A Transactional Lawyer's Perspective on the Attorney-Client Privilege: A Jeremiad for *Upjohn*

*By William W. Horton**

In the evolving dialogue concerning "gatekeeper" duties of corporate lawyers, the scope and social utility of the attorney-client privilege in the corporate setting and related concepts of client confidentiality have come under increasing scrutiny. Indeed, in the face of growing pressure on corporations to waive the privilege in connection with government investigations, some have questioned whether there is any legal or social justification for the corporate attorney-client privilege. While these challenges play out most directly in the litigation setting, concepts of privilege and confidentiality may also significantly affect the nature and flow of communications necessary for corporate and transactional lawyers, including in-house lawyers, to provide effective and appropriate counsel to their clients. This article suggests that current initiatives that weaken the practical vitality of the privilege in the corporate setting do not take into account the realities of attorney-client communications in that setting, and that such efforts may undercut the effectiveness of corporate and transactional lawyers in promoting legal compliance by their corporate clients. The article further suggests that the lessons of Upjohn Company v. United States *concerning the importance of the corporate attorney-client privilege have become obscured in the wake of recent corporate scandals and that those lessons should inform the current debate.*

I. Introduction: Where I'm Calling From

There are few principles of the common law more long-enshrined or familiar (at least by name and concept) to the general public than the attorney-client privilege, described by the United States Supreme Court as "the oldest of the privileges for confidential communications known to the common law."[1] There

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1. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (citing 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961)).

are also, it is submitted, few principles under as much current scrutiny and challenge as the attorney-client privilege, at least insofar as it applies with respect to corporations and other "entity" clients. It has become increasingly commonplace for government prosecutors and investigators to require, or at least strongly suggest, that corporate targets waive the privilege and produce privileged documents and information as a condition of "full cooperation" with a government criminal investigation.[2] At the same time, public indignation with corporate scandals has given rise to suggestions that the interests of "full and frank communication between attorneys and their clients"[3] should be subordinate to a perceived set of "gatekeeper" duties owed to third parties by lawyers representing corporations.

While, as an evidentiary privilege, the attorney-client privilege has technical application only in an adversarial proceeding,[4] as a practical matter the existence of the privilege has profound implications for the lawyer-client relationship and for the effectiveness of a lawyer's efforts to assist his or her clients in complying with the law. As the Supreme Court has observed, "The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."[5] The existence of the attorney-client privilege has been so thoroughly ingrained in the public consciousness through everything from news reports to television dramas that it is fair to say that few clients enter into discussions with their lawyers without at least some sense that such lawyers will, in general, be prohibited from disclosing the substance of such discussions without the client's consent. It is on that basis that lawyers may encourage clients to be open and frank in seeking legal advice, and on that basis that clients will, it is hoped, be inclined to do so. Whether or not the matter in question ever becomes the subject of an adversary proceeding, both parties' awareness of the existence of the privilege is believed by most lawyers to be a significant factor in facilitating the sort of communication between them and their clients that is essential to effective representation.

Although few would likely disagree with such basic statements, it is nonetheless clear that, at least in some quarters, the nature—and the inherent value—of the attorney-client privilege as it applies to corporate clients is under question, if not direct attack. In light of that phenomenon, this article will explore some practical implications of the attorney-client privilege from the perspective of a transactional lawyer, and more specifically from the perspective of a transactional lawyer with significant experience both as outside counsel and as inside counsel to corporate

2. *See, e.g.*, Vanessa Blum, *U.S. Mounts New Attack on Privilege*, LEGAL TIMES (Mar. 20, 2003), *online version available at* www.law.com/jsp/article.jsp?id=1046833592233 (last visited Aug. 26, 2005).

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

4. While they are often conflated in discussions of lawyers' professional duties, it should be noted that the attorney-client privilege is separate and distinct from, and narrower than, the attorney's duty of confidentiality toward his or her client with respect to information obtained in connection with the representation of the client. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2004). *See also* 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 9.7 (Aspen 3d ed. Supp. 2004-2). Nonetheless, as will be discussed below, the two concepts are interrelated in terms of lawyer-client relations.

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

clients. It is not intended to be a scholarly history or exploration of the privilege. Rather, it is simply intended to reflect one lawyer's reflections on the significance of the privilege in a corporate/transactional setting, and one lawyer's concerns about the adverse effects on effective corporate lawyering and corporate compliance if recent trends toward devaluing the corporate attorney-client privilege continue unabated.

II. *UPJOHN* AND THE CORPORATE ATTORNEY-CLIENT PRIVILEGE

A. THE PROBLEM OF THE PRIVILEGE IN A CORPORATE SETTING

Like much of the common law, the attorney-client privilege was originally developed in a context where, in general, lawyers represented individual clients rather than entities. Where a lawyer's client is a single individual, there is no question as to whom the lawyer owes professional duties, and there is likewise no question as to who is entitled to the benefit of (or who is entitled to waive) the attorney-client privilege. When John Sparrow goes to his lawyer and says, "I killed Cock Robin, but I swear it was in self-defense. Can you help me?," it is only by the acts of John Sparrow (or the negligence of the lawyer, in which case John Sparrow has remedies against the lawyer) that the privilege surrounding that conversation and the lawyer's advice can be lost or waived, and neither the lawyer nor any tribunal should ordinarily have any question about that.

However, when the lawyer's client is a corporation, an inanimate creature of statute, the analysis surrounding the availability of the privilege for particular consultations and the assertion or waiver of the privilege proves more intellectually complex.[6] Where a lawyer represents a corporation, he or she owes professional duties to the entity and not to any officer, director, employee, shareholder or other constituent thereof.[7] That notwithstanding, legal constructs are notoriously difficult to reach on the phone, and they are highly unreliable about appearing at meetings. Thus, a lawyer representing a corporation must of necessity communicate with—and receive direction from—the client through its officers, directors and employees. In some cases—a large merger or corporate finance transaction, for example, or a major piece of litigation—this communication may take place at a high level within the corporation. In other situations—routine transactions, employment law advice, recurring types of litigation, or what have you—this communication may predominantly or exclusively involve relatively low-level employees, with limited sophistication about legal matters. Even where communications take place at a high level, there may be circumstances where decisions binding on the corporation may need still higher levels of approval.

6. *See generally* Am. Bar Ass'n Task Force on the Attorney-Client Privilege, *Report of the American Bar Association's Task Force on the Attorney-Client Privilege*, 60 BUS. LAW. 1029, 1034–36 (2005) [hereinafter "*ABA Task Force Report*"]. Obviously, the same issues arise with respect to partnerships, limited liability companies, unincorporated associations and any number of other statutory creations. For simplicity, this article will refer to all entity clients as "corporations," recognizing that certain legal characteristics of other types of entities may have more or less influence on the analysis in particular situations.

7. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13 (2004).

Where the lawyer involved is inside counsel, the chain of communications may become even more complex. In many organizations, in-house counsel are much more fully integrated into the overall operations of the corporation than is ordinarily the case with outside counsel. For that reason, in-house counsel are relatively more likely to have communications about legal matters with employees who are clearly limited in their authority to act on behalf of the corporation, but whose input and information—and even in some cases direction—is necessary for the lawyer to advise the corporation and take legal actions on its behalf.

In the corporate setting then, the question long ago arose as to whether all communications between corporate personnel and inside or outside lawyers regarding legal matters were subject to the privilege, or whether the privilege only attached to communications conducted at some higher level. Some courts considering the issue adopted a "control group" test, in which the privilege attached only to communications with corporate personnel who were "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."[8] However, the nebulous nature of such a standard made it difficult to predict whether particular communications in a corporate setting would be considered to be privileged, and thus difficult for corporations and their lawyers to determine the extent to which communications between corporate personnel and lawyers about legal matters would be discoverable in government investigations or private litigation.

B. The *Upjohn* Decision

In 1981, the Supreme Court brought some clarity to this situation with its decision in *Upjohn Company v. United States*.[9] *Upjohn* involved a situation in which a corporation (through its chairman of the board) directed its general counsel to conduct an internal investigation into certain "questionable payments" made to foreign government officials by a subsidiary of the corporation. Assisted by outside counsel, the general counsel sent a confidential questionnaire to managers of the corporation's foreign operations seeking information concerning such payments, and also interviewed a large number of corporate personnel. Thereafter, the corporation made certain public disclosures in Securities and Exchange Commission filings about questionable payments made on behalf of the corporation.

8. City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962), *petition for mandamus and prohibition denied sub nom.* General Electric Co. v. Kirkpatrick, 312 F. 2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963).

9. 449 U.S. 383 (1981). Given the controversy that has come to surround the viability of the attorney-client privilege in the corporate setting, at least in some circumstances, it is perhaps worth noting that all the Justices concurred in the result set forth in the opinion, which was delivered by then-Associate Justice Rehnquist. Chief Justice Burger concurred in two parts of the three-part opinion, but wrote separately to criticize the Court's failure to articulate more completely a general standard governing the applicability of the privilege to communications by an employee or former employee of a corporation with a lawyer authorized to inquire into matters regarding conduct or proposed conduct within the employee's scope of employment. *See* 449 U.S. at 402–04 (Burger, C.J., concurring in part and concurring in the result).

Simultaneously with such disclosures, the Internal Revenue Service commenced an investigation relating to the payments. As part of the investigation, the IRS issued a summons requiring the production of all files relating to the corporation's internal investigation, specifically including the questionnaires sent to foreign managers and "memorandums or notes of the interviews conducted . . . with officers and employees" under the supervision of the general counsel. The corporation declined to produce the requested documents, citing both the attorney-client privilege and the work product doctrine. The IRS filed a petition to enforce the summons in federal district court. The district court adopted the recommendation of a magistrate who found that the attorney-client privilege had been waived and ordered enforcement of the summons. On appeal, the Sixth Circuit rejected the finding concerning waiver, but held that the privilege did not apply to the extent that the communications reflected by the documents were made by officers or agents outside the "control group" responsible for directing the corporation's actions in response to the legal advice rendered. Accordingly, the appeals court remanded the matter to the district court for a determination of who constituted the "control group."[10]

The Supreme Court granted certiorari, and reversed the decision of the Sixth Circuit. In so doing, the Court expressly "decline[d] to lay down a broad rule or series of rules to govern all conceivable future questions in this area [concerning the applicability of the attorney-client privilege in a corporate setting],"[11] but nonetheless made a number of statements adopting a broad view of the scope of privileged communications between agents of a corporation and the corporation's counsel and the social desirability of greater certainty concerning the applicability of the privilege in the corporate setting.

The Court first noted the public purpose served by the attorney-client privilege in encouraging clients to communicate freely and fully with their lawyers in order to obtain the lawyers' assistance and advice, and further noted 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." The Court observed that such information would often be in the possession of "[m]iddle-level—and indeed lower-level—employees," and 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." In addition, the Court pointed out the role of employees outside the control group in implementing policies adopted by the corporation in response to legal advice, noting that such advice "will also frequently be more significant to noncontrol group members than to those who officially sanction the advice."[12]

The Court went on to state that the control group test

10. *See id.* at 386–89.
11. *Id.* at 386.
12. *See id.* at 389–92.

> . . . threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, "constantly go to lawyers to find out how to obey the law," . . . particularly since compliance with the law in this area is hardly an instinctive matter . . . . [I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected[, a standard which was not met by the lower court's control group test].[13]

With regard to the specific matters at hand, the Court described at some length the facts that the communications conducted by counsel were clearly in connection with the corporation's efforts to obtain legal advice, that it was necessary to seek information "not available from upper-echelon management" to supply a basis for such advice, that the communications "concerned matters within the scope of the employees' corporate duties," that the questioned employees "were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice," and that the corporation and its counsel had stressed the confidential nature of the communications and had maintained such confidentiality. The Court also noted that the corporation had provided the IRS with a list of the employees who had been interviewed and/or had received questionnaires, and that "the Government was free to question [such] employees."[14] In a passage that resonates in the context of standards of "corporate cooperation" prevailing today, the Court stated that

> [w]hile it would probably be more convenient for the Government to secure the results of petitioner's internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner's attorneys, such considerations of convenience do not overcome the policies served by the attorney-client privilege. As Justice Jackson noted in his concurring opinion in *Hickman v. Taylor*, 329 U.S. [495,] 516, . . . : "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary."[15]

As noted above, the *Upjohn* Court declined to establish a general rule for the application of the attorney-client privilege in the context of corporate challenges to government subpoenas, stating that "[a]ny such approach would violate the spirit of Federal Rule of Evidence 501 [which provides that questions of privilege 'shall be governed by the principles of the common law' as interpreted by courts 'in light of reason and experience']." However, the Court affirmatively and expressly rejected the narrow "control group" test employed by the Sixth Circuit.[16] Further, despite the Court's insistence on a case-by-case analysis in such circumstances, the bases cited for its ruling reflect considerable support for a broad view

13. *Id.* at 392–93 (citations omitted).
14. *See id.* at 394–96.
15. *Id.* at 396.
16. *Id.* at 396–97.

of the availability of the attorney-client privilege and for the importance of certainty in applying that privilege.[17]

C. A Note on the Relationship of the Attorney-Client Privilege to the Lawyer's Duty of Confidentiality

In considering the protections surrounding communications between lawyers and their clients, it is important to distinguish between the evidentiary privilege afforded to attorney-client communications and the broader duty of confidentiality that lawyers owe to their clients. These concepts are frequently confused and conflated, unsurprisingly, by the general public, and rather more surprisingly, by practicing lawyers and legal scholars.[18] As has been noted,

> [t]he chief difference between the professional duty of confidentiality and the evidentiary attorney-client privilege is that the former applies to virtually all information coming into a lawyer's hands concerning a client, and forbids virtually all disclosures, whereas the latter only applies when the question is whether a lawyer can be *compelled* to testify about her professional communications *with a client.*[19]

More broadly, while the privilege exists to protect specific types of communications between a client seeking legal advice and the lawyer from whom such advice is sought and may be waived explicitly, implicitly or negligently by the client, the lawyer's ethical obligation relates to information relating to the representation, whether disclosed by the client or coming to the lawyer's attention from another source.[20] Disclosures contrary to this ethical obligation of confidentiality may be made only in those circumstances permitted under applicable ethical rules (or in compliance with other legal requirements) or upon the informed consent of the client.[21] Despite recent amendments to the Model Rules of Professional

17. *See, e.g.*, Swidler & Berlin v. United States, 524 U.S. 399, 409 (1998) (citing *Upjohn* as precedent against a "balancing test" application of the privilege). It should be noted, however, that *Upjohn* construed only the federal law of attorney-client privilege, and there are variations among the states (which variations apply both in state courts and in federal courts sitting in diversity cases). *See, e.g.*, Todd Presnell, *A higher standard: Claiming attorney-client privilege is tougher for in-house counsel*, 14 Bus. Law Today (May/June 2005), at 19, 21–22 (discussing state law variations).

18. *See, e.g.*, Roger C. Cramton, et al., *Legal and Ethical Duties of Lawyers after Sarbanes-Oxley*, 49 Vill. L. Rev. 725, 779–81 (2004) (arguing that existence of crime-fraud exception to attorney-client privilege "weigh[s] heavily" in favor of permissive disclosure of confidential information by lawyers, noting that such permissive disclosure "provides the lawyer with a last-resort weapon and increased leverage *in dealing with a difficult client* or one embarked on an unlawful or fraudulent course of conduct" (emphasis supplied)). Law professors are as prone to get rolling with a thought as anyone else, but one would not want to speculate too long on the ethical propriety of threatening a "difficult client" with disclosure of confidential information where such client's actual or threatened behavior does not implicate the exceptions to confidentiality already embodied in applicable rules of professional responsibility.

19. Hazard & Hodes, *supra* note 4, at § 9.7 (emphasis in original).

20. *See* Model Rules of Prof'l Conduct R. 1.6(a) and cmt. 3 (2004).

21. *See* Model Rules of Prof'l Conduct R. 1.6(a),(b) (2004). *Cf.* U.S. Sec. & Exch. Comm'n Rules 205.3(d) and 205.6(c), 17 C.F.R. §§ 205.3(d) and 205.6(c) (2005) (providing for permissive disclosure of confidential information to the SEC in certain circumstances and purporting to insulate from discipline or liability under "inconsistent" state standards any attorney making such a disclosure in good faith).

Conduct expanding the circumstances under which disclosure of client information may be permitted, the professional duty of confidentiality remains a central part of the lawyer's ethical obligations, and continues to encompass far more, and to be far more broadly applicable, than the attorney-client privilege.[22]

A full exploration of the overlap of, and differences between, the ethical duty of confidentiality and the attorney-client privilege (and correspondingly, the degree to which exceptions to the privilege, which require judicial determination, should inform unilateral decisions by a lawyer to disclose confidential information without client consent[23]) is well beyond the scope of this article. Nonetheless, it is perhaps not unreasonable to speculate that most sophisticated clients (and corporate clients are assumed, perhaps optimistically, to have some degree of sophistication) have at least a general idea that (a) communications between them and their lawyers for the purpose of seeking legal advice are subject to ethical

22. In March 2003, the ABA Task Force on Corporate Responsibility issued its final report, recommending certain changes to Model Rules 1.6 and 1.13 to create new exceptions to the duty of confidentiality. *See* Am. Bar Ass'n Task Force on Corp. Responsibility, *Report of the American Bar Association Task Force on Corporate Responsibility*, 59 BUS. LAW. 145, 166–77 (2003). After considerable and acrimonious debate, these recommendations were adopted by a narrow majority of the ABA House of Delegates at the 2003 Annual Meeting. As a result, Model Rule 1.6 was amended to permit disclosure of client information without the client's consent (i) "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services"; and (ii) "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services." Model Rule 1.13 (relating to the representation of organizational clients) was amended to (i) impose an affirmative "reporting up" duty on a lawyer representing an organization where the lawyer believed that the actual or intended acts or omissions of an employee or agent of the organization in a matter related to the representation would constitute a violation of a legal duty to the organization or might reasonably result in a violation of law imputable to the organization and that was likely to result in substantial injury to the organization, and (ii) permit the lawyer to disclose information outside the organization (whether or not such disclosure would be permitted under Model Rule 1.6) if the highest authority that could act on behalf of the organization insisted upon, or failed to address, an action or refusal to act that was "clearly a violation of law" that the lawyer "reasonably believe[d]" was "reasonably certain" to result in substantial injury to the organization, if and to the extent the lawyer believed that such disclosure was reasonably necessary to prevent such substantial injury. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 and R. 1.13 (2004). For a general discussion of the history and potential implications of the amendments, see William W. Horton, *Representing the Healthcare Organization in a Post-Sarbanes-Oxley World: New Rules, New Paradigms, New Perils*, 37 J. HEALTH L. 335, 361–69 (2004) [hereinafter "Horton, *Post-Sarbanes Oxley World*"]. While some (the author included) believe that these amendments created the potential for significant inroads on the general obligation of confidentiality, especially in the corporate setting, it should be noted that, as a structural matter, the amendments simply create additional exceptions to the previously existing confidentiality standards, and should not be construed as overriding or diminishing the general professional obligation of confidentiality.

23. *See, e.g.*, Prudential Ins. Co. of Am. v. Massaro, No. Civ. A. 97-2022, 2000 WL 1176541 (D.N.J. Aug. 2000), *aff'd per curiam*, 47 Fed. Appx. 618, 619 (3d Cir. 2002) (in lawsuit by insurer against former in-house counsel, court found that crime-fraud exception to attorney-client privilege did not apply to unauthorized, voluntary disclosures of confidential information to third parties where there had been no judicial finding that exception applied and that such disclosures "inexcusably contravened [former counsel's] ethical duties as an attorney"). *See also* Corporations Comm. of the Business Law Section of the Calif. State Bar, *Conflicting Currents: The Obligation to Maintain Inviolate Client Confidences and the New SEC Attorney Conduct Rules*, 32 PEPP. L. REV. 89, 116–24 (2004) [hereinafter "*Conflicting Currents*"] (discussing applicability of privilege exceptions to duty of confidentiality under California statutory law).

duties of confidentiality, and (b) their lawyers cannot ordinarily be compelled to testify about those communications.

Obviously, there are exceptions to both the duty of confidentiality and the privilege, and most clients, even most corporate clients, will have little or no knowledge of those exceptions and, for that matter, little or no appreciation for the many ways in which clients can be deemed to have waived the privilege.[24] On the other hand, it would be naïve to suggest that clients would be inclined to be as forthcoming with their lawyer if that lawyer were required to say, as a general matter, "You understand that everything we talk about is confidential, unless someone who's suing you asks me about it in court." Simply put, even though a client's understanding of the privilege is likely to be quite imperfect, and even though the sphere in which the privilege comes into play is in fact quite limited, it seems likely that clients' awareness of the privilege is a significant factor in their comfort in disclosing information to lawyers from whom they seek guidance. Thus, it may be argued, while many of the concerns expressed in a corporate setting about erosion of attorney-client privilege more properly relate to the erosion of the ethical duty of confidentiality, both factors contribute to the mix of information that clients take into account in confiding in their lawyers.

III. The Practical Significance of Privilege and Confidentiality in the Corporate Setting

A. What Corporate/Transactional Lawyers Do

Were one to rely solely on the popular press (or increasingly, on the scholarly legal press) or the statements of elected officials and those responsive to them, one might come to the conclusion that the chief occupation of corporate and transactional lawyers is facilitating corporate fraud and assisting corrupt executives in transferring shareholder wealth to themselves.[25] Nonetheless, what such lawyers do, on most days at least, is considerably more mundane, and moreover, is done under statutory and ethical schemes that provide considerable guidance as to the role such lawyers are expected to fulfill.

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24. *See, e.g.*, Thomas E. Spahn, *Business lawyers: Listen up! Attorney-client privilege isn't just for trial lawyers*, 14 Bus. Law Today (May/June 2005), at 11, 17.

25. *See, e.g.*, Susan P. Koniak, *Corporate Fraud: See, Lawyers*, 26 Harv. J.L. & Pub. Pol'y 195, 195 (2003) ("without lawyers, few corporate scandals would exist and fewer still would succeed long enough to cause any significant damage"); Representative Michael G. Oxley, The Role of Attorneys in Corporate Governance, Opening Statement for Hearing on the Role of Attorneys in Corporate Governance before the House Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises (Feb. 4, 2004), *available at* http://financialservices.house.gov/media/pdf/020404ox.pdf (last visited Aug. 26, 2005) (statement marked "Prepared, not delivered") ("The active participation of attorneys in perpetuating corporate fraud has been well-documented, and indeed, is quite troubling. Attorneys were violating not only the profession's code of ethics, but they were also breaking the law."); Appendix C (Role of Enron's Attorneys) to Final Report of Neal Batson, Court-Appointed Examiner, in *In re: Enron Corp.*, Case No. 01-16034 (AJG), Bankr. S.D.N.Y. (Nov. 4, 2003), *available at* www.enron.com/corp/por/examinerfinal.html (last visited Aug. 26, 2005) (extensively criticizing conduct of Enron Corporation's inside and outside counsel in assisting corporation in effecting various fraudulent or potentially fraudulent transactions).

In general, corporate lawyers (whether internal or external) are called on by their clients to advise them of the legal risks and consequences of various courses of action and the ways in which various corporate goals may be achieved within the legal framework, and to assist in structuring, negotiating, documenting and implementing those transactions that the corporation, through its authorized agents, has determined it wishes to pursue. These tasks may encompass the relatively glamorous—a billion-dollar merger or a major financing—and the tediously ordinary—the negotiation of a lease or the preparation of an employment contract.

In carrying out those tasks, corporate lawyers operate within certain principles established by state law and by applicable rules of professional responsibility. State corporation statutes vest the management of the business and affairs of a corporation in its board of directors and those under the direction of the board, including its officers.[26] Subject to certain exceptions, professional responsibility rules require lawyers representing a corporation to defer to the judgment of those persons who are charged with making decisions on behalf of the corporation, even where the lawyer disagrees with such decisions or believes them to be unwise.[27] Thus, in the ordinary course, a lawyer is expected to take direction from those authorized to act on behalf of the corporation, and is not empowered to usurp the authority of those persons even where the lawyer disagrees with the prudence of particular directions. This does not mean that the lawyer should not attempt to assist the client corporation in reaching better decisions; indeed, among the most valuable skills that a corporate lawyer can bring to bear is the ability to assist the client's personnel to see factors they may not have considered and to assess more accurately the risks and benefits accruing to particular courses of action. Rather, what it means is that under both applicable law and applicable professional responsibility standards, the balance of power in decision-making is ordinarily allocated to the corporate client, acting through its authorized constituents.

There are those who would change this, of course, at least in some settings. Particularly in the aftermath of the "corporate scandal" environment that came to public attention with the collapse of Enron Corporation, there is an increasing sentiment in some quarters for corporate lawyers to act in a greater capacity as

26. *See, e.g.*, MODEL BUSINESS CORPORATION ACT §§ 8.01(b), 8.41 (3d ed. 2003).

27. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.13, cmt. 3 (2004) ("When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province."). Rule 1.13(b) creates an exception to this general rule:

> If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

This provision of Rule 1.13(b) is, however, clearly intended to relate to the unusual situation, and does not create a general unilateral right of the lawyer to substitute his or her judgment for that of the duly authorized constituents of the organization. As they say, the boss may not always be right, but he's always the boss.

"gatekeepers," with more-or-less formalized duties to non-clients.[28] There is, and will continue to be, a lively debate as to how and in what circumstances lawyers representing a corporation should be permitted to substitute their judgment for that of the authorized representatives of their client in circumstances not known to the lawyer to involve crime or fraud by the client, and what duties lawyers have to third parties or the public in general where such lawyers believe that client agents are not acting in the best interests of the corporation. As it stands today, however, corporate and transactional lawyers function within a legal sphere in which decision-making authority is, in most cases, clearly allocated to their clients, and such lawyers' duties must be carried out within such sphere, taking into account existing ethical and legal standards that may affect those duties in certain circumstances.

B. The Information Issue

A key factor in the corporate lawyer's ability to perform his or her duties effectively is the information provided by the client. As has been pointed out,

> . . . corporate actors have an informational advantage over attorneys. In a corporate attorney-client relationship, the most basic information failures involve the flow of information from the client to the attorney, not in the opposite direction as suggested by [Section 307 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7245 (Supp. II 2002), relating to the duties of attorneys appearing and practicing before the SEC in the representation of an issuer]. It is essential to remember that corporate attorneys do not have, nor does [§307] give them, the powers of an inspector general. An attorney's understanding of the corporation's operations and problems will be determined by the willingness of corporate employees to provide that attorney with information.

28. *See, e.g.*, Rutheford B. Campbell, Jr. & Eugene R. Gaetke, *The Ethical Obligation of Transactional Lawyers to Act as Gatekeepers*, 56 Rutgers L. Rev. 9 *passim* (2003). (This article is, it may be said, an impressive example of "ipse-dixitism." The authors observe, early on, "Indeed, legal assistance is essential to the completion of most significant transactions in the complex, regulated world of modern corporate enterprise. Through the rendition of legal services to corporate clients, transactional lawyers thus serve as gatekeepers, overseeing the ultimate passage of their clients' transactions from planning to fruition." *Id.* at 14. From this rather unusual "definition" of "gatekeeping," the authors proceed to conclude that the lawyer's duty to the corporation under Model Rule 1.13 should be construed to require the lawyer to act in the best interests of the corporation's shareholders (presumably as determined by the lawyer), and to propose that corporate lawyers should be hired and compensated by, and solely accountable to, the corporation's audit committee.) *See also* Complaint in Sec. & Exch. Comm'n v. Isselmann (D. Or.) (filed Sept. 21, 2004), *available at* www.sec.gov/litigation/complaints/comp18896b.pdf (last visited Aug. 26, 2005) (charging issuer's general counsel with securities violations for "fail[ing] to fulfill his gatekeeper role" by failing "to provide important information to [the issuer's] Audit Committee, Board of Directors, and auditors regarding a significant accounting transaction that enabled [the issuer] to report a profit rather than a loss," notwithstanding absence of allegations that general counsel had participated in planning or implementing the fraud and despite general counsel's apparent efforts to raise at least some questions concerning the underlying matters). *Cf.* John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 Colum. L. Rev. 1293 *passim* (2003) (noting that the organized bar has resisted imposition of a gatekeeper role for lawyers and that the SEC had not directly asserted such a role with any persistence (at the time), and describing arguments for and against enhancing any such gatekeeper role).

> The quality of the attorney's counsel is a function of the quality of information he receives from the client.[29]

In short, when a corporate lawyer is charged with assisting the corporation in carrying out a transaction, establishing and implementing a corporate policy, or even advising a board of directors, the lawyer's ability to do so effectively will be dependent not only on the lawyer's professional skill, but also on what information is provided to the lawyer by the client about its goals, its constraints and, in some cases, its motivations. That information must come from human representatives of the corporation, and will thus be colored by the perspectives and personal goals of such persons, and indeed by how much information they themselves have. In many cases, obtaining that information and assessing its quality and completeness is the most difficult task the lawyer may face.

As noted in *Upjohn*, one purpose of the attorney-client privilege (and, it should also be acknowledged, a major purpose of the ethical rules of confidentiality) is to encourage clients to share information fully and freely with their lawyers, in order that such lawyers may provide legal advice that is as complete as possible. In the corporate setting, that information may need to come from many different sources within the corporation, depending upon the nature of the matter at hand and the allocation of knowledge and responsibility within the corporation. Even in the presence of the privilege and the ethical obligation of confidentiality, marshaling that information, assessing its completeness and credibility, and fitting disparate pieces of such information into a coherent mosaic is one of the most challenging tasks facing the corporate lawyer. The lawyer's success or failure in doing that may make a significant difference in the client's achievement of its business goals, and in whether the client, the lawyer or both incurs liability in the event that a transaction is ultimately challenged as illegal or as a breach of fiduciary duty.[30]

It appears to be beyond dispute that the attorney-client privilege is, in the first instance, a tool that our legal system considers important in facilitating such necessary information-gathering.[31] This article will discuss at a later point what implications current developments in privilege waivers might have on such information flow.

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29. Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097, 1128 (2003).

30. *See, e.g., id.* at 1115–16 (noting that obligations of Enron's outside transactional counsel would be materially different depending on whether they knew or believed particular transactions to be illegal or merely aggressive).

31. Or at least mostly beyond dispute. *Cf.* Cramton, et al., *supra* note 18, at 769–71, in which the professors argue (in the context of the SEC's attorney-conduct rules under Sarbanes-Oxley) that different confidentiality standards should apply in the context of lawyers engaged as litigators than in the context of lawyers engaged as advisors, in essence because litigators are engaged to advance the interests of the client in adversary proceedings while advisors are engaged to "ensure that corporations . . . operate within and not without the law." The article does not expressly address whether the same theory would apply to the assertion of the privilege for discussions between transactional lawyers and their clients, but it is not wholly illogical to assume that the authors would extend their analysis to that context.

C. Illegality in Theory and Practice

Much discussion concerning the social utility *vel non* of the attorney-client privilege and lawyer confidentiality in general seems premised on the notion that a client seeking to commit a crime or fraud comes into a lawyer's office and says, "I've had it up to here with Cock Robin. I've decided to kill him, and I want you to tell me how to get away with it," or, more aptly for the corporate setting, "I've decided to steal the life's savings of as many widows and orphans as I can and put them in my pocket, and I need you to paper it up for me."[32] Were that the case, life would be relatively easy, if not always pleasant, for lawyers.

In fact, however, that is not the case in which these issues commonly arise. Given the complexity of the modern regulatory environment, and the fine distinctions upon which the legality of a particular course of conduct may turn, the waters that transactional lawyers help their clients navigate are frequently dark and murky indeed.

Consider, for example, the healthcare industry. Much transactional advice given by healthcare lawyers turns upon the application of the federal Anti-Kickback Statute,[33] which, in simplified terms, makes it a criminal offense for anyone to offer, solicit, pay or receive remuneration in exchange for the referral of a patient for a good or service which may be reimbursed under Medicare, Medicaid or other federal healthcare reimbursement programs. This statute has, in effect, the potential for criminalizing much behavior that would otherwise be regarded as commercially reasonable. For example, a lawyer who happens also to own a commercial building may be inclined to lease it to a major client on terms more favorable than those generally available in the local real estate market, in an effort to thank the client for past business and make it more likely that the client will send more business in the future. While some might question the lawyer's business acumen, no one would suggest that the lawyer's behavior was illegal. On the other hand, if a hospital leases space on below-market terms to a physician who admits numerous patients to the hospital, both the hospital and the physician can be exposed to criminal sanctions under the Anti-Kickback Statute and civil penalties under numerous other statutes.

Given that most business activities undertaken by a healthcare organization are done with the intent of increasing new business (or retaining old business), it is obvious that many such activities potentially implicate the Anti-Kickback Statute. In assessing whether particular client activities in fact violate the statute (or pose a significant risk of violating the statute), the lawyer must take into account a range of regulatory safe harbors (many of which protect conduct that is commercially unlikely to occur, or that most practitioners never thought presented a problem in the first place), formal and informal regulatory announcements, advisory opinions and case law, many of which turn on factors that are not express

32. *See, e.g.*, Koniak, *supra* note 25, at 196–209 (arguing, in essence, that every lawyer at Enron, its investment bankers, its commercial bankers, Arthur Andersen, etc., knew or should have known that they were assisting in a massive fraud).

33. 42 U.S.C.A. §1320a-7b(b) (2003 & Supp. 2005).

or implicit in the statute.[34] Further, the Anti-Kickback Statute is an intent-based statute; thus, certain activities which would be subject to prosecution under the statute if the requisite intent were present might be permissible if it could be established that bad intent was lacking, and conversely, certain transactions that superficially comply with a safe harbor might still be subject to attack if it could be established that such compliance were merely a sham.

Thus, when a healthcare client turns to a transactional lawyer for advice about structuring a transaction with a referral source, it is highly unlikely that the lawyer will be able to say, "Yes, what you want to do is absolutely, without question, okay," and not much more likely that the lawyer will be able to say, "No, if you do that you're going to jail." Instead, what the lawyer must do is obtain as much information as possible, evaluate the facts and circumstances, and advise the client as to ways in which a legitimate transaction might be structured to minimize the risk of a violation and as to factors which would be more or less likely to cause the transaction to be perceived as illegitimate.[35]

To take a perhaps more familiar example, consider the role of the lawyer advising his or her client on disclosures under the federal securities laws. While the

34. As memorably expressed by one commentator:

> The modern American medical center has the legal status of a speakeasy because lawless conduct is being ignored. Though illegal, conduct deemed harmless by enforcement authorities is being countenanced. Enforcement authorities refuse to provide legal safeguards because of their perception that such safeguards would insulate abusive as well as appropriate conduct. Prosecutorial discretion—trust us—has replaced the rule of law. Thus, innovative participants in the marketplace can follow the law and be condemned by the realities of the market, or they can participate in the health care speakeasy and hope for the best—a prospect made more risky by the potential availability of private-party *(qui tam)* actions under the [federal civil False Claims Act].

James F. Blumstein, *The Fraud and Abuse Statute in an Evolving Health Care Marketplace: Life in the Health Care Speakeasy*, 22 AM. J.L. & MED. 205, 224–25 (1996).

35. In a well-known case (referred to among healthcare practitioners as the "Anderson case" or the "Kansas City case," because the case was originally unsealed as United States v. Anderson, Case No. 98-20030-JWL (D. Kan., July 15, 1998), and because it involved parties in Kansas City), two lawyers were indicted (and three others were identified as unindicted co-conspirators) for conspiring to help their hospital clients violate the Anti-Kickback Statute through a series of contracts with a particular referral source. Oversimplifying somewhat, the indictments against the two lawyers were based on advice given by them to their clients that the contracts (and records of negotiations with respect thereto) should not reflect an attempt to induce referrals and on the attorneys' roles in drafting such contracts so as to contain terms complying with the law as it was then understood. The indictments alleged, in part, that the lawyers had prepared such contracts and provided underlying legal analysis in an effort to help the hospitals conceal the fraudulent nature of the transactions. After the presentation of the government's case, the court directed a verdict of acquittal for the lawyers, holding that the evidence showed that the lawyers had a good faith belief that it was possible to structure a legal business arrangement between the parties and noting that the state of the law at the time in question was highly uncertain and subject to inconsistent interpretation by federal regulators. *See generally* Francis J. Serbaroli, *Indicting of Lawyers in a Medicare Kickback Case*, N.Y.L.J. (Sept. 30, 1998), *available at* www.cadwalader.com/assets/article/093098.html (last visited Aug. 26, 2005); *Judge Acquits Kansas City Lawyers in Medicare Fraud Trial*, HEALTH LAW. NEWS (Apr. 1999) (on file with *The Business Lawyer*); Stuart M. Gerson & Jennifer E. Gladieux, *Advice of Counsel: Eroding Confidentiality in Federal Health Care Law*, 51 ALA. L. REV. 163, 189–92 (1999). Few cases illustrate as graphically the difficulty of providing advice in the healthcare regulatory arena, and the difficult questions of fact that may arise with respect to whether a lawyer is advising a client on how to obey the law or how to conceal breaking it.

regulations of the Securities and Exchange Commission prescribe generally the types of information that most securities reports or offering documents must contain, many of those requirements are qualified by the concept that disclosure is required only if the information in question is material. Neither Congress nor the courts nor the SEC has ever established a quantifiable test for materiality. Instead, at least for most purposes under the federal securities laws, information is deemed to be material if there is a substantial likelihood that a reasonable investor would consider the information important in making an investment (or, as applicable, voting) decision.[36] Indeed, even in the context of financial statement disclosures, the SEC has indicated that the determination of materiality has qualitative as well as quantitative components, denying that any numerical rule of thumb is necessarily determinative of whether a particular financial item is material.[37]

An issuer's failure to make a disclosure (or making of a misleading disclosure) of information that is subsequently found to be material can expose the issuer (and, in some cases, its counsel) to substantial civil and criminal liability. Yet, the determination of what is material—especially with the realization that materiality determinations are normally questioned only with the benefit of hindsight, after some adverse event has happened with respect to the issuer or to the market value of its securities—is not always simple.[38] This is particularly true in light of recent SEC regulations and interpretive guidance promulgated after the Sarbanes-Oxley Act, which have both significantly changed the amount and nature of required disclosures and significantly accelerated the timeframes during which many disclosures have to be made.[39]

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36. *See* TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); Basic, Inc. v. Levinson, 485 U.S. 224, 232 (1988); Securities Act Rule 405, 17 C.F.R. § 230.405 (2005); Securities Exchange Act Rule 12b-2, 17 C.F.R. § 240.12b-2 (2005).

37. *See* U.S. Sec. & Exch. Comm'n, Staff Accounting Bulletin No. 99—Materiality, *available at* www.sec.gov/interps/account/sab99.htm (last visited Aug. 26, 2005).

38. For a discussion of the complexities of particular types of materiality decisions in the context of healthcare issuers, see William W. Horton and Monty G. Humble, *The Disclosure Dilemma: How, When, and What to Tell Stockholders and Stakeholders About Your* Qui Tam *Suit or Investigation*, in HEALTH CARE FRAUD AND ABUSE: PRACTICAL PERSPECTIVES (Linda A. Baumann, ed., American Bar Association/BNA Books Supp. 2005).

39. *See, e.g.*, U.S. Sec. & Exch. Comm'n, Final Rule: Management's Reports on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, Release No. 33-8238 (June 5, 2003), *available at* www.sec.gov/rules/final/33-8238.htm (last visited Dec. 10, 2005) (requiring extensive new disclosures and certifications relating to an issuer's disclosure controls and procedures and internal control over financial reporting); U.S. Sec. & Exch. Comm'n, Final Rule: Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, Release No. 33-8400 (Mar. 16, 2004), *available at* www.sec.gov/rules/final/33-8400.htm (last visited Dec. 10, 2005) (substantially expanding information required to be reported on Current Reports on Form 8-K and shortening Form 8-K filing deadlines); U.S. Sec. & Exch. Comm'n, Final Rule: Disclosure in Management's Discussion and Analysis about Off-Balance Sheet Arrangements and Aggregate Contractual Obligations, Release No. 33-8182 (Jan. 28, 2003), *available at* www.sec.gov/rules/final/33-8182.htm (last visited Dec. 10, 2005) (requiring substantial new disclosures concerning certain financial transactions and contractual commitments); U.S. Sec. & Exch. Comm'n, Final Rule: Acceleration of Periodic Report Filing Dates and Disclosure of Website Access to Reports, Release No. 33-8128 (Sept. 5, 2002), *available at* www.sec.gov/rules/final/33-8128.htm (last visited Dec. 10, 2005) (accelerating filing dates for periodic reports on Form 10-K and Form 10-Q for issuers with a public float of at least $75 million).

Obviously, some materiality decisions are so clear that there is no legitimate basis for argument, and the lawyer's advice to the client in such cases should be firm and unswerving. However, in many other cases, there may be a basis on which reasonable people—and even reasonable lawyers—could differ as to the materiality of a potential disclosure, or as to whether the client has enough reliable information to make a particular disclosure at a particular time.[40] Thus, after the lawyer has rendered his or her best advice, it ordinarily remains within the purview of the client personnel who are charged with responsibility for disclosure matters to decide whether a particular item or matter is material. Certainly, there may be cases where a client says, in effect, "We don't care what you say the law requires; we just ain't gonna do it." In most circumstances, though, what would be expected is that the lawyer and the relevant client personnel will discuss each other's views and concerns, do some negotiating among themselves, and then make a decision about how to satisfy the applicable legal requirements, which decision, in the event, may or may not be challenged down the road.

The point is that it is neither realistic nor particularly useful to discuss issues relating to attorney-client communications concerning a matter as to which the client is later accused of illegal behavior as if such communications normally arise in cases where client personnel advise the lawyer that they are intent on pursuing evil ends, with the lawyer's assistance. That is simply not the ordinary case.[41] Instead, it is much more likely that any communications will fall somewhere in a range between good faith efforts to become informed about the parameters of legal behavior in a complex environment, on the one hand, and efforts to lure the lawyer into giving legal advice supportive of a plan or position that is, in fact, more or less indefensible, on the other hand. That fact that some consultations may fall on this latter end of the range (frequently accompanied by client personnel's omission or even concealment of relevant information that would affect the legal analysis) does not mean that the existence of consultations on the former end of the range should be discounted as a likely possibility.

D. Where the Privilege Fits In

Well and good, then; transactional lawyers have a hard job and deserve every penny they make. What does that have to do with the attorney-client privilege,

40. *See, e.g.*, Letter from Professor Thomas D. Morgan to U.S. Sec. & Exch. Comm'n (Dec. 17, 2002), *available at* www.sec.gov/rules/proposed/s74502/tdmorgan1.htm (last visited Aug. 26, 2005) ("[R]easonable attorneys, acting reasonably, may act quite differently in given situations. Questions whether conduct would violate securities laws or violate fiduciary duties often do not appear in easy, non-controversial forms. Not all questions are in a gray area, of course, and the zone of reasonable conduct is not always large, but enough answers in life are uncertain that any single attorney's answer may not be the only good one.").

41. Indeed, simple economic analysis would suggest that it would not be the ordinary case in a corporate setting. Client personnel engaged in planning, committing or concealing a fraud normally do so because they have significant economic incentives (either potential gain or loss avoidance) for doing so. Even where the client is an important one for the lawyer (or the only one, if the lawyer is in-house), experience suggests that the economic upside for the lawyer would likely not outweigh the downside risk, certainly not by comparison with the risk/reward analysis facing the principal perpetrators.

the general rules of confidentiality, or the validity or social utility of legislation or policy that might further limit or undermine those principles?

There are at least two answers to that: one that arises on the front end of a transaction, and that is almost invariably a greater or lesser factor in any transaction, and one that sometimes, but not always, may arise in the aftermath of a transaction. Turning initially to the first of these, the relevant consideration is a logical outgrowth of some of the points discussed above. Whenever a corporation is pursuing a transaction or other corporate activity, it pursues it through individual human agents. Those agents may or may not be particularly sensitive to the legal issues that may be involved in the proposed course of action. Especially in industries or activities that are highly regulated, they need competent and informed legal advice to help them determine how to pursue the corporation's goals in a way that complies with the law. Further, left to their own devices, those agents may or may not be particularly motivated to ascribe appropriate weight to legal considerations. Where, for example, a subordinate officer has been directed by a senior executive to accomplish a given goal during a given timeframe (which, in most corporations, will be "yesterday"), such officer may not be inclined to reflect overmuch on the details of the legal analysis governing the task.

The transactional lawyer can help alleviate these concerns by informing the corporate agents of relevant legal considerations and boundaries, by providing an objective view of the risks of the proposed transaction, and by bolstering the fortitude of the corporate agent who "doesn't feel quite right" about the proposed course of action but needs some moral reinforcement (or a scapegoat—"the lawyers won't let me do it") to raise his or her concerns with senior management. In addition, of course, the lawyer may be able to suggest alternative approaches to achieving the goal that allow it to be pursued in a way which offers fewer potential legal concerns, or ways to modify the goal by bringing it more clearly within a legal safe harbor.

The lawyer cannot effectively fill this role without information from the corporate agent(s) that is as complete and frank as possible. While there is no obvious way to prove it empirically, it appears quite reasonable to believe that the general knowledge of such an agent that information provided to the lawyer in the course of seeking legal advice on behalf of the corporation is privileged contributes to the agent's willingness to provide such information.[42]

There are at least two possible contrary arguments to this, of course. The first, and superficially most attractive, of these is the argument that if the client agent is genuinely seeking to fulfill his or her duties in compliance with the law, the

42. *See, e.g.*, Evidence Project, American University, Washington College of Law (Paul R. Rice, Dir.), *Attorney-Client Privilege: Perceptions and Implications in the Corporate Setting, Survey of Personnel, April, 1998* [hereinafter "*American University Evidence Project Survey*"], *available at* www.acprivilege.com/articles/SURVEY.pdf (last visited Aug. 26, 2005) (setting forth, among other things, data regarding responses from randomly selected corporate personnel at Fortune 100 corporations to questions concerning attorney-client privilege and confidentiality; concluding that existence of corporate privilege "appears . . . to encourage candor" by corporate agents, but noting that such results were based in part on an "erroneous belief" that the corporation would "use its privilege to protect the agents [individually]"). *See also ABA Task Force Report*, *supra* note 6, at 1038.

privilege is irrelevant; what harm can occur if information exchanged between the agent and the lawyer is disclosed? The problem with this argument is that client agents who are not themselves lawyers may, in the course of seeking advice about the law, say things that may be perceived as expressing an unlawful intent or an intent to breach a fiduciary duty to the corporation. Such statements may not be intended in that way—non-lawyers tend to think less about the legal implications of their words—and, in fact, may be important to the legal analysis, because they can alert the lawyer to issues that need to be addressed in recommending how to proceed with the transaction or recommending that it be abandoned for legal reasons. Some of the implications of this will be addressed more fully in the next major section; for the moment, suffice it to say that if client agents do not believe that they may speak freely to the corporation's lawyers because the statements they make, questions they ask and responses they receive will not be privileged, they are likely to be less forthcoming, which is in the end likely to increase the legal risks to the corporation. As the *Upjohn* Court noted, "compliance with the law in this area [i.e., operating in the regulated environment in which corporations do their business] is hardly an instinctive matter."[43] If client agents cannot speak and ask questions without fear that their mistakes may be freely disclosed and held against them, they are unlikely to speak in a particularly useful fashion.

The second is the argument that, since the corporate attorney-client privilege runs only to the corporate entity, conversations involving what are arguably personal concerns of the agent are not entitled to the privilege because they are separate from the concerns of the corporation and thus separate from the engagement of the lawyer—i.e., if the agent raises matters that affect his or her personal interests, those should not be covered by whatever privilege may exist for advice sought for the benefit of the corporation. Carried to its logical extreme, however, this argument would undercut one of the most valuable roles corporate lawyers play: helping corporate agents recognize when their own interests may conflict with the interests of the corporation, and helping them reconcile those interests in a way that ensures that the interests of the corporation are satisfied.

For example, suppose a corporate agent consults the lawyer with respect to a transaction in which the agent has a financial interest separate from that of the corporation. It is in the best interests of the corporation for the agent to make full disclosure of such separate interest to the lawyer, because the lawyer can then take steps to ensure that the corporation's interests are protected and any conflicts are addressed at the relevant level within the corporation. It is, as a practical matter, usually going to be impossible to separate the discussion of the corporate goals—the transaction rationale, if you will—from the discussion of the personal interest of the agent, in order to say "This part of the conversation is privileged, but this part is not." Thus, a narrow reading of the corporate privilege is likely to

43. *Upjohn*, 449 U.S. at 392.

reduce the probability that all relevant information will be disclosed to the lawyer.[44]

Thus, on the front end of a proposed corporate transaction, the privilege—and the awareness of corporate agents that the privilege exists—facilitates the ability of the lawyer to gather relevant information and provide better and more comprehensive advice and counsel. To understand the significance of the privilege (and related concepts of confidentiality) in the aftermath of a transaction, it is necessary first to consider certain concerns arising out of the current environment relating to the privilege.

IV. Attacks on the Privilege: The Eroding Citadel, Part One

Since the revelation of corporate malfeasance at Enron, Worldcom and elsewhere and the passage of the Sarbanes-Oxley Act, basic concepts of privilege and confidentiality in the corporate setting have come under attack. While much of the discussion of such phenomena has focused on the litigation and liability aspects of corporate life—what happens when the scandal is disclosed or becomes apparent?—the continuing erosion of such concepts has implications for the corporate/transactional lawyer as well—the "aftermath" (or more precisely, "anticipated aftermath") effect alluded to above. To see this, it is necessary first to discuss, albeit briefly, the nature and source of the attacks on privilege and confidentiality.

A. Attacks from the Realm of Theory

As alluded to above, there is a great deal of scholarly writing on the market today that advocates a greatly expanded gatekeeper role for lawyers representing corporate clients, coupled with expanded duties to disclose what the lawyer has concluded to be corporate wrongdoing.[45] Much of this writing is not narrowly focused on the attorney-client privilege, or even very much on the specifics of the existing rules of confidentiality; instead, it is more broadly focused on a re-

44. Obviously, there is a line to be drawn somewhere. Where the client agent is seeking advice that is purely personal in nature—"How do we structure this deal to ensure that I maximize my bonus?"; "I've violated a corporate policy and I need you to help me paper it up"; etc.—there is no logical reason to cover that with the protection of the corporate privilege, and indeed it may well be incumbent upon the corporate lawyer to expressly advise the agent that the discussion is not privileged. *See* Model Rules of Prof'l Responsibility R. 1.13(f) (2004) (requiring that in dealing with corporate constituents, a lawyer representing the corporation must explain to such constituents the identity of the client when the lawyer knows or reasonably should know that the interests of the corporation are adverse to those of the constituents). The point is that, as logically implied by *Upjohn*, when a discussion between a corporate lawyer and a corporate employee involves matters within the scope of the employee's duties, the scope of the privilege ought to be broad enough to encompass even statements that reflect the self-interest that inevitably colors the employee's view of the situation, so long as those statements do not diverge into an obvious conflict with the interests of the corporation.

45. *See, e.g.*, Cramton, et al., *supra* note 18; Koniak, *supra* note 25; Campbell & Gaetke, *supra* note 28; Letter from William H. Simon, Saunders Professor of Law, Stanford Law School, to Jonathan G. Katz, Secretary, U.S. Sec. & Exch. Comm'n (Dec. 13, 2002), *available at* www.sec.gov/rules/proposed/s74502/simon121302.htm (last visited Aug. 26, 2005).

definition of the lawyers' duties to encompass a general responsibility, accomplished through whatever means, to disclose information that the lawyer believes to pertain to criminal or fraudulent activity by client personnel. Accordingly, any meaningful discussion of the academic proposals is beyond the scope of this article, and the phenomenon of academic challenges to a number of aspects of privilege and confidentiality is noted merely as an environmental factor influencing the current discussion.

B. Attacks from the Legislative/Administrative Arena

A second front on which the battle over privilege and confidentiality has been engaged arises from Section 307 of the Sarbanes-Oxley Act,[46] and more specifically from the SEC's rulemaking and proposed rulemaking thereunder.[47] Section 307 required the SEC to "issue rules . . . setting forth minimum standards of professional conduct for attorneys appearing and practicing before the [SEC]," including a rule requiring such attorneys to "report up" within the organization evidence of a material violation of securities law or fiduciary duty (or other "similar violation") by an issuer or any agent thereof. The SEC took that statutory directive and ran with it, adopting a rule that not only created complex rules regarding the "reporting up" duty, but also provided for permissive disclosure of otherwise confidential information in certain circumstances and purported to preempt any state law or rule that would prohibit such disclosure, and further proposing permissive or mandatory "noisy withdrawal" by lawyers in certain cases.

The history and specifics of the proposed and final rulemaking are convoluted, complex and, to some degree, confusing, and again, even a superficial recounting of them is beyond the scope of the present discussion.[48] What is important for the current context is the way in which the rules—and especially the "noisy withdrawal" rule that remains a live proposal—create inroads on the concepts of client confidentiality, the way in which they create opportunities for the elevation of lawyer judgment over client judgment in some circumstances, and the way in which the SEC has been prepared to declare, without a great deal of explanation or specific statutory authority, that its rules regarding disclosure of client information take precedence over state laws and professional rules regarding confi-

46. Codified at 15 U.S.C § 7245 (Supp. II 2002).

47. *See* U.S. Sec. & Exch. Comm'n, Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys, Release No. 33-8150 (Nov 21, 2002), *available at* www.sec.gov/rules/proposed/33-8150.htm (last visited Aug. 26, 2005) (initial proposal); 17 C.F.R. §§ 205.1–205.7 (2005) (final rules as adopted); U.S. Sec. & Exch. Comm'n, Final Rule: Implementation of Standards of Professional Conduct for Attorneys, Release No. 33-8185 (Jan. 29, 2003), *available at* www.sec.gov/rules/final/33-8185.htm (last visited Aug. 26, 2005) (adopting release for final rules); U.S. Sec. & Exch. Comm'n, Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys, Release No. 33-8186 (Jan. 29, 2003), *available at* www.sec.gov/rules/proposed/33-8186.htm (last visited Aug. 26, 2005) (additional and alternative proposed rules).

48. The author has attempted to discuss them in what, it is hoped, is a considerably more than superficial way in Horton, *Post-Sarbanes-Oxley World*, *supra* note 22, *passim*.

dentiality and privilege.[49] Once again, the SEC's rulemaking under Section 307 demonstrates the environmental pressures that are being placed on the attorney-client privilege and related confidentiality concerns.

C. Attacks from the Prosecutorial and Investigatorial Front

Most significant for present purposes is the erosion of the privilege that increasingly arises in the context of government criminal investigations (and, as well, in civil investigations that are prosecutorial in nature, such as investigations and proceedings by the SEC's Enforcement Division). Where a corporation comes under investigation for alleged criminal or fraudulent activity, the normal reaction of its board and managers is to announce their intention to "cooperate fully" with the investigation. Further, prosecutors may well demand—even at a stage where the nature of the claims being asserted and the purported factual basis therefore remain somewhat unclear—that corporations make a determination as to whether they intend to cooperate with the investigation under threat of imminent indictment if they do not elect to do so. In this context, issues of attorney-client privilege quickly become of paramount concern.

In June 1999, then-Deputy Attorney General Eric Holder issued a memorandum to Department of Justice personnel and United States Attorneys on "Federal Prosecution of Corporations," commonly referred to as the "Holder Memorandum."[50] The Holder Memorandum set forth, among other things, the following "general principle":

> In determining whether to charge a corporation [with federal criminal violations], that corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges.[51]

The significance of this language is immense. Under the view of the world set forth in the Holder Memorandum, a corporation effectively cannot be considered to be cooperating with a federal criminal investigation without admitting wrongdoing by agents of the corporation. In this view, cooperation does not entail merely opening the doors to the investigators to let them see what they can find; rather, the corporation must voluntarily come forward with some admission of guilt.

49. *See id.* at 369–72 (discussing SEC's position on preemption of state-law confidentiality rules, and contrary positions taken by Washington and California bar groups); *Conflicting Currents*, *supra* note 23, *passim* (discussing potential conflict between SEC's position and California law and precedent).

50. Memorandum to All Component Heads and United States Attorneys from the Deputy Attorney General, Subject: Bringing Criminal Charges Against Corporations, signed on June 16, 1999, *available at* www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html (last visited Aug. 26, 2005), with attached document "Federal Prosecution of Corporations" ("Holder Memorandum").

51. *Id.* at § VI.A.

Further, the Holder Memorandum strongly suggests that cooperation entails offering up information that would enable prosecutors to identify individual wrongdoers within the organization and waiving applicable privileges that would otherwise potentially facilitate the defense of the action.

This position was reiterated in January 2003 by then-Deputy Attorney General Larry D. Thompson in a revised statement of principles referred to as the "Thompson Memorandum."[52] In the covering memorandum, Deputy Attorney General Thompson stated that

> The main focus of the revisions [to the principles originally set forth in the Holder Memorandum] is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation. Too often business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation. The revisions make clear that such conduct should weigh in favor of a corporate prosecution.[53]

In that regard, the Thompson Memorandum retained the Holder Memorandum's language on voluntary disclosure, identification of culpable corporate agents, and waiver of applicable privileges.[54]

Similar concepts are embodied in the provisions of the Federal Sentencing Guidelines applicable to organizational defendants. For an organization to receive a reduction in its "culpability score" under the Sentencing Guidelines based on cooperation, it must "fully [cooperate] in the investigation" and "[demonstrate] recognition and affirmative acceptance of responsibility for its criminal conduct" (and to receive the maximum reduction under the relevant exception, it must self-report the criminal conduct "prior to an imminent threat of disclosure or government investigation").[55] In the Application Notes to the relevant guideline, the Sentencing Commission's views on what constitutes adequate cooperation are further elucidated:

> To qualify for a reduction under subsection (g)(1) or (g)(2) [providing for culpability score reductions based on cooperation], cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization. A prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel

52. Memorandum to Heads of Department Components and United States Attorneys from Larry D. Thompson, Deputy Attorney General, Subject: Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), *available at* www.usdoj.gov/dag/cftf/corporate_guidelines.htm (last visited Aug. 26, 2005) ("Thompson Memorandum"). *See generally* Richard Ben-Veniste & Lee H. Rubin, *DOJ Affirms and Expands Aggressive Corporate Cooperation Guidelines*, Washington Legal Foundation Legal Backgrounder, vol. 18, no. 11 (Apr. 4, 2003), *available at* www.mayerbrown.com/news/article.asp?id=702&nid=5 (last visited Aug. 26, 2005).

53. Thompson Memorandum, *supra* note 52.

54. *Id.* at § VI.A.

55. UNITED STATES SENTENCING COMM'N, 2004 FEDERAL SENTENCING GUIDELINES § 8C2.5(g).

> to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct.[56]

This Application Note further provides that, while waiver of the attorney-client and work product privileges is not necessarily a prerequisite to a reduction in an organization's culpability score, it may become such a prerequisite if it is "necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."[57] Presumably, to count as "timely" cooperation, any privilege waiver must be made early in the process, as described in the above-quoted Application Note.

Cooperation (potentially including waiver of privilege) is not solely a relevant concern in criminal investigations. For example, enforcement pronouncements by the Securities and Exchange Commission demonstrate the very similar issues that arise in responding to civil and administrative investigations.

In October 2001, in connection with the settlement of a specific enforcement action, the SEC issued a general statement of its policy on giving credit for "self-policing, self-reporting, remediation and cooperation" in considering potential enforcement actions against securities issuers where issuer personnel had committed federal securities law violations.[58] In its report, the SEC focused on the fact that, in the specific case at hand, the issuer had provided the SEC Enforcement Division staff with detailed information concerning its internal investigation (including notes and transcripts of interviews with the culpable employee) and that the issuer had not invoked the attorney-client or work product privileges "with respect to any facts uncovered in the investigation." In a footnote, the Commission strongly implied that issuers seeking "cooperation credit" with the SEC should consider waiving applicable privileges "as a means (where necessary) to provide relevant and sometimes critical information to the [SEC] staff."[59] The policies espoused in the SEC's statement have come to be taken as gospel by lawyers advising issuers on responses to SEC enforcement activity, and the SEC has focused on, among other things, the willingness of issuers to provide privilege waivers as an indicium of cooperation.[60]

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56. *Id.*, Application Note 12 (emphasis supplied).

57. *See id.* On August 15, 2005, the American Bar Association submitted comments to the Sentencing Commission proposing amendments to this Application Note that would provide that "thorough cooperation" would require only the disclosure of "all pertinent *non-privileged* information" (rather than "all pertinent information") and to expressly provide that waiver of the attorney-client privilege and work product protection would not be a factor in determining eligibility for a reduction in culpability score under § 8C2.5(g)(1) and (2). *See* Letter, dated Aug. 15, 2005, from Robert D. Evans, Director, Am. Bar Ass'n Governmental Affairs Office, to United States Sentencing Comm'n, *available at* www.abanet.org/poladv/commentlettertoussc.pdf (last visited Aug. 26, 2005).

58. *See* 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, Release No. 34-44969 (Oct. 23, 2001), *available at* www.sec.gov/litigation/investreport/34-44969.htm (last visited Aug. 26, 2005).

59. *Id.* at n. 3.

60. *See, e.g.*, U.S. Sec. & Exch. Comm'n, SEC Charges Royal Ahold and Three Former Top Executives with Fraud; Former Audit Committee Member Charged with Causing Violations of the Securities Laws, Litigation Release No. 18929 (Oct. 13, 2004), *available at* www.sec.gov/litigation/litreleases/

There has been much discussion of these policies, and their effect on attorney-client communications, in the profession and in both the scholarly and trade press. Prosecutors tend to assert that they never, or almost never, "require" such a waiver,[61] and indeed provide statistics demonstrating that even requests for waivers are uncommon.[62] The defense bar, on the other hand (including the many former prosecutors who populate the defense bar), vigorously asserts otherwise.[63]

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lr18929.htm (last visited Aug. 26, 2005) (noting decision not to impose penalties on issuer was based on issuer's "extensive cooperation," specifically including waiver of the attorney-client and work product privileges for its internal investigation).

61. *See, e.g., 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*, UNITED STATES ATTORNEYS' BULLETIN (Nov. 2003), at 1–5. (Mr. Comey was named Deputy Attorney General in late 2003 and departed that post in mid-2005.)

62. *See, e.g.*, Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587, 597–98 (2004) (citing UNITED STATES SENTENCING COMM'N AD HOC ADVISORY GROUP, REPORT OF THE AD HOC ADVISORY GROUP ON THE ORGANIZATIONAL SENTENCING GUIDELINES (2003) [hereinafter "ADVISORY GROUP REPORT"] at 98–99). It is worth noting that the data cited from this report are derived—as indeed, they probably must be—from self-reporting by the surveyed U.S. Attorneys' Offices. It is also worth noting that the Advisory Group suggested that the Sentencing Commission consider amending the relevant Sentencing Guideline Application Notes to clarify that routine waiver of privilege was not a prerequisite to a culpability score reduction for cooperation or to a recommendation for a downward departure from a Guidelines sentence where the organization in question satisfied the other standards for cooperation and circumstances did not otherwise require a waiver in order to meet the "effective cooperation" standard. *See* ADVISORY GROUP REPORT, *supra* at 103–04. The Sentencing Commission has not adopted that recommendation.

63. *See, e.g.*, Mary Jo White, *The Current Enforcement Environment: The Best of Times/The Worst of Times—Can We Reach a Reasonable Middle Ground? PLI Corporate Counsel Forum 2004, Luncheon Speech, April 26, 2004*, in 2 36TH ANNUAL INSTITUTE ON SECURITIES REGULATION 997, 1005–06 (Practicing Law Institute 2004):

> In my view, both as [former] U.S. Attorney and defense attorney, the government should be showing more deference than they often do to the attorney-client privilege and should not be asking a company to waive the attorney-client privilege unless a waiver is truly necessary for the government to obtain full information from the company. And waiving the privilege is supposed to be only one of many factors for a prosecutor to weigh in deciding a corporation's fate. Declining a request for a waiver should not be viewed, as it seems to be at times, by some prosecutors, as an ominous "line in the sand" that leads a prosecutor to a decision to indict a company, or at least to seriously threaten it.
>
> As those of you in the trenches know, many prosecutors and SEC lawyers, at the outset of their investigations, seem to be routinely asking for a waiver. The company's decision to waive or not has become a litmus test for many prosecutors, even though, under the Thompson [Memorandum], it is not supposed to be. The pressure to waive is intense and the consequences of deciding to waive or not to waive are quite significant—a true and excruciating Hobson's choice.

See also, e.g., Blum, *supra* note 2; ADVISORY GROUP REPORT, *supra* note 62, at 101–03 (and sources cited therein).

In connection with this discussion, it should be noted that the Acting Deputy Attorney General recently directed all United States Attorneys and Department of Justice component department heads to establish written waiver review policies for their respective districts and components, governing the process for determining whether to request a waiver of the attorney-client privilege or work product immunity in a particular case. This directive expressly declines to impose specific requirements for such a review policy. *See* Memorandum to Heads of Department Components and United States Attorneys from Robert D. McCallum, Jr., Acting Deputy Attorney General, Subject: Waiver of Corporate Attorney-Client and Work Product Protection (Oct. 21, 2005), *available at* www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm (last visited Dec. 10, 2005).

In considering the practical realities of the situation, two key considerations should be borne in mind. First, it is fair to note that when defense lawyers say that prosecutors or civil enforcers require a waiver, they generally mean that they have been informed that a failure to waive the privilege will or may be an adverse factor in evaluating their clients' cooperation for purposes of avoiding indictment or reducing the sentencing culpability score[64] (although it is likewise fair to note that such message is frequently communicated, and a response frequently expected, at a point in the investigation where the corporation may have very limited information about the facts underlying the investigation, the evidence suggesting corporate wrongdoing, or the potential corporate exposure[65]). Thus, it is not accurate to suggest that a decision not to waive applicable privileges is, in and of itself, a guarantee of a corporate indictment. Nonetheless, the pressure for such a waiver is likely to be great, and forgoing an early opportunity to give such a waiver may lead to significant adverse consequences for the corporation (especially if the corporation believes that an indictment will, as a practical matter, have the same adverse effect on its business and prospects as a criminal conviction).

Second, it also appears to be fair to note that the whole argument about whether prosecutors or investigators "require" or even "strongly request" a waiver is a bit of a red herring in real life. While it is probably impossible to prove empirically, or even by citation to authority, experience suggests that it is increasingly unnecessary for prosecutors or investigators to request a waiver at all. Given the premium placed on "timely" cooperation, it appears on at least an anecdotal basis that many defense lawyers, called in to advise a corporation on responding to a serious investigation or potential indictment, will advise their clients *sua sponte* that they should reach out to the government and offer to waive applicable privileges and turn over to the government not only the results of an internal investigation, but also the documentation obtained in arriving at those results. Indeed, this is a logical result of the increasing pressure on corporations to avoid indictment by identifying culpable and potentially culpable individuals and providing evidence that will enable the government to charge such persons.[66] Prosecutors may well argue that they are not responsible for the decisions that corporate targets and their lawyers make in determining to volunteer information in the hopes of avoiding an indictment or reducing an ultimate sentence, and as a literal matter that is certainly true. However, the environment created by prosecutorial pressure for early waivers—whether or not such pressure is "fair" in a philosophical sense—has certainly contributed to the increasing perception that the attorney-client privilege has become, as a practical matter, irrelevant in a significant corporate investigation.

64. *See* Buchanan, *supra* note 62, at 598 n. 47 (noting that such a practice is "consistent with the Thompson [Memorandum]").

65. *See* Blum, *supra* note 2; Ben-Veniste & Rubin, *supra* note 52, at 2–3.

66. *See, e.g.*, Laurie P. Cohen, *Prosecutors' Tough New Tactics Turn Firms Against Employees*, WALL ST. J., June 4, 2004, at A1, A8; Andrew Longstreth, *Double Agent*, AM. LAW. (Feb. 2005) at 68–73.

V. Implications for Corporate and Transactional Lawyers (and Their Clients): The Eroding Citadel, Part Two

Well and good, then. Assume that the defense bar is substantively correct, and that as a matter of policy or practice, the corporate attorney-client privilege has, *Upjohn* notwithstanding, been rendered a practical nullity where the corporation is under threat of indictment or significant civil enforcement action (SEC sanctions, say, or a potential Medicare exclusion coupled with False Claims Act liability). Why is that relevant to the concerns of corporate and transactional lawyers? Aren't they long gone by the time the investigators come in?

As clearly described in *Upjohn*, a key reason for the existence of the corporate attorney-client privilege is to facilitate communications between corporate representatives—even those well below the executive level—and lawyers who provide legal advice to the corporation. Although the specific fact situation involved in *Upjohn* related to information exchanged during the course of an internal investigation, the basic principles enunciated in the case apply no less persuasively in the ordinary day-to-day interactions that lawyers and corporate personnel have about the ongoing business of the enterprise. The free exchange of communications between corporate personnel and corporate lawyers—even corporate personnel afflicted with the same burdens of self-interest that encumber most folks in most settings—is critical to ensuring that lawyers have the information they need to provide effective advice, counsel and representation to the corporation.

Most of these communications will never be tested for privilege, because most of them will never relate to matters that become entangled in litigation, whether routine civil litigation or a major criminal proceeding. Further, in many cases there may be other, non-privileged communications and documents that obviate the need to address privilege questions. However, it is impossible to know in advance whether a particular privileged communication relating to a particular transaction or corporate policy will someday become a central focus of a litigated matter. As the *Upjohn* Court noted, "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected."[67] Thus, reasonable clarity as to the application and viability of the privilege is important to the corporate attorney-client communication, just as it is to the individual attorney-client communication. The purpose of the privilege is jeopardized if the attorney and the client must guess, subject to after-the-fact adjustment, as to whether the privilege will or will not apply to a conversation.

This is particularly true of those conversations that relate to areas that are most likely to end up as the subject of investigations, because that is where the line between seeking, in good faith, advice on the requirements of the law and how to meet corporate goals in a manner that is consistent with it and seeking advice on how to evade the requirements of the law is most likely to become confused

67. 449 U.S. at 393.

and indistinct. No corporate employee needs to ask a lawyer's advice on whether it is appropriate to pay executive bonuses with an undocumented "loan" from the pension fund, or whether it is okay to bribe a regulator to overlook an instance of noncompliance. Instead, the questions are likely to arise in those areas where complex, and even counterintuitive, regulations and policies mark elusive boundaries between that which is permissible and that which is a serious violation.[68]

Consider, for example, the now-legendary Enron "special purpose entity" off-balance sheet transactions. As information about them has come out, it has of course become very clear that the structure of the transactions did not meet then-prevailing accounting requirements, and that they were constructed by executives with distinctly impure motives. With the benefit of hindsight and relatively comprehensive information, it has been argued that the fraud inherent in the transactions was so apparent that no one involved could have been confused about it.[69]

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68. On a tangentially related point, it might also be noted that much of the public discussion concerning the importance of confidentiality and privilege in the attorney-corporate client relationship tends to assume that corporate clients are uniformly sophisticated entities with an extensive knowledge of both the laws and regulations applicable to their affairs and the nature of, and limitations on, confidentiality and privilege. *See, e.g.*, Cramton, et al., *supra* note 18, at 816:

> The public companies regulated by the SEC . . . have large experience and sophistication concerning the hiring, supervision and firing of lawyers. They are sophisticated repeat-players who use law regularly in carrying on their business, entering into transactions, dealing with regulatory authorities and participating in litigation. They are the major group of clients who are well informed about the details of the attorney-client privilege and the exceptions to it, the work-product immunity and the professional duty of confidentiality. They are also clients whose managers may have a large economic incentive to use lawyer secrecy to delay compliance with regulations or to conceal ongoing violations of them. . . . The social value of secrecy versus disclosure is less when one is dealing not with individual citizens encountering law for the first time, but with large and informed repeat-players, profit-making organizations that have strong incentives to delay or conceal compliance with regulatory requirements that impose substantial costs.

Even in the context of public companies (which is admittedly the context in which Professors Cramton, et al., are writing here), this is a statement that seems staggeringly ill-thought-out. For example, in 2002, the SEC estimated that approximately 41% of reporting companies, or over 3,800 reporting companies, would not satisfy its relatively modest definition of an "accelerated filer" for purposes of periodic reports under the Securities Exchange Act of 1934 (essentially, companies that had been reporting companies for at least one year and had a public float of $75 million) and that approximately 2,500 reporting companies (other than investment companies) had total assets of $5 million or less. *See* U.S. Sec. & Exch. Comm'n, Final Rule: Acceleration of Periodic Report Filing Dates and Disclosure of Website Access to Reports, Release No. 33-8128 (Sept. 5, 2002), *available at* www.sec.gov/rules/final/33-8128.htm#IIB (last visited Aug. 26, 2005). It appears, at least, a bit conclusory to assert that simply by virtue of being public companies, such enterprises are "sophisticated repeat-players" skilled at manipulating the law and their lawyers to their own ends, with a resulting lesser "moral claim" (in the professors' phrase) for protection of their confidentiality interests, as asserted by the professors. *See* Cramton, et al., *supra* note 18, at 815–16. Fundamentally, it appears that a plausible argument can be made that society is well served by taking steps that encourage such enterprises—not to speak of the even larger number of smaller, relatively unsophisticated businesses that happen to be conducted in corporate form—to seek out legal advice and provide information to their lawyers in connection therewith in a manner that is subject to reasonable protections of confidentiality and privilege.

69. *See, e.g.*, Koniak, *supra* note 25, at 196–209. (Note that, in Professor Koniak's rather, shall we say, bi-chromatic view of the world—that is, it's all black and white—the Enron fraud apparently should have been evident from the mere choice of names used for some of the SPEs: "entities with

Yet, the fact remains that, with a relatively small number of factual changes—highly significant factual changes, admittedly, but not all that many of them—several of the now-discredited Enron partnerships could have been structured so that Enron's accounting treatment was consistent with generally accepted accounting principles and so that its disclosures (or non-disclosures) would have been, while not particularly informative, consistent with the practices of other issuers engaged in GAAP-compliant off-balance sheet transactions.[70] The accounting rules in effect at the time with respect to the consolidation of special purpose entities were complex and arcane and turned in part on extremely non-intuitive concepts (e.g., that something that walked like a loan and talked like a loan and was largely documented like a loan could be turned into something else entirely, by, in effect, the borrower's promise to repay only 97% of it).

Any conversation between an Enron business person and an Enron lawyer regarding these types of transactions might well cover areas that could seem to be an effort to evade the law, or could just as likely seem like an effort to understand the rather odd tightrope that had to be walked to structure such an off-balance sheet transaction within permissible bounds, depending on what specifically was said and what information was otherwise available to the business person or the lawyer. Indeed, it is at least hypothetically possible that the business person could come to the lawyer with a proposal for a transaction that would, in fact, have violated legal and accounting rules, and that the lawyer could have used that conversation to point out the flaws and describe what facts would have to be changed to cause the transaction to comply. The point is not—in fact, it is expressly not—to defend or justify transactions at Enron or the conduct of any of its personnel or lawyers, a task which is beyond the knowledge or expertise of the author. The point is simply to point out that the sorts of conversations that frequently come into question in criminal and regulatory investigations are often not the ones about the easy stuff, but rather about the areas where bona fide uncertainty and outright bad intent may well begin to resemble each other.

Or consider a more pedestrian example from the healthcare industry. Suppose a mid-level hospital employee comes to one of the hospital's lawyers to structure a contract with a physician who makes (or whom it is hoped will make) referrals to the hospital. Such a conversation is almost always going to be overlaid with the patina of potential illegality; hospitals rarely do deals with physicians unless they have some hope, however, tangential, that more business will result (or

names like Raptor and Condor, names that all but screamed out, 'Fraud is going on here.'." *Id.* at 196.)

70. *Cf.* Fisch & Rosen, *supra* note 29, at 1115 (citations omitted):

> In analyzing the conduct of [Vinson & Elkins] lawyers [advising Enron], we are, of course, missing a crucial fact—whether the lawyers knew, during the course of their representation, that Enron principals were engaged in fraudulent conduct. The litigation against V&E and other attorneys repeatedly asserts that the lawyers knowingly assisted Enron in perpetrating a fraud, and that may be the case, although to date, little objective evidence of such knowledge has been revealed to the public. The alternative, and perhaps more likely scenario, is that V&E lawyers knew of aggressive and risky transactions and reporting decisions, but did not have actual knowledge of illegal conduct.

existing business will be retained), and that fact always entails the potential application of the Anti-Kickback Statute and other laws governing relationships with referral sources.

(Among these other laws, for example, is the Ethics in Patient Referrals Act—the so-called "Stark Law"[71]—which is a civil, "strict liability" statute. The Stark Law, which is hardly a model of clarity, was adopted in its current form in 1993, with an effective date of January 1, 1995 (an earlier and narrower version was adopted in 1989 with an effective date of January 1, 1992). Final regulations under the original version of the statute were not adopted until 1995. Proposed regulations under the revised (1993) version of the statute were not issued until 1998. Final regulations under the revised version were issued in two "phases," the first in 2001 and the second in 2004, with the promise of yet a third phase (expected to revisit some issues addressed in the first two phases and to break some new ground) to come at a date not yet determined.[72] This history perhaps gives some idea of the complexities and uncertainties with which healthcare lawyers and their clients have to deal.)

The Anti-Kickback Statute alone is interpreted by numerous safe harbor regulations and associated commentary, voluminous court cases, over 130 advisory opinions issued by the Office of Inspector General of the Department of Health and Human Services, and a number of other regulatory pronouncements issued by the Office of Inspector General.[73] While this may seem like a vast body of law from which the lawyer can derive guidance, a great deal of it consists of pronouncements about actions that *might* violate the law *if* the requisite intent were present and pronouncements about actions that *might* violate the law but as to which the relevant authorities would not pursue enforcement actions because of offsetting policy considerations or safeguards. Similarly, potential violations of the Stark Law and the underlying regulations frequently turn on fine distinctions of fact (such as the cash value of non-cash benefits that a hospital has provided to a physician), and the regulations provide that certain exceptions to the prohibitions embodied in the Stark Law will not be available unless the underlying conduct does not violate the Anti-Kickback Statute, thus converting the certainty superficially provided by the Stark regulations to a facts-and-circumstances analysis under another statute entirely. If the lawyer and the client do not navigate this maze properly, the client may be exposed to civil and criminal penalties, liability under the False Claims Act, and permissive or mandatory exclusion from participation in federal healthcare programs, among other things.

For these reasons, the discussion between our hypothetical client representative and our hypothetical lawyer is very likely to include, at some point, statements

71. 42 U.S.C.A. § 1395nn (2003 & Supp. 2005).

72. *See generally* Am. Health Lawyers Ass'n Fraud and Abuse, Self-Referrals and False Claims Practice Group, Physician Organizations Practice Group and Hospitals and Health Systems Practice Group Member Briefing, Stark II Phase II Final Regulations 1–2 (May 2004) (on file with *The Business Lawyer*).

73. *See generally* materials linked to http://oig.hhs.gov/fraud.html (last visited Aug. 26, 2005) (but for court decisions, which have to be located by the conventional means).

that could be construed as evidence of an intent to violate the law.[74] If the client representative is making a good faith effort to seek legal advice about how to structure the proposed contract in compliance with the law, but in the course of doing so says "We're going to have to shut down our outpatient clinic if we can't find a way to keep Dr. Fiscus on the team," that statement alone could be construed to demonstrate illegal intent. (And as a practical matter, given the highly uncertain and subjective application of the Anti-Kickback Statute and the Stark Law to some fact settings, the discussion is as likely to be framed in terms of enforcement risk as it is in terms of "strict legality" versus "strict illegality," which elevates even further the possibility that parts of the discussion could be construed to show a bad state of mind.) As the law and enforcement policy have developed, that is simply the nature of much attorney-client communication in the healthcare industry, even where the communication is ultimately aimed at reaching a result that complies with the law.[75]

Where does the attorney-client privilege fit into this? It is, in fact, rather simple, if not susceptible of ready proof. In order for a lawyer to render effective advice and to assist a client in complying with the law (or even to admonish a client that a particular course of action is likely to violate the law, and that the lawyer must withdraw his or her services unless the client modifies its behavior appropriately), it is necessary for the lawyer to ascertain as much information as possible about the facts involved, the objectives the client seeks to pursue, and any other factors which might influence the legal analysis. This information is in the control of the client representatives with whom the lawyer deals. If, for example, our hypothetical hospital client representative does not disclose to the lawyer the anticipated referral relationship between the physician party to the contract and the hospital, the lawyer will be missing an absolutely critical factor in the legal analysis.

Client representatives not infrequently read the newspapers or watch CNBC, and therefore it is quite possible that they will become aware that a number of corporate executives and employees are being charged with misconduct and that some of them are incurring substantial penalties in connection therewith. If they are inclined to dig into the matter further, they may determine that some of these charges result from the increasing pressure on corporations to offer up allegedly culpable individual defendants in an effort to ward off corporate indictments, and

74. Under one case, much beloved of the government, a transaction or business arrangement may be construed to violate the Anti-Kickback Statute if even one purpose of the statute is to induce the referral of patients for goods or services which may be paid for under a government reimbursement program. *See* United States v. Greber, 760 F.2d 68 (3d Cir.), *cert. denied*, 474 U.S. 988 (1985). If strictly applied, this one-purpose standard would have the effect of making substantially all business transactions between healthcare providers criminal violations, inasmuch as healthcare providers, like other business enterprises, tend to undertake transactions in the hope of generating more business or of keeping existing business from going elsewhere.

75. Indeed, this may be the case in almost any setting when the subject is compliance with law as defined by regulation—that is, where what is at issue is essentially compliance with more-or-less arbitrary legal constructs that must be learned rather than intuited—as opposed to compliance with law derived from generally accepted moral principles—i.e., principles that are part of the basic social structure.

they may determine that one of the ways in which such allegedly culpable individuals are identified is through the waiver of the attorney-client privilege by the corporation.

Moreover, client representatives are frequently distrustful of lawyers in the first instance, and if a client representative is seeking advice about an area known to encompass legal risks, what is the logical reaction of a client representative who develops a fear that notes, records and emails concerning communications with the corporation's lawyer may be used—perhaps with justification, perhaps not—to identify persons who were acting with the intent to violate the law? Well, at least one logical reaction would be to minimize the frequency, duration and content of such communications so as to avoid the risk of providing any information that might later be construed as incriminating. Certainly, this is the reaction of persons who are in fact interested in breaking the law. Yet, it may also become the reaction of persons who do not understand the law, who do not appreciate the legal import of remarks they make, and who simply want to minimize the risk that they will raise issues that could come back to bite them. This is the "aftermath" effect referred to above—that clients who fear what their communications with lawyers may be inferred to mean once a transaction has gone bad and is under investigation will modify, in a way adverse to effective legal representation, their willingness to provide information on the front end of the transaction.

It is impossible to quantify the risk of such behavior, and certainly there are those who may argue that such risk is chimerical at best—that client representatives acting in good faith will not avoid the obvious benefits of sound legal advice because of some hypothetical and remote fear of painting a target on their own backs through imprudent statements, memos or emails.[76] Yet, is the risk in fact so speculative? There are already suggestions that increasing pressure on corporations to waive the attorney-client privilege with respect to an internal investigation, even prior to commencing it, may discourage employees from cooperating with such an investigation.[77] To the extent that corporate employees become aware that waivers (whether "coerced," strongly encouraged or volitional) are in fact becoming routine in government investigations, it is not unreasonable to assume that employees will simply become reluctant to communicate openly and completely with corporate attorneys at all.

Bluntly, even in today's relatively enlightened compliance environment, corporate employees usually do not perceive it as a career-enhancing strategy to go

76. And, as discussed at text accompanying notes 80–82 *infra*, since the corporate client controls the privilege and may in any event waive it, whether intentionally or otherwise, all corporate representatives must recognize that their otherwise privileged communications might someday be revealed without their consent. However, some of such research as is available suggests that corporate representatives often assume, albeit potentially incorrectly, that the corporation will in fact assert the privilege to protect their communications or will otherwise "protect" individuals from disclosure of their individual communications. This implies that corporate representatives' understanding of the privilege, even though imperfect or even misguided, is a factor in encouraging them to communicate openly with corporate lawyers. *See American University Evidence Project Survey*, *supra* note 42.

77. *See, e.g.*, Ben-Veniste & Rubin, *supra* note 52, at 3–4.

to their superiors with a report that "I've talked to the lawyers, and they've got some concerns about the deal." If an employee has reason to ponder whether his or her statements in connection with a legally complex situation may someday be taken out of context and held up to a prosecutor as evidence of the employee's individual culpable knowledge, that certainly does not add to the incentive to speak frankly with the corporation's counsel.

The point is that the slippery slope toward diminution or even elimination of the corporate attorney-client privilege insofar as it relates to governmental investigations and prosecutions may well have a chilling effect on communications between corporate client representatives and corporate lawyers, which, as is the logical implication of the *Upjohn* analysis, is likely to lead in turn to less effective lawyering in the corporate and transactional context and diminished legal compliance by corporations. As noted above, it is impossible to quantify or empirically support this potential impact. On the other hand, it is equally impossible to empirically disprove it, and much of the discussion that tends to support the notion that diminished concepts of confidentiality and privilege (or increased "reporting out" duties for lawyers) is grounded in similar arguments based on policy rather than observed fact.[78] There is a choice to be made about the relative social priority between (a) facilitating government investigations of corporate wrongdoing (which, despite the headlines, one would still like to think is the exception rather than the rule in terms of corporate behavior) by diminishing the confidentiality of corporate attorney-client communications and (b) encouraging more open communications—with the result, one hopes, of more informed legal advice and greater corporate compliance—by preserving the respect traditionally accorded to such confidentiality, even at the risk of making government investigations less efficient. While it is difficult to develop objective evidence to guide that choice, it is not unreasonable to suggest that the pendulum has swung too far in the direction of diminished respect for confidentiality and privilege.[79]

In that regard, of course, it must be acknowledged that any reliance on the attorney-client privilege as a factor encouraging open communications between corporate agents and corporate lawyers inherently rests on a fragile framework, in that the privilege belongs to the corporation as an entity and may be waived by the corporation without consultation with such agents, irrespective of any pressure imposed by the government.[80] In the absence of an individual attorney-

78. *See, e.g.*, Cramton, et al., *supra* note 18, at 814–17.

79. *See generally ABA Task Force Report*, *supra* note 6, at 1047–50 (outlining concerns raised by various sources about consequences of privilege waivers in favor of the government).

80. *See, e.g., In re*: Grand Jury Subpoena: Under Seal, 415 F.3d 333 (4th Cir. 2005) (holding that there was no individual privilege with respect to statements made by corporate employees to corporate attorneys in connection with internal investigation where such employees were advised that investigating attorneys represented the corporation and that corporation could waive the privilege (which it did), notwithstanding that attorneys told employees that such attorneys "can" or "could" also represent the employees until a conflict appeared; employees' subjective belief that attorneys represented them individually did not establish individual privilege where evidence did not show that it was reasonable for employees to believe that an individual attorney-client relationship had been created).

As an aside, this case presents some particularly disturbing facts. The internal investigation in question apparently commenced prior to any government investigation (at least one known to the

client relationship between the corporate agent and the corporate attorney, the corporate agent will always be subject to the ultimate discretion of the corporation to waive the privilege if the corporate decision-making authority determines to do so.[81]

That notwithstanding, it is likewise not unreasonable to suggest that such discretion may be excessively influenced by "routine" pressure for corporate privilege waivers from government investigators and prosecutors, to the extent one concedes that such routine pressure is a genuine phenomenon. If waivers are routinely requested and given (or, as alluded to in the preceding section, have reached the stage where they are simply assumed to be necessary even before such a request issues), corporate agents will likely come to discount the likelihood that any waiver decision will be made as a result of a deliberative process by the corporation's board and will assume that such decision will be made reflexively. Again, the relevant question is whether this is a socially useful result or if it will, in fact, impede the sort of attorney-client dialogue that is likely to lead to enhanced corporate compliance. The framework may indeed be fragile, but that fact does not inherently lead to the conclusion that it should be torn down altogether.[82]

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corporation). Thus, it is unclear whether the employees were on notice that their statements to the investigators might be turned over to the government, unlike the situation where an internal investigation follows public (or internal corporate) disclosure of a government investigation. In order to ensure that the employees could make an informed decision as to their cooperation with the internal investigation and whether they wished to consult with personal counsel, it would have been preferable for the employees to have been informed of the circumstances under which a corporate waiver might arise, and it is not clear from the facts recited by the Fourth Circuit that such information was conveyed. In addition, at least one of the employees asked at the conclusion of the interview whether he needed personal counsel, and an investigating attorney "responded that he did not recommend it," according to the opinion. *See id.* at 336.

Further, the record reflected that while the investigating attorneys made it clear that they represented the corporation and that the corporation could waive the privilege, they also advised the employees that they (the investigating attorneys) could represent the employees as well so long as there was no conflict with the corporation. In finding that there was no reasonable basis for the employees to believe that an individual attorney-client relationship had been created between them and the investigating attorneys, both the district court and the appellate court placed great weight on the fact that the attorneys stated "'we *can* represent you,'" rather than "'we *do* represent you.'" *See id.* at 340 (emphasis in original). While the Fourth Circuit noted that other factors, including the statements regarding corporate control of the privilege, militated against a reasonable belief that an individual attorney-client relationship had been created, this one-word distinction seems a slim reed upon which to hang such weight. Indeed, the Fourth Circuit characterized the "watered-down 'Upjohn warnings' the investigating attorneys gave the employees" as "a potential legal and ethical mine field." *Id.* at 340.

81. *Cf. id.* at 340 (noting that had the investigating attorneys actually entered into an individual attorney-client relationship with an employee as well as their attorney-client relationship with the corporation, the attorneys "would have had to withdraw from all representation and to maintain all confidences" rather than waive the employee's privilege when a conflict arose, as it would have upon the corporation's decision to waive the corporate privilege).

82. In that regard, the American Bar Association House of Delegates adopted vigorously worded resolutions in August 2005 expressing "strong support" for

> the preservation of the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal matters fully and candidly with their counsel so as to (1) promote compliance with law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure

VI. A Special Note: The Peculiar Problem of In-House Counsel

It is worth pausing for a moment to consider the particular implications of routine privilege waivers on the ability of internal counsel to perform their jobs effectively. As has been frequently discussed, privilege issues are always more complex when the involve communications between client personnel and the client's internal lawyer, especially when the internal lawyer has "business" functions as well as "legal" functions.[83] Nonetheless, evidence suggests that internal corporate counsel tend to believe that the existence of the privilege is an important factor in helping them perform their jobs. In a recent survey of in-house counsel by the Association of Corporate Counsel, 93% of respondents believed that "senior level employees" of their client were aware of the privilege when consulting the in-house counsel, 68% believed that "mid- and lower-tier level employees" were aware of and/or relied on the privilege when consulting the in-house counsel, and 95% believed that there would "be a 'chill' in the flow/candor of information provided to counsel if the privilege did not offer protection to client communications or [counsel's] attorney work product."[84]

Just as one might reasonably question prosecutors' protestations that they only seek privilege waivers when they really, really need them, one might reasonably question in-house counsel's protestations that they cannot do their work if it is not broadly protected by privilege. Both positions are tainted by self-interest, and it is not particularly feasible to do empirical testing of the validity of either position. On the other hand, it does not appear unreasonable to note that if one agrees with the argument—and it is an argument the Supreme Court agreed with in *Upjohn*—that the existence of the privilege promotes corporate compliance by protecting a free flow of information between corporate agents and corporate attorneys, one is logically compelled to believe that that argument should be even more persuasive in the in-house setting.

In the nature of their jobs, internal counsel are likely to communicate with a broader range of corporate agents than are outside counsel, and that range is

access to justice and (4) promote the proper and efficient functioning of the American adversary system of justice

and opposing "policies, practices and procedures of governmental bodies" that would erode the attorney-client privilege and work product doctrine, as well as "the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage." *See* Resolution Adopted by the House of Delegates of the Am. Bar Ass'n, August 9, 2005, *available at* www.abanet.org/poladv/report111.pdf (last visited Aug. 26, 2005).

83. *See generally, e.g.*, Presnell, *supra* note 17, *passim*; Michael A. Lampert, *In House Counsel and the Attorney Client Privilege*, *available at* http://library.findlaw.com/2000/Oct/1/128767.html (last visited Aug. 26, 2005); Mark C. Levy, *Keeping the Attorney-Client Privilege In-House: Guidelines for Corporate Counsel*, Law Journal Newsletters—The Corporate Counselor (October 2004 and November 2004), *available at* www.saul.com/common/publications/pdf_562.pdf (last visited Aug. 26, 2005).

84. *See* Ass'n of Corp. Counsel, *Association of Corporate Counsel Survey: Is the Attorney-Client Privilege Under Attack*?, *available at* www.acca.com/Surveys/attyclient.pdf (last visited Aug. 26, 2005). *See also, e.g.*, Leonard Post, *Eroding Privilege Hurts Corporate Compliance*, Nat'l L.J. (May 3, 2005), *available at* www.law.com/jsp/newswire_article.jsp?id=1114679111406 (last visited Aug. 26, 2005).

likely to include not just those in policymaking positions but also those who are involved in the daily implementation of corporate policies, and those who are most likely to be aware of issues and problems that may arise in such implementation. If such personnel are reluctant to communicate fully with internal counsel because of the sorts of concerns about privilege and confidentiality described above, internal counsel will face considerable difficulty in assisting the corporation in staying within legal boundaries.[85]

Moreover, where the relationship between internal counsel and corporate senior management is a healthy one, informed in-house counsel may exercise greater persuasive force in steering management to the right direction than would outside counsel. Where in-house counsel interacts with senior management on a regular and continuing basis, in-house counsel is more likely than outside counsel to know the corporate strategy considerations that affect particular courses of action and to know the carrots and sticks that particular members of management are likely to be personally most responsive to. While all internal counsel are familiar with the phenomenon that, in some circumstances, outside counsel's advice will be given greater weight, even when it is identical to that of inside counsel, the fact remains that inside counsel is likely to have greater day-in-and-day-out influence on management because of a greater understanding of the imperatives to which management responds.

This advantage is, however, negated where either senior management or lower-level employees do not share necessary information with the internal lawyer. Just as is the case with outside counsel, an in-house lawyer cannot perform effectively where access to relevant information is withheld by those who have it. Thus, if one accepts the position that the existence of the attorney-client privilege is a significant factor in encouraging client representatives to share full and complete information, that position holds as much weight in the in-house setting as it does in the outside setting. Accordingly, even though the analysis of privilege issues may be more complicated in the in-house setting, it is equally important that the privilege not be devalued in that setting—perhaps even more so. If it is, the value of internal counsel to corporate compliance will likewise be diminished.

As it stands, the burdens placed on in-house counsel to preserve claims of privilege may be substantial. Some commentators, looking at issues of privilege that have arisen in cases involving communications by in-house counsel, have proposed protective steps that have the potential for impeding the relationships and flow of communication that are essential for effective in-house lawyering.[86]

85. *See* Post, *supra* note 84 (quoting Barry Nagler, general counsel of Hasbro, Inc.: "In-house counsel are uniquely engaged in the front end of decision-making and can prevent bad things from happening[.] . . . But you can't stop what you don't know.").

86. For example, Presnell, *supra* note 17, posits that in-house lawyers should resist taking on "non-legal" titles such as vice president, should preface notes and memoranda concerning communications with corporate employees with statements that assert that such communications related expressly to legal matters, and should maintain separate files within the legal department for "legal-related documents" and "business-related documents." *See id.* at 24–25. The article provides ample justification for such steps, and doubtless they are good ideas if preservation of the attorney-client privilege is the principal goal sought to be achieved. However, such steps are frequently not realistic or practical in

The most useful aspect of in-house lawyers is just that: they are in-house, available for immediate and informal consultation and involved in the relatively unguarded conversations that occur in the day-to-day affairs of the corporation. The more that considerations of privilege force in-house lawyers to impose legalistic formalities on communications with other employees, the less likely it is that those employees will be inclined to engage in those communications or provide the sort of full information to the in-house counsel that is conducive to effective legal advice.

Beyond that, when an internal lawyer has reason to believe that the interests of a corporate agent may diverge from those of the corporation, the in-house lawyer will, at least in some circumstances, have a duty to expressly advise the agent that the lawyer represents the corporation and not the agent, and even to advise the agent to obtain personal counsel.[87] This professional duty is inescapable. Yet, in an environment in which disclosure of privileged information to the government has indeed become routine, this duty may pose significant challenges

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the corporate setting, at least without creating artificial barriers between in-house lawyers and business personnel that may impair the effectiveness of such lawyers.

See also Joseph J. Siprut, *An In-House Counsel's Guide to Preserving Attorney-Client Privilege*, 92 ILL. B.J. 586 (2004). In that article, the author proposes a number of "practice pointers" to help in-house counsel in preserving the privilege (with, it should be noted, a particular focus on Illinois, which continues to apply the "control group" test rejected in *Upjohn*). Those pointers include an admonition that, where the control group test applies, the in-house counsel should avoid "communicat[ing] with someone who is unable to act on your legal advice without consulting other employees"; an admonition to separately address issues of business advice and issues of legal advice; a suggestion that minutes be maintained of meetings in which legal advice is sought; and a suggestion that "[b]efore the communication takes place, [in-house counsel should] talk with the business person about what topics will be discussed at the meeting and whether that discussion will be protected by the privilege." *See id.* at 587–88. The dilemma posed by such advice is that it makes great sense from the standpoint of preserving the privilege, but simultaneously makes it less likely that the purpose sought to be served by the privilege—the protection of good-faith communications in which legal advice is sought and provided—will be realized. In the first place, such highly structured communications are not the norm within the corporate setting. In the second place, there are few discussions among corporate lawyers and their clients, whether those lawyers are internal or external, that do not involve business as well as legal considerations, and any artificial test that, in essence, requires an in-house lawyer (who is clearly acting in such a role, as opposed to a lawyer with discrete business functions) to hold up signs saying "Privileged" and "Not Privileged" as a conversation progresses will have the effect of rendering a nullity any concept of privilege in a corporate setting. Outside of certain very limited contexts—a meeting specifically to discuss the matters at issue in a lawsuit, for example—strict application of these protective measures will likely simply mean that lawyers get invited to fewer meetings, get consulted less often, and are generally marginalized within the organization.

87. *See, e.g.*, Timothy J. Dacey, *In House Counsel's Duty to Give "Miranda" Warnings to Corporate Officers and Employees*, *available at* http://library.findlaw.com/2003/Oct/31/133126.html (last visited Aug. 26, 2005). Such duties are not imposed simply on in-house lawyers. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13(f) (2004) (lawyer representing organization must, in dealing with organization's constituents, advise them of the identity of the client when lawyer knows or reasonably should know that interests of organization and constituents are adverse) and Comment 10 thereto (if lawyer dealing with constituent finds interest of constituent to be adverse to corporation, lawyer should advise constituent that constituent may wish to obtain independent representation and advise that discussions between lawyer and constituent may not be privileged, among other things); MODEL RULES OF PROF'L CONDUCT R. 4.3 (2004) (dealing with lawyer's responsibilities in communicating with unrepresented person). However, because of the regular interaction between an internal lawyer and corporate personnel, the issues arising in such a situation may be particularly acute, as discussed in the text following this note.

for the in-house counsel. It is possible that a communication which is potentially self-incriminating for a corporate agent may still be subject to the corporate attorney-client privilege (and to work product protection as well), because the self-incriminating portion of such communication arises in what is otherwise a conversation in which the agent is seeking legal advice within the scope of the agent's corporate responsibilities (e.g., the agent may have consulted the lawyer for advice on what the corporation should do to correct a misstatement in a securities filing, and in the course of such consultation may have revealed that the agent intentionally caused such misstatement). If the lawyer gives an *Upjohn* warning to the agent early in the discussion, the agent may decline to speak further, and the corporation's ability to obtain the information necessary to take timely and complete corrective action may be impaired. If the lawyer delays giving such warning, the lawyer may not satisfy his or her professional duties to ensure that the agent understands that the communication may not be privileged as to the agent, and may even impair his or her own ability to represent the organization in the matter. This dilemma exists irrespective of any pressure that the government may subsequently bring on the corporation to waive its privilege, but the lawyer's knowledge that all information disclosed in the communication may end up in the hands of the government adds further stress to what is already a difficult professional situation.

In light of these particular pressures that are inherent in the role of in-house counsel, should there be a heightened standard imposed on waivers of privilege with respect to communications with in-house counsel? No. On the other hand, neither should there be a presumption that in-house communications are less entitled to the protection of the privilege than are communications with outside lawyers. Other things being equal, as described above, in-house counsel will often be in the best position to promote legal compliance within their organizations. The imposition of artificial restrictions on the applicability of the privilege in the in-house setting—restrictions that would not be imposed where substantively the same communications occurred with outside counsel—can only detract from the effectiveness of in-house counsel, because corporate agents will become less likely to communicate openly with in-house counsel and involve them in ways that allow them to have a positive impact on corporate compliance.

VII. Conclusion: What We Got Here Is a Failure to Communicate

Fittingly, perhaps, the familiar line quoted above is from a well-known movie about, among other things, law enforcement.[88] It seems apt for the subject at hand, in multiple ways.

88. Donn Pearce & Frank R. Pierson, Cool Hand Luke (Warner Bros. 1967). In what is perhaps a more tangible illustration of the problem than one might hope, it is difficult to verify, at least without actually watching the movie at the time, the exact wording of the line. The quoted version is taken from the shooting draft, as reproduced at www.geocities.com/classicmoviescripts/script/cool_hand_luke.html (last visited Aug. 26, 2005).

First, it describes the fear that corporate and transactional lawyers, and their colleagues in the defense bar, express concerning the results of increasing inroads on the corporate attorney-client privilege. Without the protection afforded by the privilege, so the argument goes, employees and other agents of corporate clients will not freely communicate with lawyers representing the corporation, and the lawyers' efforts to assist the corporation with appropriate legal advice will be impaired. For the reasons described above, this concern appears to be a reasonable one, even if difficult to demonstrate with clear evidence.

Beyond that, "a failure to communicate" also fairly describes much of the dialogue about privilege and confidentiality that goes on in the academic sphere, and between prosecutors and other government representatives and those who represent corporations. The debate has increasingly come to be shaped by the notions that corporations, acting through their representatives, are fundamentally inclined to behave in unlawful or fraudulent ways, that lawyers are engaged, unwittingly or not, in helping them in their tasks, and that the interests of the public in swift and efficient prosecution of corporate wrongdoing outweigh the interests served by honoring traditional standards of privilege and confidentiality in the corporate setting. In turn, much of that debate assumes a universe in which the boundaries between legal and illegal behavior are clearly demarcated and well understood, ignoring the areas of uncertainty that in fact characterize many of the situations in which corporate clients most need effective legal counsel. Instead of weighing the relative costs and benefits of greater or lesser degrees of respect for privilege and confidentiality, the dialogue tends to be conducted from polar extremes, with those who view prosecutorial imperatives as paramount on one side and those who sanctify the privilege beyond its established bounds on the other.

In the course of this increasingly acrimonious debate, it appears that the Supreme Court's teachings in *Upjohn* have largely been set aside, at least insofar as they inform discussions of policy. (Thankfully, *Upjohn* appears to have some continuing viability in issues of corporate privilege that actually get litigated.) *Upjohn* is not by any means a case that supports overbroad concepts of privilege. The Court focused rather extensively on the efforts made by the defendant corporation and its lawyers to ensure that that materials as to which protection was sought reflected information relating to legal advice sought by and on behalf of the corporation and to maintain the customary safeguards required with respect to privileged materials. Further, the Court noted that the privilege did not foreclose the government from seeking to obtain factual information (as opposed to attorney-client communications) from corporate agents, including those who had communicated with the corporation's lawyers. There is simply nothing in the decision that suggests that the Court had gone off on some sort of frolic and detour that would allow the broad assertion of privilege to conceal all manner of corporate wrongdoing.

Instead, what the Court did was to examine the benefits and social utility of a reasonable concept of the attorney-client privilege in the corporate setting, and to conclude that giving appropriate deference to the privilege would facilitate more effective legal representation for the corporation and thus improve its ability

to conduct its operations in compliance with the law. This is not an unreasonable concept, and yet it is one that seems to be increasingly devalued in current practice, when corporations faced with government investigations and potential indictment are increasingly advised that they simply cannot afford the risks of asserting the attorney-client privilege.

As this article has sought to demonstrate, this approach to life entails real costs to the corporation (and to the societal interests in improved corporate compliance), and not just in the area of investigations and litigations over alleged criminal or fraudulent behavior.[89] More broadly, it is suggested that the continuing erosion of privilege and confidentiality in the corporate setting has the potential to affect, in a significant way, the ability of corporate and transactional lawyers to obtain information that is necessary for them to provide appropriate and complete legal advice to their clients that will enhance such clients' ability to conduct their businesses in a legally sound fashion.

Does society's interest in more effective corporate prosecutions (or, more realistically, the prosecution of individual corporate agents) outweigh its interest in providing a reasonable zone of confidentiality that may encourage corporate agents to be more forthcoming with corporate lawyers? More specifically, is this latter interest unreasonably endangered by the current diminution of the protections provided by the privilege? *Upjohn* does not answer those questions. However, the Supreme Court's opinion does suggest some valuable purposes served by respecting the attorney-client privilege in the corporate setting, and it seems that a new look at the sound reasoning expressed by the Court would serve to frame the current debate somewhat better than the polarized positions that currently characterize it. Any such analysis would be well served by considering the implications not just in the prosecutorial/investigational setting, but in the world of corporate and transactional representation as well.

89. While this article has not sought to consider the impact of privilege waivers in favor of the government on private litigation, that is, of course, a very real concern as well. *See, e.g., ABA Task Force Report*, *supra* note 6, at 1041–42.