

Memorandum

To: NIFTEP Workshop Participants
From: Davalene Cooper
Date: April 25, 2011
Re: Problem/Exercise on Attorney-Client Privilege

This is a problem I use early in the semester in my Law and Ethics of Lawyering course. The problem itself is from the textbook I use for the course, Stephen Gillers, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS, 8th edition. I first expanded the problem in order to give the students the opportunity to explore the various tests that have been applied to attorney-client privilege in the United States. This problem follows a broader discussion of Model Rule 1.6 and attorney-client privilege more generally. Then, I expanded the problem to highlight the differences between attorney-client privilege in the United States and the European Union, as applied to in-house counsel.

In order to focus the students on the problem, I created the attached chart to identify the various positions on this issue. Students work in groups of three to fill in the chart. Please contact me directly if you would like my annotated teacher's chart for this exercise.

After students complete this first part of the problem, we discuss their answers as a group. Then for the second part of the problem, I ask them to consider what might be different if the department store was located in a European Union jurisdiction. I distribute the CCBE 2.3 provisions on confidentiality with the commentary. Since the commentary references the *AM&S* case, I also give them that case, as well as the most recent decision on the issue of in-house counsel—*Akzo Nobel Chemicals Ltd. v. Commission*. After the groups have time to read and discuss these documents as a group, we discuss them in the larger class.

My goal for this exercise is to begin to sensitize students to how different the legal and ethical rules might be in other parts of the world. This is a theme I try to emphasize throughout the course.

“Slip and Fall”

Facts—Edith Wharton, customer, fell and broke her hip while shopping at a department store. The fall took place in the Timepiece Department. The assistant general counsel for the store has been charged with conducting an investigation, and asked an employee in security to interview any witnesses. He interviewed the following witnesses, wrote reports on the interviews and gave them to the assistant general counsel. Wharton’s lawyer deposed these same witnesses, but they all had memory failure as to some portion of the event. Therefore, Wharton’s lawyer demanded the notes be produced. **What is the result under each of these tests?**

Witnesses	Result under <i>Upjohn</i>–6th Cir.	Result under <i>Upjohn</i>–SCT	Result under <i>Goodfarb</i>	Result under Restatement §73
Max Burkow, Head of Maintenance (Vice President for Physical Plant Operations & Maintenance)				
Tim Morse, Floor Waxer				
Tina Sandstrom, Salesperson in Men’s Dept. returning from break				
Rex McCormick, Rug Dept. Buyer shopping on his day off				

Delia Corcoran, Burkow's predecessor, since retired, who established the store's standards and procedures for floor waxing a year ago.				
Ed Rivera, President of the company that supplies wax to the store				
Angie Kuhn, customer who was in the timepiece department and saw the fall.				