilege, it is necessary to demand some relationship between the information-giver whose communications it protects and both the corporation and the corporation's involvement in the underlying transaction.[76]

This assumption that a person must be either an employee or its functional equivalent for the extension of privilege to be justifiable is erroneous. In the real estate hypothetical, it is unlikely that either Mr. Right or Mr. Inlaw would be considered agents for the purpose of the privilege under *Upjohn* or under Sexton's interpretation of *Upjohn*.[77] The hypothetical is a real-world example of individuals who do not fit the traditional definition of persons to whom the privilege would extend, but who nonetheless possess a significant relationship to the client and the client's involvement in the transaction that is the subject of legal services. This relationship is more significant than that of a mere "witness" as described in the quote from Sexton, but current legal analysis would drop both Mr. Right and Mr. Inlaw into the latter category.[78] However, doing so frustrates the "purpose of the privilege" which is to encourage open communication between the client and the attorney.[79]

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76. *Id.* at 496-97 (internal citation omitted).
77. *See id.* at 496.
78. *Id.*
79. *See Upjohn*, 449 U.S. at 389.

A modification of Sexton's third rule is necessary. The proposed revision should read: "The information-giver must have significant information indispensable to the attorney in rendering legal advice regarding the corporation and the corporation's involvement in the transaction that is the subject of legal services." Such an alteration to Sexton's third rule would better serve the true purpose of the privilege by shifting the focus of the privilege and thereby ensuring it is protecting information based on its relevance and necessity, and not by the status of the person who has the information.

B. *Extension to Accountants and other "Translators"*

Courts have also held that the attorney-client privilege applies to third parties if they are accountants or other professionals hired to assist the lawyer in providing legal advice to the client.[80]

This exception exists because, as "the practice of law has grown more complex, attorneys cannot function effectively without the help of others."[81] It only applies, however, "when the communications are made for the 'purpose of obtaining legal advice *from the lawyer*.'"[82]

1. Basis in Case Law

The analogy of the attorney-client privilege extending to third party "translators" first appears in *Kovel*.[83] Kovel was a former IRS agent who had been retained by a tax law firm to assist them in tax cases.[84] He was held in contempt when he refused to answer questions under oath regarding information he believed to be covered by the attorney-client privilege that existed between the lawyer he was working for and the client.[85] The court began its analysis by establishing that,

80. *See* United States v. Kovel, 296 F.2d 918, 922 (2nd Cir. 1961); *Ferko v. NASCAR, Inc.*, 218 F.R.D. 125, 133-34 (E.D. Tex. 2003); *see also In re* Harwood P-G, Inc., 403 B.R. 445, 458 (Bankr. W.D. Tex. 2009) ("While normally disclosure to a third party waives the [attorney-client] privilege, an exception applies for disclosures to accountants or other professionals hired to assist the lawyer in providing legal advice to the client.").

81. *Ferko*, 218 F.R.D. at 134 (citing *Kovel*, 296 F.2d at 922).

82. *Id.* at 135 (emphasis in original).

83. *Kovel*, 296 F.2d at 922.

84. *Id.* at 919.

85. *Id.* at 920 ("Here the parties continue to take generally the same positions as below—Kovel, that his status as an employee of a law firm automatically made all communications to him from clients privileged; the Government, that under no circumstances could there be privilege with respect to communications to an accountant.").

> [I]n contrast to the Tudor times when the privilege was first recognized . . . the complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others; few lawyers could now practice without the assistance of secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts . . . ' '[t]he assistance of these agents being indispensable to his work and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents.'[86]

The court continued its analysis by extending the privilege beyond "menial or ministerial employees" through an extended example in which it justified the extension of privilege to a translator according to the same privilege requirements Wigmore outlined in the previous section of this paper:

> We cannot regard the privilege as confined to 'menial or ministerial' employees. Thus, we can see no significant difference between a case where the attorney sends a client speaking a foreign language to an interpreter to make a literal translation of the client's story; a second where the attorney, himself having some little knowledge of the foreign tongue, has a more knowledgeable non-lawyer employee in the room to help out; a third where someone to perform that same function has been brought along by the client; and a fourth where the attorney, ignorant of the foreign language, sends the client to a non-lawyer proficient in it, with instructions to interview the client on the attorney's behalf and then render his own summary of the situation, perhaps drawing on his own knowledge in the process, so that the attorney can give the client proper legal advice. All four cases meet every element of Wigmore's famous formulation, § 2292, '(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)

86. *Id.* at 921 (internal citation omitted).

> by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived,' save (7); literally, none of them is within (7) since the disclosure is not sought to be compelled from the client or the lawyer. Yet § 2301 of Wigmore would clearly recognize the privilege in the first case . . . § 2301 would also recognize the privilege in the second case and § 2311 in the third unless the circumstances negated confidentiality. We find no valid policy reason for a different result in the fourth case, and we do not read Wigmore as thinking there is.[87]

The court then extrapolated the contention that disclosures to some agents of the lawyer did not extinguish the privilege into an extended analogy comparing accountants to translators:

> This analogy of the client speaking a foreign language is by no means irrelevant to the appeal at hand. Accounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases. Hence the presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege, any more than would that of the linguist in the second or third variations of the foreign language theme discussed above; the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit.[88]

The court finished its analysis of the accountant's role by establishing that the privilege would only apply where the advice being sought was legal and not financial, and where the advice was that of the lawyer and not of the accountant.[89]

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87. *Id.* at 921-22.

88. *Id.* at 922.

89. *Id.* ("If what is sought is not legal advice but only accounting service . . . or if the advice sought is the accountant's rather than the lawyer's, no privilege exists. We recognize this draws what may seem to some a rather arbitrary line between a case where the client communicates first to his own accountant . . . and others, where the client in the first instance consults a lawyer who retains an accountant as a listening post . . . [b]ut that is the inevitable consequence of having to reconcile the absence of a privilege for

Expanding on *Kovel*, the court in *In re Harwood* explained: "The third-party professional must have been hired for a specific purpose, which significantly relates to the [privileged] communications. Thus, the third-party professional's services must have 'enabled the giving of legal advice.'"[90] Thus, the privilege attaches to communications with third party professionals regardless of whether they are hired by the attorney or the client.[91]

2. Analysis

Neither the Fifth Circuit nor the Texas Supreme Court has directly ruled on extending attorney-client privilege to third party consultants. However, the Fifth Circuit has stated that "the scope of the attorney-client privilege is shaped by its purpose."[92] Therefore, while the application of the attorney-client privilege to advisors hired as "translators" of financial and other information is not the exact same circumstance as the hypothetical presented, the reasoning for extending privilege to them is interchangeable. This is because the bulk of the reasoning for extending privilege to third-party advisors, much like the extension of privilege to employees in *Upjohn*, is to give the attorney all of the tools she needs to render the best possible advice in an increasingly complex and demanding legal environment.[93]

The main difference between the "translator" and the "indispensable advisor" is that there is a contractual relationship between the attorney or the client with the former, and no contractual relationship with the latter. The purpose of protecting the privilege, however, has nothing to do with the contractual relationship; rather it is focused on ensuring the attorney is provided with the best information possible to render legal advice to her client.[94] However, the logic of extending the privilege cuts in the opposite direction of the reasoning from *Upjohn*. Where *Upjohn* is interested in protecting information

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accountants and the effective operation of the privilege of client and lawyer under conditions where the lawyer needs outside help.").

90. *In re* Harwood P-G, Inc., 403 B.R. 445, 458 (Bankr. W.D. Tex. 2009) (citing Ferko v. NASCAR, Inc., 218 F.R.D. 125, 133-34 (E.D. Tex. 2003)) (internal citation omitted).

91. *See Ferko*, 218 F.R.D. at 140 n.15 ("If the client instead of the attorney hires a financial professional, the attorney-client privilege protects communications between the attorney and that financial professional if that financial professional is effectively an employee of the client.").

92. United States v. El Paso Co., 682 F.2d 530 (5th Cir. 1982).

93. *See supra* section III(A)(2)-(3).

94. *See* Upjohn Co. v. United States, 494 U.S. at 383, 389 (1981).

disclosed from the third party to the lawyer as an extension of the privilege over information given by the client to the attorney, the "translator" analysis is focused more on the threat of destroying an existing privilege by disclosure to a third-party.[95] In the context of the hypothetical, that means the "translator" protection from *Kovel* would protect any information Mr. Developer gave to the attorney through or in the presence of Mr. Right or Mr. Inlaw.

Again, the emphasis shifts slightly when viewed through the lens of the indispensable advisor context. The "translator" analysis is focused mainly on the role of the translators and their relationship to the attorney or the client as a facilitator.[96] Applying the concept of the indispensable advisor means realigning the justification for extending the privilege so that it is protecting communications based on the nature and importance of the information to the attorney, who is ultimately trying to render the best possible legal advice to her client. To do that, the indispensable advisor steps into the shoes of the accountant from the *Kovel* analogy.[97] The transition to indispensable advisor analysis is easier in one respect because the translator analysis is already heavily focused on the nature and substance of the information being provided to the attorney.[98] However, like *Upjohn*, the *Kovel* case required an agency relationship either between the attorney and the advisor or the client and the advisor.[99] Given the emphasis the cases place on the type of information being sought and its usefulness to the attorney, it is unclear why the vestigial requirement of agency relationship remains at all.

C. *The Reasoning Behind Current Extensions of the Attorney-client Privilege are Applicable to Extending the Privilege to "Indispensable Advisors"*

The individuals in the hypothetical are a good example of why the agency relationship is unnecessary. Mr. Right's express relationship with Mr. Developer revolves around assisting him

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95. *See* Sexton, *supra* note 16, at 921-22; United States v. Kovel, 296 F.2d 918, 921-22 (2nd Cir. 1961).

96. *See* Kovel, 296 F.2d at 922.

97. *See id.*

98. *See, e.g., In re* Harwood P-G, Inc., 403 B.R. 445, 459 (Bankr. W.D. Tex. 2009) ("The argument that the A & M Report cannot be privileged because it was the debtors, and not their counsel, who hired A & M must be rejected because it misapprehends the reason for allowing such communications in the first place-to facilitate communications. It has, literally, nothing to do with who hired them.").

99. *Id.* at 458.

with the financial and transactional issues that arise while running Development LLC. When Mr. Developer is dealing with the attorney however, Development LLC is not a client. Therefore, Mr. Right is not an agent of either the client Mr. Developer, or the attorney. This does not take away from the fact that he may be the only person who can understand and advise the attorney on significant aspects of Mr. Developer's project, which is the subject of the legal advice. Therefore, if the purpose of an extension of privilege to third-party translators is truly "for the purpose of obtaining legal advice,"[100] it is unclear why Mr. Right would need to be an agent of either the attorney or Mr. Developer. Much like the argument in the previous section, the indispensable advisor analysis would simply identify the translator based on his ability to facilitate the lawyer in understanding the necessary information to render the legal advice with the extension of privilege being based on the nature of the information he possesses, as opposed to his agency status. Under this analysis, therefore, the privilege should extend easily to the "indispensable advisor" in this circumstance.

IV. CURRENT CASES EXTENDING PRIVILEGE TO THIRD PARTIES

This section discusses both State and Federal cases which have started to expand the privilege beyond employees and agents to cover individuals with whom an attorney communicates. Because the extension of attorney-client privilege is a fact specific exercise, this article will include a detailed description of the facts for each of the cases discussed. These cases serve as a foundation for the argument that the attorney-client privilege should be extended to the indispensable advisor.

A. *In re Bieter Co.*

1. Facts

The Eighth Circuit was called upon to rule on a motion to stay a writ of mandamus issued by the lower court, compelling the discovery of both documents and taking of depositions which the Bieter Company claimed were covered by the attorney-client privilege.[101] The dispute was focused around communications between Bieter's attorney, who was the client, and Dennis Klohs,

100. *Kovel*, 296 F.2d at 922.

101. *In re* Bieter Co., 16 F.3d 929, 930 (8th Cir. 1994).

who was neither Bieter's client nor employee.[102] Klohs originally began working with Bieter in mid-1986 under a one year consulting agreement in which he was to work out of Bieter's office as an independent contractor and be paid a monthly fee for rendering "advice and guidance regarding commercial real estate development in Minnesota."[103] The agreement expressly stated that Klohs was an independent contractor and "not an agent, employee, or partner of Bieter."[104] The contract expired in August of 1987, a year after it was signed, and in 1990, Klohs entered a formal employment contract with Bieter.[105] It does not appear there was any formal agreement between Klohs and Bieter in the three intervening years; however, neither Klohs's duties nor his relationship with Bieter changed during that time.[106] Those duties included securing tenants for the development, working with architects, consultants, and counsel, and appearing at public hearings before city agencies.[107] Although he was not an employee of Bieter, Klohs's interactions with Bieter's counsel in the underlying litigation were extensive.[108] He attended meetings with counsel both alone and with Bieter's partners present, and he was either copied on or directly received many communications from Bieter's attorneys.[109] The attorneys regarded Klohs as Bieter's "representative" and worked closely with him as the litigation developed.[110] Finally, both Klohs's and Bieter's partners believed that communications between Klohs's and Bieter's attorneys were confidential "and were intended to be kept so."[111] The court summarized the situation as follows:

> In short, the case presents an individual who, while acting as an independent consultant to the

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102. *Id.* at 934. In the underlying suit Bieter, a Minnesota partnership was attempting to develop a parcel of land. *Id.* at 930. After ongoing problems with the local government and harassment by rival developers, Bieter brought suit against the local government and the rival developers claiming antitrust violations and violations of the Racketeering Influenced and Corrupt Organizations Act (RICO). *Id.* The district court granted summary judgment for the defendants, which was overturned by the Eighth Circuit and thereby revived the writ of mandamus at issue in this case. *Id.* at 930-31. A further discussion of the facts of the underlying case is unnecessary.

103. *Id.* at 933.

104. *Id.* at 933-34.

105. *Id.* at 934.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

> client, has been involved initially in the attempt to develop a parcel of property (the development of which appears to be the *sine qua non* of the client's existence) and subsequently in the litigation that resulted from the failure to develop said property. Despite any assertions to the contrary, it appears that this consultant was neither the client nor an employee of the client, but was instead a representative of the client. The legal question presented is whether communications either between this consultant and counsel or merely disclosed to the consultant necessarily fall outside of the scope of the attorney-client privilege because the consultant was neither the client nor an employee of the client.[112]

2. Holding

The court framed the issue in this case broadly, as "whether communications either between [Klohs] and counsel or merely disclosed to [Klohs] necessarily f[e]ll outside of the scope of the attorney-client privilege because [Klohs] was neither a client nor an employee of the client."[113] Ultimately, the court determined that Klohs was the functional equivalent of an employee and that the privilege should extend to him.[114]

The court began its analysis by pointing out that both Supreme Court Standard 503 and the decision in *Upjohn* fail to establish definitively who is a "representative of the client" for the purposes of extending the attorney-client privilege.[115] In defining who is a "representative" the court cited the following hypothetical:

> [Assume] an accountant who, though an independent contractor, performs regular accounting services for a corporation over many years. As the accountant, he has an insider's knowledge of the corporation's operations that few people even on the corporation's payroll have. Assume he represents the corporation at an IRS audit. Finally, assume that a tax indictment issues against the corporation and that an attorney

112. *Id.*
113. *Id.*
114. *See id.* at 939-40.
115. *See id.* at 937.

> is retained. Clearly, the accountant has knowledge of extraordinary importance to the attorney's investigation of the tax matter. And, equally clearly, the logic of *Upjohn* commands that the mere fact that the accountant was not an employee of the corporation should not preclude application of the privilege. There is no reason to differentiate between an accountant-employee and a regularly retained outside accountant when both occupy the same extremely sensitive and continuing position as financial advisor, reviewer, and agent: both possess information of equal importance to the lawyer.
>
> A literalistic extension of the privilege only to persons on the corporation's payroll would invariably prevent a corporation's attorney from engaging in a confidential discussion with a corporation's regular independent accountant, no matter how important the accountant's information would be to the attorney.[116]

Refusing to apply this "literalistic translation," the court held that the privilege applied to Klohs based on his relationship with the client and the need for the attorney to be able to communicate with him confidentially.[117] Furthermore, those communications were privileged and neither the communications between Klohs and the attorney nor documents shared with Klohs by the attorney destroyed the privilege that existed on those matters between the attorney and Bieter.[118]

3. Analysis

First, for the purpose of the indispensable advisor analysis, it is important to note that while the court in *Bieter* focused on the extension of privilege to a contractor,[119] the reasoning can be applied just as easily to someone who is in the same position as a contractor, yet may not have any formal relationship with the company. In fact, in *Bieter*, there was a three-year period in which Klohs was being compensated for his services by Bieter, yet there was no contract retaining him as an independent

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116. *Id.* (quoting John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 498 (1982)).

117. *Id.* at 939-40.

118. *Id.*

119. *Id.* at 937-39.

contractor, advisor, or employee.[120] Because there was no formal agreement between Klohs and Bieter at this time, the court's reasoning was based on the nature of the relationship as it applies conceptually to the extension of privilege as a means to facilitate attorney-client communications. Again, the goal was to allow the attorney to provide the best possible advice, as opposed to a formalistic rule governed by the contractual status of the company and the person to whom the extension of privilege is being claimed.

The court's analysis focused primarily on whether or not refusing to extend privilege in this case would "encourage the free flow of information to the corporation's counsel in those situations where it is most needed."[121] In a situation where an indispensable advisor has such information, it is only logical that the privilege be extended to her under the same reasoning.

a. Applicability of the *Bieter* Court's reasoning to the Commercial Real Estate Hypothetical

In a hypothetical to justify the extension of the privilege to the third party, the court stated:

> There is no reason to differentiate between an accountant-employee and a regularly retained outside accountant when both occupy the same extremely sensitive and continuing position as financial advisor, reviewer, and agent: both possess information of equal importance to the lawyer.
>
> A literalistic extension of the privilege only to persons on the corporation's payroll would invariably prevent a corporation's attorney from engaging in a confidential discussion with a corporation's regular independent accountant, no matter how important the accountant's information would be to the attorney.[122]

In this statement, the court's reasoning paralleled that behind an extension of the privilege to an "indispensable

120. *Id.* at 934 ("The agreement apparently expired on August 31, 1987, and an employment agreement was entered into between Bieter and Klohs on November 1, 1990. The record does not indicate what, if any, formal relationship existed between Bieter and Klohs from September 1987 through October 1990.").

121. *Id.* at 937 (citing Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 599 (8th Cir.1977)) ("In contrast to the control group test, [the *Harper & Row* test], encourages the free flow of information to the corporation's counsel in those situations where it is most needed.").

122. *Id.*

advisor." However, the court's de facto assumption that there must be an agency relationship appears to be nothing more than a holdover from the *Upjohn* ruling, which the court accepted without analysis.[123] The key phrase, which describes the purpose of this paper, was that "[a] literalistic extension of the privilege only to persons on the corporation's payroll would invariably prevent a corporation's attorney from engaging in a confidential discussion with a corporation's regular independent accountant, no matter how important the accountant's information would be to the attorney."[124] There is no reason given the hypothetical situation presented in this paper that the attorney would not suffer the negative effects of the exact same "literalistic extension of privilege." It is just as damaging to the attorney representing Mr. Developer to have Mr. Right and Mr. Inlaw excluded from the privilege, thereby preventing the attorney from engaging in confidential discussions with them even though there is no agency relationship.

For example, the statement from *Bieter* could be rewritten to read: "A literalistic extension of the privilege only to *agents of Mr. Developer* would invariably prevent *Mr. Developer's* attorney from engaging in a confidential discussion with *Mr. Developer's indispensable advisors Mr. Right and Mr. Inlaw*, no matter how important *those indispensable advisors'* information would be to the attorney." Here, as applied to the hypothetical, it is clear that removing the anachronistic assumption that there is an agency requirement does not affect the spirit of the court's reasoning or defeat its purpose. Therefore, under the independent advisor analysis, there is no reason the privilege should not be extended to protect communications between the attorney and Mr. Right and Mr. Inlaw.

Sexton would argue, however, that requiring an agency relationship is not anachronistic, but is prudent because, absent

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123. *See generally* Upjohn Co. v. United States, 449 U.S. 383 (1981). The Court in *Upjohn* never specifically addressed the requirement that there be an agency relationship between the client and the information giver because the court only considered the specific facts before it; in the facts of *Upjohn*, there is no question as to the agency relationship of the information givers. *Id.* The agency requirement appears to be a holdover from the scholarship and cases, which arose out of the *Upjohn* decision. *See, e.g.*, Sexton, *supra* note 16, at 487 ("The information giver must be an employee, agent, or independent contractor with a significant relationship to the corporation and the corporation's involvement in the transaction that is the subject of legal services."); United States v. Kovel, 296 F.2d 918, 921 (2nd Cir. 1961) (holding that the attorney-client privilege must include anyone who acts as the attorney's agent).

124. *In re* Bieter Co., 16 F.3d at 937 (quoting John E. Sexton, A_*Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 498 (1982)).

such a rule, the privilege would impose too high a cost.[125] However, the justification for requiring an agency relationship is the assertion that this cost arises "because the *Upjohn* privilege is a corporate privilege, it is necessary to demand some relationship between the information-giver whose communications it protects and both the corporation and the corporation's involvement in the underlying transaction."[126]

Again however, the indispensable advisor analysis meets this second definition in that it ensures a significant relationship between the information-giver and the individual seeking the legal advice because the importance and sensitivity of the information both requires and implies a significant relationship, thereby minimizing the costs Sexton feared. The need for "some relationship" does not automatically imply it must be an agency relationship; Mr. Right or Mr. Inlaw's relationship with Mr. Developer may in fact be far more significant than the relationship between a corporation and its agent. As described above, there is no apparent justification for the assumption that in order to have a significant interest, which justifies extension of privilege, there must be an agency relationship. By finding Klohs the "functional equivalent" of an agent, the *Bieter* court demonstrated that it is possible to use factors other than agency to extend the privilege without incurring the costs Sexton feared.

The concept of the indispensable advisor is premised on the notion that privilege should extend based on the nature and value of the information possessed by the information-giver to the attorney or advice giver. The hypothetical situation demonstrates that even under the analysis required in *Bieter*, there is no reason the court's reasoning could not be extended to cover the indispensable advisors as defined in this paper.

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125. *See* Sexton, *supra* note 16, at 496 ("*The information-giver must be an employee, agent, or independent contractor with a significant relationship to the corporation and the corporation's involvement in the transaction that is the subject of the legal services.* Absent this requirement, the privilege as delineated by the two requirements listed thus far would entail a serious and unnecessary cost. Communications from those who are mere witnesses to a transaction, who have no stake in its resolution or any connection with the corporation, would be protected by a privilege designed for the corporation. To protect those communications arguably would contravene the teaching of *Hickman v. Taylor* that 'the protective cloak of this privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation.'") (citation omitted).

126. *Id.* at 497.

B. *Other Cases Supporting an Extension of Attorney-client Privilege to "Indispensable Advisors"*

Some recent scholarship advocates extending the attorney-client privilege beyond the narrow agency context described in the sections above.[127] Rice argues that "[w]hen . . . third parties have an established working relationship with the corporate client that is similar to that of regular employees, courts are increasingly treating them like regular employees . . . ."[128] While not as focused on the nature of the information sought as the indispensable advisor analysis advocated by the paper, Rice's "functional equivalent" argument gives the greatest weight to the nature of the information, stating, "[t]here is little justification for distinguishing between permanent employees . . . and temporary employees . . . whose communications are equally important to the legal services that counsel renders to the corporate client."[129] However, despite this nod to the importance of the nature of the communication and the further statement that "[a]n absolute limitation on the scope of the attorney-client privilege to communications of corporate 'insiders' is inappropriate, unwise, unfair, and inconsistent with the rationale and policy of the privilege,"[130] the focus is still on the agency relationship.[131] While the sentiment of this statement strongly supports an extension of privilege based on the indispensable advisor analysis, the rationale of the "functional equivalent" analysis remains rooted in the nature of the relationship between the information giver and the advice-seeker.[132] A re-evaluation of some of the cases Rice relied on will

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127. *See generally* PAUL RICE, 1 ATTORNEY-CLIENT PRIVILEGE IN THE U.S. § 4:19 (West 2011).

128. *Id.* This assertion appears to be a conclusion based on the list of cases in the footnote following the statement. *See id.* at n.3. This section will analyze a sampling of those cases applying them in a slightly different context than Rice, advocating not that they provide for a privilege based on a "working relationship" with the client but rather on the premise that they support the information-centric indispensible advisor extension of privilege.

129. *Id.* at 6-7 (internal quotation marks omitted).

130. *Id.* at 8.

131. *Id.* at 9-10.

132. *Id.* ("[I]t makes little sense to limit the privilege protection to communications between 'insiders' and corporate counsel and deny it to communications of third parties who the corporation treats like 'insiders' because of the 'meaningful' economic relationship they have with the company. The assessment of this 'meaningful' relationship should turn on whether the agent: (1) possesses decision-making responsibility regarding the matter about which legal help is sought, (2) is involved in the chain of command on the subject of the legal services, or (3) is personally responsible for or involved in the activity that might lead to liability for the corporation.") (internal citation omitted) (footnote

show that they can just as easily be interpreted to support the indispensable advisor analysis as the functional equivalent analysis. A discussion of some selected cases follows.

1. Rager v. Boise Cascade Corp.

Rager v. Boise Cascade Corporation[133] is a case arising from various statutory and common law claims by Rager regarding the termination of his employment by Boise.[134] The issue germane to this discussion is whether Cecchi, an independent contractor hired by Boise to administer employment matters, was protected when discussing issues within the scope of his contractual obligations with counsel for Boise regarding the termination of Rager, or whether those communications are discoverable.[135]

a. Rice's Analysis

Rice cites *Rager's* holding that contended,

> Even without deciding whether Cecchi had the power, given to him by his principal Boise, to act personally on whatever legal advice he received from VanHole, consistent within the purposes underlying the attorney-client privilege, the communications between Boise's agent, Cecchi, and its attorney, VanHole, in the seeking and receiving of legal advice on behalf of Boise must be protected.[136]

This holding supports the argument that

> [t]he test of whether an outside consultant's communications with a client's attorney are protected by attorney-client privilege should be whether the agent is the functional equivalent of an employee – one having a continuing relationship with the client before and after the

omitted). Note that the focus is still on the relationship of the individuals, and not on the relevance of their information to aid the attorney who is giving the advice.

133. No. 88-C1436, 1988 WL 84724 (N.D. Ill. August 5, 1988).

134. *See id.* at *1 ("This case arises from a five-count complaint related to the termination of Rager's employment with Boise alleging violation of the federal Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, and common law claims of breach of employment contract, libel and slander, retaliatory discharge and willful and wanton conduct.").

135. *Id.* at *3.

136. PAUL RICE, 1 ATTORNEY-CLIENT PRIVILEGE IN THE U.S. § 4:19, at 14 (Thompson Reuters 2011) (citing *Rager*, 1988 WL 84724, at *4).

> communications, on a subject that was within the scope of his employment relationship.[137]

While this is a legitimate interpretation of the case, it still focuses on the agent-centric analysis of the court.

b. Indispensable Advisor Analysis

The case can be used with equal success to support an information-centric analysis that gives credence to an indispensable advisor analysis. For example the court in *Rager* also held,

> The focus here should be on what kind of information Cecchi sought from VanHole, not what use Cecchi personally could make of any information he received from VanHole. Cecchi's declaration makes it clear that he was employed to act essentially for and with Boise in unemployment compensation matters. It was his intention to obtain legal advice to be used for and with Boise in those matters. Under these circumstances, his status as VanHole's client for and with Boise cannot seriously be questioned. Accordingly, Boise's motion for a protective order is granted.[138]

This analysis by the court aligns very closely with the standard this article advocates: that the importance of the information should be used when determining whether or not to extend privilege under the indispensable advisor analysis. While the court discusses the nature of Cecchi's employment, it is not making its decision based on any kind of employment relationship between Cecchi and Boise; rather, the court is focused on the nature of the communication and information passing between Cecchi as the information-provider, or consumer, and the attorney as the advice-giver.[139] It does not matter that Cecchi is not a client of the attorney or that Cecchi is not per se an employee of Boise because the court is focused on

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137. RICE, *supra* note 136, at 14. While the reasoning of Rice's argument is derived from the quote at the beginning of the sentence, the test he applies comes from an earlier part of the case where the court held there are "three fundamental requirements of agency, all of which are met by Cecchi in this case. First, an agent must have the power to affect the legal relations of the principal and others. Next, the agent is a fiduciary who works on behalf of the principal and primarily for his benefit. Last, the principal has the right to control the conduct of the agent." *Rager*, 1988 WL 84724, at *4 (citations omitted).

138. *Rager*, 1988 WL 84724, at *4.

139. *See id.*

the purpose of the privilege and the nature of the information being sought.[140] Because here the *information* is indispensable to the attorney in order to render advice to her client Boise, Cecchi is in the role of indispensable advisor regardless of his relationship.

c. Application to the Real Estate Hypothetical

Applying this same analysis back to the hypothetical, it is the best example yet of why the indispensable advisor analysis is the appropriate framework for extending privilege to Mr. Right and Mr. Inlaw. In the hypothetical, Mr. Right and Mr. Inlaw are equivalent to Cecchi. While their relationship with Mr. Developer will likely not satisfy any of the other tests set out for the extension of privilege because of the lack of an ongoing agency relationship with regards to the client or the situation which the client is seeking advice, they should still be protected because of the nature of the information they hold and its value to the attorney.

2. Twentieth Century Fox Film Corp. v. Marvel Enterprises, Inc.

Another case cited by Rice, which aligns itself with a dual analysis using the indispensable advisor framework, is *Twentieth Century Fox Film Corporation v. Marvel Enterprises, Inc.*[141] The substance of the underlying case is whether or not Marvel, which had worked on a television series called "Mutant X," was violating its license agreement with Fox, which had purchased the rights to the "X-Men" characters.[142] The relevant discussion, for purposes of this article, focuses on fifteen documents that Fox had disclosed to several independent contractors but refused to turn over in discovery claiming attorney-client privilege.[143] The

140. *See id.*

141. *See* RICE, *supra* note 136, at 14 (discussing Twentieth Century Fox Film Corp. v. Marvel Enters., Inc., No. 01 Civ. 3016(AGS)(HB), 2002 WL 31556383 (S.D.N.Y. 2002)).

142. *Twentieth Century Fox Film Corp.*, 2002 WL 31556383, at *1 ("For present purposes, it is sufficient to note that the underlying issues in this case are the extent to which the licensor of the copyrighted 'X-Men' characters retained rights to produce a television series and whether the 'Mutant X' television series produced by defendants violates the license granted by defendant Marvel Entertainment Group, Inc. to plaintiff.").

143. *See id.* ("The current dispute arises out of fifteen documents withheld from production by Fox on the basis of the attorney-client privilege and work-product protection. . . . Fox argues in opposition that the independent contractors to whom disclosure was made stood were directly involved in the production of X-Men 2 and that disclosure to them did not operate as a waiver of the privilege because they functioned as employees and Fox's economic decision to conduct its business through independent contractors as opposed to employees should not affect the scope of its privilege.").

court found that, although their employment was sporadic, the independent contractors with whom Fox shared the communications were the functional equivalents of employees; therefore, the attorney-client privilege extended to them, and the documents remained confidential.[144]

a. "Functional Equivalent" Analysis

This case is an example of the functional equivalent argument being implemented in a way that makes sense. Given the circumstances of the disclosure and the nature of the industry, there were no "insiders" or "employees" in the normal sense one would expect when attempting to apply the privilege to third- parties in the corporate context.[145] Therefore, the court held that "[s]ince the employees in issue were the functional equivalent of employees, disclosure of otherwise privileged documents to them does not operate as a waiver of the attorney-client privilege."[146]

b. "Indispensable Advisor" Analysis

This case is the "exception that proves the rule" in terms of the indispensable advisor analysis. In this case, a disclosure was made to a third party, but the disclosure of the information did not have anything to do with facilitating the attorney in rendering better legal advice to the client.[147] This case demonstrates the last aspect of the indispensable advisor analysis: a reversal of the flow of information so that the attorney is actually providing information to the indispensable advisor for the benefit of the client.

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144. *See id.* at *2 ("In this case, I find that the non-employees to whom disclosure was made were the functional equivalent of employees. Fox's determination to conduct its business through the use of independent contractors is a result of the sporadic nature of employment in the motion picture industry; for a wide variety of reasons, producers, directors and actors generally do not 'turn out' movies with the same mechanical regularity with which most tangible products are produced. The fact that the nature of the industry dictates the use of independent contractors over employees should not, without more, create greater limitations on the scope of the attorney-client privilege.").

145. *See id.*

146. *Id.*

147. *See id.* ("Fox has submitted an uncontradicted affidavit which states that the individuals who received the documents in issue were all under contract to work for Fox by providing production-related services for the X-Men film (and, in fact, are again working for Fox on the upcoming sequel film) and therefore had interests in common with Fox regarding the production. Like several Fox employees who provided other services for the X-Men film, these individuals received copies of these memoranda so that they, as well as the Fox employees who were copied, could accomplish their work and so that they would know the respective rights of Marvel and Fox in case a dispute should arise.").

The interesting aspect of this, however, is that because dissemination of information to non-parties usually destroys the privilege, and the indispensable advisor analysis usually focuses on the nature and necessity of the communication, there must be some other way to determine who may receive the information without destroying the privilege. If the nature of the information itself is creating the privilege, and anyone who receives it becomes an indispensable advisor to the client, the constraints of the privilege are meaningless and the purpose of the privilege is usurped. Ironically, in a situation where the information is flowing in this direction, there must be a functionally equivalent test, or there are no bounds on how far the privilege will extend, proving that the functionally equivalent and indispensable advisor analysis are not mutually exclusive.

V. CONCLUSION

Who is the indispensable advisor? For the purposes of this paper, the indispensable advisor is someone who does not currently fall under any extension of the attorney-client privilege, but to whom the privilege should extend because he possesses a "significant relationship to the [client] and the [client's] involvement in the transaction that is the subject of legal services"[148] and is provided based on a focus on the nature of the information and its usefulness to the attorney regardless of who possesses it. As shown, this type of analysis in extending attorney-client privilege both augments the purpose of the privilege and dovetails with existing privilege modifications to allow attorneys to render the best possible advice to their clients.

David Wechsler

148. *In re* Bieter Co., 16 F.3d 929, 937 (8th Cir. 1994).