

# RECONSIDERING THE CORPORATE ATTORNEY-CLIENT PRIVILEGE: A RESPONSE TO THE COMPELLED-VOLUNTARY WAIVER PARADOX

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## I. INTRODUCTION

“[T]he [corporate] attorney-client privilege is under attack today as never before.”<sup>1</sup> “Privileged information used to belong to the client; now it apparently belongs to the government.”<sup>2</sup> “[T]he extent of the erosion of privilege protections and the level of concern about that erosion suggest that the system may be nearing a turning point—a point at which the continued viability of the privilege is at risk.”<sup>3</sup> “The sound you hear

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1. Ronald C. Minkoff, *A Leak in the Dike: Expanding the Doctrine of Waiver of the Attorney-Client Privilege (2002 Update)*, in ETHICS AFTER ENRON: PROTECTING YOUR FIRM OR CORPORATE LAW DEPARTMENT: A SATELLITE PROGRAM 195, 199 (PLI New York Practice Skills, Course Handbook Series No. F0-00GL, 2002), available at WL 126 PLI/NY 195; accord Kathryn Keneally, *White Collar: Threat to the Corporation's Attorney-Client Privilege and Work Product Immunity*, CHAMPION, Feb. 2001, at 53 [hereinafter Keneally, *Threat*] (“[T]he protections accorded by the attorney-client privilege and work product immunity for corporations are under attack.”).

2. Joseph P. Savage, Jr. & Melissa M. Longo, “Waive” Goodbye to Attorney-Client Privilege, CORP. COUNS., Mar. 2001, at 5.

3. Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why it is Misguided)*, 48 VILL. L. REV. 469, 586-87 (2003).

coming from the corridors of the Department of Justice is a requiem marking the death of privilege in corporate criminal investigations.”<sup>4</sup>

These quotes are representative of the widespread sentiment within the corporate legal community concerning the perceived increased vigilance of certain government agencies to obtain voluntary waivers of the attorney-client privilege and work product protection in exchange for possible prosecutorial or regulatory leniency. Most notably, the Department of Justice (“DOJ”) has adopted guidelines that seem to make waiver of the attorney-client privilege and work product protection a prerequisite for being deemed “cooperative,” a significant designation that carries with it the prospect for more favorable penal treatment.<sup>5</sup> In addition, the United States Sentencing Commission underscored the potential importance of such waivers by approving an amendment to the Federal Sentencing Guidelines in 2004 that, under certain circumstances, makes privilege waiver a factor in assessing a corporation’s “culpability score,” which is used in determining the appropriate sentencing range.<sup>6</sup>

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4. David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 147 (2000). For further expressions of alarm regarding the state of the attorney-client privilege and work product protection, see generally American College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307 (2003); David Krakoff & Ilana Sultan, *For Clients’ Sake: Under Assault From Government and the ABA, the Privilege Needs Defenders*, LEGAL TIMES, Oct. 1, 2001, at 34.

5. See Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components and U.S. Attorneys on Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) [hereinafter Thompson Memo], at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm); Memorandum from Deputy Attorney General Eric H. Holder, Jr., to Heads of Department Components and U.S. Attorneys on Bringing Criminal Charges Against Corporations (June 16, 1999), reprinted in *Justice Department Guidance on Prosecutions of Corporations*, 66 CRIM. L. REP. (BNA) 189 (Dec. 8, 1999) [hereinafter Holder Memo]; see also *infra* notes 187-95 and accompanying text; Robert A. Del Giorno, *Corporate Counsel as Government’s Agent: The Holder Memorandum and Sarbanes-Oxley Section 307*, CHAMPION, Aug. 2003, at 22, 23 (suggesting that it is somewhat disingenuous for the DOJ to maintain that waiver of privilege is not an absolute prerequisite to a finding of “cooperation,” given the government’s view that “a corporation’s failure to disclose privileged information [represents] an effort to hide the truth”); Minkoff, *supra* note 1, at 202-03 (maintaining that the “Holder Memorandum is just an example of the extraordinary pressure prosecutors place on corporate targets in criminal cases to disclose attorney-client information”).

6. See Kathryn Keneally, *Corporate Compliance Programs: From the Sentencing Guidelines to the Thompson Memorandum and Back Again*, CHAMPION, June 2004, at 42, 46 [hereinafter Keneally, *Corporate Compliance*]; Allan Van Fleet, *Sentencing Guidelines Amendments Jeopardize the Attorney-Client Privilege for Organizations*, PROF’L LIAB. LITIG. ALERT, Winter 2005, at 1. The Amendment, which went into effect on November 1, 2004, added the following commentary to Section 8C2.5: “Waiver of attorney-client privilege and work product protections is not a prerequisite to a reduction in culpability score . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to

In light of such developments, corporations and their counsel understandably feel great pressure to abandon the time-honored sanctuary of the attorney-client privilege and work product doctrine when confronted with a government investigation. Although prosecutors and other agency officials maintain that waiver is never required or compelled<sup>7</sup> and also dispute claims that it is routinely requested,<sup>8</sup> there is a growing body of evidence to the contrary.<sup>9</sup> Moreover, even if the

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the organization.” U.S. SENTENCING COMM’N GUIDELINES MANUAL § 8C2.5, cmt. 12 (2004); *see also* Van Fleet, *supra*, at 7.

It is important to note, however, that as a result of efforts by the ABA and other organizations, on April 5, 2006, the Sentencing Commission reversed its position, voting to eliminate the waiver commentary from Section 8C2.5. *See* Peggy Aulino, *Sentencing Commission Changes Provision that Critics Have Charged Undercut Privilege*, 22 *Laws. Man. On Prof. Conduct (ABA/BNA)* 193, 193 (April 19, 2006). Unless Congress intervenes, the revision will take effect on November 1, 2006. *See id.* Though certainly a very positive development for the corporate bar, it seems unlikely that this change will significantly affect the DOJ’s stance regarding privilege waiver. For further discussion regarding the Sentencing Guidelines as they pertain to the waiver issue, *see* Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 *WAKE FOREST L. REV.* 587, 593-94, 607-10 (2004); *see also infra* notes 233-39 and accompanying text.

7. *See, e.g.*, Joan C. Rogers, *DOJ Official Suggests Corporate Defendants Do Not Have to Waive Privilege, but it Helps*, 21 *Laws. Man. on Prof. Conduct (ABA/BNA)* 391, 391 (July 27, 2005) (reporting Acting Assistant Attorney General John C. Richter’s assertion that “waiver of privilege is not a requirement and is not a litmus test for cooperation with the government”); Philip Urofsky, *Interview With United States Attorney James B. Comey Regarding Department of Justice’s Policy on Requesting Corporations Under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection*, in *CORP. COUNS. F.* 2004, at 639, 642 (PLI Corporate Law & Practice, Course Handbook Series No. B-1421, 2004) (reporting U.S. Attorney James Comey’s position that “[t]he Principles do not require waiver, and do not even require cooperation”). *But see* Van Fleet, *supra* note 6, at 7 (observing that “[a]t least one U.S. Attorney has publicly called for a complete waiver of the attorney-client privilege by all corporate targets wishing to obtain credit for their cooperation”). For the language of the Holder and Thompson Memos that suggests waiver is not mandatory, *see infra* note 191 and accompanying text.

8. *See* Buchanan, *supra* note 6, at 598 (discussing the results of a survey of the ninety-four U.S. Attorneys’ Offices conducted in 2002 by the U.S. Sentencing Commission Ad Hoc Advisory Group, which “revealed that requests for waiver . . . were the exception rather than the rule”); Marcia Coyle, *Lawyers Fear a DOJ ‘Culture of Waiver’*, *NAT’L L.J.*, Mar. 13, 2006, at 13 (noting that the “Justice Department maintains today that waivers are not the norm”).

9. *See generally* AM. CHEMISTRY COUNCIL, ASS’N OF CORP. COUNS. ET AL., *THE DECLINE OF THE ATTORNEY-CLIENT PRIVILEGE IN THE CORPORATE CONTEXT – SURVEY RESULTS* (March 2006) [hereinafter *COALITION SURVEY*], available at <http://www.acca.com/Surveys/attyclient2.pdf>; ASS’N OF CORP. COUNS., *EXECUTIVE SUMMARY, ASSOCIATION OF CORPORATE COUNSEL SURVEY: IS THE ATTORNEY-CLIENT PRIVILEGE UNDER ATTACK?* (Apr. 2005) [hereinafter *ACC SURVEY*], available at <http://www.abanet.org/buslaw/attorneyclient/publichearing20050421/testimony/hackett1.pdf>; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, *EXECUTIVE SUMMARY, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SURVEY: THE ATTORNEY-CLIENT PRIVILEGE IS UNDER ATTACK* (Apr. 2005) [hereinafter *NACDL SURVEY*], available at [http://www.acca.com/Surveys/attyclient\\_nacdl.pdf](http://www.acca.com/Surveys/attyclient_nacdl.pdf); *see also* Richard Ben-Veniste & Lee H. Rubin, *DOJ Reaffirms and Expands Aggressive Corporate Cooperation Guidelines*, *LEGAL BACKGROUNDER*, Apr. 4, 2003, at 1, 1, available at <http://www.mayerbrownrowe.com/>

corporate legal community is collectively exaggerating the zeal and frequency with which waiver is being urged, it is impossible to dispute that the potential for what amounts to compelled-voluntary waiver represents a legitimate fear.

This perceived ever-present concern has caused many corporate executives and their counsel to question the continued efficacy of the attorney-client privilege and work product doctrine. In particular, they contend that the escalating pressure to waive these protections is eroding the desired atmosphere of mutual candor and trust that has traditionally been the hallmark of the attorney-client relationship, which, in turn, is adversely affecting counsel's desire and ability to conduct the thorough factual investigations<sup>10</sup> lauded by the Supreme Court in *Upjohn Co. v. United States*.<sup>11</sup>

The upshot, so the argument goes, is the inevitable provision of ineffective legal representation.<sup>12</sup> More precisely, the parade of horrors envisaged include: (1) the erosion of trust between attorney and client—corporate executives and employees will cease to be forthcoming out of a fear that whatever they communicate will ultimately be disclosed,<sup>13</sup>

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news/article.asp?id=702&nid=5 (noting “ever more frequent government practice of seeking a blanket waiver of the privilege before the company has completed its internal probe”); Richard M. Cooper, *Privilege Under Fire*, NAT'L L.J., Mar. 14, 2005, at 12 (observing that “prosecutors increasingly demand waiver of the privilege as an element of organizational cooperation”); Zornow & Krakaur, *supra* note 4, at 154 (noting that “federal prosecutors more and more frequently go so far as to state that unless a company provides its privileged information to the government, the company will be deemed not to have cooperated”).

10. See *infra* note 14.

11. 449 U.S. 383, 390 (1981). For a detailed discussion of *Upjohn*, see *infra* notes 160-85 and accompanying text.

12. See Zornow & Krakaur, *supra* note 4, at 149 (observing that “our criminal justice system has already begun to suffer the loss of fully informed and vigorously adversarial legal representation in exchange for prosecutorial expediency”); see also Del Giorno, *supra* note 5, at 22 (suggesting that the Holder Memo, Section 307 of the Sarbanes-Oxley Act and related attorney conduct Rule 205 “greatly impact the attorney-client privilege and [a] lawyer’s ability to effectively represent a client”).

13. See Ben-Veniste & Rubin, *supra* note 9, at 2 (observing that “the prospects of a company waiver may . . . restrict the free flow of information between company employees and counsel”); Cooper, *supra* note 9, at 12 (noting that “[i]ncreasing employees’ risks from cooperation may reduce their willingness to answer questions at all or to answer truthfully and fully”); see also Del Giorno, *supra* note 5, at 23 (observing that when an agreement to waive the privilege is “already in place, the attorney must inform the witness that anything disclosed will be turned over to the government”); Keneally, *Threat*, *supra* note 1, at 53 (noting that an “individual officer or employee has the right not to speak to the government, and gains no protection when he or she speaks to the corporation’s attorney”); Van Fleet, *supra* note 6, at 8 (observing that the “policy [of] demanding waiver . . . will subject employees to the cruel trilemma of self-accusation, obstruction of justice, or discharge”). But see *infra* notes 202-11 and accompanying text (suggesting that level of trust and candor is already low given the very nature of the corporate attorney-client privilege).

and corporate counsel will understandably be more skeptical of the accuracy or completeness of the information communicated to them; (2) lawyers' internal investigations will become "paperless"<sup>14</sup>—counsel will refrain from taking notes or preparing memoranda in connection with corporate representations to avoid future provision of a blueprint for culpability to regulators and perhaps third parties;<sup>15</sup> and (3) lawyers and clients will cease to conduct internal investigations altogether,<sup>16</sup> in an effort to evade the waiver issue entirely, which will invariably lead to a decrease in corporate legal compliance.<sup>17</sup> If these side effects of compelled-voluntary waiver are in fact a reality, there is truly cause for

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14. See American College of Trial Lawyers, *supra* note 4, at 322 (suggesting that in response to DOJ pressure to waive, "counsel often anticipate at the outset of an investigation that 'the fruits of the investigation stand a substantial chance of being delivered to the government,' and . . . [a]s a result, counsel may simply refrain from putting inculpatory information in written form"); Ben-Veniste & Rubin, *supra* note 9, at 2 (noting that "by creating disincentives to formalize thoughts or convey impressions in writing, [the prospect of waiver] may produce undesirable changes in the manner in which company lawyers . . . perform their jobs"); Cooper, *supra* note 9, at 12 (observing that "the costs added by a waiver to a finding of adverse information may temper the zeal to find it and/or the completeness of its recordation (if and when found) in corporate counsel's notes and memoranda"); Del Giorno, *supra* note 5, at 23 (suggesting that an attorney with knowledge that information related to a representation will have to be disclosed to the government "may be more cautious in creating written documentation of witness interviews and other investigations"); Savage & Longo, *supra* note 2, at 5 (positing that the DOJ's waiver policy "may well result in less written legal advice").

15. See COALITION SURVEY, *supra* note 9, at 14 (observing that because of the potential for privilege waiver "I can no longer send memos that say: 'under no circumstances may you do this,' or the like, for fear of reprisal [in the future]") (quoting one Survey respondent); Ben-Veniste & Rubin, *supra* note 9, at 2 (maintaining that "companies which decide to waive the privilege in criminal investigations must do so with the sober recognition that they also may be handing over their internal documents to both the plaintiffs' bar and relevant federal and state regulatory authorities"). Of those federal courts of appeal that have addressed the issue, the vast majority have held that a corporate client may not "selectively waive" the attorney-client privilege or work product doctrine as to the government without likewise waiving those protections as to other third parties. See, e.g., Richard M. Strassberg & Sarah E. Walters, *Is Selective Waiver of Privilege Viable?*, N.Y.L.J., July 7, 2003, at 7 (observing that the "prevailing view in most circuits is that there can never be 'selective waiver' of the attorney-client privilege"); see also *infra* notes 35-36 and accompanying text. For a more detailed discussion of courts' treatment of this so-called "selective waiver" issue, see *infra* Part V. In addition, it is widely recognized that one may not limit waiver to the specific information disclosed—waiver will be broadened to encompass other information related to the same subject matter. See *infra* note 56 and accompanying text.

16. See Savage & Longo, *supra* note 2 (observing that the DOJ's waiver policy "serves to discourage the acquisition of legal advice by corporations in the first place"); see also Cole, *supra* note 3, at 486 (noting that "[f]ailing to afford the protection of the attorney-client privilege to communications between business entities and their legal counsel would have a chilling effect on internal investigations of corporate activities").

17. See COALITION SURVEY, *supra* note 9, at 14 (noting that "[t]o allow for this type of [waiver] request will merely result in many corporations no longer including in-house counsel in important decision-making processes which may in fact lead to even more wrongdoing") (quoting one Survey respondent); see also *infra* notes 224-26 and accompanying text.

concern, as they are completely contrary to the expected benefits of this corporate regulatory initiative.

The concept of encouraging greater cooperation with federal investigations was a direct response to the unprecedented business scandals that marred the image of corporate America at the turn of this century.<sup>18</sup> The utopian expectation was that the prospect of favorable regulatory or penal treatment would increase corporate self-regulation and inspire greater overall corporate responsibility.<sup>19</sup> In short, privilege waiver, as a component of the larger “cooperation” calculus, was expected to serve the utilitarian ideal of achieving the greatest good for everyone—the government, corporate America, and most importantly, the public.

Further, from a purely pragmatic standpoint, the DOJ policy (and others like it)<sup>20</sup> was intended to promote efficiency and costs savings.<sup>21</sup> Rather than conducting a time-consuming and expensive investigation that might lead to subsequent protracted litigation, compelled-voluntary waiver would permit the agencies to cut directly to the chase, so to speak. The DOJ undoubtedly believed that the best evidence of corporate wrongdoing would consist of information arguably protected by the attorney-client privilege and/or work product doctrine, information that they would have great difficulty obtaining in the absence of a voluntary waiver, if they could obtain it at all. Consequently, privilege waiver seemed to provide the most effective

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18. See Buchanan, *supra* note 6, at 587 (observing that “the subject of organizational accountability has been brought to the fore by a series of high-profile corporate scandals that have shaken the public’s confidence in the way that some of our largest companies conduct business”). Cf. Van Fleet, *supra* note 6, at 8 (noting that “waiver undermines the policy of full and frank internal disclosure of corporate wrongdoing embodied in the Sarbanes-Oxley Reform Act of 2002”).

19. See, e.g., Buchanan, *supra* note 6, at 599 (observing that the amendments to the Organizational Sentencing Guidelines “placed great emphasis on the development of [good corporate] culture in providing that ‘[t]hese guidelines offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct through an effective compliance and ethics program.”); John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 311 (2004) (noting that “the premise that underlies [such] reform efforts is that the federal government should transform corporations into ‘good citizens’”).

20. See, e.g., Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44,969, 2001 SEC LEXIS 2210 (Oct. 23, 2001), available at <http://www.sec.gov/litigation/investreport/34-44969.htm> (last visited Nov. 21, 2005) (delineating criteria to be considered in evaluating a company’s cooperation in connection with determination regarding possible enforcement action).

21. See Cooper, *supra* note 9, at 12 (noting that “[w]aivers give prosecutors potentially useful information, with minimal expenditure of prosecutorial resources”); see also *In re Columbia/HCA*, 293 F.3d 289, at 303 (6th Cir. 2002).

avenue for quickly getting to the bottom of potential corporate misconduct. All this, of course, presupposed that corporations and their counsel would continue to operate consistent with a prototypical attorney-client model, openly and candidly exchanging factual information and legal advice.<sup>22</sup> If, however, the privilege waiver policies have indeed chilled the corporate attorney-client relationship and converted it into one of cautious distrust, as has been suggested, then one might reasonably conclude that the DOJ, among others, ironically, may have made the problem worse.<sup>23</sup>

Before the advent of compelled-voluntary waiver, there was arguably a greater probability that counsel would receive all pertinent information, both good and bad, and would accordingly have the opportunity to steer the company in a lawful direction. If such candid interchanges are no longer occurring, then it seems to follow that there is an increased risk of corporate wrongdoing and the government's efforts to ferret out such behavior may actually be undermined.<sup>24</sup>

Nevertheless, there is certainly room for doubt as to whether the looming threat of compelled-voluntary waiver is affecting or will affect the corporate attorney-client relationship in the fashion postulated. Independent legal and economic incentives exist that may inspire corporations to strive for legal compliance irrespective of the prospect of privilege waiver.<sup>25</sup> Furthermore, one can plausibly question how

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22. See *infra* notes 59-60 and accompanying text.

23. See COALITION SURVEY, *supra* note 9, at 13-14 (maintaining that "current [waiver] policies run a significant risk of chilling attorney client communications in the future which will heighten, rather than reduce, compliance risks") (quoting one Survey respondent); American College of Trial Lawyers, *supra* note 4, at 321 (observing that "[t]he chilling effect on corporate self-scrutiny is obvious and there will be a serious adverse impact on the ability of corporations to prevent the occurrence of future violations of law, and of counsel to conduct meaningful and effective internal investigations").

24. See COALITION SURVEY, *supra* note 9, at 16 (observing that "[t]he heavy-handed 'requests' for waiver of the attorney/client privilege, with heavy handed penalties levied for failure to 'cooperate,' will undermine the administration of justice in the long run") (quoting one Survey respondent); Ben-Veniste & Rubin, *supra* note 9, at 3 (contending that the government's growing propensity to seek privilege waiver at the beginning of an investigation "is fraught with substantial risk for both the company and federal officials, as such a policy may in fact lead to the disclosure of less information to the government rather than more"); Cooper, *supra* note 9, at 12 (observing that "an aggressive prosecutorial tactic (demanding waivers) may lead to increased wrongdoing (by eroding the effectiveness of corporate counsel)"); Van Fleet, *supra* note 6, at 8 (positing that a "waiver policy that dissuades companies from coming forward will hurt government efforts to prosecute criminal violations and reduce compensation to victims").

25. See, e.g., Brian E. Hamilton, *Conflict, Disparity, and Indecision: The Unsettled Corporate Attorney-Client Privilege*, 1997 ANN. SURV. AM. L. 629, 648 (1997) (maintaining that the "possibility of facing punishment for regulatory violations should be the greatest deterrent to non-compliance"); see also *Samaritan Found. v. Goodfarb*, 862 P.2d 870, 879 (Ariz. 1993) (rejecting

forthcoming corporate executives and employees really are to their counsel even with the guarantee of confidentiality provided by the attorney-client privilege. Corporate constituents, for example, could legitimately distrust the security provided to them by the corporate privilege, given that it belongs to the corporation rather than to them individually.<sup>26</sup> Hence, they may very well view internal investigations, conducted in the absence of the prospect of compelled-voluntary waiver, with a comparable degree of skepticism. In other words, it is possible that before the concept of compelled-voluntary waiver even existed, the corporate attorney-client dynamic may not have been all that different from the flawed relationship that commentators currently attribute to the DOJ policy.<sup>27</sup> As a result, widespread alarm over the perceived governmental pressure to waive the privilege could, perhaps, be much ado about nothing.

The obvious question that begs an answer is: Which position is correct?—Is compelled-voluntary waiver eviscerating the corporate attorney-client privilege and its concomitant benefits; or is the corporate attorney-client privilege already a fundamentally flawed doctrine that fails to promote the elemental touchstones of its forerunner, the individual attorney-client privilege? As this Article reveals, the answer to these questions is both “yes” and “no.” There is some truth to each position, but at the end of the day, accepting either does little to resolve the controversy surrounding the DOJ and other privilege waiver policies. Something more needs to be done to address adequately the problems

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arguments that in the absence of a broad privilege, corporations would refrain from “policing their own activities to ensure” legal compliance, and concluding instead that “[c]orporations comply with the law because they wish to avoid liability”); *infra* notes 224-26 and accompanying text.

26. See Hamilton, *supra* note 25, at 646 (observing that because a client corporation “can waive the privilege at any time subsequent to an employee’s communications [with counsel] . . . , the employee has no guarantee that the information he shares . . . will never be revealed in litigation”); John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 509 (1982) (noting that “in those cases where the information-holder has a personal, as well as a corporate, legal interest in the information he possesses, the possibility that the corporation might waive the attorney-client privilege, thereby rendering the information discoverable, would create a powerful incentive either to refuse to communicate with the attorney or to prevaricate”); Urofsky, *supra* note 7, at 643 (recounting then U.S. Attorney James Comey’s contention that “[e]xperienced attorneys routinely advise an employee that the interview is covered *only* by the corporation’s attorney client privilege and that the corporation could decide to waive it”).

27. See Urofsky, *supra* note 7, at 643 (noting then U.S. Attorney James Comey’s observation that “[t]here is no parade of horrors conjured up by the defense bar when, on their own initiative, they waive the attorney client privilege or work product protection”); see also Hamilton, *supra* note 25, at 646-47 (observing that because employees’ communications with counsel are never assured of non-disclosure, they “will probably not be so forthcoming as was assumed in *Upjohn*”).

created by the oxymoronic concept of compelled-voluntary waiver, as well as the inherent deficiencies of the corporate attorney-client privilege.<sup>28</sup>

The debate thus far has focused on the privilege waiver policies themselves and what needs to be done to alleviate their perceived effects on the corporate attorney-client privilege, with the American Bar Association (“ABA”) being the most notable contributor to the discussion. Specifically, on October 6, 2004, ABA President Robert Grey established the Presidential Task Force on the Attorney-Client Privilege,<sup>29</sup> whose mission is:

[To] examine the purposes behind the privilege and its exceptions, the circumstances in which competing objectives are currently being asserted by governmental agencies and others to override the privilege, and the extent to which the correct balance is being struck between these competing objectives and the important policies underlying the privilege.<sup>30</sup>

On June 7, 2005, the Task Force issued a preliminary recommendation that seemed somewhat rigid and unimaginative, essentially proclaiming that to the extent governmental policies are eroding the privilege, the ABA should oppose them.<sup>31</sup> The ABA House of Delegates unanimously approved a slightly altered version of this

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28. Although the government’s waiver policies relate to both the attorney-client privilege and the work product doctrine, much of the debate has been cast in terms of the privilege alone. The reasons for this are unclear, but it is likely either a reflection of the perceived greater importance of the attorney-client privilege, or else is simply shorthand intended to cover the work product doctrine as well. Whatever the rationale, for the sake of consistency, this Article will hereafter follow the same nomenclatorial preference by centering the discussion primarily on the “corporate attorney-client privilege.”

29. See Press Release, ABA, ABA President Robert Grey Creates Task Force to Advocate for Attorney-Client Privilege (Oct. 6, 2004), available at <http://www.abanet.org/buslaw/attorneyclient/pressrelease.shtml>. The Task Force is chaired by McKenna Long Aldridge, partner and former ABA President R. William Ide III, and is comprised of thirteen members (in addition to the chair) and three reporters, led by Professor Bruce A. Green of Fordham University School of Law. See ABA, ABA Presidential Task Force on the Attorney-Client Privilege: Members, <http://www.abanet.org/buslaw/attorneyclient/members.shtml> (last visited Mar. 21, 2006).

30. ABA Presidential Task Force on the Attorney-Client Privilege: Mission Statement, <http://www.abanet.org/buslaw/attorneyclient/home.shtml> (last visited Mar. 21, 2006).

31. See ABA Task Force on Attorney-Client Privilege: Recommendation 111, [http://www.abanet.org/buslaw/attorneyclient/materials/hod/recommendation\\_adopted.pdf](http://www.abanet.org/buslaw/attorneyclient/materials/hod/recommendation_adopted.pdf) (last visited Mar. 21, 2006). The June 7, 2005 Report of the ABA Task Force in connection with its Recommendation is available at <http://www.abanet.org/buslaw/attorneyclient/materials/hod/report.pdf>.

recommendation in August 2005, which did little more than strengthen the resoluteness of the Task Force's suggested position.<sup>32</sup>

In apparent response to the ABA's pronouncement, as well as the overall concern regarding compelled-voluntary waiver, on October 21, 2005, the DOJ formally ordered what amounts to greater administrative oversight and regulation of waiver requests by all United States Attorneys.<sup>33</sup> In particular, the DOJ directive, embodied in a memorandum authored by Acting Deputy Attorney General Robert D. McCallum, Jr., provides, in pertinent part, that:

To ensure that federal prosecutors exercise appropriate prosecutorial discretion under the principles of the *Thompson Memorandum*, some United States Attorneys have established review processes for waiver requests that require federal prosecutors to obtain approval from the United States Attorney or other supervisor before seeking a waiver of the attorney-client privilege or work product protection. Consistent with this best practice, you are directed to establish a written waiver review process for your district or component.<sup>34</sup>

In addition to the ABA and DOJ responses, other contributors to the debate have proposed legislative or judicial recognition of "selective waiver" of the corporate attorney-client privilege as a possible compromise.<sup>35</sup> Under this proposal, a corporation would be permitted to

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32. See Joan C. Rogers, *Delegates Unanimously Support Resolution Opposing Government Coercion on Privileges*, 21 *Laws. Man. on Prof. Conduct (ABA/BNA)* 414, 414 (Aug. 10, 2005) (observing that the version ratified by the House of Delegates is "more strongly worded than the task force's recommendation").

33. See Joan C. Rogers, *DOJ Instructs U.S. Attorneys to Formulate Written Process for Privilege Waiver Requests*, 21 *Laws. Man. on Prof. Conduct (ABA/BNA)* 564 (Nov. 2, 2005).

34. *Id.* Although it is somewhat encouraging to compelled-voluntary waiver critics that the DOJ is at least trying to address their concerns, many appear to believe that the McCallum Memo does not represent a very meaningful gesture. See *id.* (observing that some lawyers were of the opinion "that the new policy is a positive step but falls short of the changes needed to prevent federal prosecutors from routinely and inappropriately demanding privilege waivers"); Stephen W. Grafman & Jeffrey L. Bornstein, *New Memo Won't Help*, *NAT'L L.J.*, Nov. 14, 2005, at 31 (contending that "[t]he new policy, if it can be called that, will have little, if any, effect in eliminating the now virtually routine request for waivers of attorney-client and attorney work-product privilege"); see also Rogers, *supra* note 33, at 565 (noting one prominent New York defense attorney's opinion that the new policy was "a fairly superficial gesture").

35. See, e.g., David M. Brodsky & Jeff G. Hammel, *What Price Cooperation? Reducing the Costs of Waiving Privilege During SEC Investigations*, 6 *WALL ST. LAW.*, Dec. 2002, at 1, 3-4 (recommending "legislatively limiting the scope of the waiver in connection with an SEC investigation so that the information obtained through the waiver may be used solely by the Enforcement Staff . . . not in civil contexts outside the investigation"); Buchanan, *supra* note 6, at 606 (observing that "[s]ome critics have requested legislative enactment or judicial creation of a privilege to cover voluntary disclosures of attorney-client privileged and work product information to the government"); see also Ashok M. Pinto, *Cooperation and Self-Interest are Strange*

waive the privilege as to the government in isolation without effecting a broader, general waiver.<sup>36</sup> Put simply, the waiver would be limited only to the material disclosed and the party to whom disclosure was made.

Though well-intended and understandable, neither the ABA's rigid privilege stance, the DOJ's mandate for greater scrutiny of waiver requests, nor the concept of selective waiver is likely to move the compelled-voluntary waiver discussion towards a meaningful resolution. This stems from their singular concentration on the waiver issue in the context of maintaining the corporate attorney-client privilege in its present form. Such a limited approach overlooks the potential for compromise that could result from steering the discussion towards reconsideration of the corporate attorney-client privilege itself.

Specifically, it may be possible to narrow the scope of the corporate attorney-client privilege so as to protect the sort of information that the privilege was originally designed to cover, as well as that which corporations desire most to be kept confidential, such as legal advice from counsel or incriminating communications from senior management to corporate counsel. This would likely render "non-privileged" a great deal of what the government currently seeks to obtain via waiver. Hence, corporations subject to a DOJ investigation would be able to disclose such information voluntarily without ever having to confront the privilege waiver issue. The purpose of this Article is to make the case for this nuanced approach to resolving the compelled-voluntary waiver paradox.

After discussing some foundational background principles regarding the individual and corporate attorney-client privileges in Parts II and III, Part IV provides a detailed examination of the compelled-voluntary waiver issue and its alleged effects on the corporate attorney-client relationship. The Article continues in Part V with a discussion and assessment of the selective waiver doctrine, which appears to be the most popular remedial proposal at present. Part VI then presents support for refocusing the waiver debate on reconsideration of the privilege itself, and concludes with a proposal for the establishment of a uniform corporate attorney-client privilege, the scope of which should be

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*Bedfellows: Limited Waiver of the Attorney-Client Privilege Through Production of Privileged Documents in a Government Investigation*, 106 W. VA. L. REV. 359 (2004).

36. See Cooper, *supra* note 9, at 12 (observing that under existing circumstances, "waiver may not be limited to the prosecutors, but may extend to regulatory bodies, plaintiffs' lawyers and others . . . [and] may be held to cover the disclosure's subject matter . . . , not merely the particular information disclosed").

modeled after the once popular “control group” test, albeit in a slightly revised form.

While some may disagree with this Article’s specific proposal, the underlying concept of centering the privilege waiver dialogue around reconsideration of the corporate attorney-client privilege seems worthy of reflection. At a minimum, it provides a more constructive beginning to the discussion and likely presents a more realistic opportunity for reaching an acceptable compromise that will preserve the sanctity of the privilege in its most fundamental form, while reasonably accommodating the government’s investigatory objectives.

## II. THE INDIVIDUAL ATTORNEY-CLIENT PRIVILEGE

### A. *Scope of the Privilege*

The attorney-client privilege is evidentiary in nature, protecting against the compelled disclosure by the attorney or client of communications between them that satisfy the requisite elements.<sup>37</sup> The precise formulation of the individual attorney-client privilege may vary somewhat between jurisdictions, but the general requirements are essentially the same.<sup>38</sup> In order for information to be protected from compelled disclosure, it must constitute “(1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.”<sup>39</sup>

The privilege is actually somewhat broader than the elements might facially suggest. First, a “communication” can be oral, written or even

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37. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.1.1 (1986) (observing that the privilege is a “rule of evidence that precludes another party in litigation from asking either client or lawyer what either has exchanged in confidence”).

38. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 5, tit. A, introductory note (2000) [hereinafter RESTATEMENT] (observing that “[e]very American jurisdiction provides—either by statute, evidence code, or common law—that generally neither a client nor the client’s lawyer may be required to testify or otherwise to provide evidence that reveals the content of confidential communications between client and lawyer in the course of seeking or rendering legal advice or other legal assistance”); WOLFRAM, *supra* note 37, § 6.3.1 (noting that the attorney-client privilege is recognized in every jurisdiction within the United States and that “[f]ormulations and model statements of it abound”).

39. RESTATEMENT, *supra* note 38, § 68 & reporter’s note (noting that the *Restatement’s* definition of the attorney-client privilege “differs only slightly from other general formulations put forward in recent decades”); FED. R. EVID. 501 (providing that “in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law”).

non-verbal and still qualify for protection.<sup>40</sup> In addition, the requirement that the protected communication be between “privileged persons” encompasses not just the attorney and client or prospective client, but also the authorized agents of either.<sup>41</sup> For example, associates or other employees within a lawyer’s firm who are necessary to carry out a representation would be considered “privileged persons” for purposes of the attorney-client privilege.<sup>42</sup>

A critical limiting factor on these seemingly liberal components of the privilege, however, is that it only protects “communications” themselves, not underlying facts.<sup>43</sup> The easiest way to comprehend this is to consider it in the context of a written communication prepared for and transmitted to a lawyer by a client for the purpose of obtaining legal advice. The written document itself would most likely be covered by the attorney-client privilege, but the information contained therein would not. Barring some other valid objection, third parties would be able to gain access to that information through some form of court-sanctioned compulsion, such as a deposition, discovery request or subpoena.

In addition, the scope of the individual attorney-client privilege is further circumscribed by the strict requirements that the communication be for the purpose of acquiring or rendering legal advice, and be conveyed and maintained in confidence. Communications will not qualify for protection if made for some purpose other than obtaining legal assistance from a lawyer,<sup>44</sup> or if made in the presence of or

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40. See RESTATEMENT, *supra* note 38, § 69 cmts. b, e; WOLFRAM, *supra* note 37, § 6.3.5.

41. See RESTATEMENT, *supra* note 38, § 70 (defining “privileged persons” to include “the client (including a prospective client), the client’s lawyer, agents of either who facilitate communications between them, and agents of the lawyer who facilitate the representation”).

42. See RESTATEMENT, *supra* note 38, § 70 cmt. g (noting that lawyers “may disclose privileged communications to other office lawyers and with appropriate nonlawyer staff—secretaries, file clerks, computer operators, investigators, office managers, paralegal assistants, telecommunications personnel, and similar law-office assistants”); WOLFRAM, *supra* note 37, § 6.3.8 (recognizing that “a lawyer may permissibly discuss confidential information about a client with partners and associates in the lawyer’s own firm”). *Cf.* MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 5 (2004) (observing that “[l]awyers in a firm may, in the course of the firm’s practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers”).

43. See *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) (indicating that “[t]he privilege only protects disclosure of communications; . . . not . . . disclosure of the underlying facts by those who communicated with the attorney”); see also RESTATEMENT, *supra* note 38, § 69 cmt. d (observing that the “privilege protects only the content of the communication between privileged persons, not the knowledge of privileged persons about facts themselves”); WOLFRAM, *supra* note 37, § 6.3.5 (noting that the privilege protects “the specific content of the communication to the lawyer, not the facts themselves”).

44. See RESTATEMENT, *supra* note 38, § 72 cmt. b (noting that the client or prospective client “must have consulted the lawyer to obtain legal counseling or advice, document preparation,

subsequently disclosed to third parties (knowingly or inadvertently).<sup>45</sup> Moreover, because the attorney-client privilege necessarily hinders the quest for the truth,<sup>46</sup> which at least theoretically defines the American legal system, it is well established that the privilege is to be strictly construed.<sup>47</sup>

The narrowness of the attorney-client privilege is complemented by the recognition of several exceptions. The best-known and most frequently recognized is the crime-fraud exception.<sup>48</sup> Under this exception, the privilege is nullified when the client seeks legal advice or assistance “for the purpose of,” “in the furtherance of” or “in connection with” a future or on-going crime or fraud.<sup>49</sup> In essence, the “purpose” element of the privilege is corrupted by the client’s nefarious intent.<sup>50</sup> As Justice Benjamin Cardozo once aptly stated: “The privilege takes flight

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litigation services, or any other assistance customarily performed by lawyers in their professional capacity”).

45. See, e.g., RESTATEMENT, *supra* note 38, § 71 & cmt. a (observing that “[e]ven if the initial communication is in confidence and otherwise qualifies for protection as a privileged communication, its privileged status may be lost by subsequent revelation of the communication”).

46. See RESTATEMENT, *supra* note 38, § 68 cmt. c (noting that the “law accepts the risks of factual error and injustice in individual cases in deference to the values that the privilege vindicates”); WOLFRAM, *supra* note 37, § 6.1.4 (observing that the privilege’s guarantee of confidentiality “is purchased only at the price of excluding from trials evidence from lawyers and clients about their conversations—a detraction from the search for truth that is ‘plain and concrete’”); Sexton, *supra* note 26, at 446 (suggesting that “even its staunchest proponents concede that, whenever the privilege is invoked, otherwise relevant and admissible evidence may be suppressed”).

47. See Sexton, *supra* note 26, at 446 (maintaining that because of the “tension . . . between the secrecy required to effectuate the privilege and the openness demanded by the factfinding process . . . [.] it has been concluded broadly that the contours of the privilege should ‘be strictly confined within the narrowest possible limits consistent with the logic of its principle’”) (quoting 8 J. WIGMORE, WIGMORE ON EVIDENCE § 2291 (McNaughton rev. ed. 1961)); EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 12-14 (4th ed. 2001); WOLFRAM, *supra* note 37, § 6.3.4. *But see* EPSTEIN, *supra*, at 14 (observing that even though “courts frequently say the privilege is to be narrowly or strictly construed, their decisions do not always bear out this dictum”).

48. See, e.g., RESTATEMENT, *supra* note 38, § 82.

49. There are various specific formulations of the scope of the crime-fraud exception. The *Restatement* provides that the exception applies when a client “consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so, or . . . regardless of the client’s purpose at the time of consultation, uses the lawyer’s advice or other services to engage in or assist a crime or fraud.” RESTATEMENT, *supra* note 38, § 82. The U.S. Court of Appeals for the Second Circuit, on the other hand, utilizes a slightly different definition, recognizing that “the privilege does not apply where legal representation was secured in furtherance of intended, or present, continuing illegality.” *United States v. Hodge and Zweig*, 548 F.2d 1347, 1354 (9th Cir. 1977).

50. It is important to note that the *client’s* intent is the critical triggering factor for the crime-fraud exception—“the exception applies even if a lawyer is unaware of the client’s intended crime or fraud.” WOLFRAM, *supra* note 37, § 6.4.10.

if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law.”<sup>51</sup>

Another well known exception is the so-called “self defense” exception, under which a lawyer is permitted to disclose and utilize otherwise privileged information in order to defend himself or herself against a charge of wrongdoing by the client or some third party.<sup>52</sup> In addition, under this exception, a lawyer is likewise allowed to use privileged communications for the purpose of establishing a claim against a client or former client, typically for the recovery of attorney’s fees.<sup>53</sup> In these instances, one could also view the exception as somewhat of a waiver or negation of the element of confidentiality, insofar as the attorney’s legal assistance itself has been put at issue in a separate proceeding.<sup>54</sup>

Although similar to an exception to the attorney-client privilege, waiver is usually thought of as a separate concept. As alluded to earlier, it is basically a relinquishment of the “confidential” component of the privilege, and it can be accomplished through an inadvertent disclosure or through a conscious voluntary revelation.<sup>55</sup> The latter form is the focus of this Article and will be explored in much greater detail in subsequent sections. For present purposes, the significance of waiver relates to the narrowing effect that it has upon the breadth of the attorney-client privilege. Furthermore, when courts determine that waiver has occurred, it will most likely be extended beyond the

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51. GEOFFREY C. HAZARD, JR., ET AL., *THE LAW AND ETHICS OF LAWYERING* 303 (4th ed. 2005) (quoting *Clark v. United States*, 289 U.S. 1, 15 (1933)); *see also* RESTATEMENT, *supra* note 38, § 82 cmt. b (observing that the crime-fraud exception “can be founded on the additional moral ground that the client’s wrongful intent forfeits the protection”).

52. *See* RESTATEMENT, *supra* note 38, § 83 (providing that the “privilege does not apply to a communication that is relevant and reasonably necessary for a lawyer to employ in a proceeding . . . to defend the lawyer or the lawyer’s associate or agent against a charge by any person that the lawyer, associate, or agent acted wrongfully during the course of representing a client”).

53. *See* RESTATEMENT, *supra* note 38, § 83 (permitting a lawyer to disclose, to the extent relevant and reasonably necessary, otherwise privileged communications in order “to resolve a dispute with a client concerning compensation or reimbursement that the lawyer reasonably claims the client owes”).

54. *Cf.* RESTATEMENT, *supra* note 38, § 80.

55. *See* RESTATEMENT, *supra* note 38, § 79 (providing that the “privilege is waived if the client, the client’s lawyer, or another authorized agent of the client voluntarily discloses the communication in a non-privileged communication”).

particular communication in question to other information that relates to the same subject matter,<sup>56</sup> as well as to any interested third party.<sup>57</sup>

The overt constricting of the scope and applicability of the attorney-client privilege might lead one reasonably to conclude that the alleged side effects of the DOJ's waiver efforts might actually be present even in the absence of such governmental pressure. Nevertheless, the reality appears to be that the privilege's tight constraints are substantially counter-balanced by its sacrosanct aura<sup>58</sup> and the related pragmatic justifications that reputedly support it. The next section will examine the historical foundation and development of the privilege in an effort to illuminate both the basis and the propriety of its revered standing in our legal hierarchy.

### B. *Evolution of the Privilege—Origins and Justifications*

The principal rationale for the attorney-client privilege is strongly rooted in the belief that it encourages open and candid communication between attorney and client, and thereby facilitates the rendition of

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56. See RESTATEMENT, *supra* note 38, § 79 cmt. f (observing that partial disclosure of privileged information typically results in the general waiver of the privilege with regard to communications related to the same subject matter, whether disclosed during the course of a trial or in the context of pretrial discovery). This type of waiver is typically referred to as "subject matter" waiver and it is the common by-product of the disclosure of otherwise privileged communications, although under certain circumstances, one may be able to effect what has been called a "partial" waiver. Specifically, if the disclosure of privileged information is made in a non-litigation context and not for the purpose of obtaining some potential intrajudicial benefit, then courts are willing to limit the scope of the waiver only to the material actually disclosed. See, e.g., RESTATEMENT, *supra* note 38, § 79 cmt. f & reporter's note (discussing *In re von Bulow*, 828 F.2d 94 (2d Cir. 1987), among other cases, as an example of a situation in which public disclosure of privileged information outside of litigation did not result in subject matter waiver).

57. See *supra* note 15 and accompanying text. For a thorough discussion of the concept of "selective waiver," which allows one to limit the extent of a waiver to a particular party, see *infra* Part V.

58. The perceived sanctity of the attorney-client privilege is reinforced by the broader ethical duty of confidentiality, which basically prohibits a lawyer from disclosing or using, without client consent, "information relating to the representation of a client." MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2004) (emphasis added); see also *id.* R. 1.8(b), 1.9(c)(1) (discussing prohibitions regarding "use" of confidential information to a client's and former client's disadvantage, respectively). This broader protection, provided to information that qualifies as confidential, is often conflated with the attorney-client privilege by both attorneys and their clients, which no doubt contributes to the corporate outrage over compelled-voluntary waiver. See, e.g., Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. TEX. L. REV. 69, 72, 75 (observing that "even courts addressing client secrecy issues conflate the principles of privilege and confidentiality" and that similar confusion amongst lawyers and clients exists). In other words, the misconception of the scope of the privilege greatly expands the quantity of information that corporations and their counsel believe that the government is improperly co-opting.

effective legal services.<sup>59</sup> Although this justification is uniformly acknowledged within the American legal system as the cornerstone for the creation and continued recognition of the attorney-client privilege,<sup>60</sup> the actual origin and evolution of the privilege call into question the definitive nature of this contemporary assessment.<sup>61</sup>

As with many other aspects of our law, the genesis of the American version of the attorney-client privilege can be traced to England.<sup>62</sup> The initial motivation for recognition of the privilege by English courts was apparently a by-product of British etiquette. Specifically, courts of England were reluctant “to require lawyers to breach the code of a gentleman by being compelled to reveal in court what they had been told by clients.”<sup>63</sup> As such, unlike the modern American edition, under which the privilege belongs to the client, the privilege in England originally

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59. See RESTATEMENT, *supra* note 38, § 68 cmt. c (noting that the “rationale for the privilege is that confidentiality enhances the value of client-lawyer communications and hence the efficacy of legal services”); Vincent S. Walkowiak, *An Overview of the Attorney-Client Privilege When the Client is a Corporation*, in ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION: PROTECTING AND DEFENDING CONFIDENTIALITY 1, 1 (Vincent S. Walkowiak ed., 2004) [hereinafter PROTECTING AND DEFENDING] (indicating that the “purpose of the attorney-client privilege, established long ago, is to promote the free flow of information between attorneys and their clients while removing the fear that the details . . . will be revealed to outsiders,” which ultimately enables the attorney to “render accurate advice”); see also EPSTEIN, *supra* note 47, at 4 (observing that “[w]ith fear of disclosure, all facts will not be freely revealed and legal advice cannot be effectively given”); Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1061 (1978) (observing that “the advocate can adequately prepare a case only if the client is free to disclose everything, bad as well as good . . . [and] the legal counselor can properly advise the client what to do only if the client is free to make full disclosure”).

60. See, e.g., Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 NOTRE DAME L. REV. 157, 161 (1993) [hereinafter Thornburg, *Sanctifying*] (observing that encouragement of full communication between attorney and client has been the “theory on which lawyers, judges, and commentators primarily rely in justifying the existence of the corporate attorney-client privilege”).

61. See, e.g., Hazard, Jr., *supra* note 59, at 1070 (contending that the historical foundations of the attorney-client privilege were less than firm and its development “slow and halting until after 1800”).

62. *But see* Thornburg, *Sanctifying*, *supra* note 60, at 160 (observing that the “roots of the attorney-client privilege can be traced to a Roman law concept of loyalty: advocates were incompetent to testify against their clients because such testimony would involve an immoral breach of duty, and such an immoral person was irrebuttably presumed to be unworthy of belief”).

63. RESTATEMENT, *supra* note 38, § 68 cmt. c; see also WOLFRAM, *supra* note 37, § 6.1.2 (noting the early rationale for the privilege as being related to the “‘gentleman’s honor’ notion that lawyers should not be embarrassed by being called upon to reveal unnice things about clients”); Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 3 (1998) (observing that the attorney-client privilege was originally “based on ‘the oath and the honor of the attorney,’ who needed to be spared from the unseemly task of having to testify in court”); see also Thornburg, *Sanctifying*, *supra* note 60, at 160 (noting that “until the mid-1700’s English courts granted a privilege to ‘gentlemen’ [not just lawyers] from testifying if such testimony would violate a promise of secrecy”).

belonged to the lawyer.<sup>64</sup> Furthermore, under English law until the mid-nineteenth century, parties in cases were not considered competent to testify, either on their own behalf or as a part of the opposition's presentation.<sup>65</sup> Thus, the prohibition against an attorney testifying as to communications with a client also served to prevent parties from effecting an end-run around their disqualification as witnesses.<sup>66</sup> In other words, if a client could not testify, it only made sense that his or her attorney would be precluded from doing so with regard to the subject of the representation.<sup>67</sup>

The testimonial limitations with regard to parties, however, may have paralleled the attorney-client privilege only to the extent that an adversary would not otherwise be able to obtain the restricted information. In particular, in English courts of law, parties were not permitted to conduct discovery. Hence, the prohibition against allowing parties to testify in court effectively precluded litigants from in any way obtaining information from an adversary directly. Therefore, it made sense to prevent the indirect acquisition of that same information from a party's attorney through recognition of the attorney-client privilege.<sup>68</sup>

On the contrary, in courts of equity, in which discovery was permitted, this coherent justification for the privilege seemed more tenuous.<sup>69</sup> Specifically, at equity, even though the parties were still not permitted to testify in court, they could obtain the "testimonial information" that they sought from the opposing party directly through discovery.<sup>70</sup> And, if the adversary could get at the information in this

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64. See RESTATEMENT, *supra* note 38, § 68 cmt. c; see also Fischel, *supra* note 63, at 3 (noting that given the initial rationale for the privilege, it was viewed as belonging to the lawyer, rather than the client); Hazard, Jr., *supra* note 59, at 1070 (observing that "some of the early cases express the idea that the privilege was that of the lawyer").

65. See RESTATEMENT, *supra* note 38, § 68 cmt. c; see also WOLFRAM, *supra* note 37, § 6.1.2 (discussing parties' lack of competence to testify in their own behalves, as well as their ability to assert a "privilege of not being called to testify in behalf of an adversary (on the ground that it might be self-incriminatory or expose the witness to disgrace)").

66. See RESTATEMENT, *supra* note 38, § 68 cmt. c; see also Hazard, Jr., *supra* note 59, at 1083 (observing that one of the original reasons for the privilege was to prevent "obtaining a party's testimony indirectly when it could not be adduced directly").

67. See WOLFRAM, *supra* note 37, § 6.1.2 (observing that in light of the testimonial restrictions on parties at this time, "it would have been anomalous to require a party's lawyer to testify to damaging information"); see also Fischel, *supra* note 63, at 4 (noting that attorneys were viewed as necessary for the efficient operation of the court system in England, and "[t]o encourage [their] employment . . . it became indispensable to extend to them the immunity enjoyed by the party" (emphasis omitted) (quoting *Whiting v. Barney*, 30 N.Y. 330, 332-33 (1864)).

68. See *supra* note 66 and accompanying text.

69. See Hazard, Jr., *supra* note 59, at 1083.

70. See *id.*

fashion, there would have been considerably less of a need for the protection of the attorney-client privilege to safeguard such information in the possession of the client's attorney.<sup>71</sup>

The roots of this notion can be gleaned from *Preston v. Carr*,<sup>72</sup> a case in which letters written by a defendant to his solicitors conveying factual information concerning legal advice sought had to be produced over the defendant's objection.<sup>73</sup> Notwithstanding the absence of privilege protection for the letters themselves, the court found that the advice ultimately provided by the barrister (counsel) in response did not have to be disclosed.<sup>74</sup> Essentially, the court held that "when a communication to an attorney can be proved by some means other than the attorney's own testimony, the privilege does not apply."<sup>75</sup>

At first blush, this broad proposition sounds like a rather extraordinary potential limitation on the scope of the privilege, but upon further examination, it does not appear to have been nearly so dramatic in the context of this case. According to Professor Geoffrey Hazard, the court's decision in *Preston* only precluded a client from maintaining the privilege to avoid "yielding his *own* knowledge about the matters in controversy simply because he [had] related them to his solicitor."<sup>76</sup> In other words, the letters prepared by the defendant for the purpose of conveying factual information to his solicitors could no more be protected from discovery than could the factual information contained within the defendant's head, upon which the letters were based. As such, *Preston* seemingly represents but a slight variation on the contemporary notion that the privilege only protects *communications* between attorney and client, not the underlying facts.<sup>77</sup> The critical distinction, though, is

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71. *See id.*

72. *Preston v. Carr*, (1826) 148 Eng. Rep. 634, 635 (Exch. Div.).

73. *See Hazard, Jr., supra* note 59, at 1082 (discussing *Preston v. Carr*, (1826) 148 Eng. Rep. 634, 635 (Exch. Div.)).

74. *See id.*

75. *Id.*

76. *Id.*

77. Interestingly, Professor Hazard suggested that a client could avoid the disclosure predicament involved in *Preston* by simply communicating with his or her counsel orally, rather than in writing. *See id.* at 1083 n.97. This communication would be protected by the privilege, and the client could convey whatever he or she desired in a deposition. *See id.* As Professor Hazard duly notes, however, this could raise another disclosure quandary to the extent that the client's testimony constitutes perjury, requiring counsel to rectify the fraud upon the court. *See id.*

The irony of Professor Hazard's observations is that they portend one of the alleged side-effects of compelled-voluntary waiver in the context of the corporate attorney-client privilege—i.e., that counsel and clients will cease to put information related to internal investigations in writing. *See supra* notes 14-15 and accompanying text.

that under today's version of the privilege, the letters would themselves qualify as "communications."<sup>78</sup>

It also seems possible to view *Preston* as a forerunner to the Supreme Court's decision in *Fisher v. United States*.<sup>79</sup> There the Court held that pre-existing documents, turned over to counsel for the purpose of obtaining legal advice, would not be protected by the attorney-client privilege, unless they would have been otherwise protected from disclosure while in the possession of the client—*e.g.*, by the client's Fifth Amendment privilege against self-incrimination.<sup>80</sup> In *Preston*, on the other hand, the court's unwillingness to protect the letters was a function of its reluctance to acknowledge that the defendant had a privilege to assert in his own right.<sup>81</sup> In other words, by turning over information that would have been discoverable while in his possession, the defendant could not somehow render it privileged in a ubiquitous sense.<sup>82</sup>

As the privilege evolved in England, there were certainly other doctrinal developments that bore resemblance to significant aspects of the modern American analog. This progression, however, at times may have been more a function of what some judges believed the privilege should embody,<sup>83</sup> rather than a studied expansion of the privilege based

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78. See *supra* note 40 and accompanying text.

79. 425 U.S. 391 (1975).

80. See *id.* at 402; see also Hazard, Jr., *supra* note 59, at 1082 (discussing the court's reasoning in *Preston* that "since defendant himself would have to disgorge his knowledge on deposition, and since he would have to produce preexisting memoranda of events such as a diary or correspondence with others, it is no ground for objection that his memoranda of the events were sent to counsel").

81. In particular, the Chief Baron stated that: "I cannot accede to the proposition which has been contended for, that the privilege of an attorney is the privilege of the client, to the extent that the client himself may avail himself of that privilege, to avoid discovering communications which have passed between him and his solicitor." *Preston v. Carr*, (1826) 148 Eng. Rep. 634, 635 (Exch. Div.).

82. Though factually distinguishable, it is the author's opinion that the analytical affinity between *Preston* and *Fisher* suggests a very important link between the past and the present conceptions of the attorney-client privilege that must be kept in mind when rethinking the scope of the corporate privilege. For a deeper exploration of the concept of reconstituting the corporate privilege so as to cover only information that would not have been communicated in the absence of the privilege, see *infra* notes 275-76 and accompanying text; see also Sexton, *supra* note 26, at 480 (observing that "a perfectly defined corporate privilege would protect 'only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege'" (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1975))).

83. See Hazard, Jr., *supra* note 59, at 1083 (observing that the relatively definite and limited attorney-client privilege of the early 1800s "received a redefinition in rhetoric that greatly enlarged its potential scope" after 1830); see also *id.* at 1083-85 (discussing two decisions by Lord Broughman in which he expanded the scope of the privilege beyond any reasonable recognition, basically encompassing just about any communication between attorney and client).

upon its original underpinnings.<sup>84</sup> Nevertheless, there were others who sought to remain true to the decidedly narrow parameters of the attorney-client privilege that had previously been established. In particular, judges adhered to the traditional doctrinal constraint that a communication had to have some relation to pending or prospective litigation in order to be protected,<sup>85</sup> as well as to the concept that the privilege is inapplicable when the element of “confidence” is lacking or when legal assistance is sought for an unlawful purpose.<sup>86</sup>

Although its somewhat disjointed development undoubtedly posed interpretative problems for the English courts, probably the greatest difficulty was created by the removal of the prohibition against parties testifying.<sup>87</sup> This effectively eliminated one of the original bases for the privilege, and thus starkly presented for the first time to the courts of England the conflict between the search for the truth and the protection of attorney-client confidences.<sup>88</sup> Rather than reconsidering the scope or efficacy of the privilege, however, the courts apparently labored to address the dilemma within the traditional confines of the doctrine, attempting to reconcile conflicting precedents.<sup>89</sup>

Unlike in England, the predicament of furthering the quest for the truth while at the same time preserving the confidential nature of attorney-client communications is one that was presented to the courts of the United States from the very beginning. This could explain, at least in part, the general willingness of American courts initially to embrace the narrow conception of the privilege that had defined the British doctrine. Most notably, early cases in the United States reflected fidelity to the long-established limitation that the privilege only applied to communications that related to existing or potential litigation.<sup>90</sup> Yet, at some point, as with the doctrinal evolution in England, the privilege in America expanded beyond this very narrow focus, fostering the air of

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84. *See id.* at 1085 (observing the complete disconnection between the privilege as interpreted by Lord Broughman and “its point of origin”—the client’s incompetency to testify in court).

85. *See id.* at 1079 (interpreting the formulation of the attorney-client privilege in *Annesley v. Anglesea*, 17 How. St. Trials 1139 (1743) as limiting the protection to “matters disclosed in connection with pending or proposed litigation, but only if it [was] germane to the attorney’s function in the litigation”); *see also id.* at 1081, 1085-86 (discussing later cases in which it was emphasized that the privilege to communications related to both pending and prospective litigation).

86. *See id.* at 1085-87.

87. *See id.* at 1086.

88. *See id.*

89. *See id.* (observing that rather than acknowledging and addressing the contradiction between the search for the truth and the protection of confidences, the English courts sought to reconcile the conflicting precedents).

90. *See id.* at 1090-91.

sacredness that now envelopes it,<sup>91</sup> as well as misconceptions with regard to the actual scope of its protection.<sup>92</sup> Notwithstanding this, courts and commentators have persisted in clinging to the mantra that the privilege be strictly construed.

The substance of this section draws significantly from Professor Hazard's well-known law review article on the history of the attorney-client privilege.<sup>93</sup> His ultimate assessment provides a poignant message that seems equally applicable to the current controversy and confusion that surrounds the privilege in the United States: "Taken as a whole, the historical record is not authority for a broadly stated rule of privilege or confidence. It is, rather, an invitation for reconsideration."<sup>94</sup>

### C. *Constitutional Principles Supporting Recognition of the Individual Privilege*

Apart from the doctrinal development and underpinnings of the individual attorney-client privilege, it is also important to examine some constitutional principles that the privilege serves to reinforce, namely the Fifth Amendment privilege against self-incrimination and Sixth Amendment right to counsel. Even though these constitutional guarantees played no role in the recognition of the privilege in the United States,<sup>95</sup> a close relationship undeniably exists.

#### 1. The Fifth Amendment

The Fifth Amendment provides in pertinent part that no person "shall be compelled in any criminal case to be a witness against himself. . . ."<sup>96</sup> By logical extension, this guarantee would be of little benefit if the accused's communications to his or her advocate could be compelled by the government. As with the early British version of the privilege, which was grounded on the incompetence of parties to testify,<sup>97</sup> permitting the acquisition of information from a criminal defendant's counsel when that information could not be obtained from him or her directly would seriously weaken the protection accorded by

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91. See *supra* note 58 and accompanying text.

92. See, e.g., Zacharias, *supra* note 58, at 75 (observing the confusion that exists with regard to the distinction between the ethical duty of confidentiality and the attorney-client privilege amongst judges, lawyers and clients).

93. See Hazard, Jr., *supra* note 59.

94. *Id.* at 1070.

95. See WOLFRAM, *supra* note 37, § 6.2.1 (observing that the "attorney-client privilege developed historically without any relationship to constitutional rights").

96. U.S. CONST. amend. V.

97. See *supra* note 65 and accompanying text.

the Fifth Amendment.<sup>98</sup> As such, to preserve the efficacy of the privilege against self-incrimination, it only makes sense that information protected by the Fifth Amendment must not lose its protection when communicated by a client to counsel for the purpose of obtaining legal advice.<sup>99</sup>

It is not the Fifth Amendment, however, that safeguards this information once conveyed to counsel. The privilege against self-incrimination is a personal right, possessed only by the individual asserting it.<sup>100</sup> Compelling a criminal defense lawyer to disclose information incriminating to a client would not be “*self-incriminating*,” nor would it require the client to be a witness against himself, as the client is not personally compelled to do anything.<sup>101</sup> Given this constitutional reality, it’s obvious that the necessary protection must come from some other source, and that is where the attorney-client privilege comes into play.<sup>102</sup>

The privilege protects all communications between attorney and client, made in confidence, for the purpose of obtaining or rendering legal advice.<sup>103</sup> As a result, any information, no matter how incriminating, that is communicated to counsel under the requisite circumstances is entitled to the privilege’s protection, provided that no exceptions apply. It is important to note that the Supreme Court’s decision in *Fisher* was limited to the scenario of a client turning over *pre-existing* documents to counsel for the purpose of obtaining legal advice. Therefore, the Court had to address the additional difficult question of whether these materials would be protected by the Fifth Amendment while in the hands of the client. This concern is not implicated when the communication of incriminating information is oral or, if written, is prepared for the express purpose of conveying such

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98. *Cf. supra* notes 66-67 and accompanying text.

99. *See Fisher v. United States*, 425 U.S. 391, 405 (1975) (finding that if pre-existing tax documents transferred to counsel for the purpose of obtaining legal advice were “unobtainable by summons from the client, [they were also] unobtainable by summons directed to the attorney by reason of the attorney-client privilege”).

100. *See id.* at 397 (noting that the “Fifth Amendment is limited to prohibiting the use of ‘physical or moral compulsion’ exerted on the person asserting the privilege”).

101. *See id.* (holding that “[t]he taxpayer’s [Fifth Amendment] privilege . . . is not violated . . . because enforcement against a taxpayer’s lawyer would not ‘compel’ the taxpayer to do anything—and certainly would not compel him to be a ‘witness’ against himself”).

102. *See id.* at 401 (holding that “[i]nsofar as private information not obtained through compelled self-incriminating testimony is legally protected, its protection stems from other sources . . . such as the attorney-client privilege”).

103. *See supra* note 39 and accompanying text.

information to counsel in connection with the representation.<sup>104</sup> There would likely be no question as to the applicability of the Fifth Amendment under these circumstances, and the attorney-client privilege, in this context, undergirds the Fifth Amendment by preventing the circumvention of its protections.<sup>105</sup>

Furthermore, in the absence of the sanctuary that the privilege provides, it seems likely that a criminal defendant would refrain from disclosing to counsel incriminating facts that might be critical to preparing an adequate defense.<sup>106</sup> If this occurs, it follows that the effectiveness of the representation could be undermined, thus implicating the Sixth Amendment right to counsel.

## 2. The Sixth Amendment

Under the Sixth Amendment, a criminal defendant is entitled to the effective assistance of counsel in connection with his or her defense.<sup>107</sup> While there are certainly aspects of effectiveness that are solely a function of an attorney's competency and diligence, even the most competent and diligent attorney arguably can be rendered ineffective if he or she is operating with incorrect or incomplete factual information. This is recognizably where the Sixth Amendment and the attorney-client privilege intersect.

As already discussed, the primary rationale for the privilege is to encourage complete and candid communication between lawyer and client.<sup>108</sup> Beneath this over-arching purpose, however, are three commonly articulated assumptions that relate directly to the Sixth Amendment right to counsel. The first assumption is that it is to an individual's benefit to have the assistance of counsel when confronting legal difficulties, particularly criminal ones.<sup>109</sup> Second, it has been

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104. For further discussion of *Fisher* and its potential contribution to the debate regarding compelled-voluntary waiver, see *infra* notes 276-77 and accompanying text.

105. *Cf. supra* notes 66-67 and accompanying text.

106. See Walkowiak, *supra* note 59, at 1 (observing that “[i]t is frequently the most harmful information that the attorney needs most in order to provide accurate counsel to a client”). *But see infra* note 111 and accompanying text (characterizing as “somewhat controversial” the assumption that a client would necessarily withhold embarrassing information in the absence of the privilege).

107. The language of the Sixth Amendment actually only provides for the “[a]ssistance of counsel,” but that right has been interpreted by the Supreme Court to include an “effective[ness]” guarantee as well. See U.S. CONST. amend. VI; see also *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

108. See *supra* notes 59-60 and accompanying text.

109. See WOLFRAM, *supra* note 37, § 6.1.3; see also RESTATEMENT, *supra* note 38, § 68 cmt. c (observing that “vindicated rights and complying with obligations under the law and under modern

assumed that an attorney's advice and counsel "must be based upon a firm grasp of the facts of the situation and information about the client's objectives gained from client disclosures."<sup>110</sup> The third assumption is a logical, though somewhat controversial, corollary to the first two, that being, counsel will not be able to obtain the necessary disclosures in the absence of an assurance of confidentiality.<sup>111</sup> In particular, the belief is that it's critical for an individual criminal defendant to be able to tell his or her lawyer everything in order for truly effective representation to be provided. Without a durable attorney-client privilege, so the argument goes, a client will be reluctant to disclose potentially embarrassing or compromising details that could be essential to the formulation of an effective defense.<sup>112</sup>

Along these lines, grave Sixth Amendment concerns have been expressed in the wake of certain regulations promulgated following the enactment of the USA PATRIOT Act that essentially permit the government to eavesdrop on attorney-client communications in specified situations.<sup>113</sup> The fear is that if counsel and client are aware, or even suspect that the government is listening to their conversations, important

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legal processes are matters often too complex and uncertain for a person untrained in the law, so that clients need to consult lawyers").

110. WOLFRAM, *supra* note 37, § 6.1.3; *see also* RESTATEMENT, *supra* note 38, § 68 cmt. c (noting that "a client who consults a lawyer needs to disclose all of the facts to the lawyer and must be able to receive in return communications from the lawyer reflecting those facts"); Walkowiak, *supra* note 59, at 2 (observing that without the privilege, a lawyer's advice might be "rendered without all the underlying facts" and therefore could be inaccurate).

111. *See* WOLFRAM, *supra* note 37, § 6.1.3. This proposition is thought to be somewhat controversial because it is largely based on speculation and intuition, there being no empirical evidence to support it. In fact, one of the only empirical studies conducted in this regard suggests that "lawyers are more likely than nonlawyers to believe that the privilege encourages client disclosures and that most nonlawyers are unaware of the privilege or erroneously assume that it extends to communications with a large number of other professionals as well." RESTATEMENT, *supra* note 38, § 68, reporter's note. *But see* ACC SURVEY, *supra* note 9, at 3 (reporting that ninety-three percent of lawyers surveyed believed that senior-level corporate employees were aware of the privilege and that sixty-eight percent believed that mid- and lower-level employees were as well).

112. *See* RESTATEMENT, *supra* note 38, § 68 cmt. c (observing that "clients would be unwilling to disclose personal, embarrassing, or unpleasant facts unless they could be assured that neither they nor their lawyers could be called later to testify to the communication").

113. 28 C.F.R. § 501.3(d) (2005) (granting the Attorney General exclusive authority to have communications between an attorney and imprisoned client monitored based upon a "reasonable suspicion" that communications may be utilized to facilitate "terrorism" or "acts of violence"); *see also* Robert J. Anello, *Justice Under Attack: The Federal Government's Assault on the Attorney-Client Privilege*, 1 CARDOZO PUB. L. POL'Y & ETHICS J. 1, 2-8 (2003); Cole, *supra* note 3, at 550-51; Ellen S. Podgor & John Wesley Hall, *Government Surveillance of Attorney-Client Communications: Invoked in the Name of Fighting Terrorism*, 17 GEO. J. LEGAL ETHICS 145, 146-47 (2003).

disclosures will not be made, which in turn will have an adverse affect on the representation.<sup>114</sup>

The critical point to keep in mind with regard to the Sixth Amendment right to counsel, as well as the Fifth Amendment privilege against self-incrimination and the various other nuances of the attorney-client privilege discussed in the foregoing sections, is that they all contemplate an *individual* client being represented by counsel. Do the same justifications for the attorney-client privilege as between individual client and attorney support recognition of the privilege in the corporate context? If the answer is “yes,” the question that remains is: What is the proper scope of the corporate attorney-client privilege? The next section will examine and critique the historical and existing answers to this important question.

### III. THE CORPORATE ATTORNEY-CLIENT PRIVILEGE

#### A. *The Propriety of the Privilege in the Corporate Context*

In light of the particularized elements of the individual attorney-client privilege and the requirement that they be narrowly construed, it seems reasonable to conclude that the doctrine should be wholly inapplicable in a corporate legal setting. In the corporate context,<sup>115</sup> the organization itself is recognized as the client, though it can only act through its directors, officers and other employees.<sup>116</sup> As such, from a strict definitional standpoint, the corporate “client,” for purposes of the

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114. See Anello, *supra* note 113, at 6 (observing that the “logical outcome of the rule is that the attorney and client will communicate little and certainly will not discuss strategic facts,” which will inevitably have an adverse effect on the client’s Sixth Amendment right to effective assistance of counsel); Podgor & Hall, *supra* note 113, at 153-58 (discussing various constitutional concerns raised by the rule); see also *Fisher v. United States*, 425 U.S. 391, 403 (1975) (noting that “if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice”); RESTATEMENT, *supra* note 38, § 68 cmt. c (observing that “it is assumed that lawyers would not feel free in probing client’s stories and giving advice unless assured that they would not thereby expose the client to adverse evidentiary risk”).

115. Throughout this section, as well as the Article in general, all references that relate in any way to “corporations” are also intended to encompass all types of corporate or other legally recognized organizational entities.

116. See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977) (noting the problem posed from a privilege standpoint when “the client is a corporation that can communicate or receive communications only by or through its human agents”); MODEL RULES OF PROF’L CONDUCT R. 1.13(a) (2004) (recognizing that “[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents”).

attorney-client privilege, would be incapable of communicating with counsel. Only the individual constituents of the corporation can do so, and they are admittedly not the client.

Furthermore, the privilege's principle justification—encouraging candor between attorney and client so as to facilitate effective legal representation—on its face, appears to have little application in the corporate environment.<sup>117</sup> This is so because the privilege, to the extent recognized, would belong to the corporation, as the client, and not to its directors, officers and employees individually.<sup>118</sup> Accordingly, there really is no personal incentive for corporate constituents to be candid with counsel. The confidential protection that is guaranteed is not theirs; and hence, privilege purists would argue that these individuals would most likely refrain from disclosing information that might reflect poorly upon them.<sup>119</sup> Therefore, given that a corporate client can act only through its constituents, if they are not forthcoming with counsel, then neither is the corporation itself.

In addition, the assumptions that underlie the privilege's traditional rationale are similarly inapposite when a corporation is the client.<sup>120</sup> For example, the fundamental notion that the existence of the privilege helps to encourage clients to seek the assistance of counsel in connection with their legal problems<sup>121</sup> is less convincing in the corporate setting because businesses "are forced by circumstances and impelled by business necessity to resort to lawyers."<sup>122</sup> As one corporate executive put it:

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117. See DAVID LUBAN, *LAWYERS AND JUSTICE* 218-19 (1988) (observing that this standard justification for the privilege is particularly dubious in the corporate context); Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 226 (1989) (suggesting that this rationale is problematic in the corporate context because "any sense of personal security on the part of the employee may be illusory"). *But see id.* at 244 (survey of lawyers and corporate executives revealed that a majority believed the corporate attorney-client privilege encouraged candor).

118. See *Samaritan Found. v. Goodfarb*, 862 P.2d 870, 877 (1993) (observing that this "encouraging candor" rationale "only works if the communicator controls the privilege"); LUBAN, *supra* note 117, at 221 (indicating that in the corporate context, the client is the organization itself); WOLFRAM, *supra* note 37, § 6.5.4 (observing that "the benefits of the privilege are solely for the advantage of the corporation"); Thornburg, *Sanctifying*, *supra* note 60, at 173 (suggesting that "[i]t is very clear that in the corporate setting it is the entity—the corporation—that is the lawyer's client and not the individual employees of the corporation"); see also RESTATEMENT, *supra* note 38, § 73 cmt. j (noting that "[t]he privilege for organizational clients can be asserted and waived only by a responsible person acting for the organization for this purpose").

119. See *supra* note 26 and accompanying text; *infra* notes 202-09 and accompanying text.

120. See WOLFRAM, *supra* note 37, § 6.5.3 (noting that "general theories advanced to support the attorney-client privilege . . . apply only with diminished strength or not at all to a corporate client").

121. See *supra* note 59 and accompanying text.

122. WOLFRAM, *supra* note 37, § 6.5.3.

“The benefits [of communicating with counsel] outweigh the risks. You have to run a business and the attorney-client privilege is only one of many factors to worry about.”<sup>123</sup>

Moreover, the constitutional principles that are reinforced by the attorney-client privilege in the individual context have less relevance with regard to corporations. The Fifth Amendment privilege against self-incrimination is a personal guarantee; and therefore, a corporation, as an entity, is not entitled to such protection.<sup>124</sup> Further, while corporations do have a right to the effective assistance of counsel,<sup>125</sup> the individualized nature of this constitutional safeguard seems to lessen its importance in the corporate context as related to the attorney-client privilege.<sup>126</sup> As a result, the corporate attorney-client privilege does not further related constitutional purposes in the same manner as the individual privilege.<sup>127</sup>

Consequently, a plausible case can be made for not extending the privilege to corporations, and some scholars and courts have, in fact, argued in support of this position.<sup>128</sup> Such a viewpoint, however, represents a very distinct minority. The legal community has overwhelmingly answered the question of whether the privilege should be recognized in the corporate context with a resounding “yes.”<sup>129</sup> The

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123. Thornburg, *Sanctifying*, *supra* note 60, at 165 (quoting from Alexander, *supra* note 117, at 370).

124. *See Bellis v. United States*, 417 U.S. 85, 85 (1974) (holding that the Fifth Amendment privilege against self-incrimination did not apply to corporations).

125. *See, e.g., United States v. Rad-O-Lite of Phila., Inc.*, 612 F.2d 740, 743 (3d Cir. 1979) (holding that the Sixth Amendment guarantee of effective assistance of counsel applies to corporate defendants).

126. *See HAZARD, JR.*, *supra* note 51, at 275 (observing that “[c]onsiderations of individual dignity and autonomy that undergird the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel are limited to natural persons”); *see also WOLFRAM*, *supra* note 37, § 6.5.3 (noting that arguments based on human dignity offered to support recognition of the individual attorney-client privilege “are irrelevant” in the corporate context).

127. *See infra* notes 274-77 and accompanying text.

128. *See, e.g., Radiant Burners, Inc. v. Am. Gas Ass’n*, 207 F. Supp. 771, 775 (N.D. Ill. 1962), *rev’d*, 320 F.2d 314 (7th Cir. 1963), *cert. denied*, 375 U.S. 929 (1963) (holding that “[s]ince the primary element of secrecy essential to any claim of the attorney-client privilege is not possible in the case of a corporation and since in any event the privilege is purely personal, . . . it is not available to [corporations]”); LUBAN, *supra* note 117, at 217-33 (arguing against recognition of the corporate attorney-client privilege and maintaining that the privilege does not transfer well to the corporate context); Thornburg, *Sanctifying*, *supra* note 60, at 159 (maintaining that “[o]nly elimination of the corporate attorney-client privilege can free the court system from the distortion and expense that was created by expanding the privilege to include corporate secrets”); *see also Fischel*, *supra* note 63, at 20, 33 (arguing that the justifications for the attorney-client privilege, corporate or otherwise, are flawed and that the privilege and related duty of confidentiality should be abolished).

129. *See Upjohn Co. v. United States*, 449 U.S. 383, 389-90 (1981) (observing that notwithstanding the “complications in the application of the privilege [that] arise when the client is

more difficult and perplexing concern has been with regard to the proper scope and characteristics of the corporate attorney-client privilege.<sup>130</sup>

*B. Recognition of the Corporate Attorney-Client Privilege—The Control Group Test*

Although recognition of a corporate attorney-client privilege was widely regarded as appropriate, the idiosyncrasies of the corporate form greatly complicated the actual task of determining the scope of this new doctrine.<sup>131</sup> To address this difficulty, courts generally applied the rather straightforward and logical approach of trying to accommodate the corporate privilege within the individual privilege structure by analogizing a corporation to a person.<sup>132</sup> In other words, the typical privilege requirements had to be satisfied in order for the protection to

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a corporation, . . . and not an individual . . . this Court has assumed that the privilege applies [in this context]"); *Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 484 (E.D. Pa. 1962) (holding that "the availability of the privilege to corporations has gone unchallenged so long and has been so generally accepted that [the court felt compelled to] recognize that it does exist"); RESTATEMENT, *supra* note 38, § 73 reporter's note (observing that "by far the great majority of courts and commentators assert or assume that the privilege generally extends to corporate and other organizational clients"); Walkowiak, *supra* note 59, at 4 (noting that "[i]t is well established that the attorney-client privilege applies to the corporate client"); WOLFRAM, *supra* note 37, § 6.5.3 (maintaining that "despite the absence of a compelling social reason for extending the privilege to corporations and similar bodies, every jurisdiction treats corporations as covered by it"); Sexton, *supra* note 26, at 444 (observing that "[n]otwithstanding the failure of the *Upjohn* Court to articulate a justification for the corporate attorney-client privilege, the issue of the availability of the privilege to corporations is, for all practical purposes, now settled").

130. See RESTATEMENT, *supra* note 38, § 73 reporter's note (noting the inability of courts and commentators to agree as to the appropriate scope for the corporate attorney-client privilege); see also Sexton, *supra* note 26, at 447 (observing that the "rules for applying the privilege to corporations and the justifications underlying the existence of the corporate privilege have remained unclear").

131. See Sexton, *supra* note 26, at 449 (noting that "[i]n contrast to the broad consensus among federal courts regarding the availability of an attorney-client privilege for corporations, conflicting views have evolved over who in the corporation may communicate as the 'client' for purposes of the privilege"); Walkowiak, *supra* note 59, at 4 (observing that "while the prerequisites for asserting the attorney-client privilege . . . are rather straightforward when applied to an individual, they are not so simple when the client is a corporation"); WOLFRAM, *supra* note 37, § 6.5.1 (noting that applying the privilege in the organizational context "has raised problems of great difficulty and controversy"); see also LUBAN, *supra* note 117, at 217-33 (arguing against recognition of the corporate attorney-client privilege).

132. See, e.g., Sexton, *supra* note 26, at 478-79 (observing that "[i]n general, courts have developed the contours of the corporate attorney-client privilege by direct analogy to the privilege possessed by natural persons, that is, they have sought to identify those corporate actors who sufficiently personify the corporation to be treated as the corporate 'client' and have extended the protection of the privilege to communications made by the persons thus identified").

apply<sup>133</sup>—there had to be a confidential communication between the client and the attorney for the purpose of seeking or providing legal advice—but courts had to figure out the best analog for the “client” element in the corporate setting.<sup>134</sup>

The first few federal cases that addressed this issue adopted a surprisingly broad approach.<sup>135</sup> In *United States v. United Shoe Mach. Corp.*,<sup>136</sup> for example, the District Court for Massachusetts concluded that the privilege encompassed any “information furnished by an officer or employee of [a corporation] in confidence and without the presence of third parties.”<sup>137</sup> It has been suggested that such an expansive version of the privilege was likely a vestige of the less open litigation process that existed prior to the advent of liberal discovery under the Federal Rules of Civil Procedure.<sup>138</sup>

Over time, this broad view of the corporate attorney-client privilege waned, with courts engaging in the more focused enterprise of identifying those corporate constituents who could be viewed as personifying the organization.<sup>139</sup> This eventually led to the creation of what is commonly referred to as the “control group” test.<sup>140</sup> While jurisdictions came to settle upon slightly different variations,<sup>141</sup> this approach, as originally articulated in *Philadelphia v. Westinghouse*

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133. See, e.g., WOLFRAM, *supra* note 37, § 6.5.1 (noting that in the corporate context “[m]ost aspects of the general standard for invocation of the privilege . . . apply”).

134. See *id.* (observing that the “problem has been to determine which persons speak for the entity client for purposes of invoking the privilege and waiving it”); Sexton, *supra* note 26, at 449 (noting the necessity of determining the precise identity of the client in the corporate context); see also *Westinghouse*, 210 F. Supp. at 485 (noting that the critical question in determining whether a corporation is protected by privilege is “whether the person making the communication is the client or [just] a witness”).

135. See WOLFRAM, *supra* note 37, § 6.5.2 (noting that there were initially no problems with respect to the implementation of the corporate attorney-client privilege because the few federal courts exhibited a “tendency to make the privilege very broad”).

136. 89 F. Supp. 357 (D. Mass. 1950).

137. *Id.* at 359.

138. See WOLFRAM, *supra* note 37, § 6.5.2 (observing that the broad privilege “was more in accord with the pre-1938 modes of litigation by secret and surprise and less in the spirit of modern trials, which are characterized by extensive pre-trial discovery of an opponent’s information”).

139. See *supra* note 132.

140. For a general discussion regarding the control group test, see Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424 (1970).

141. See Walkowiak, *supra* note 59, at 5 (observing that some states have expanded versions of the control group test in terms of the categories of individuals whose communications may be deemed privileged); see also *Westinghouse*, 210 F. Supp. at 485 (noting that “[v]arious answers . . . have been proposed” to the question of how one goes about determining “whether the person making the communication is the client”).

*Electric Corp.*,<sup>142</sup> recognized corporate communications as privileged when the following circumstances were present:

[I]f the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice.<sup>143</sup>

The clear intent behind the establishment of the control group test was to squeeze the corporate form into the framework of the individual attorney-client privilege. As a result, this approach was admittedly narrow, which was both good and bad. The benefit of such a constricted application was that it was as true as possible to the privilege's doctrinal origins and purpose, avoiding the overbreadth of the earlier decisions, which basically had afforded corporations greater privilege protection than individuals.

Under the control group test, corporate employees who would be characterized as mere "fact witnesses" in the individual setting, are treated in precisely that fashion. Their communications to counsel are no more protected by the attorney-client privilege than would be information conveyed by a third-party witness to an attorney in an individual personal injury matter. More precisely, such communications would fall under the qualified protection of the work product doctrine, but not the privilege.<sup>144</sup> Communications by other corporate constituents, however, who, like a client (or agent of a client), are in a position to make decisions or act on the advice of counsel rightfully qualify for the absolute protection of the attorney-client privilege. Thus, the narrow limitations of the control group test can, in fact, be viewed as quite reasonable.

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142. 210 F. Supp. 483 (E.D. Pa. 1962).

143. *Id.* at 485. It is interesting to note that the court in *Westinghouse* relied upon *Hickman v. Taylor*, 329 U.S. 495 (1947), the seminal case regarding the work product doctrine, in excluding from the coverage of the corporate attorney-client privilege communications between counsel and mere fact witnesses carried out in anticipation of litigation. *Id.* Such communications are only entitled to the qualified protection of the work product doctrine. For a discussion of the relationship between *Hickman* and the control group test, see Sexton, *supra* note 26, at 450-51.

144. See *supra* note 143.

The contrary position, expressed most definitively by the Supreme Court in *Upjohn Co. v. United States*,<sup>145</sup> was that restricting the privilege to a limited, indeterminate group of individuals<sup>146</sup> within a company actually undermined the ultimate purpose of the attorney-client privilege—to enhance the effectiveness of legal representation, which in turn fosters greater compliance with the law.<sup>147</sup> More specifically, the privilege acts to protect a two-way conveyance of information, both the communication of factual information by the client and the imparting of legal advice by counsel.<sup>148</sup> In order to provide competent and useful legal assistance, an attorney needs to be able to gather as much factual information as possible that relates to the subject matter of the representation.<sup>149</sup> A broader privilege is believed to foster an open communicative atmosphere, allowing counsel to conduct a more thorough investigation<sup>150</sup>—a greater number of corporate constituents will be amenable to meeting with the corporation’s attorney, and counsel will feel less constricted with regard to whom he or she can speak. These perceived benefits of a less restrained privilege in the corporate context led to the establishment of an alternative approach—the so-called “subject matter” test.

*C. Expansion of the Corporate Attorney-Client Privilege—The Subject Matter Test*

The subject matter test was first recognized eight years after the inception of the control group test in *Harper & Row Publishers, Inc. v. Decker*.<sup>151</sup> In that case the Seventh Circuit held that the control group test was under-inclusive, as the corporation’s privilege necessarily needed to cover communications with counsel by certain agents of the

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145. 449 U.S. 383 (1981).

146. See WOLFRAM, *supra* note 37, § 6.5.4 (noting that under “the terms of the doctrine, the control group may be different for different legal problems”).

147. See *Upjohn*, 449 U.S. at 384; Note, *supra* note 140, at 431 (acknowledging the argument that “the control group test is so restrictive that the fear of disclosure to outsiders will deter corporations from gathering information and communicating it to counsel”); *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1977) (observing that “the control group test inhibits the free flow of information to a legal advisor and defeats the purpose of the attorney-client privilege . . . [, and] may result in discouraging communications to lawyers made in a good faith effort to promote compliance with the complex laws governing corporate activity”).

148. See *Upjohn*, 449 U.S. at 390.

149. See *infra* notes 169-70 and accompanying text.

150. See *Upjohn*, 449 U.S. at 390-91.

151. 423 F.2d 487 (7th Cir. 1970), *aff’d per curiam*, 400 U.S. 348 (1971).

company who fall outside of the “control group.”<sup>152</sup> According to the court:

An employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation’s attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney’s advice is sought by the corporation . . . is the performance by the employee of the duties of his employment.<sup>153</sup>

Though broader than the control group approach, this new subject matter test did not necessarily extend the corporate attorney-client privilege to those employees or agents who might be characterized as mere “bystander witnesses.”<sup>154</sup> The court expressly reserved decision with regard to whether communications by these corporate constituents would be deserving of any protection.<sup>155</sup>

Nevertheless, some later courts viewed the *Harper* court’s version of the subject matter test as not restrictive enough, and accordingly developed slightly different iterations.<sup>156</sup> For example, the Eighth Circuit in *Diversified Industries, Inc. v. Meredith*,<sup>157</sup> added a few additional elements to its edition of the subject matter test, requiring the following for application of the corporate attorney-client privilege:

(1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee’s corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.<sup>158</sup>

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152. *See id.* at 491.

153. *Id.* at 491-92.

154. *Id.* at 491.

155. *See id.*

156. *See* Sexton, *supra* note 26, at 454-55 (discussing several federal court decisions in which variations of the subject matter test were applied).

157. 572 F.2d 596 (8th Cir. 1977).

158. *Id.* at 609. It is interesting to note that the Restatement adopts a broader form of the subject matter test, omitting the requirement that the communication be made at the direction of a corporate superior. *See* RESTATEMENT, *supra* note 38, § 73. Besides the usual prerequisites for application of the attorney-client privilege, the communication need only be “between an agent of the organization and a privileged person . . . [and] concern[] a legal matter of interest to the organization . . . .” *Id.* § 73(2)-(3) (emphasis added).

Whatever the formulation, courts viewed the subject matter test as more in keeping with the privilege's goal of encouraging full and candid communications between attorney and client.<sup>159</sup> Hence, it should have come as little surprise that when the Supreme Court entered the corporate privilege fray in *Upjohn*, it rejected the control group test in favor of what appears to have been the *Diversified* court's version of the subject matter test. The Court, however, refrained from adopting a definitive framework for deciding corporate privilege coverage, basing its decision instead on the specific facts before it and suggesting that future matters should be decided in a similar case-by-case manner.<sup>160</sup> The facts of *Upjohn* are thus critical, and likely provide a roadmap for how best to insure that communications between counsel and corporate constituents will be protected by the attorney-client privilege, at least at the federal level.

In this case, defendant Upjohn's independent accountants discovered during an audit that a corporate subsidiary had made some "questionable payments" to foreign government officials in order to obtain government business.<sup>161</sup> Upon being notified of the payments, Upjohn's general counsel consulted outside counsel and determined that an internal investigation as to these payments was appropriate.<sup>162</sup>

In connection with this investigation, the attorneys sent a questionnaire to certain managerial employees, accompanied by a cover letter from Upjohn's Chairman of the Board, which described the purpose and nature of the investigation.<sup>163</sup> The questionnaire sought detailed information as to any "possibly illegal" payments made by

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Another noteworthy approach utilized after *Harper* and before the Supreme Court's decision in *Upjohn* was a combination of both the control group and subject matter tests. In *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C. 1974), the court held that the corporate attorney-client privilege applied when the following circumstances were present: "(1) the person communicating on behalf of the corporation is a member of the control group or an employee authorized to communicate by a member of that group, (2) the subject matter of the communication is related to the employee's duties in the corporation, and (3) the communication is necessary to the rendering of legal advice." Sexton, *supra* note 26, at 454 (summarizing the test employed by the court in *Duplan*). The problem with this approach is that it ignores the inherent inconsistency between the control group and subject matter tests—by combining the two, the court compromised the underlying rationale for each. *See id.* at 454 n.43.

159. *See, e.g., Diversified*, 572 F.2d at 609 (noting that unlike the control group test, the subject matter test "encourages the free flow of information to the corporation's counsel in those situations where it is most needed").

160. *See Upjohn Co. v. United States*, 449 U.S. 383, 396-97 (1981); *see also infra* notes 173-74 and accompanying text.

161. *See id.* at 386.

162. *See id.*

163. *See id.* at 386-87.

Upjohn, and was to be responded to in a “highly confidential” fashion.<sup>164</sup> The employees were instructed to return their responses directly to Upjohn’s general counsel. In addition to distributing the questionnaire, Upjohn’s general and outside counsel also conducted interviews of various officers and employees, including the recipients of the questionnaires.<sup>165</sup>

As a result of the investigation, Upjohn voluntarily disclosed certain questionable payments to the Securities and Exchange Commission and the Internal Revenue Service (“IRS”). The IRS responded by initiating an investigation of its own, and Upjohn cooperated to a certain extent. It provided the IRS with lists of the individuals who responded to the questionnaire, as well as those who were interviewed, but declined to produce the actual questionnaires or the notes and memoranda from the internal interviews, with regard to which Upjohn asserted both the attorney-client privilege and work product doctrine.<sup>166</sup>

The court of appeals rejected Upjohn’s privilege claim based on application of the control group test finding that “[t]o the extent that the communications were made by officers and agents not responsible for directing Upjohn’s actions in response to legal advice . . . that the communications were not the ‘client’s.’”<sup>167</sup> The Supreme Court disagreed, observing that the control group test “frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation.”<sup>168</sup> The Court emphasized the importance of the attorney fact-gathering process to the provision of sound and informed legal advice,<sup>169</sup> and found that rigidly defining the group within the corporation to which the privilege could attach undermined this critical activity. As the court noted:

In the corporate context, . . . 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

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164. *Id.* at 387.

165. *See id.*

166. *See id.* at 387-88.

167. *Id.*

168. *Id.* at 392.

169. *See id.* at 390 (observing that “the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice”).

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.<sup>170</sup>

In addition, extending the privilege beyond the control group, according to the Court, would increase candor between counsel and corporate employees, which in turn would foster greater overall corporate legal compliance.<sup>171</sup> Finally, besides frustrating the purpose of the attorney-client privilege, the Court also found that the control group test lacked predictability, which would hamper the efficacy of the corporate privilege.<sup>172</sup>

As already noted, in lieu of the control group test, the Supreme Court opted for a case-by-case approach in determining the applicability of the corporate attorney-client privilege,<sup>173</sup> and held that under the specific facts presented, the privilege applied.<sup>174</sup> Although the Court declined to set forth a bright-line test, its recognition of the privilege here suggests receptivity to the *Diversified* approach.<sup>175</sup> Specifically, the majority's opinion can be read to imply that if confidential communications are "made by [employees of the corporation, concerning matters within the scope of the employees' corporate duties,] to counsel for [the corporation] acting as such, at the direction of corporate superiors in order to secure legal advice from counsel[.]"<sup>176</sup> then those communications will be protected by the attorney-client

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170. *Id.* at 391. The Court also noted that counsel's legal advice may often "be more significant to noncontrol group members than to those who officially sanction the advice, and [thus,] the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy." *Id.* at 392.

171. *See id.* at 392 (observing that the control group test's "narrow scope . . . makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law"); *see also* Sexton, *supra* note 26, at 469-71 (discussing the "voluntary compliance" rationale underlying the *Upjohn* decision).

172. *See Upjohn*, 449 U.S. at 393 (noting that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all"); *see also* Sexton, *supra* note 26, at 482 (observing that "[p]redictability is necessary because the relevant actors (the attorney and the information-giver) must judge prospectively whether the privilege will protect their communication," otherwise the privilege's fundamental purpose of encouraging candor in attorney-client communications cannot be realized).

173. *See Upjohn*, 449 U.S. at 396 (stating that "we decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas").

174. *See id.* at 395.

175. *See* Sexton, *supra* note 26, at 461 (noting that "some commentators have argued that the *Upjohn* Court embraced the modified subject matter test . . . adopted by the Eighth Circuit in *Diversified*").

176. *Upjohn*, 449 U.S. at 394.

privilege so long as the confidential nature thereof is preserved.<sup>177</sup> It also seems important that the employees be made “sufficiently aware that they [are] being questioned in order that the corporation [can] obtain legal advice.”<sup>178</sup>

Ultimately, though it touted the need for predictability in this area and criticized the control group test for its shortcomings in this regard, the Supreme Court did little to reduce the uncertainty surrounding the scope of the corporate attorney-client privilege.<sup>179</sup> Even if one could accurately characterize the modified-subject matter test recognized in *Diversified* as “the test” after *Upjohn*, uncertainty and potential overbreadth remain problems. In particular, the Eighth Circuit in *Diversified* sought to avoid the possibility of cloaking mere “fact witnesses” with the privilege by limiting coverage to matters within the scope of an employee’s duties.<sup>180</sup> However, depending upon a corporation’s definition of such duties, determining which employees fall outside of the modified-subject matter test’s coverage may prove to be an exercise in futility—i.e., job descriptions might be expanded for the purpose of casting a wider privilege net. Hence, this analytical framework could, in practice, provide more protection than was intended or is necessary to serve the underlying rationale of the attorney-client privilege, and may unduly blur the line between the privilege and the work product doctrine.<sup>181</sup>

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177. See, e.g., Joan C. Rogers, *Attorney-Client Privilege: Although Corporate Attorney-Client Privilege Is Established, Challenges Persist*, 16 *Laws. Man. on Prof. Conduct (ABA/BNA)* 336 (July 5, 2000).

178. *Upjohn*, 449 U.S. at 394.

179. See *id.* at 396-97 (conceding that its case-by-case approach “may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege”); see also *id.* at 404 (Burger, C.J., concurring) (criticizing the Court’s concession that its holding might undermine certainty as “neither minimiz[ing] the consequences of continuing uncertainty and confusion nor harmoniz[ing] the inherent dissonance of acknowledging that uncertainty while declining to clarify it within the frame of issues presented”); Sexton, *supra* note 26, at 471 (observing that “[b]y declining to promulgate a broad rule to govern application of the attorney-client privilege to corporations, the Justices adopted a course that arguably will occasion unpredictability and confusion for corporate attorneys, their clients, and the courts”).

180. See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1977) (maintaining that “[b]y confining the subject matter of the communication to an employee’s corporate duties, we remove from the scope of the privilege any communication in which the employee functions merely as a fortuitous witness”); see also *Samaritan Found. v. Goodfarb*, 862 P.2d 870, 878 (Ariz. 1993) (en banc) (rejecting a broad formulation of the subject matter test as overly inclusive insofar as it would protect communications by corporate constituents whose “connection to [a] liability-causing event [was] too attenuated to fit the classical model of what it means to be a client”); Hamilton, *supra* note 25, at 641 (discussing *Goodfarb*).

181. See *supra* note 143 (discussing how such communications are more appropriately protected by the work product doctrine).

Notwithstanding the confusion and uncertainty surrounding the corporate attorney-client privilege, one point is clear, and that is *Upjohn* provides the standard in federal court when federal law supplies the rule of decision.<sup>182</sup> This, at a minimum, means that the control group test, at present, is not a viable approach in this context.

In state courts, on the other hand, both the control group and subject matter tests, and everything in between appear to be possibilities.<sup>183</sup> The lack of uniformity between the states in this regard poses a major problem for national corporations with presences in various jurisdictions.<sup>184</sup> Under applicable choice of law rules it is possible that any of the potential approaches could govern, which probably means, that in many instances, prudent counsel must act as if the most restrictive test for the corporate attorney-client privilege will be applicable—in all likelihood that would be the control group test.<sup>185</sup>

For purposes of this Article, the *Upjohn* test is really the only approach that needs to be reconsidered as the compelled-voluntary waiver issue is primarily a federal phenomenon. Hence, the Article's ultimate proposal only relates to the scope of the *federal* corporate attorney-client privilege. Nevertheless, the inconsistencies that pervade

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182. Rule 501 of the Federal Rules of Evidence provides that: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." FED. R. EVID. 501; *see also* Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250 (Ill. 1982) (rejecting the *Upjohn* approach under Illinois law and instead opting to adhere to control group standard); Walkowiak, *supra* note 59, at 8 (observing that "*Upjohn* establishes that actions in federal court that are based upon federal statutes or federal claims require the application of the subject matter test to corporate [attorney-client] communications"). For a general discussion of the history of Rule 501, *see* Julie Elizabeth Rice, Note, *The Attorney-Client Privilege in the Corporate Context: The Intersection of Federal and Illinois Law*, 1984 U. ILL. L. REV. 175, 181-85 (1984).

183. *See generally* Hamilton, *supra* note 25; Rice, *supra* note 182; *see also* Consolidation Coal, 432 N.E.2d at 254-56 (discussing various tests employed with regard to the scope of the corporate attorney-client privilege).

184. *See* Hamilton, *supra* note 25, at 649 (noting that "[p]redicting which privilege rule will be applied . . . is difficult for attorneys who represent national corporations, especially if the organization is faced with a multi-state investigation that could result in both state and federal claims against the company"); Rice, *supra* note 182, at 188 (observing that counsel for corporations that do business in more than one state "must be aware of the approach to the attorney-corporate client privilege employed by each state in which the corporation conducts business, as well as the federal approach, because of the possibility of a privilege claim arising in any state").

185. *See* Alexander, *supra* note 117, at 309 (reporting one corporate lawyer's responses to an empirical survey question regarding *Upjohn* and the control group test: "We're not confident that privilege applies at all levels;" and another: "I don't trust *Upjohn*"); Hamilton, *supra* note 25, at 655 (noting that "it is more likely that the narrower of two privilege rules will apply in a conflict of laws situation").

state treatment of the privilege cannot be ignored, and indeed provide some helpful insight into the type of federal approach that would most accurately mirror responsible corporate behavior. In other words, if counsel to large companies must by necessity behave as if the control group test applies, irrespective of whether it ultimately will, why not adopt a similar analysis in the federal arena? Moreover, adoption of a clear, uniform federal approach would likely have significant influence on the direction that the states take in this regard in the future, perhaps leading to greater consistency across the country.<sup>186</sup>

These compelling arguments for a uniform approach to the privilege do not even take into account the perceived problems that allegedly flow from compelled-voluntary waiver. As the next section reveals, when such additional concerns are added to the mix, reconsideration of the scope of the corporate attorney-client privilege seems all the more necessary and advisable.

#### IV. COMPELLED-VOLUNTARY WAIVER AND THE EROSION OF THE CORPORATE ATTORNEY-CLIENT PRIVILEGE

##### A. *The DOJ Policy*

The concept of utilizing an entity's agreement to waive the attorney-client privilege as consideration for more lenient regulatory treatment appears to have originated in June of 1999 with the issuance of the DOJ's Memorandum regarding "Bringing Criminal Charges Against Corporations," authored by then Deputy Attorney General Eric H. Holder, Jr.<sup>187</sup> The Holder Memo, as it has come to be called, was intended to provide guidance with regard to the specific factors that "should generally inform a prosecutor in making the decision whether to charge a corporation in a particular case."<sup>188</sup> Among the eight categories emphasized by the Holder Memo for prosecutorial consideration was a "corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in [the investigation of its agents] . . . , including, if necessary, a *waiver of the [corporate] attorney-client and*

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186. It is also important to recognize that even absent such nationwide adoption, the proposed solution of a more restrictive corporate attorney-client privilege test is one to which corporations and their counsel could adhere without unduly prejudicing their ability to take advantage of extant approaches that are more liberal. Put another way, to the extent that a state may allow for more protection, the information covered by a narrower federal privilege would obviously be protected. See Hamilton, *supra* note 25, at 658.

187. See Holder Memo, *supra* note 5.

188. Holder Memo, *supra* note 5, at 189.

*work product [privileges] . . .*”<sup>189</sup> The Holder Memo further elaborated upon this consideration as follows:

One factor the prosecutor may weigh in assessing the adequacy of a corporation’s cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements. In addition, they are often critical in enabling the government to evaluate the completeness of a corporation’s voluntary disclosure and cooperation.<sup>190</sup>

Significantly, notwithstanding these perceived benefits to the government of waiver, the Holder Memo maintained that the DOJ “does not . . . consider waiver of a corporation’s privileges an absolute requirement, and prosecutors should consider the willingness of a corporation to waive the privileges when necessary to provide timely and complete information as *only one factor* in evaluating the corporation’s cooperation.”<sup>191</sup>

In January 2003, then Deputy Attorney General Larry D. Thompson reissued a slightly revised version of the Holder Memo, entitled “Principles of Federal Prosecution of Business Organizations.”<sup>192</sup> The critical portions of the Thompson Memo relating to privilege waiver are virtually identical to those in the Holder Memo, with one notable exception. In discussing the weight that prosecutors should attribute to a corporation’s willingness to waive the privilege, the Thompson Memo provides that it should be considered as “one factor” as opposed to the Holder Memo’s “*only one factor*.”<sup>193</sup> The effect, whether or not intended, is to lessen the prior Memo’s downplaying of

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189. Holder Memo, *supra* note 5, at 191-92 (emphasis added).

190. Holder Memo, *supra* note 5, at 192.

191. *Id.* (emphasis added). See also *supra* notes 7-8 and accompanying text (discussing government’s position that waiver is not routinely demanded).

192. See Thompson Memo, *supra* note 5. This iteration of the Memo stressed that the “main focus of [its] revisions [was] increased emphasis on and scrutiny of the authenticity of a corporation’s cooperation.” *Id.* at 1. In particular, the Memo expanded upon the types of corporate actions that should be considered as being designed to impede the government’s investigation; for example, instructing employees to refrain from fully cooperating. See *id.* at 6. Along these lines, the Thompson Memo added a ninth factor for prosecutorial consideration—“the adequacy of the prosecution of individuals responsible for the corporation’s malfeasance.” *Id.* at 3.

193. Compare *id.* at 5, with Holder Memo, *supra* note 5, at 192.

the significance of waiver. Though subtle, the message may be that “willingness to waive” is a moderately more important consideration under the Thompson Memo.

Whatever faint distinctions exist between the two Memos, the ultimate result appears to be the same, at least from the perspective of the corporate bar, namely, routine demands by DOJ for waiver, which corporations feel compelled to provide.<sup>194</sup> Willingness to waive may indeed be but a single factor in the “cooperation” analysis, but corporations clearly perceive that it is a highly significant “one” in the eyes of the government. The amendment to the U.S. Sentencing Guidelines, suggesting that waiver could be a prerequisite to the reduction of a corporation’s culpability score under certain circumstances,<sup>195</sup> added further credence to this perception.

### B. *The Perceived Effects of Privilege Waiver*

Although significant uncertainty exists under *Upjohn* with regard to what corporate communications will be non-discoverable, the corporate legal community has expressed great concern over the potential consequences that compelled-voluntary waiver may have on the corporate attorney-client privilege.<sup>196</sup> Ironically, the most significant of these perceived side effects—reduced candor between counsel and corporate employees—already exists under the current formulation of the federal privilege, even absent the specter of government-coerced waiver. The remaining anticipated problems, when closely examined, seem exaggerated, at best.

At present, there is a widespread sentiment that compelled-voluntary waiver will inevitably result in corporate constituents being less candid with counsel.<sup>197</sup> According to this argument, if these

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194. See *supra* notes 5-9 and accompanying text. It is important to note that waiver is typically sought by the DOJ in one of two scenarios: (1) after a corporation has conducted an internal investigation and self-reported its wrongdoing, apparently to determine the thoroughness and accuracy of the self-report; or (2) before an internal investigation has even been completed, essentially requesting a prospective waiver as to anything in the future that might be deemed privileged. This latter scenario is the one that the corporate legal community finds particularly troublesome, and one that is believed to be on the rise. See Ben-Veniste & Rubin, *supra* note 9, at 1 (noting the “ever more frequent government practice of seeking a blanket waiver of the privilege before the company has completed its internal probe”).

195. See *supra* note 6 and accompanying text; see also *infra* notes 233-39 and accompanying text.

196. See *supra* notes 12-17 and accompanying text.

197. See *supra* note 13 and accompanying text; see also COALITION SURVEY, *supra* note 9, at 15 (observing that “instead of advancing the interests of the public, government attorneys have now

individuals comprehend that the corporation will likely be forced to waive the privilege at some point in the future, it is most probable that they will be reluctant to cooperate fully in connection with any internal investigation.<sup>198</sup> This reluctance is exacerbated, even within the upper echelons of senior management, by the fact that a waiver as to the government will likely also effect a waiver of the privilege as to non-governmental third parties,<sup>199</sup> not to mention as to all other information that relates to the same subject matter.<sup>200</sup> Such corporate reticence tears at the very heart of the attorney-client privilege's central purpose of encouraging full and frank communication between lawyer and client. As a result, many view compelled-voluntary waiver as the death knell to the privilege in the corporate context.<sup>201</sup>

Such doomsday predictions, however, seem to ignore the fact that there is ample room for skepticism with regard to how forthcoming employees are under the existing corporate privilege regime.<sup>202</sup> For one thing, corporate counsel are duty bound to advise employees with regard to both the scope of the legal representation and the attorney-client privilege prior to conducting any sort of interview in connection with a corporate investigation.<sup>203</sup> Indeed, something akin to a *Miranda*-type

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created a situation where clients are going to be less, not more, forthcoming") (quoting one Survey respondent).

198. The potential for corporate employees to keep their mouths shut in connection with an internal investigation is no doubt considered to be even greater when the corporation has already effected a prospective waiver of the privilege—i.e., agreed to waive before the inception of an internal investigation as to any matters that might later be deemed privileged.

199. See *supra* note 15 and accompanying text; Van Fleet, *supra* note 6, at 8 (suggesting that civil liability brought about by the virtually inevitable blanket waiver of the attorney-client privilege "alters the cost-benefit analysis executives must make in deciding whether to report a potential criminal violation"—i.e., accepting a criminal fine may be more cost effective); see also COALITION SURVEY, *supra* note 9, at 13 (observing that "[i]n addition to a chilling effect on communications with between [sic] the client and the lawyer, waiver of privilege subjects companies to disclosure of these materials in litigation, potentially causing grievous harm to the company") (quoting one Survey respondent).

200. See *supra* notes 16, 56 and accompanying text.

201. See *supra* notes 1-4 and accompanying text.

202. See Sexton, *supra* note 26, at 463 (observing that "[o]ne may question whether the attorney-client privilege actually induces any client, individual or corporate, to provide information that would not otherwise be forthcoming"); see also Thornburg, *Sanctifying*, *supra* note 60, at 166 (noting that, as a practical matter, "the existence of the privilege in future litigation is sufficiently uncertain at the time a communication must be made (or not), that the corporate employee must simply decide to reveal what she thinks best and take her chances, with the possibility of privilege playing at most a marginal role"); *supra* note 117 and accompanying text.

203. See Sara Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 940, 941 (2003) (observing that many practitioners recommend that counsel routinely provide warnings to employees, whether or not required, and "[m]ost experts agree that the strategic advantages of

warning might be called for depending upon the circumstances. For example, one corporate organization has suggested that something along the lines of the following might be in order as a pre-interview instruction:

We have been retained to represent the Company to conduct our own review and investigation of this matter. The Company has requested that all of its employees cooperate fully and completely in our efforts, and we trust that you will be forthcoming and truthful in your responses.

Although we do not represent you personally, what you tell us today is privileged from disclosure outside the Company. However, the Company may determine, in its own discretion, to advise . . . others outside the Company[] of the results of our work. The decision of whether to disclose this information will be made solely by the Company. If we determine that you are personally at risk in this investigation, we will advise you. You are free to retain your own lawyer. Should that be necessary, the Company, under appropriate circumstances and limits, may be prepared to advance you reasonable legal fees and costs and may recommend a lawyer. . . . Do you understand this?<sup>204</sup>

It should probably go without saying that following such an instruction, it is highly unlikely that an employee with anything to hide would be entirely truthful, if he or she would speak at all.<sup>205</sup>

Hence, as a practical matter, attorneys are likely to employ a warning that is not quite so precise and ominous. Such an approach, however, can be risky. For instance, if the proffered instructions reasonably lead a corporate employee to believe that the company's counsel actually represents him or her personally, a court may legally recognize that belief, resulting in a host of potential problems for both

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providing some type of pre-interview warning outweigh the disadvantages"); Bruce A. Green, *Interviewing Client Officers and Employees: Ethical Considerations*, PROF'L LIAB. LITIG. ALERT, Winter 2005, at 1, 3 (noting the general advisability of the practice of a corporation's lawyers clarifying "that they are not representing the corporation's officers or employees individually").

204. AM. HEALTH LAWYERS ASS'N, BEST PRACTICES HANDBOOK IN ADVISING CLIENTS ON FRAUD AND ABUSE ISSUES, Exhibit D (1999); *see also* Duggin, *supra* note 203, at 944-46 (discussing district court judge's suggestion of a similar model for a pre-interview warning to a corporate employee).

205. *See* Thornburg, *Sanctifying*, *supra* note 60, at 174 (observing that providing employees with "a truthful picture about the limits of the corporate attorney-client privilege [will] not generate much candor"); *see also* Duggin, *supra* note 203, at 946 (noting that such "warnings could bring an internal investigation to a grinding halt while employees scramble to find individual counsel").

the corporation and its counsel.<sup>206</sup> Most notably, the corporate client may be disabled from effecting a waiver of the attorney-client privilege as it would belong to the employee individually.<sup>207</sup>

Even successful utilization of less exacting instructions carries with it the potential of chilling communications between counsel and corporate employees.<sup>208</sup> Merely emphasizing that counsel represents the corporation and not the individual or suggesting the possibility of voluntary privilege waiver by the corporation can have the same effect on an employee's willingness to cooperate as the lurking prospect of

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206. See RESTATEMENT, *supra* note 38, § 73 cmt. d (noting that “[i]f a lawyer fails to clarify the lawyer’s role as representative solely of the organization and the organization’s agent reasonably believes that the lawyer represents the agent, the agent may assert the privilege personally with respect to the agent’s own communications”); see also Duggin, *supra* note 203, at 940 (suggesting that the principal reason for employing pre-interview warnings is “to avoid any possibility that a court will subsequently permit the individual employee to invoke the protections of the attorney-client privilege on grounds that an attorney-client relationship existed between investigating counsel and the interviewee”); Green, *supra* note 203, at 4 (observing that the “failure to clarify the lawyer’s role poses the risk of inadvertently creating a lawyer-client relationship with the officer or employee”).

It is important to note that, at a minimum, under Model Rule 1.13(d) (followed in some form by most states), a lawyer is ethically bound to clarify his or her role when it is reasonably apparent that the company’s interests are adverse to the constituent:

In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.

MODEL RULES OF PROF’L CONDUCT R. 1.13(d) (2004). In addition, similar ethical obligations exist under Model Rule 4.3, which provides that:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

*Id.* at R. 4.3.

207. See *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333, 337-38 (4th Cir. 2005) (observing that if corporate counsel enters into an attorney-client relationship with a corporate constituent, the corporation would not be able to waive that individual’s privilege to the extent that a conflict arises); see also Green, *supra* note 203, at 4 (suggesting that corporate counsel face the untenable situation of deciding “whether to give . . . warnings when they may not be required, and thus risk discouraging disclosures, or to refrain from [doing so], and thus risk litigation concerning the propriety of their professional conduct”).

208. Indeed, it is likely that many employees misperceive the scope of the attorney-client privilege or are completely unaware of its existence. Thus, they may approach any interview with corporate counsel with a certain degree of wariness based on a view that nothing they say will be held in confidence.

compelled-voluntary waiver.<sup>209</sup> If an employee has absolutely nothing to hide, however, he or she will probably be cooperative with or without the protective cloak of the attorney-client privilege,<sup>210</sup> and if not, the corporation could no doubt exert pressure to induce the cooperation sought.<sup>211</sup>

Another commonly feared by-product of compelled-voluntary waiver is that attorneys will cease to memorialize in writing the fruits of investigations and/or the legal advice imparted as a result thereof.<sup>212</sup> The

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209. See *supra* note 26 and accompanying text; see also Buchanan, *supra* note 6, at 600 (noting that “it is not a new practice for a corporation’s lawyers to advise employees in the context of a criminal investigation that they represent only the corporation, and not the employee, and that this has implications for the confidentiality of any communications with the employee”); Sexton, *supra* note 26, at 467 (observing that because the “threat of waiver or of shareholder litigation is present whenever there is an issue of corporate liability, [certain employees] might be generally unwilling to speak to the corporation’s attorneys notwithstanding the initial availability of the privilege”). Cf. Thornburg, *Sanctifying*, *supra* note 60, at 167 (noting that “numerous waiver doctrines and exceptions make it possible that discovery will be allowed even when the privilege would otherwise protect communications”).

Furthermore, even in the absence of the possibility of waiver, it still seems questionable whether an employee would be entirely forthcoming with counsel. If an employee has done something improper, fear of reprisal might naturally cause him or her to be less than fully candid with the company’s lawyer, even under an absolute guarantee of confidentiality. See Sexton, *supra* note 26, at 466 (noting that some employees “will *not* speak [with counsel] even if they are assured that their communications will not be disseminated beyond those involved in the litigation both because they fear recrimination within the corporation and because they understand that at least some corporate officials will be privy even to privileged communications”).

It is also important to note that employee candor may be undermined by the existence of the well-established “good cause” exception to the corporate attorney-client privilege in the context of shareholder litigation against the company, which suggests that under such circumstances, there is a significant possibility that the privilege will not apply. See *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); see also Sexton, *supra* note 26, at 514-16 (discussing the effect of the *Garner* exception on the willingness of corporate employees to cooperate with counsel).

210. See Sexton, *supra* note 26, at 466 (finding it “noteworthy that many individuals—most particularly those whose interests do *not* conflict with the corporation—will gladly speak even without the protection of [the] privilege”); Hamilton, *supra* note 25, at 647 (observing that “[i]f an employee is not concerned that a statement’s divulgence will later harm her, then she will tend to be unconcerned about the information that she reveals to corporate counsel”).

211. See Thornburg, *supra* note 60, at 175 (observing that a “corporate employee who refuses to confide in the corporation’s attorney at this employer’s request risks disapproval, demotion, and discharge”); see also Hamilton, *supra* note 25, at 647 (indicating that a corporation could “threaten to fire an employee who [is] not forthcoming with relevant information”); Sexton, *supra* note 26, at 491 (noting that there is really no reason for the privilege under circumstances where the employee “will communicate with the attorney even if the privilege [did] not exist, or if a nonlegal objective [would be] sufficient to stimulate communication with the attorney”). Cf. Note, *supra* note 140, at 429 (suggesting that “[w]hen [employees] consider how much to reveal to counsel, they are likely to be deterred more by the fear that management will be displeased when it learns of their conduct than by the fear of disclosure to opposing litigants”).

212. See *supra* note 14 and accompanying text.

likelihood of this occurring is enhanced by the virtual certainty that any written materials voluntarily disclosed to the government will lose their privilege protection as to third parties.<sup>213</sup> A lawyer's ethical duty of competency combined with a fear of malpractice liability or the possibility that some other civil or criminal action will be instituted against him or her seem to provide ample motivation for careful documentation and record-keeping.<sup>214</sup>

Furthermore, even prior to the inception of compelled-voluntary waiver, much of the information that an attorney would typically gather and prepare during the course of an internal investigation would be protected only by the work product doctrine. As such, a proper showing by the government or some other third party of substantial need for the materials and that the substantial equivalent could not be obtained without enduring undue hardship would have rendered an attorney's "fact" or "ordinary" work product discoverable.<sup>215</sup> Even "opinion" work product,<sup>216</sup> under exceptional circumstances could be deemed unprotected.<sup>217</sup> Notwithstanding this qualified protection, lawyers have clearly persisted in their practice of memorializing information prepared in anticipation of litigation in written or other tangible form. Admittedly, the threat of compelled waiver by the government is somewhat more intimidating than the prospect of court ordered disclosure of work product, but the argument that lawyers will refrain from maintaining proper representation-related records should logically apply to either scenario. The fact that it does not simply reveals the flawed nature of the reasoning that is being employed.

In addition, it is significant that more than one federal official has expressed the view that in the vast majority of situations, the government is not interested in obtaining what in all likelihood amounts

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213. See *supra* note 15 and accompanying text.

214. See Thornburg, *Sanctifying*, *supra* note 60, at 182 (observing that "[a]lthough they would prefer to communicate in secret, attorneys would not cease to investigate if that secrecy were removed because too many forces require full and accurate information"). Cf. Hamilton, *supra* note 25, at 647 (maintaining that "[i]f an employee has information relevant to a legal investigation, counsel will likely pursue it regardless of the applicable privilege rule . . . [as] [n]o competent counsel would face litigation or dispense advice without first learning every possible detail").

215. See, e.g., FED. R. CIV. P. 26(b)(3) (defining "work product" as "tangible things . . . prepared in anticipation of litigation or for trial by or for [a party] or by or for that . . . party's representative"); see also Buchanan, *supra* note 6, at 596.

216. RESTATEMENT, *supra* note 38, § 87(2) (providing that "[o]pinion work product consists of the opinions or mental impressions of a lawyer; all other work product is ordinary work product").

217. See *Upjohn Co. v. United States*, 449 U.S. 383, 401-02 (1981).

to attorney advice or opinion work product.<sup>218</sup> They are most concerned with discovering factual information that will aid them in their investigations:

[W]aiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue. Except in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation.<sup>219</sup>

Even if the sincerity of such stated positions can be questioned, the other incentives present should still serve to encourage corporate counsel to make a record of his or her investigation and advice. At most, one might reasonably expect attorneys to exercise greater caution with regard to what is included in such records as well as the manner in which certain observations might be worded.

It is also worth noting that the advent of the voluntary disclosure requirements under the Federal Rules of Civil Procedure elicited a strikingly similar over-reaction from the organized bar in terms of the predicted negative effect that this procedural innovation would have on attorneys' ability to advocate effectively on behalf of their clients.<sup>220</sup> In

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218. See, e.g., Thompson Memo, *supra* note 5, at 5 n.3 (stating the limited scope of the waiver that the government may seek under most circumstances); Buchanan, *supra* note 6, at 596 (noting that "the government rarely seeks the attorney's mental impressions of witness interviews"). *But see* COALITION SURVEY, *supra* note 9, at 8-9 (indicating that Survey results suggest that the government's seeking waiver as to such information may not be as infrequent as the government maintains).

219. See Thompson Memo, *supra* note 5, at 5 n.3; see also Buchanan, *supra* note 6, at 596 (observing that the information disclosed pursuant to "waiver is nearly always attorney work product concerning the underlying facts, rather than privileged communications"). *But see supra* note 218.

220. See Linda S. Mullenix, *Adversarial Justice, Professional Responsibility, and the New Federal Discovery Rules*, 14 REV. LITIG. 13, 39 (1994) (acknowledging the "quasi-hysterical claims that the new discovery rules will lead to the demise of the adversary system as we know it"); Elizabeth G. Thornburg, *Giving the "Haves" a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 234 (1999) (recounting the sentiment of many in the defense bar that "the requirement of automatic disclosure seemed . . . incompatible with litigator culture, an understanding of the 'adversary system,' including discovery, as a process in which the only operative value is aggressive assertion of the interests of the client"); see also Amendments to the Federal Rules of Civil Procedure and Forms, 146 F.R.D. 401, 511 (1993) (Scalia, J., dissenting) (observing that, "[b]y placing upon lawyers the obligation to disclose information damaging to their clients—on their own initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear . . . —the new Rule would place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the opposing side"). *Cf.* Christopher C. Frost, Note, *The Sound and the Fury or the Sound of Silence?: Evaluating the Pre-Amendment Predictions and Post-Amendment Effects of the Discovery Scope-Narrowing Language in the 2000*

particular, in 1993, the Federal Rules were amended to require that certain categories of information be disclosed voluntarily to one's adversary.<sup>221</sup> While the original scope of the disclosure requirement was admittedly too vague and broad, necessitating further narrowing amendments,<sup>222</sup> many within the bar remained opposed to any type of voluntary disclosure. In retrospect, these lawyers' fears, though no doubt heartfelt, were quite exaggerated, and not surprisingly, never realized.<sup>223</sup> An ex post assessment of the compelled-voluntary waiver controversy might yield a similar conclusion.

Finally, many have also expressed the concern that compelled-voluntary waiver will cause corporations to forego conducting internal investigations altogether.<sup>224</sup> This is the most drastic and farfetched of the alleged side effects. Given the enormous incentives that are present for companies to comply with the law,<sup>225</sup> it seems inconceivable that the mere prospect of losing the protection of the attorney-client privilege would cause a company to risk its very existence by simply ignoring possible corporate wrongdoing.<sup>226</sup>

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*Amendments to Federal Rule of Civil Procedure 26(b)(1)*, 37 GA. L. REV. 1039, 1057-59, 1086-87 (2003) (discussing the strong negative reactions from the plaintiffs' bar with regard to amendment narrowing scope of discovery and concluding that the actual effects have been virtually unnoticeable).

221. See, e.g., FED. R. CIV. P. 26(a)(1)(A) (1993) (requiring voluntary provision of "the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings").

222. See, e.g., FED. R. CIV. P. 26(a)(1)(A) (2000) (requiring voluntary provision of "the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment . . .").

223. See Frost, *supra* note 220, at 1056 (observing that "[f]ears and predictions about that [disclosure] provision . . . were not borne out in practice"). Cf. Mullenix, *supra* note 220, at 46 (observing that "Justice Scalia's concerns about the relationship among the [1993] discovery rules [amendments], professional responsibility, and the adversary system have a Chicken-Little 'sky-is-falling' quality").

224. See *supra* note 16 and accompanying text.

225. See Duggin, *supra* note 203, at 887 (observing that "in the wake of the Enron, World Com, Tyco and other recent corporate financial fiascos, the risks of failing to recognize significant legal problems . . . are greater than ever before").

226. See LUBAN, *supra* note 117, at 218 (observing that "[l]arge organizations have no alternative to cycling all of their legally relevant information through the general counsel's office, no more than they have to sending financial information to their (unprivileged) accountant"); Sexton, *supra* note 26, at 464 (noting that "several commentators have argued that because of the exigencies of the regulatory state and because of their general business needs, corporations would communicate with attorneys even if the privilege were not available"); *id.* at 465 (observing that employees and even some members of senior management may not place the good of the institution above personal interests, and therefore, might withhold or distort information in the absence of privilege protection). Cf. Samaritan Found. v. Goodfarb, 862 P.2d 870, 879 (Ariz. 1993) (suggesting

Notwithstanding the ability to explain away many of the purported problems that compelled-voluntary waiver creates, recent empirical studies by the Association of Corporate Counsel (“ACC”) and the National Association of Criminal Defense Lawyers (“NACDL”) provide some tangible evidence that the corporate legal community’s concerns may be more than just exaggerated speculation.<sup>227</sup> Among the 363 in-house lawyers that responded to the ACC Survey, and the 365 outside attorneys that responded to the NACDL Survey, 95% expressed the view that there would be a “‘chill’ in the flow [and] candor” of communications between clients and counsel in the absence of the protections afforded by the attorney-client privilege and the work product doctrine.<sup>228</sup>

In addition, 30% of the ACC Survey respondents believe that their clients personally experienced an erosion of their privilege and work product protection.<sup>229</sup> The NACDL Survey, on the other hand, revealed that a slightly higher percentage of outside counsel hold this opinion—47% out of 344 respondents.<sup>230</sup>

The Surveys also provided respondents with the opportunity to convey their personal views regarding such issues as waiver, the benefits of the privilege and the consequences that would accompany the erosion thereof. Summaries of these responses were consistent with the views already discussed in this section.<sup>231</sup> Along these lines, it is perhaps most significant to note that the overwhelming sentiment in both Surveys was that the attorney-client privilege improved a lawyer’s ability to “monitor,” “enforce,” and/or “improve company compliance initiatives.”<sup>232</sup>

In November 2005, the ACC and NACDL Survey results were presented to the United States Sentencing Commission in connection with the Commission’s re-examination of the commentary language regarding the privilege contained in Chapter 8 of the Sentencing Guidelines.<sup>233</sup> In response, the Commission requested additional

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that “in most cases [corporations] will conclude that ignorance is too high a price to pay to avoid taking witness statements that are potentially discoverable”).

227. See ACC SURVEY, *supra* note 9; NACDL SURVEY, *supra* note 9. For an earlier, similar empirical study regarding the corporate attorney-client privilege, see generally Alexander, *supra* note 117.

228. See ACC SURVEY, *supra* note 9, at 3; NACDL SURVEY, *supra* note 9, at 3.

229. See ACC SURVEY, *supra* note 9, at 3.

230. See NACDL SURVEY, *supra* note 9, at 4.

231. See *supra* text accompanying notes 197-201, 212-13, 224.

232. See ACC SURVEY, *supra* note 9, at 4; see also NACDL SURVEY, *supra* note 9, at 7.

233. See COALITION SURVEY, *supra* note 9, at 2; see also *supra* note 6 and accompanying text.

information with respect to the frequency and effects of government demands for waivers.<sup>234</sup> This request, among others, spurred the ACC and NACDL, along with a sizable contingent of similarly interested organizations,<sup>235</sup> to conduct a second, more comprehensive survey (“Coalition Survey”), the results of which were submitted in March 2006 to the House Judiciary Committee’s Subcommittee on Crime, Terrorism and Homeland Security.<sup>236</sup>

Over 1200 in-house and outside counsel responded to the Coalition Survey, and the overwhelming sentiment expressed was that demands for privilege waiver have become the norm.<sup>237</sup> Specifically, approximately seventy-five percent of the respondents agreed that a “culture of waiver” now exists, within “which governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections.”<sup>238</sup>

The Coalition Survey apparently had the desired effect, inspiring a vote by the Sentencing Commission on April 5, 2006, to remove the privilege waiver language from its Guideline commentary.<sup>239</sup> Nevertheless, one might still reasonably question the significance of its and the other two surveys’ results given that all three largely appear to convey only the subjective perceptions and accounts of the corporate bar. Consequently, they can be viewed collectively as little more than an exclamation point behind the extant anecdotal evidence proffered by waiver critics. Whatever credence one is willing to give to these studies, at a minimum, they do confirm that there is a widespread and genuinely held belief that compelled-voluntary waiver will adversely affect corporate counsel’s ability to provide quality, effective legal representation. Whether real or imagined, that belief alone could prove to be a self-fulfilling prophecy, which is enough to establish the existence of a very real problem. The next section discusses one of the principal remedial measures that has been proposed thus far in response.

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234. See COALITION SURVEY, *supra* note 9, at 2.

235. The other organizations involved included: American Chemistry Council; Business Civil Liberties, Inc.; Business Roundtable; The Financial Services Roundtable; Frontiers of Freedom; National Association of Manufacturers; National Defense Industrial Association; Retail Industry Leaders Association; U.S. Chamber of Commerce; and Washington Legal Foundation. See *id.* at 1.

236. See Coyle, *supra* note 8. See generally COALITION SURVEY, *supra* note 9.

237. See generally COALITION SURVEY, *supra* note 9.

238. *Id.* at 3; see also *id.* at 6 (observing that “[i]t is clear that this has become the ‘rage’ among prosecutors”) (quoting one Survey respondent).

239. See *supra* note 6. The revision will not take effect until November 1, 2006, assuming that Congress does not act to the contrary. See *id.*

## V. RECOGNITION OF THE SELECTIVE WAIVER DOCTRINE AS A REMEDY TO THE COMPELLED-VOLUNTARY WAIVER PROBLEM

It virtually goes without saying that the most serious over-arching concern with regard to compelled-voluntary waiver is the reality that corporate acquiescence thereto will result in waiver of the privilege as to third parties, most notably, potential plaintiffs and their counsel.<sup>240</sup> Many have argued that this problem could be remedied through recognition, judicially or legislatively, of the concept of selective waiver.<sup>241</sup> Specifically, according to such proposals, companies should be allowed to effect a waiver as to the DOJ, or other government agency, but still be able to maintain the privilege with regard to others.<sup>242</sup>

Although a few courts have expressed a willingness to recognize selective waiver,<sup>243</sup> primarily only when the government has explicitly agreed to maintain the confidentiality thereof,<sup>244</sup> most courts have rejected the doctrine altogether.<sup>245</sup> The rationale for this strict “no selective waiver” position is based primarily on the elements of the attorney-client privilege and the requirement that it be narrowly construed. In particular, an authorized disclosure of a privileged communication to any non-privileged person destroys the required “confidential” nature of that communication, thereby rendering it no longer privileged for all purposes. In *In re Subpoena Duces Tecum*,<sup>246</sup> for example, the D. C. Circuit insisted that “the attorney-client privilege should be available only at the traditional price: a litigant who wishes to assert confidentiality must maintain genuine confidentiality.”<sup>247</sup>

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240. See *supra* note 15 and accompanying text; see also COALITION SURVEY, *supra* note 9, at 4 (suggesting that Survey results indicate that third party lawsuits are among the top consequences stemming from investigations by the government).

241. See, e.g., Pinto, *supra* note 35, at 382-88.

242. See *supra* notes 35-36 and accompanying text.

243. See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (recognizing selective waiver outright because “[t]o hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them”).

244. See, e.g., *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993) (expressing willingness to recognize selective waiver when either a common interest is shared between the disclosing party and the government or the government and the disclosing party enter into an explicit confidentiality agreement); *Teachers Ins. & Annuity Assoc. of Am. v. Shamrock Broad. Co.*, 521 F. Supp. 638, 644-45 (S.D.N.Y. 1981) (recognizing selective waiver when “the right to assert the [attorney-client] privilege in subsequent proceedings is specifically reserved at the time the disclosure is made”).

245. See *supra* note 15.

246. 738 F.2d 1367 (D.C. Cir. 1984).

247. *Id.* at 1370 (quoting *Permian Corp. v. United States*, 665 F.2d 1214, 1222 (D.C. Cir. 1981)).

Although there are exceptions to this rule, such as when co-parties share privileged information in the context of joint or common interest arrangements, these are viewed as being consistent with the privilege's underlying purpose of encouraging candid communications to facilitate effective representation.<sup>248</sup>

Another related reason for rejecting selective waiver is the view that one should not be able to use the privilege in order to gain what amounts to a tactical advantage. In *In re Columbia/HCA Healthcare Corporate Billing Practices Litigation*,<sup>249</sup> the court observed that "any form of selective waiver, even that which stems from a confidentiality agreement, transforms the attorney-client privilege into 'merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage.'"<sup>250</sup> The privilege is an absolute protection, not to be bartered away with regard to some, but not others.<sup>251</sup> To put it euphemistically, corporations should not be permitted to have their cake and eat it too.

Notably, some courts have treated the work product protection differently with regard to selective waiver, which is largely a function of the distinct purpose for which that doctrine exists.<sup>252</sup> Specifically, the primary reason for affording protection to work product materials is to prevent an adversary from obtaining a tactical advantage in litigation through the acquisition of an opponent's trial preparation materials.<sup>253</sup> Thus, the work product doctrine really only applies as between adversaries in pending or prospective litigation. As a result, sharing work product with someone who may be characterized as a non-

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248. See *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1423-24 (3d Cir. 1991).

249. 293 F.3d 289 (6th Cir. 2002).

250. *Id.* at 302 (quoting *In re Steinhardt*, 9 F.3d 230, 235 (2d Cir. 1993)).

251. See *Permian Corp.*, 665 F.2d at 1221 (maintaining that a "client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit").

252. See, e.g., *In re McKesson HBOC, Inc.*, No. 20743, 2005 WL 934331 (N.D. Cal. Mar. 31, 2005) (recognizing selective waiver as to work product materials disclosed to the government because of the benefits that flow to the public and in keeping with authority that suggests work product protections can be preserved through a negotiated confidentiality agreement with the government). *But see* *McKesson Corp. v. Green*, 610 S.E.2d 54 (2005) (finding waiver as to work product materials voluntarily turned over to the SEC because the SEC did not share a common interest and confidentiality agreement did not completely preclude disclosure by the SEC); *In re Columbia/HCA*, 293 F.3d 289, at 304-07 (6th Cir. 2002) (rejecting selective waiver as to work product materials notwithstanding confidentiality agreement).

253. See *Hickman v. Taylor*, 329 U.S. 495 (1947).

adversary is not contrary to the purpose of the immunity.<sup>254</sup> Therefore, some courts have held that a corporation's waiving of the work product doctrine as to the government does not result in a blanket waiver as to third parties, provided that a reasonable confidentiality agreement is in place between the company and the government.<sup>255</sup>

Such a rationale, however, is not applicable to the attorney-client privilege, as the disclosure of a privileged communication to anyone, adversary or not, is wholly inconsistent with the elemental prerequisites. Nevertheless, proponents of selective waiver have raised some fairly compelling public policy arguments in support of their position. These are perhaps best articulated in Judge Danny J. Boggs' dissent in *In re Columbia/HCA*.<sup>256</sup>

This case involved an investigation by the DOJ into some questionable practices engaged in by Columbia/HCA that resulted in the over-billing of Medicare and Medicaid patients. The hospital conducted an internal audit of its billing practices and the DOJ requested the results thereof in connection with its investigation. After initial resistance, the hospital acquiesced, following a change in management, and disclosed the information sought by the DOJ, including materials subject to protection under the attorney-client privilege and work product doctrine.<sup>257</sup> Prior to this disclosure, however, it was agreed that: (1) the DOJ would keep all of the information produced strictly confidential as consideration for the hospital's cooperation; and (2) the production would not constitute a general waiver of the attorney-client privilege and work product protections.<sup>258</sup>

The DOJ and hospital eventually settled the matter for a reported \$840,000,000.<sup>259</sup> Not surprisingly, this led to a number of private civil actions against Columbia/HCA, in the context of which demands were made for the production of the audit materials that had been turned over to the DOJ. Columbia/HCA objected based on the attorney-client privilege and work product doctrine, and in response, the plaintiffs argued that those protections had been waived.<sup>260</sup> Thus, the issue of

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254. See *Browne, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 479 (S.D.N.Y. 1993) (noting that "disclosure simply to another person who has an interest in the information but who is not reasonably viewed as a conduit to a potential adversary will not be deemed a waiver of the protection").

255. See, e.g., *In re McKesson*, 2005 WL 934331; *Permian*, 665 F.2d 1214.

256. 293 F.3d at 307-14.

257. See *id.* at 292.

258. See *id.*

259. See *id.*

260. See *id.* at 293.

whether a defendant can selectively waive the attorney-client privilege and/or work product doctrine was ultimately squarely put before the Sixth Circuit and that court rejected the concept. As with the majority of the Circuit Courts that have addressed the issue, the Sixth Circuit, in an opinion written by Judge Thomas B. Russell, simply could not reconcile selective waiver with the fundamental elements of the protections or with the underlying purpose of fostering full and frank communications between attorney and client.

Unlike the rest of the court, Judge Boggs did not feel moored to the strict doctrinal underpinnings of the attorney-client privilege. According to him, given that the attorney-client privilege is a creature of common law, it was appropriate for the court to utilize its “reason and experience” in shaping the privilege’s contours.<sup>261</sup> The over-riding public policy at issue, according to Judge Boggs, was the government’s interest in ferreting out corporate wrongdoing. He maintained that the government’s mission in this regard is to protect the public, and judicial acknowledgment of selective waiver will enable it to do so more effectively and efficiently.<sup>262</sup> Indeed, he would go so far as to claim that in the absence of selective waiver, the government would have no other means to obtain potentially critical privileged information.<sup>263</sup>

Judge Russell, writing for the majority, accredited the possible gains in efficiency noted by Judge Boggs, but was troubled by the countervailing policy concerns created by selective waiver. Specifically, he felt that it would be difficult to define who constituted “the government” for purposes of selective waiver. For example, should citizens acting under federal authority as private attorneys general be included within the definition?<sup>264</sup> In addition, he viewed selective waiver as, in essence, making the government an accessory to corporate wrongdoing, concealing potentially helpful information from third

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261. *Id.* at 310 (Boggs, J., dissenting).

262. *Id.* at 312 (Boggs, J., dissenting). It should be noted that Judge Boggs would only extend availability of selective waiver to a party’s dealings with the government, and might require a confidentiality agreement between the government and the waiving party. *Id.* at 313.

263. *Id.* at 311 (Boggs, J., dissenting). Judge Boggs also expressed the view that since there was no dispute as to whether the information sought was protected by the attorney-client privilege, the burden should have been placed on the plaintiffs to prove waiver, rather than on Columbia/HCA to disprove it. *Id.* at 308. In addition, he criticized the court’s hindsight conclusion that if a party disclosed privileged information in the future, then the protection was unnecessary to encourage the communication in the first instance. On the contrary, Judge Boggs maintained that one’s decision to disclose privileged information in light of intervening circumstances sheds no light on one’s prior willingness to be forthcoming. *Id.* at 309-10.

264. *See id.* at 303.

parties who have been or may be harmed.<sup>265</sup> According to him, the government possesses other means besides waiver for obtaining the same information and should pursue those avenues.

The real point of contention between the judges is that Judge Boggs believes that in the absence of selective waiver, corporations will not be forthcoming with the government, while Judge Russell concludes that corporations will still cooperate and suggests that selective waiver's only benefit is that it makes the government's job easier and cheaper, effects that are outweighed by other more important policy concerns. Their disagreement captures well the heart of the selective waiver debate. Whether or not one favors adoption of this doctrine hinges upon the significance attributed to the promotion of corporate investigations by the government. At present, the strong doctrinal basis of the privilege, combined with other practical considerations, make the prospect of a trend in the direction of judicial acceptance of selective waiver remote.

Notwithstanding this, legislative recognition of selective waiver is certainly a possibility. Prior efforts in this regard, however, have been unsuccessful.<sup>266</sup> In addition, selective waiver does not appear to be a popular remedy among the corporate community, as it may actually increase the government's compelled-voluntary waiver efforts, and in the end, the corporations are still being forced to disclose information that they would rather keep strictly confidential. As a result, the various side effects of compelled-voluntary waiver likely would not be alleviated by recognition of selective waiver. Given this, devoting any further energy towards its codification seems ill advised and will only serve to detract attention from the real issue—the corporate attorney-client privilege itself, as elaborated upon in the next section.

## VI. RETHINKING THE CORPORATE ATTORNEY-CLIENT PRIVILEGE

Although there are obvious deficiencies and difficulties associated with the selective waiver doctrine, the ABA's rigid "pro-privilege/anti-waiver" stance,<sup>267</sup> and the DOJ's mandate for greater oversight of waiver

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265. *See id.* (observing that "[t]he investigatory agencies of the Government should act to bring to light illegal activities, not to assist wrongdoers in concealing the information from the public domain").

266. For example, in 2004, a bill was introduced in the United States House of Representatives that would have officially recognized selective waiver as to documents and information supplied to the SEC. *See* Buchanan, *supra* note 6, at 606-07. Although approved by the House Financial Services Committee, the bill was not passed by the House in 2004 and has apparently not been reintroduced.

267. *See supra* notes 29-32 and accompanying text.

requests,<sup>268</sup> their common fundamental shortcoming stems from the analytical frame of reference being utilized. Rather than myopically viewing compelled-voluntary waiver as the problem to be solved, the selective waiver proponents, the ABA and the DOJ would be better served by focusing their attention on the corporate attorney-client privilege itself. More to the point, the debate should center around reconstituting the privilege in the federal context in such a way as to enable corporations and their counsel to shield the information that they most desire to be protected—such as, legal advice from counsel and communications to counsel by corporate constituents who are capable of binding the corporation or rendering it criminally or civilly liable.

While the government would no doubt welcome the acquisition of these types of communications, various agency officials have represented that this is not the sort of information that the government typically seeks through waiver.<sup>269</sup> Thus, reform efforts should be directed towards defining the corporate attorney-client privilege in a manner that preserves the protection in its most fundamental form, and encouraging the pertinent government agencies to commit formally to seeking waiver of such a privilege only in very limited circumstances.

There are unquestionably various possibilities for reworking the corporate privilege, but the author favors the adoption of a variation of the traditional control group test. The critical issue with regard to this approach relates to how one defines “control group.” The traditional scope of the control group has been criticized as being under-inclusive, particularly with regard to its failure to encompass corporate employees whose conduct in a given matter could render the corporation vicariously liable.<sup>270</sup> As a result, the author recommends adopting something along the lines of the description employed in Comment 7 to ABA Model Rule 4.2,<sup>271</sup> which describes the corporate constituents with whom opposing counsel may not speak when the corporation is known to be represented by counsel. This Comment provides that, in the absence of

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268. See *supra* notes 33-34 and accompanying text.

269. See *supra* notes 7-8 and accompanying text.

270. See Hamilton, *supra* note 25, at 650 (observing that “[i]f a non-control group employee exposes his employer to liability, it is reasonable for the corporation to have control over whether the employee’s communications concerning the liability-causing event are privileged”).

271. Model Rule 4.2, commonly referred to as the “anti-contact” rule, provides as follows:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

MODEL RULES OF PROF’L CONDUCT R. 4.2 (2004).

consent from a corporation's attorney, opposing counsel is prohibited from communicating with the following corporate employees about the matter that is the subject of the representation:

A constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.<sup>272</sup>

Only communications between individuals falling within this description and the company's counsel regarding the subject of the representation should be protected by the corporate attorney-client privilege. In other words, only communications "with those employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts [that are] at issue . . . or who have authority on behalf of the corporation to make decisions about the course of the [representation]" would be covered.<sup>273</sup>

The rationale for borrowing the Model Rule definition, rather than some other approach, is that its description comes as close as possible to articulating a true corporate analog for the individual client paradigm.<sup>274</sup>

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272. *Id.* R. 4.2 cmt. 7. *Cf.* *Samaritan Found. v. Goodfarb*, 862 P.2d 870, 879-80 (Ariz. 1993) (relying on an earlier iteration of this comment to Model Rule 4.2 in advocating a functional approach to the corporate attorney-client privilege, narrower than the subject matter test but broader than the control group formulation). Professor Sexton suggests a similar formulation that he maintains would be consistent with the teachings of *Upjohn*. Specifically, his privilege would protect:

Communications of those persons (otherwise qualifying) who, either when they are speaking or after they have acquired their information: (1) possess decisionmaking responsibility regarding the matter about which legal help is sought, (2) are implicated in the chain of command relevant to the subject matter of the legal services, or (3) are personally responsible for or involved in the activity that might lead to liability for the corporation.

Sexton, *supra* note 26, at 500.

273. *Messing, Rudavsky & Weliky, P.C. v. President & Fellows of Harvard Coll.*, 764 N.E.2d 825, 833 (Mass. 2002) (describing the corporate constituents with whom counsel are prohibited from speaking under the Massachusetts' version Rule of 4.2, which the court there interpreted in a fashion consistent with Comment 7 to Model Rule 4.2); *see also supra* note 272.

274. *Cf. Messing*, 764 N.E.2d at 833-34 (maintaining that its interpretation of the protection afforded by Rule 4.2 in the corporate context was "consistent with the purposes of the rule, which are not to 'protect a corporate party from the revelation of prejudicial facts,' . . . but to protect the attorney-client relationship and prevent clients from making ill-advised statements without the counsel of their attorney"). For a similar privilege formulation, *see* Sexton, *supra* note 26, at 500; *see also supra* note 272.

Another viable possibility might be the approach adopted by the Supreme Court of Arizona in *Samaritan Found. v. Goodfarb*, 862 P.2d 870 (Ariz. 1993). In that case the court held:

In light of the fact that recognition of the individual attorney-client privilege presupposed creation of the corporate variety, it seems only logical to define the scope of the corporate privilege in a fashion that aligns it most closely with the origins and justifications for the individual privilege.<sup>275</sup> The modified control group approach that this Article advocates does just that.

First, it is important to acknowledge that the significance of the individual privilege is at its apex when it protects client information in the possession of the attorney that would have been undiscoverable if retained by the client. Otherwise, the client would understandably be reluctant to communicate openly and candidly with his or her counsel. This concept is consistent with the views expressed by the Supreme Court in *Fisher v. United States*,<sup>276</sup> and serves to reinforce an individual's Fifth Amendment privilege against self-incrimination as well as the Sixth Amendment right to effective assistance of counsel. Specifically, a client does not waive his or her Fifth Amendment privilege by conveying protected information to counsel, and hence, can freely communicate such information to counsel, thereby enhancing the attorney's ability to carry out the representation effectively.

While a corporation admittedly may not be entitled to these constitutional safeguards in the same sense as an individual,<sup>277</sup> if one is truly seeking to analogize the corporate attorney-client privilege to the individual variety, then it is important to construct a privilege that allows for similar protections. By narrowing the group of corporate representatives whose communications would be covered by the privilege to those who are capable of controlling or binding the entity in some fashion, the privilege is necessarily focused upon the type of

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[W]here an investigation is initiated by the corporation, factual communications from corporate employees to corporate counsel are within the corporation's privilege only if they concern the employee's own conduct within the scope of his or her employment and are made to assist counsel in assessing or responding to the legal consequences of that conduct for the corporate client.

*Id.* at 872-73. Though certainly an improvement over the subject matter or modified subject matter tests, the author does not think that this definition is narrow enough to be sufficiently aligned with the scope of the individual privilege. It should also be noted here that the Arizona legislature apparently overruled *Goodfarb* in favor of an approach more along the lines of *Upjohn*. See Hamilton, *supra* note 25, at 642.

275. Cf. *Goodfarb*, 862 P.2d at 876 (holding that it was appropriate to "apply to corporations the same reasoning as has been applied in regard to natural persons in reference to [the attorney-client] privilege") (quoting *D.I. Chadbourne, Inc. v. Superior Court*, 388 P.2d 700, 709 (1964)).

276. 425 U.S. 391 (1976); see also *supra* notes 96-105 and accompanying text; Sexton, *supra* note 26, at 480-82.

277. See *supra* notes 124-27 and accompanying text.

information that would most be entitled to coverage under the individual attorney-client privilege.

In addition, the revised scope suggested would prevent the corporate privilege from affording organizational clients greater protection than individuals. In particular, one of the principal concerns associated with the subject matter test is the risk that it covers even communications between counsel and employees who amount to mere fact witnesses,<sup>278</sup> persons who would undoubtedly not fall beneath the privilege umbrella in a non-corporate setting. At most, in the individual context, these witnesses' statements would be entitled to the qualified protection of the work product doctrine, and the same should be true when the client is a corporation.

In a similar vein, the individual privilege protects communications between duly authorized agents of the client and counsel.<sup>279</sup> The same would essentially be the case under the proposed corporate privilege, as it includes not only individuals who are the controllers or decision-makers for the company, but also those whose actions may be attributed to the entity with respect to a given set of circumstances.

From a historical, doctrinal perspective it is critical that the corporate privilege track the individual privilege as closely as possible, but it is also significant that in doing so, a number of benefits are achieved. For one thing, it lessens the conceptual asymmetry that presently exists between those whose communications may come within the scope of the privilege and those who are permitted to make decisions regarding the invocation or waiver thereof.<sup>280</sup> Specifically, the *Upjohn* approach potentially protects information conveyances from even low-level employees, but limits the ability to waive the privilege to those who would fall within the traditional definition of the control group.<sup>281</sup> Under the proposed version of the corporate privilege, these two groups would be more closely aligned, if not identical, in most instances—again, creating greater doctrinal cohesiveness between the individual and corporate privileges.

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278. See *supra* notes 154-55, 180 and accompanying text.

279. See *supra* notes 41-42 and accompanying text.

280. See Sexton, *supra* note 26, at 505-10 (discussing the problems created by the inconsistency of permitting only the corporation alone, through its control group, to invoke or waive the privilege). Cf. Stephen A. Saltzburg, *Corporate and Related Attorney-Client Privilege Claims: A Suggested Approach*, 12 HOFSTRA L. REV. 279, 306 (1984) (arguing for limiting corporate attorney-client privilege to communications by individuals “who have authority to control the subsequent use and distribution of the communications”).

281. See *supra* notes 118-19 and accompanying text.

Another fairly obvious benefit is the increased degree of predictability that should flow from the revised approach. Predictability is the characteristic that Justice Rehnquist maintained was essential with regard to the corporate privilege, yet he and the rest of the Court failed to achieve this ideal in *Upjohn*, resigning themselves to what amounted to a case-by-case analysis.<sup>282</sup> While the proposed privilege does not rise to the level of an unequivocal bright-line test that will enable counsel to predict in every instance when a particular communication will be protected, it provides a far more definitive construct than that which is currently employed.

Finally, and for purposes of the compelled-voluntary waiver, most importantly, the proposed corporate attorney-client privilege will protect that about which corporations are primarily concerned—legal advice and incriminating statements attributable to the corporation—while leaving unprotected that which is reportedly of most interest to the government—factual information.<sup>283</sup> The result is that corporations can be deemed “cooperative” by turning over the unprotected factual materials without the necessity of waiver and the related concerns that accompany it—i.e., subject matter waiver and waiver as to third parties.

An obvious question that remains is: How will this new privilege be implemented? There appear to be two possibilities. The first is that in an appropriate case, the Supreme Court could be urged to overrule *Upjohn* in favor of the approach suggested, or some similar approach. Although the likelihood of this occurring may be somewhat remote, given the nature of the problems associated with the corporate attorney-client privilege, as revealed in this Article, it is not implausible that the Court could be convinced to reconsider this seminal case. A more realistic method of implementation would be through legislation. Because *Upjohn* only applies in federal matters, Congress could legislatively overrule that decision.

Either remedial vehicle, of course, leaves unaddressed the problem created by the disparate corporate attorney-client privilege approaches employed throughout the states.<sup>284</sup> Nevertheless, it seems realistic to assume that the federal enactment of a uniform privilege will have somewhat of a trickle down effect and will eventually take hold at the state level as well. Indeed, the ABA, as the foremost purveyor of model

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282. See *supra* notes 173, 179 and accompanying text.

283. See *supra* notes 218-19 and accompanying text.

284. See *supra* notes 183-85 and accompanying text.

guidelines for lawyers, could go a long way to making this a reality by adding its considerable imprimatur to any such legislative reform.

## VII. CONCLUSION

Compelled-voluntary waiver of the corporate attorney-client privilege by the government is perhaps the most significant concern presently facing corporations and their attorneys. The prospect of having to cooperatively disclose materials that would otherwise be held in the strictest of confidence undeniably affects, to some degree, all aspects of the corporate attorney-client relationship. Perhaps not to the extreme level that many suggest, but some adverse effect seems inevitable, even if it only stems from the doomsday mindset that many corporate lawyers and their clients have adopted—if they truly believe that the privilege is dead, it's difficult to dispute that they may be acting as if this is really the case.

When something appears to be dead or dying, the proper solution is not to merely proclaim that it is alive and well or to behave as if band-aid type remedies will do the trick. The only solution is to breath new life into the declining vessel. The new life that the waning corporate attorney-client privilege needs is a reconstitution in light of the many changes in corporate America and corporate oversight that have occurred over the past quarter of a century. The specific solution offered in this Article may not be the answer, but it nevertheless seems clear that refocusing the debate on the scope and doctrinal origins of the corporate attorney-client privilege is essential to resolving the compelled-voluntary waiver paradox.

## QUESTION AND ANSWER

PROFESSOR WOLFRAM: Chuck Wolfram. Lonnie, I have an empirical question. Just listening to you describe the policy statement, the memorandum of the Justice Department. If I were a lawyer advising a client and the client asks, well, are they going to ask for it or not, I think just looking at the policy, I have to say, I haven't the foggiest idea. Are there any further elaboration standards, for example, of when a U.S. attorney should or should not ask for a voluntary waiver? And I guess the ultimate empirical question is, how much of this is going on?

PROFESSOR BROWN, JR.: It depends on who you ask. Actually, if you ask corporate lawyers they say it goes on all the time. And actually, there are two empirical studies that were recently done, and one of the problems was that there wasn't really any evidence of how

frequently this was being done, as well as what the effect really was on the corporate attorney-client privilege. So the Association of Corporate Counsel and the National Association of the Criminal Defense Lawyers did a survey, one of in-house counsel, one of outside counsel on this issue, and I think ninety-five percent said that this is having a negative effect on privilege.<sup>285</sup> They also overwhelmingly suggested that this is being done on a routine basis, almost automatic for a U.S. attorney to make the request. On the other hand, there's a U.S. attorney, I think her name is Mary Beth Buchanan, who recently wrote an article in Wake Forest Law Review,<sup>286</sup> and she sits on the U.S. Sentencing Commission's ad hoc advisory committee, and they did a survey of U.S. attorneys and she said you can count on two hands as to the number of times that waiver has been requested. And that was doing a survey of the various U.S. attorneys offices, so there's a complete disagreement as to how frequently it's done. I had conversations with Larry Thompson who taught at Georgia for a semester, and he suggested too that it's not being done nearly as frequently as corporations think, but I believe that the fear that it might be is probably still enough to affect behavior. How frequently it's actually occurring, I don't know. I tend to think that it's probably going on a lot more than the Justice Department is trying to argue.

PROFESSOR WOLFRAM: Thank you.

PROFESSOR POWELL: I just wanted to follow up with reference to the Buchanan article and her report as to how frequently this was used. The commission was in fact aware of her study. The American Corporate Counsel engaged in their survey to correct the report. After Buchanan had written her article and had suggested, if there was any basis for it, so at least in terms of the newest evidence, the commission at least had both views in front of them as it was weighing this matter. Secondly, the testimony was overwhelming, by corporate counsel of all stripes. They had already begun changing the way in which they did their business. You make reference to the fact that notes would not be taken and that sort of thing—corporate counsel will report. They had already moved on in that direction, and that was out of fear, the same fear that Professor Wolfram raised. They simply were unsure as to how vigorously the Justice Department was going to pursue this, which raises

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285. NAT'L ASS'N OF CRIM. DEFENSE LAWYERS, THE ATTORNEY-CLIENT PRIVILEGE IS UNDER ATTACK, *available at* <http://www.nacdl.org/public.nsf/Legislation/Overcriminalization002> (last visited Feb. 21, 2006).

286. Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587 (2004).

my other point. When you were summarizing the position of the commission in terms of what it was seeking, I'm not sure whether you emphasized the fact that the commission was really seeking a commitment on the part of the Department of Justice, that they would not routinely use this as their approach, and the commission never said: "You have no right under any circumstances to press for a waiver, but it strikes us as wrong to make this the starting point." So it seems to me, there's another area for possible compromise, and that would be for the Justice Department to first affirm that it has no intention of routinely using this, to secondly articulate the circumstances in which it must use it, and then third hear from corporate counsel about whether that is a basis for finding some sort of a middle ground, but the Justice Department has been adamant that it is, you know, this is not something that it's willing to negotiate.

PROFESSOR BROWN, JR.: Right. And the language of the two memoranda, I guess the Thompson Memorandum superseded the Holder Memorandum, but the language said that it won't be done routinely, and that's sort of what they want to do about this. It's only supposed to be resorted to when necessary, and it should be considered as only one factor, and sort of a funny observation, it's not really funny, but I make the observation in the paper, one of the changes that Larry Thompson was making was to delete "only." So it said "only one factor" and now it says "one factor," which may even suggest that the Justice Department was subtly de-emphasizing the fact that it wasn't going to be more aggressive in doing so. In my proposal, besides suggesting that we need to reconsider the privilege and change it, I also suggest that the government's got to meet part of the way in keeping with that suggestion that they have to indicate, they will only seek waiver under very particular circumstances. So there does have to be some give and take in this context primarily to protect the information that I think is at the heart of it, which is legal advice and information that might be incriminating to the corporation itself.

PROFESSOR POWELL: Well, finally, just one little point, could you indicate why it is that you think that the Holder Memorandum and the Thompson Memorandum, so why those were initiated? What were the precipitating events on what appeared to be a vehicle that wasn't broken suddenly became broken, and there was the need for the Justice Department to ratchet up the environment?

PROFESSOR BROWN, JR.: In my paper, I suggest that it was the corporate scandals and the change in the overall environment, the perception that there was a need to get to the bottom of these scandals

quickly, and more importantly, I think the hope was to encourage corporate compliance—to get corporations to sort of develop compliance programs as a matter of practice. They just had to do it, and by ratcheting it up some more, maybe you increase the level of corporate compliance, and certainly, the main argument is, I think one of the most notable cases on the selective waiver is Judge Boggs of the Sixth Circuit. He emphasizes the importance of the policy—the government policy. Just to be able to ferret it out, corporate wrongdoing, in an efficient and cost effective manner. That’s good for everybody. That’s good for the entire public, so we ought to encourage that, and because the attorney-client privilege is a common law doctrine, we as the court, we can play with this a little bit. I’m simplifying. That’s kind of what Judge Boggs said. I think that he is correct, in that I think that was the policy incentive in part behind it. Maybe there was something a little more sinister in terms of why it was adopted. But it’s interesting that two different administrations emphasized pretty much the same thing. The only significant difference in the Thompson Memorandum is that he’s a little more hard core on corporations impeding investigations—they now set up joint representation arrangements between the individual employees and the corporation, and his Memo suggests that this may be impeding the investigation itself, which I think that actually—that aspect of the Thompson Memorandum has not been emphasized, but it will upset corporate counsel I think as much if not more so than the compelled-voluntary waiver issue.

PROFESSOR NEEDHAM: Carol Needham from St. Louis University. I wanted to invite you to expand a little more on the normative. When should the government seek voluntary waiver and when should it maybe not be resisted when it is not actually waived, have you thought at all about it?

PROFESSOR BROWN, JR.: The memo says when it’s necessary, and I haven’t fully considered when it would be absolutely necessary, but I would think it would have to be when there’s no other way to obtain that particular information. I’m not proposing some kind of a qualified type privilege, but I think, in terms of waiver, maybe that’s what it would be, akin to what we have with work product. But if they could demonstrate that there is this information that is essential to government’s investigation, and there is no way otherwise to be obtained in that instance, I think they may say you need to waive the privilege. I could think of instances of information being destroyed, and they have to be recreated or maybe just—I think it would be a high—I would want it to be a pretty high level for the government to have to meet to

establish that it truly was in need of that information, but I think my hope would be that this wouldn't happen that much at all. It wouldn't be that much of a need. If we hold them to their representation, that's what they really want to do is to facilitate their investigation or their review of the corporate investigation by looking at factual information, then it shouldn't be that big of an issue, and my conversations with certain individuals at Justice suggest that that's really what they want. They actually are more interested in work product than they are in attorney-client privilege information, and work product is more apt to be found selectively waivable judicially. There would be a selective waiver, not iron clad, but there's a better chance to make that argument. I spend most of the time talking about the attorney-client privilege but I sort of dump the work product in there as well. I don't think there are as many concerns on the work product front, unless it's opinion work product, as there are on the privilege front.

PROFESSOR LERMAN: I'm Lisa Lerman of the Catholic University School of Law. This is really not my field, but your talk is very interesting and getting me curious, so one thing I was wondering about is what we know about the extent to which the protection of the privilege actually results in a higher degree of corporate compliance, because it sort of seems like if you picture corporations trying to hide information, then you think the waiver request is very reasonable and if you picture the sort of prototype corporation trying to do investigation to ensure compliance with the law, and they are kind of doing good internal regulations and stuff, then you would want the privilege to be protected. So one question is, do we know anything about that, and then the second question just kind of taking off on Carol's question, whether it might make sense to have one factor in whether it's reasonable to request a waiver of the privilege be the particular corporate track record on prior internal compliance activity?

PROFESSOR BROWN, JR.: Okay, so your first question was?

PROFESSOR LERMAN: What's going on in the corporate world? How often do internal investigations result in a higher degree of compliance than you would have with a lesser degree of privilege?

PROFESSOR BROWN, JR.: I mean, I don't know whether—I'm not sure actually—I guess you could figure it out by looking at the track record. The corporation that may have misbehaved once, now are they being good after the fact?

PROFESSOR LERMAN: What, if anything, is known about the way that the internal corporate investigation has changed and what result they produce? I don't know.

PROFESSOR BROWN, JR.: By the way they conduct their investigations?

PROFESSOR LERMAN: Yes.

PROFESSOR BROWN, JR.: Well, I think the argument would be that if anything, the investigations may have gone south as a result of the waiver issue because of the side effects that are alleged, corporate counsel—Burnele suggested that they're actually not writing things down. I think it's very dangerous, because it's somewhat unrealistic, I think because lawyers have a duty of competence and they are also concerned about their own personal liability—I suppose, so to try to do it just in your mind as opposed to having a record, and if something goes wrong, you don't have a document. I find it hard to believe that that's being done. The suggestion is compelled waiver has forced lawyers to do this. In addition, being less forthcoming during an internal investigation than before compelled voluntary waiver or extensive review of your investigation, the suggestion is now that's the case. I tend to disagree with that as well, because I mentioned in my talk that I think that employees are somewhat skeptical anyway of their communication. I don't think that it's improved, and I certainly don't think corporations could tell you that the corporate compliance effort has improved and, if anything, the government may have made the situation worse by enacting these waiver provisions overall.

PROFESSOR LERMAN: So my other question was just about, if you were going to start running a list of possible criteria when it was proper to ask for waiver—I suppose corporations like other institutions have prior records of compliance and you might know something about previous voluntary efforts.

PROFESSOR BROWN, JR.: Yes, and there are voluntary programs in place. *Upjohn* was the result of a voluntary program put in place by the SEC. I think the EPA has got some voluntary programs in place for disclosure. And I don't think that voluntary disclosure without the government finding out first that that should be a factor—

PROFESSOR LERMAN: Right.

PROFESSOR BROWN, JR.:—certainly a factor in determining cooperation. It ought to be a factor certainly as to whether or not the government should take it up a notch, and say, okay, now you waive the privilege. One of the biggest concerns that I've found in my research with regard to corporate counsel is that they now request increasingly for waiver at the outset of the investigation. So the corporation may suggest, we found out something, and we're going to conduct an investigation, then the DOJ says, okay, great, waive the privilege now. That's the most

dangerous, because you're waiving the privilege in the future. As to what, you don't even know, and I think that is a real problem. It may be a factor in or affect negatively how the corporation carries out its investigation, and that's the one big argument; they need to stop asking for waiver in this context altogether—that's inappropriate.

PROFESSOR LERMAN: Yeah. You can even question whether it would be valid, right, if there's a waiver that—

PROFESSOR BROWN, JR.: A future waiver, yeah.

PROFESSOR LERMAN: Future waiver, right.

PROFESSOR SIMON: Roy Simon. Hofstra. Is it realistic at all to think about a statute that would say that a voluntary waiver to the United States Department of Justice does not constitute a waiver to third-parties? Would that help the situation at all in terms of making it more palatable for corporations to waive the attorney-client privilege in government investigations knowing that they would then not be waiving with respect to class action plaintiff suits?

PROFESSOR BROWN, JR.: And that's the selective waiver notion which I don't think will work, only because the courts have rejected it. There could be—it could be enacted legislatively, it has been attempted, but has not at this point been successful. I think you still have the potential side effect problems, although they would be reduced, because you don't have the broad waiver, so I think you're right, and that's a pretty popular approach, but it's more popular for the Department of Justice. They want selective waiver. I don't think corporate counsel is all gung-ho about the notion of selective waiver. I didn't talk about implementation in connection with my proposal—because there are really only two ways that it could be. One way would be for the Supreme Court to overrule *Upjohn*, because *Upjohn* is the law, and we're talking about the federal privilege. The other way would be for the federal government to enact the privilege. There could be legislation enacted that would supersede *Upjohn*, and I would hope that in doing so, even though we still have states doing different things in terms of privilege, the real quandary for corporate counsel, if they think about it, is they don't—aren't sure what privilege law is going to apply. I would hope the states might follow suit and decide—maybe we need to create predictability and have a more uniform attorney-client privilege. And I think if the ABA, as the foremost purveyor of model rules, would endorse a model corporate privilege that states might be willing to adopt, it would help corporate counsel's position a lot. [Applause]